

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 102 OF 2018

(FORMERLY MERU ELRC CAUSE NO. 7 OF 2018)

NELLY NJERI MUCHIRI1ST CLAIMANT

JOYCE WANJIRU MATI.....2ND CLAIMANT

VERSUS

COUNTY SECRETARY, EMBU.....1ST RESPONDENT

THE CHAIRMAN EMBU COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

JUDGMENT

1. The Claimants sued the Respondents for their alleged wrongful termination from employment. The Claimants averred that they were employed vide letters of appointment dated 2nd October 2013 by the Respondents to work for the Embu County Government. The Claimants averred that were to be confirmed and consequently be admitted to the County's permanent establishment after serving a probationary period of 6 months. The 1st Claimant averred that she was in job Group L earning a consolidated salary of Kshs. 71,880/- and the 2nd Claimant averred that she was designated to job Group H as provided in the letter of appointment earning a consolidated salary of Kshs. 33,662/-. The Claimants averred that on 31st January 2017 the 2nd Respondent suspiciously attempted to vary their terms of employment through letters by its Secretary. The Claimants averred that the 1st Respondent in a written advisory dated 17th February 2017 cautioned the 2nd Respondent on the illegality of the move. They averred that in August 2017 a new Deputy Governor assumed office and promptly asked the Claimants to seek re-deployment as he did not require their services. The Claimants averred that they reported to the 1st Respondent's office for re-deployment but he advised them to proceed on leave pending re-deployment and on 21st November 2017 at the end of the leave period, they wrote to the 1st Respondent seeking re-deployment. The Claimants averred that they had been reporting for duty at the office of 2nd Respondent from 21st November 2017 to 12th February 2018 when the impugned decision to terminate them was communicated. The Claimants averred that they did not receive their January salary and their efforts to get an explanation from the payroll manager and the Head of Human Resource Management were unsuccessful. The Claimants averred that they wrote to the 1st Respondent on 6th February 2018 seeking for redress on the withholding of salary and the apparent striking off the payroll and in a letter purportedly written on 31st January 2018 the 1st Respondent communicated the decision to terminate the Claimants' employment, stopping payment of salaries with immediate effect on 31st December 2017 and expunging them from the payroll. The Claimants averred that the sequence of events was shocking to them and the evident degree of malice traumatizing. The Claimants averred that the main allegation in the dismissal letter was that the terms of service were pegged on the former Deputy Governor whose term had since ended on 21st August 2017, an allegation that the Claimants find strange as the same was not a component of the employment contract in force. The Claimants averred that they at all material times believed that their employment was on permanent and pensionable basis and at no time were they made aware of any reasons that would warrant the variation. The Claimants averred that their efforts to seek redress were frustrated as they were tossed from one office to another with no solution in sight. They averred that the 2nd Respondent's decision to terminate their employment was unilateral, ill-conceived, malicious, unlawful and a violation of their constitutional rights. The Claimants averred that as a result of the foregoing, they had been rendered jobless for no fault they are aware of, with no income, and the unilateral and malicious stoppage of salaries for the months of January and February 2018 had left them exposed to pecuniary embarrassment of unpaid house rent, unpaid school fees, lack of food and unpaid utility bills. The Claimants thus sought judgment against the Respondents for a declaration to remove into this court and set aside the decisions of the Respondents to unlawfully terminate them, an order to direct the Respondents to reinstate them into the Embu County Payroll or in the alternative pay the Claimants of the time difference until their age of retirement from the dates of termination, an order directing the Respondents to pay the Claimants unpaid salary for January and February totalling Kshs. 143,760/- and Kshs. 67,324/- respectively, an order prohibiting the Respondents from interfering with or altering the terms of employment of the Claimants or otherwise carrying out any discriminatory administration action against them, general damages and costs of the suit.

2. The Respondents filed a response to the memorandum of claim and admitted that the Claimants were employed by the County Government of Embu as a personal assistant to the Deputy Governor job group L and a personal secretary III to the Deputy Governor job group H respectively. The Respondents averred that the Claimants' letters of appointment clearly outlined terms and conditions of employment and that the appointments were on contractual terms of service with effect from 2nd June 2013 and the same would be based on the Deputy Governor's term of office. The Claimants being agreeable to the terms appended their signatures on the letters of appointment. The Respondents averred that the Claimants were not confirmed into the County's permanent establishment as per the terms of the contract after probation period. The Respondents averred the Claimants had been handpicked by the Deputy Governor and they had not been engaged in a competitive recruitment process. The 2nd Respondent denied that it attempted to vary the terms of the Claimants but rather the purpose of the letters was to clarify and exemplify the terms of the contract to align them with the letters of employment. The Respondents averred that the Claimants' employment automatically terminated on 21st August 2017 when the term of the Deputy Governor ended as was agreed in the letters of appointment. The Respondents averred that was no indication of re-deployment as the Claimants had already ceased to be

