



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 30 OF 2018

DAVID GITHAKA GAICHU & 129 OTHERS.....CLAIMANTS

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

JUDGMENT

1. The 130 Claimants sued the Respondents for their alleged unfair, unprocedural and illegal termination of employment. The Claimants averred that they were competitively recruited and/or engaged by the 1st Respondent effective 22nd February 2017 following interviews by the 2nd Respondent and were issued with respective letters of appointments on a permanent and pensionable basis. The Claimants averred that they were rendering services to the 1st Respondent when on or about the 21st September 2017, they were individually served with letters requiring them to show cause as to why the posts should not be revoked alleging that the said posts are no-existent. They all responded to the show cause letter and explained each and every allegation contained therein after which they continued to work until 22nd October 2017 when they were served with termination letters by the Chairman to the 2nd Respondent effective between 6th and 9th October 2017. The Claimants averred that they were not subjected to a fair hearing prior to termination which is against natural justice and public service policy therefore the purported termination of their employment is for all purposes and intent illegal, null and void. The Claimants averred that the 2nd Respondent unilaterally terminated their services without giving them reasons despite them giving appropriate responses to the circumstances regarding their employment thus rendering their termination illegal, null and void. The Claimants therefore prayed for judgment against the Respondents jointly and severally for immediate and unconditional reinstatement of the claimants to employment; payment of salaries and allowances; payment of arrears at Kshs. 23,392/- per month together with all lawful and due increments which continue to escalate until full payment as well as the costs of the suit plus interest at the court rates.

2. The Respondents filed a memorandum of response and averred that the Claimants have no cause of action against them, that the suit is an abuse of this court's process and the memorandum of claim herein is fraudulent. The Respondents averred that the Claimants were appointed as village administrators between February and March 2017 through mistakes of law set out in their respective notice to show cause letters. The Respondents averred that the appointments of the Claimants were made in the contravention of the various provisions of the Constitution and the County Governments Act as described in the notice to show cause letters. The Respondents averred that the appointments of the Claimants were made at a time when campaigns for the Presidential, National Assembly, Senate, Governors and Members of the County Assembly were approaching their peak and the relevant procedures in the County Governments Act were flouted. The Respondents averred that the Claimants were appointed to work with non-existent Village Councils, they were not given any job description, they had no offices to operate from, they did not have officers to report to and that they were only included in the 2st Respondent's payroll but they did nothing. The Respondents averred that they conducted investigation touching on the appointments between August and September 2017 and established that the Claimants' appointments were fraudulent, irregular, illegal, unconstitutional, null and void and were fit for review under Section 75 of the County Governments Act read together with Article 236 of the Constitution. The Respondent averred that the Claimants were sent notice to show cause letters outlining their cases. The Respondents averred that the Claimants showed cause both in writing and through oral representations which each of them made before the organs of the Respondents on 6th and 9th October 2017 respectively and they all signed an attendance register. The Respondents averred that they considered both the oral and written representations of the Claimants and the requirements of the rule of law and concluded that the Claimants' appointments were mistaken and illegal and ought to be terminated forthwith. They averred that the termination was done in accordance with among others Articles 10, 47, 201 and 236 of the Constitution and also Section 75 of the County Governments Act and thus prayed that the Claimants' suit be dismissed with costs.

3. The 1st Claimant Mr. David Kithaka Gachuki testified on his behalf and that of the other 129 Claimants save for the 120th Claimant who was acting in person and relied on his statement and the list of documents as his evidence. He testified that due process was followed when they were being employed as there was an advertisement and interview and that they were issued with appointment letters on a permanent and pensionable basis and served a 6 months' probation period. He testified that they were not invited for a hearing and stated that on 6th and 9th October 2017 they were called and when being addressed they were told that it was a normal head count being undertaken. He stated that

