



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 542 OF 2016

IN THE MATTER OF ARTICLE 22, 41, & 236 OF THE

CONSTITUTION OF KENYA 2010

IN THE MATTER OF SECTION 12 (1)(a), 12(2)(3) & 20 OF THE EMPLOYMENT & LABOUR RELATIONS ACT

IN THE MATTER OF THE ALLEGED DEMOTION OF THE CLAIMANT SERVICES

BETWEEN

BENEDICT MTOTO MWABILI.....CLAIMANT

VERSUS

COUNTY PUBLIC SERVICE BOARD

TAITA TAVETA COUNTY.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the Respondent as the County Head of Treasury (Budget and Expenditure Management) Job Group 'R' vide appointment letter dated 10.2014. The appointment was done after a competitive process, which saw him emerge the best after the interviews. He was to serve for 4 years and he was to earn basic pay of Kshs.109,089 - 144,928, house allowance of Kshs.40,000 plus other allowances amounting to Kshs.14,000 per month. He was confirmed to the post of Director - Accounting Services (Budget & Expenditure) by letter dated 9.12.2014 following his satisfactory performance, professionalism and accountability. Even before the confirmation, the claimant continued in vain to apply for study leave to finalize some Accounting courses he was supposed to do in order to achieve CPA(K).

2. On 29.2.2016, the Respondent wrote to him a letter Re-designating him from his duly appointed position to the post of Principal Accounting Officer Job Group 'N' but the salary was to remain unchanged. The letter also requested him to upgrade his qualifications to the required standards. The Claimant was dissatisfied and brought this suit alleging that the said re-designation was a breach of his contract, unfair, unlawful and unconstitutional because it was done without prior consultation and fair hearing. He therefore brought this suit seeking declaration that the re-designation was unfair, unconstitutional and a breach of his contract; injunction to restrain the Respondent or her agents from effecting the said re-designation; reinstatement to his position of the county head of Treasury (Budget & Expenditure) Job Group R: and in the alternative he be paid Kshs.198,028 x 27 months = Kshs.5,372,514 for breach of contract. He also prays for certificate of service plus costs and interest.

3. The Respondent admitted that she employed the Claimant as the County Head of Treasury (Budget & Expenditure Management Job Group 'R'). However, she discovered later that he lacked the Minimum qualification required to that office being CPA(K). According to her, the Claimant lacked the technical capacity required of him to discharge the duties in the said office and consequently, she re-designated the Claimant to the position of Principal Accounting officer without loss of benefits. It is therefore the defence case that the Claimant was, and still is not qualified for the position County Head of Treasury (Budget & Expenditure Management Job Group 'R') and prays for the suit to be dismissed with costs.

4. The suit was heard on 30.3.2017 when the Claimant testified as CW1 while by consent of both parties, the Respondent dispensed with calling her witness and instead adopted the witness statement written by Mr. Mathew Mfuko and the documentary evidence filed. Thereafter both parties filed written submissions, which I have carefully considered herein.

Claimant's case

5. CW1 stated that he saw a job advert by the Respondent for the post of County Head of Treasury (Budget & Expenditure Management) Job Group 'R' and he applied. Thereafter he was shortlisted, interviewed on 11.12.2013 and then appointed to the position on 10.1.2014 to serve for years. His salary was Kshs.109,000 – 144,000, house allowance of Kshs.40,000 plus other allowances of Kshs.140,000. After serving 6 months probation, he was confirmed to the position by the letter dated 9.12.2014 which acknowledged that he had done a satisfactory performance.

6. CW1 further stated that on 29.2.2016, he received a letter varying his contract of service by re-designating him to Principal Accounting Officer Job Group 'N'. He was dissatisfied because the re-designation was done without prior notice and consultation. He contended that he was qualified for the job and he was competitively recruited and confirmed for the post without any issues. He further contended that the re-designation was done in breach of the law and against the advice by the Public Service Commission (PSC) vide the letter dated 3.6.2016 by which the Respondent was advised that she could not re-designate him after the probation but should retain him in the Job Group 'R' and encourage him to attain the required qualification. He blamed his employer for his failure to attain the required CPA(K) because, before and even after the said advice by the PSC, he tried in vain to get study leave to finalize his CPA course because there was no sufficient staff and he was always told to finish if not the Annual Budget or Supplementary Budget.

7. CW1 stated that, although his salary remained the same, he lost allowances and responsibilities as a result of the said re-designation. He therefore prayed for compensation for unfair termination and breach of contract being the salary for the 27 months pending before the expiry of his contract. He however abandoned the prayer for reinstatement due to the frustrations he allegedly faced in the department. He also prayed for certificate of service, costs, and interest.