employees of the County Government of Embu by effluxion of time and were therefore not entitled to any salaries. The Respondents averred that as the said termination was automatic, there was no communication terminating the Claimants' employment from the respondents. The Respondents averred that the effect of the termination was the stoppage of salaries and removal from the payroll as the County could not have continued to pay for services not rendered. The Respondents averred that they thus acted in strict adherence to the terms and conditions of the letter of appointment and the Claimants are therefore not entitled to any of the reliefs sought. The Respondents averred that the Claimants have totally failed to establish their claim of unlawful termination of employment and consequently a claim for reinstatement is unfounded. The Respondents averred that the terms of the letter of appointment were clearly set out and binding upon the Claimants.

3. The 1st Claimant Nelly Njeri Muchiri adopted her statement and a list of documents and testified that she was employed in 2013 through the Transition Authority. She stated that they did an interview with the transition authority and when the Public Service Board was established they did a second interview after which they were employed on a permanent and pensionable terms. She stated that she was surprised when the Respondents said that her terms were concomitant with the term of the Governor as there was no hint in the terms she accepted in 2014. The Claimant testified that the termination was politically motivated as the Deputy Governor fell out of the support of the Governor. She added that the rest of the employees were re-deployed but herself and the colleague named Joyce were terminated. She testified that the termination was unfair as they were employed on a permanent and pensionable terms. She testified that the others in their office were on contractual terms and they were removed alongside the Deputy Governor. She maintained that she became permanent and pensionable after probation. The 2nd Claimant Joyce Wanjiru Mati adopted her statement and her list of documents and testified that she was first employed in 2013 as an administrative assistant by the County Government of Embu through the Transitional Authority after a successful interview. She stated that after the Public Service Board was sworn in she was taken through another interview after which she was appointed, served probation for a period of 6 months and was confirmed as a permanent employee.

4. The Respondents' witness was Mr. Johnson N. Nyaga, the County Secretary who adopted his statement as his evidence in chief. He testified that he was not the Secretary to the Public Service Board but rather he was the County Secretary. He testified that he assumed office on 5th January 2018 as a County Secretary and his work was to communicate the resolutions of the County Public Service Board to whoever is hired, fired or demoted. He also stated that the County Secretary deploys employees and that he is the one who authored the Claimants' letter of stoppage of salary and removal from payroll. He further stated that the Secretary of the Board is the chair of Human Resource Committee. He confirmed that the Public Service Board forms part of Embu County Government. He confirmed the letter which came from the Board showed that the employees were permanent and pensionable as per clause 5 of the letters of employment. He stated that the Claimants were not interviewed and they were terminated as soon as the Deputy Governor left office. He testified that according to the County Governments Act the Deputy Governor is allowed to pick the secretary, cook, driver, personal secretary, and tea girl of choice and this therefore means that the employees were employed by the Deputy Governor.

5. Parties thereafter filed submissions. The Claimants submitted that from their testimony as read together with their witness statements, it is clear that there is indeed a violation of rights and breach of contract by the Respondents against them. The Claimants submitted that a keen look and analysis of the dates and contents of the purported termination letters establishes that the letters were as a result of anarchy in a failing system and it is indeed suspect that there is a clear conflict of dates and timelines in the sense that the purported dismissal letters are dated 31st January 2017 addressing future matters of 21st August 2017 and 31st December 2017. The Claimants submitted that this was purely speculative and in furtherance of anarchy. They submitted that in the letter dated 17th February 2017 from the office of the County Secretary and head of public service, the County Secretary noted that the Respondents never brought to the attention of the Claimants that there was an error in their letters of offer before and at the time the Claimants signed their acceptance of the Board's conditions and offer of employment. The Respondents elected to ignore this advice and proceeded to terminate the Claimants. The Claimants submitted that the letter dated 17th February 2017 from the office of the County Secretary and head of public service addressed to the 1st Respondent also noted that it was curious how the 1st Respondent had chosen to issue termination letters soon after or a day after the 1st Respondent had tendered their notice of resignation from their position as Secretary/ CEO of the Board. The Claimants submitted that it was the Respondents' failure to correct the anomaly at the earliest stage possible and as such they cannot be heard to say that there was an error at the time of appointment of the Claimants which allegedly came to their attention more than 3 years after the offer of employment was accepted and equally 2 years after the Claimants were admitted to the County Government's permanent establishment payroll. The Claimants relied on the case of **Kenya University Staff Union & Another v Masince Muliro University of Science and Technology [2018] eKLR** and submitted that Section 26(2) of the Employment Act is couched in mandatory terms. The Claimants submitted that therefore the terms of the letter of offer of 2nd October 2013 were binding and in the circumstances, more favorable to the Claimants in this suit. They submitted the provisions of Section 26(2) as alluded in the above case are superior to the terms of offer which in essence were more favorable to the Claimants. The Claimants submitted that a prudent interpretation of clause 5 of the offer of appointment dated 2nd October 2013 would lead to the conclusion that the said contractual terms would automatically mutate into permanent and pensionable terms upon successful completion of the Claimants' probation period and that the clause should be adopted and be interpreted in favour of the Claimants. The Claimants submitted that they had a legitimate expectation of being taken in after 6 months of probation and within the ambit of clause 5 of the appointment letter. They submitted that this expectation was indeed met, regularized and validated by virtue of their employment after successfully completing the probation period. The Claimants urge that their claim be allowed as prayed.