they were also asked their date of employment, level of education and where they worked. He testified that the County Government failed to act on their response to the notice to show cause and terminated them and that is why they sought for relief and obtained orders of stay to maintain the status quo. He testified that as per the orders they were to remain employees but they have never been paid since the month of November to date. He stated that the 2nd Respondent's board was not constituted when they were being terminated. He stated that the appointment letters were signed by the secretary and the termination letters were signed by the Chairman instead of them being signed by the Secretary as well. He testified that upon termination they had suffered together with their families and requested the court for protection from unjustifiable harassment and from being hindered to perform their duties. In cross-examination he stated that the salaries and dues for October were paid but he came to realize that two or three people one of them being Chris Mugendi were not paid. He confirmed that they still work as village administrators despite the dismissal after obtaining an order from court to maintain the status quo. He testified that there were no grounds for the termination as they had not broken any law.

4. The 120th Claimant Mr. Eustance Ndeke Kamundi acting in person testified and reiterated the sentiments of the 1st Claimant Mr. David Kithaka Gachuki. He stated that there was no requirement of Chapter 6 of the Constitution in the advertisement. He stated that he is still working after getting the order of the court maintaining the status quo but he maintained that the Respondents had failed to pay them a salary contrary to the court's order that directed them to pay.

5. The 1st Respondent's witness was Dr. Fredrick Njeru Kamande who stated that he was working as a County Secretary of the County Government of Tharaka Nithi adopted his statement and relied on the bundle of documents as his evidence. He confirmed that these jobs were advertised by the County Public Service Board, applications were received, interviews were conducted and appointment letters were issued. There were 6 months' probations and that indeed the Claimants were confirmed. He testified that in August 2017 a new Government took office and a head count was conducted and it was then realized that all the Village Administrators were not qualified and so they were issued with notice to show cause letters. He stated that the recruitment was unlawful and irregular and added that when a mistake is realized nothing stops the Governor and the team from acting. He testified that Section 75 of the County Government Act provided for remedies where procedures had been flouted. He stated that the Claimants were called to a meeting via SMS where they had a chance to clarify the explanations made over and above their written explanations on the response to the notice to show cause but however, they all failed to satisfy the panel. The 2nd Respondents' witness Stephen Nthiga Mitugo the Chair of the 2nd Respondent adopted his affidavit and the statement as his evidence. He testified that after an audit was carried out issues of qualification and age arose as the advertisement required that they should be above 30 years. He stated that they had a register which proved that all the Claimants attended a meeting in relation to the allegations that were made in the notice to show cause. He stated that the Village Administrators had not complied since they had not submitted all the documents as required under Chapter 6 of the Constitution. The final witness for the Respondents' was Mr. Alexander Muratha Head of HR who adopted his statement in examination in chief. He testified that where there is no manual for HR in Public County they use guidelines from Public Service Commission as it is covered by the County Government Act. He stated that the Claimants were given an opportunity to explain how they were employed as they also reviewed their documents. He stated that some of the Claimants had the requisite documents while others did not have them. He testified that the Panel then forwarded recommendations to the County Public Service Board with the key recommendation being that the ones who did not meet the criteria should be terminated. He stated that the Claimants were heard through a notice to show cause and others came for oral hearing. He stated that the Claimants used a flawed process and entered the payroll unprocedurally.