Defence Case

8. Mr. Mathew Mfuko stated in his written testimony that the respondent advertised a vacancy for the post of Head of treasury (Budget Expenditure & Management) whose minimum qualification was CPA(K) certificate; that the Claimant applied, was shortlisted, interviewed and eventually appointed to the said position; that during the interview the Claimant indicated he had completed the CPA(K) course and therefore eligible to fill the said position but after the appointment he was found to be without the CPA(K) certificate; that is when the Chief Officer in charge of Finance discovered that the Claimant had not attained the CPA(K) qualification as required, he notified the Respondent and recommended for re-designation to the position of Principal Account job group 'N' where he was qualified to serve; that the Respondent sought and was granted permission from the PSC to have the Claimant retained in job group 'R' after the re-designation to the new junior position; and that upon such recommendation from the PSC, the Respondent instructed the C.O. Finance to stop the claimant from discharging the duties of the County Head of Treasury (Budget, Expenditure & Management) and let him do the duties of the Principal Accounting Officer.

9. According to Mr. Mfuko the said re-designation of the Claimants position was legitimate and merited because he lacked the technical qualifications to hold the previous appointment. He therefore denied that the re-designation was actuated by bad faith and ulterior motive. He contended that despite demand and reminders, the claimant never availed the CPA(K) certificate and never attempted to acquire the said qualifications. He also contended that when the position of County Head of Treasury (Budget, Expenditure & Management) was re-advertised the Claimant never applied for the same because he had not attained the CPA(K) and as such fresh recruitment was done competitively and a new person appointed to fill the vacancy. He therefore prayed for the suit to be dismissed because it is overtaken by events and also because it is before the wrong forum. In his view, the proper action by the Claimant was an appeal before the PSC and a suit before this court.

Analysis and Determination

10. After considering the pleadings, evidence and submissions, it is clear that the Claimant was employed by the Respondent under a renewable four years contract starting 5.2.2014. The appointment was in Job Group 'R' and the basic pay was Kshs.109,089 – 144,928, house allowance of Kshs.40,000 plus other allowances of Kshs.14,000 per month. It is also clear that the advertisement for the position published in the Saturday Nation dated 21.9.2013 required that the eligible candidates were supposed to be holders of CPA(K) qualifications. There is also no dispute that the Claimant did not hold the said qualification but he was nevertheless shortlisted, interviewed and appointed to the position but shortly thereafter the C.O Finance raised an alarm that the Claimant did not possess CPA(K) certificate and recommended that he should be re-designated to the position of Principal Account. There is further no dispute that the Respondent sought the permission from the PSC on the matter of the re-designation and also for the Claimant to retain the Job Group 'R' and the benefits thereof and it was granted.

11. The was the issues for determination as framed by the parties are:

- a) Whether this court has jurisdiction to determine this suit;
- b) Whether the re-designation was lawful, proper and justified;
- c) Whether the process of the re-designation was fair;
- d) Whether the claimant is entitled to the reliefs sought.

Jurisdiction

12. The Respondent has contended that this Court lacks jurisdiction to determine this suit by dint of Article 234 (1) of the constitution and section 77 (1) of the County Governments Act and Regulation 89a) of the Public Service Commission (County Governments Public Service Appeals Procedures) Regulations 2016. According to the Respondent, the Claimant ought to have filed an appeal before the PSC before

bringing this suit here and as such the suit is prematurely filed. I have carefully considered the provisions of Article 234(1) (i) of the Constitution, section 77 (1) of the County Governments Act and Regulation 89(a) of the Public Service Commission (county governments public service Appeals procedures) regulations 2016 and noted that they are not in conflict have with Article 162 (2) (a) and 165 (5) of the constitution and the provisions of the Employment and Labour Relations Court Act which prescribe jurisdiction to this Court, and they have not attempted to amend the same.

13. In my view the provision of section 77 (1) of the County Governments Act and Regulation 89(a) of the Public Service Commission (County Governments Public Service Appeals Procedures) Regulations 2016 have are not coined to create mandatory procedure but they give parties an alternative forum for ventilating employment grievances. The said alternative process in my view is internal mechanism, which does not take precedence to the Court process because it does not provide for any recourse to this Court if a party is dissatisfied with the decision of the PSC. If the drafters of the act and the regulations contemplated otherwise, they would synchronized them with the constitutional and statutory provisions which establishes this Court and donates jurisdiction to it. That was not done and there is no mention of this Court in the said County Government Act and the PSC regulations.