6. The Respondents submitted that it is clear and beyond peradventure that the Claimants' employment was contractual and based on the term of the Deputy Governor and that in essence the offer letter expressed that they would remain engaged for as long as the Deputy Governor was in office and upon her vacation, they would also vacate their positions. The Respondents submitted that the Deputy Governor's role ceased on 21st August 2017 and on which date the term of engagement of the Claimants were also terminated. The Respondents submitted that this cannot be termed as an unfair termination as it was a lapse in the contractual terms. The Respondents submitted that the Claimants willingly and with full knowledge of the terms executed the letters of offer and were thus bound by the terms. The Respondents submitted that the Claimants attempted to cling on the provision of paragraph 5 of the offer of appointment letter arguing that upon completion of their 6 months probation period, they were to be made permanent and pensionable. The Respondents submitted the said clause was neither unconditional nor automatic but provided that one had to be issued with a letter of appointment upon the expiry of 6 months and was also subject to quarterly performance evaluation by the supervisor. The Respondents submitted that the Claimants confirmed that they were not in possession of any other letters of appointment confirming them as permanent and pensionable and they also had not undergone any supervision to qualify for such terms. The Respondents submitted that the Claimants further confirmed that it was not a term of the letters of offer of employment that they would be deployed to other services upon completion of their services with the Deputy Governor. The Respondents submitted that it was never communicated to them that such an option was available to them and hence it cannot

form part of their engagement and must be ignored in its entirety. The Respondents submitted in view of the foregoing, that the Claimants have not proved their case on a balance of probabilities. The Respondents submitted that they were wrongly sued and are non-parties to this claim. The Respondents submitted that the Claimants were hired by the Public Service Board Embu County which is mandated to carry out such appointments and that the 1st Respondent is only the head while the 2nd Respondent only chairs sittings of the Board and that as such, the reliefs sought against them cannot stand in law. The Respondents submitted that according to Section 57 of the County Government Act the County Public Service Board is a body corporate capable of suing and being sued in its corporate name and even if the allegation that the Claimants were employed by the Embu County Government was true, it is not a party to these proceedings thus no relief can be sought against it. The Respondents relied on the case of **Kisumu County Public Service Board & another v Nashon W.O. Oguya & 5 Others [2018] eKLR**, where Nduma J. held “*From the foregoing positions, it is abundantly clear that the County Public Service Board is separate and distinct from its members and the secretary and that it can sue and be sued as a corporate body separate from its members.*” The Respondents submitted that this claim is hopelessly defective *ab initio* and ought to be dismissed with costs.

7. The 1st Claimant was employed as a personal assistant and the 2nd Claimant was employed as a personal secretary to H.E. the Deputy Governor. Their terms of service were stated to be with effect from 27th May 2013 based on her term of office. This was clearly spelt out in their letters of employment. Despite this, they assert that their terms were permanent and pensionable and were not pegged on the term of the Deputy Governor. That cannot be so as their letters identify their positions as concomitant with those of the Deputy Governor. In the claim before the Court the Claimants moved against the officers who held the positions of County Secretary and the Chair of the County Public Service Board instead of the Embu County Government and the County Public Service Board. As the Board is capable of suing and being sued in its own name as a corporate entity there was no basis to sue the individuals. Be that as it may, the Respondents were ably defended by the Counsel appointed by the County Government and therefore no personal liability fell on the Respondents. The suit was not proved on a balance of probability as there was nothing to suggest the terms on the appointment of the Claimants were either discriminatory nor altered to their detriment. They misapprehended their employment terms and these terms never converted to any other either by passage of time or on account of the end of the probationary period. In the final result the suit is dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 3rd day of December 2019

Nzioki wa Makau

JUDGE