6. The Claimants' submissions were to the effect that they responded to the Notice to show cause letters and explained that they were competitively recruited by the 2nd Respondent following an advertisement for the post and therefore their appointment was regular. They submitted that did not control the use of public money within the County and therefore were not aware that the wage bill for the County was Kshs. 200,000,000/-. They also explained that they are not to be expected to be aware of the various consultations prior to their appointment and that they had fulfilled the requirements of Chapter 6 of the Constitution. The Claimants submitted that no minutes of the purported hearing was produced to confirm if indeed any representations were made by the Claimants at the purported hearing. Moreover, no notice of such a hearing if at all was produced by the Respondents indicating the manner and the nature of the hearing if any thus the termination was unfair in the circumstances. The Claimants submitted that in any event an employer is obligated to prove the reasons for termination under Section 43 of the Employment Act. It was submitted that in the present case the Respondents did not prove the reasons for terminating the Claimants as stated under the notice to show cause letters. The Claimants submitted the Respondent stated that the Claimants failed to appeal their decision to the Public Service Commission hence insinuating that this court does not have jurisdiction and argued that the Respondents never objected to this court's jurisdiction in their response to the claim nor did they file a Preliminary Objection to the competency of the suit and cannot raise the same at the stage of submissions. They placed reliance in the case of **Crown Foods Ltd v General Cargo Service [2019] eKLR** and submitted that furthermore, the matter has already been dealt with on merit and thus the suit cannot be struck out at this time on the technicalities raised. The Claimants submitted that the Respondents should not be allowed to change the case at this juncture and object that the court has no jurisdiction when it was never pleaded or raised as a preliminary objection. They relied on Order 2 Rule 4 of the Civil Procedure Rules and the case of **Callen Gatune Francis v Tharaka Nithi County Public Service Board & Another [2018] eKLR** and submitted that this court has held that in case of dismissal of an employee, this court has jurisdiction to hear the cause. The Claimants submitted that they have made a case against the Respondents and urge that the claim be allowed as prayed.

7. The 120th Claimant's submissions were to the effect that due process was followed in recruiting Village Administrators as the posts were advertised, the Claimants were shortlisted to attend an interview after which they were issued with appointment letters. He submitted that all successful Village Administrators were invited for an inaugural exercise that was attended by the Governor, County Executive Committee Members, Sub County and Ward Administrators. He submitted that all Village Administrators carried out their normal duties under cross supervision of the ward administrators who were there supervisors and no any disciplinary action has been taken against them. He submitted further that the post of village administrators was passed under the Act of Tharaka Nithi County Assembly in the Village Unit Delineation Bill 2016. He thus submitted that the office of Village Administrator is established under Section 52 (1) and duties captured under Section 52(3) and that under Section 48 of the County Governments Act, the County Government is mandated to decentralize functions and provision of services. The 120th Claimant submitted that the Respondents argument that the County Executive Committee (CEC) neither deliberated nor approved the recruitment of Village Administrators was not in the province of the Claimant. He submitted in response to the wage bill standing at Kshs. 200,000,000/- is purely failure by the County Government Public Service Board which has been on a hiring spree and solely contravenes Article 175 (b) of the Constitution of Kenya. He submitted he has never failed the threshold of Chapter 6 of the

Constitution. He submitted that even though the Respondents maintained that they accorded the Claimants fair hearing, they failed to produce any evidence to show that the Claimants were given a fair hearing by the County Public Service Board. The 120th Claimant submitted that they had to serve a 6 months' probation and that was sufficient time for the Respondents to correct their mistakes if at all there were any. He submitted that the issue of lacking documents should not arise, because all required documents were submitted during the application and during the interview and if at all they needed more documents, they were at liberty to ask for them within the 6 months' probation. He submitted that they were employed constitutionally with a well constituted County Public Service Board comprising of 7 members and the Secretary signed their appointment letters. He submitted that however, following the influence of the current Governor, the Boards were authorized to revoke their appointment and those who refused were harassed and their services were terminated. He submitted that the Board was not well constituted at the time they were terminated as 3 of its members had been sacked. The 120th Claimant submitted that the termination letters were signed by the Chairman instead of the Secretary contrary to the law since the Chair has no written authority to perform the duties of the County secretary. He submitted that the termination was politically motivated due to changes from the 1st regime to the 2nd regime for personal interest and he thus prayed that the Respondents response to the claim be disregarded as it has no merit and the court directs that the Claimants be reinstated unconditionally and put strict orders for the Respondents not to harass, victimize, unrecognized and shame the Village Administrators in the community. He also prayed that the Respondents be ordered to pay all dues and salary arrears of March 2017 and salary of November 2017 to date.