14. As regards Article 234 (1) (i) of the constitution, i do think that the drafters of the constitution only intended to provide for the powers and jurisdiction of the PSC and not take away this court's jurisdiction over the employment and labour relations disputes as contended by the respondent herein. Any different interpretations of the said article would mean that the constitution is in conflict with itself, which is not the case. Consequently, I find and hold that this court has the original jurisdiction to determine any employment and labour relation disputes between County Government Public Service Boards and their employees and as such, this suit is properly before the Court.

The process/procedure followed

15. The Claimant's case on this issue is that the re-designation was done through an unfair procedure because it was done without consideration of his views. He contends that the letter dated 29.2.2016 which notified him of the re-designation was final and conclusive as it conveyed a final decision after it was already made by the Respondent to unilaterally vary his contract of service. He contended that section 10(5) of the Employment Act provides in mandatory terms that the employer can only vary or revise the terms of the contract of service after consultations with the employee. He further relied on several decisions of this Court, which have upheld the mandatory requirement by section 41 of the Act before termination the contract of service of an employee on account of misconduct, poor performance and physical incapacity, the employee must be accorded a fair hearing.

16. The Respondent has however contended that oral hearing was not required before the re-designation of the claimant to junior position. She further contended that the claimant was served with several letters about his lack of qualification for job and he responded requesting up to December 2014 to attain the CPA(K) qualifications.

17. After careful consideration of evidence and the submission presented by both parties, I am satisfied that the re-designation of the claimant vide the letter dated 29.2.2016 was not done through a fair procedure. I have noted from the letter dated 21.2.2014 by the C.O. Finance to the respondent that the lack of CPA(K) qualification was brought to the attention of the respondent 11 days after he reported to work. In addition, I have noted from the respondent's letter dated 29.6.2015 that she knew from the beginning that the claimant did not have the CPA(K) qualification. The letter stated the following in part:

***"RE: ATTAINMENT OF THE REQUIRED QUALIFICATION** This has reference to the above subject matter.*

This is to inform and advice you that you are required to complete your CPA course to attain CPA (K). Kindly note this was a requirement, which you were expected to have and you promised to complete the same by December, 2014. Kindly send a copy of the certificate if the qualifications have been attained."

18. Despite the foregoing matters, the Claimant was never notified of all the consultations between his senior, the Respondent and the PSC, which were happening concerning the fate of his contract of service until 29.6.2015 when the Respondent wrote to him the said letter demanding for a copy of his CPA(K) certificate. He was never given any chance by the Respondent to explain why he was not able to complete the CPA course within the agreed period. Had he been given a chance before the decision to redesign his job was done, he would been able to produce the evidence of receipt to prove that he had booked the exam but was denied study leave to sit for the exams by the same C.O finance who was busy recommending for his re-designation.

19. It is now a settled law under section 10(5), and 41 of the Employment Act, Article 47 of the Constitution and a plethora of decisions of this court that, before taking any action to the detriment of an employee, the employer must accord the employee a prior fair hearing. In this case, the contract of service of the claimant was varied to his detriment by the respondent before according any fair hearing. The re-designation letter by the C.O. Finance dated 29.2.2016 stated in part:

RE: RESIGNATION

The above subject refers.

As you are aware there were issues raised regarding your lack of CPA (K) qualification, which the Board had earlier reminded you of the same.

In view of this, it has been decided that you be and you are hereby redesignated from County Head of Treasury(Budget and Expenditure management) job group 'R' to Principal Accounting officer job group 'N'. However, your salary will remain as per your appointment letter. You are requested to upgrade your qualifications as required."

20. In addition the claimant was never given any hearing by the PSC when the Respondent sought and obtained approval to have the

claimant paid salary personal to self at job group 'R' even after re-designation of his position to the Principal Accountant 'N' and the request was granted vide the letter by PSC dated 3.6.2015.

Whether the re-designation was lawful, proper, and justified

21. The Claimant contended that he won the position of County Head of Treasury (Budget & Expenditure Management) after emerging top in a competitive recruitment process. He has admitted that he had not attained CPA(K) qualification as at the time he was appointed to the said position. He has however contended that he has the competence to do the job through experience at the National Treasury. He has further contended that he had before the said re-designation performed his duties competently and that is evident from the confirmation letter dated 9.12.2014 which acknowledged his professionalism and accountability in his service. After the said confirmation he was never served with any show cause letter or any other correspondence accusing him of incompetence to discharge his duties due to lack of the CPA(K) qualification. He therefore contends that the re-designation was unlawful and unjustified.

22. However, on the other hand the Respondent has contended that Claimant did not have the qualification of CPA(K) as required by the advertisement that declared the vacancy and invited applications. According to her, the lack of the said qualification meant that the Claimant lacked the technical capacity to perform the duties of the said office. The Respondent has however not explained why was the Claimant being denied study leave until after he was through with the budget preparations. In my view, the only plausible answer is that there was no other persons who were available to discharge the said task.

23. In view of the foregoing, it is clear that the reason for the re-designation was the lack of CPA (K) qualification and not incompetence. The question that follows is therefore whether the re-designation coming after 2 years of dedicated service was lawful and justified. From the letter by the Respondent dated 29.6.2015, the employer that the Claimant lacked the CPA (K) qualification and gave him a whole year after the appointment to complete the course and attain the said qualification. It is therefore false for the defence witness to accuse the Claimant of lying that he had the CPA (K) qualification during interview.

24. In my view were the employee discloses that he does not meet the minimum qualifications for the position advertised, and the employer proceeds to shortlist him, interview him and then appoints him with the understanding that the employee will complete the course and attain the qualification within a specified period, it is unfair and unjust for the same employer to terminate him on ground of that lack of academic qualification, unless the employee is proved to be too incompetent to do the job he is so appointed or that he is not keen to complete the course within the specified time.

25. The position is however the opposite if the employee secure the same job through fraudulent misrepresentation of facts concerning his academic qualifications through fake testimonials. In the latter case, the employer is entitled to repudiate the contract of the employee as soon as he discovers the fraud regardless of the employee's competence to perform the job so secured.

26. In this case, the Claimant committed no fraud regarding his CPA (K) qualification. He also showed keen interest to complete his CPA course as agreed between him and the Respondent but his Departmental Head, C.O Finance frustrated all his efforts by denying him study leave after booking the necessary CPA examinations. The foregoing view is supported by the receipt from the Examining body dated 19.9.2014 produced as exhibit C.6 and leave application produced as C.7 & 8. Had been leave to go for his exams, probably this case would not have been necessary today.

27. Having made the foregoing observations, I wish to look at the meaning of the word 'Redesignation' as contemplated in the County Governments Act Section 2 of the defines redesignation as:

" the conferment upon a person , of a county public office at a grade equal to or substantially equal to the one previously held by that person and whose major consequence is to change from one cadre to the other to facilitate that person's horizontal mobility characterized with the change in career path."

28. The foregoing meaning of redesignation is not akin to what was done to the Claimant. In my view and I agree with him that he was just demoted to a junior office as a punishment for not completing his CPA course within the time agreed between him and the respondent. It was therefore not valid and fair reason to warrant the action taken against him and procedure followed was also not fair. Consequently, it is hereby held that the alleged redesignation of the claimant was unfair unconstitutional and unlawful and it amounted to mere demotion

Reliefs

Declaration

29. The Claimant prayed for declaration that his re-designation from the Head of County treasury (Budget & Expenditure Management) job group 'R' to Principal Accounting officer job group 'N' is unfair, unconstitutional and unlawful and a violation of his contract of service. In view of my finding above that the re-designation was unfair and unjustified because the claimants lack of qualification was condoned and partly contributed to by the respondent and that the procedure followed before the re-designation was unfair because the claimant was not any prior consultation/fair hearing I proceed to make the declaration sought by the claimant that his re-designation was unfair, unconstitutional and unlawful and that it amounted to breach of his contract of service.

Injunction/reinstatement

30. The prayers for injunction to restrain the Respondent from re-designating the Claimant to Principal Accounting Officer Job Group 'N' and reinstatement to the Head of County Treasury (Budget & Expenditure management are overtaken by events because the latter vacancy has since effectively filled and the Claimant in his evidence has stated that he has since resigned due to the frustrations he suffered in that office. In any case, I could not reinstate him at this time because his 4 year term contract expired on 10.2.2018.

Alternative prayer of damages and certificate of service.

31. I have already made a finding of fact that the redesignation of the Claimant to a junior position was unfair and unjustified and the Claimant was entitled to treat it as a repudiatory breach and claim compensation for constructive termination of his contract of service. He contended that he was to lose in allowances and declined to take the lower position and instead resigned. However according to the Respondent the demotion never occasioned any financial loss to the claimant because he was retained in his Job Group "R" and paid a salary personal to self at Job Group 'R'.

32. The foregoing contention by the defence notwithstanding, I award him 7 months' salary as compensation for the unfair constructive termination of his employment contract by the Respondent. Using his gross pay of Kshs.198,928 he will get Kshs.1,392,496. In making the said award I have considered the fact that he did not contribute to the termination through misconduct and also the fact his contract was to lapse in 7 months' time.

33. Finally, I grant the prayer for certificate of service because that is his right under section 51 of the employment Act.

Disposition

34. For the reasons stated above judgment is entered for the Claimant in the sum of Kshs.1,392,496 plus costs and interest. He will also be issued with a certificate of service.

Dated and signed at Nairobi this 12th day of February, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

LINNET NDOLO

JUDGE