8. The Respondents submitted that they issued the Claimants with a notice to show cause to which the Claimants replied after which they invited for oral representations. The Respondents submitted that the Claimants attended the hearing and signed a register and after the representations made were considered alongside the material the Respondents issued them with termination letters. The Respondents submitted that these facts have not been disputed and need not be proved as provided for by Section 61 of the Evidence Act. The Respondents submitted that they are part of the state organs within the meaning of Article 10 of the Constitution which makes adherence to the rule of law a national value. The Respondents submitted that this adherence requires observance of both the procedures applicable and also substance. The Respondents cited the case of **Methodist Church Trustees Registered v The Attorney General & 6 Others [2010] eKLR**, where the Court stated that in a democratic republic the law is king, and submitted that in invoking Section 75 of the County Governments Act, they were accepting that in our Republic the law is king and where mistakes have been made, they must be corrected. They submitted that in essence the Claimants are complaining that the rule of law has been adhered to. The Respondents submitted that the Constitution and the County Governments Act govern contracts of employees of County governments and as held by Odunga J. in **Republic v Secretary County Public Board & another Ex parte Hulbai Gedi Abdille [2015] eKLR**, there cannot be a valid contract where such provisions of the County Governments Act as Sections 65 and 66 and Article 10 of the Constitution are not complied with. The Respondents submitted that this claim is fraudulent and as held by court of appeal in **Nabro Properties Ltd v Sky Structures Limited [2002] Vol. 2 KLR 299**, no party is allowed to benefit from its wrong. The Respondents submitted that the Claimants are seeking to benefit from their illegal actions/crimes as their claim is based on illegal contracts which the court will not enforce. The Respondents submitted that the Claimants could not and cannot purport to rely on those illegal contracts to lay valid/legal claims. The Respondents submitted that they acted in accordance with Section 43 of the Employment Act as they heard the Claimants both through their written and oral submissions and the employer exercised its right to terminate their services after the hearing. The Respondents relied on the case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** where the Court of Appeal stated, "*however in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.*" The Respondents submitted that in line with Section 77 of the County Government's Act, the Claimants were supposed to seek a remedy from the Public Service Commission as the decision they are complaining about was the decision of the County Public Service Board. The Respondents submitted that the suit is premature as the Public Service Commission was the proper forum. They made reference to the Court of Appeal case of the **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** where it was held that where there is clear procedure provided for in statute it should be strictly followed. The Respondents submitted that on this ground the Claimants' claim is for dismissal with costs. The Respondents further submitted that the remedy of reinstatement is available only where an employee was unlawfully dismissed and it is therefore not available to the Claimants as they have come to the wrong court and if they had done so, the Public Service Commission which is a state organ would have dismissed them too for non-observance of the rule of law. The Respondents cited the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** and submitted that there exists no special circumstances in the case before the court to award the remedy of reinstatement. The Respondents submitted that the contracts relied on by the Claimants are void *ab initio* as the Respondents did not have the capacity to enter into contracts with the Claimants. The Respondents submitted that by virtue of the rule in **Macfoy v United Africa Company Ltd [1961] 3 All ER 1179**, they were entitled to terminate their illegal employments. It was submitted that it is a maxim of law that courts will not assist in enforcement of illegal contracts like the ones before the court and in view of the foregoing the Respondents urged the court to dismiss the Claimant's claim with costs.

9. The issue of jurisdiction has arisen and it is submitted that under Section 77 of the County Governments Act, the Claimants ought to have approached the Public Service Commission. Section 77 of the County Governments Act materially provides as follows:-

77. (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office;

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

(4) The Commission shall not entertain an appeal more than once in respect to the same decision.

..... (underline for emphasis mine)

The Claimants it would seem were obliged to approach the Public Service Commission if dissatisfied with the decision of the Respondents. The Claimants cannot argue, in the face of the clear provisions of section 77 of the County Government Act, that they can bypass the legislation and come to this Court seeking reprieve for matters that were for the Public Service Commission to handle. As held in the case of **Republic v Secretary County Public Service Board ex parte Hulbai Gedi Abdille** the law does not envision a situation where the litigants chose what part of a statute to follow. The Claimants should therefore have approached the Public Service Commission in terms of Section 77 of the County Governments Act as held in the decision instead of coming to court. The suit is unmerited. Suit is dismissed but each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 2nd day of December 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar