



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 62 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**ALFRED MINCHA NDUBI.....CLAIMANT**

**VERSUS**

**THE COUNTY ASSEMBLY NYAMIRA COUNTY.....RESPONDENT**

**JUDGEMENT**

The facts of this case are not contested. The claimant Alfred Mincha Ndubi applied for the position of Sergeant At Arms following advertisement of the position by the respondent. He was interviewed and later issued with a letter of employment.

In the letter dated 19<sup>th</sup> November 2013, his salary is stated as €2,079.5 to €2,792 per month with house allowance of €100 and commuter allowance/other allowances of €400. He was required to report to work on 1<sup>st</sup> December 2013. He was to be on probation for 6 months.

The claimant reported for work on 1<sup>st</sup> December 2013, which was a Sunday, but found nobody. He reported for work again on 2<sup>nd</sup> December 2013 and was taken through orientation together with other employees who reported on the same day. He was however arrested during the orientation by a contingent of about 16 policemen and charged with the offence of assaulting one Thadeus Nyabaru Momanyi, a member of County Assembly of Nyamira on 30<sup>th</sup> November 2013. He was arraigned in court on 5<sup>th</sup> December 2013 but was released on bond. However when he reported back to work he was not allowed to perform his duties as Sergeant At Arms.

On 11<sup>th</sup> December 2013, the claimant sent a demand letter to the respondent through his advocates demanding an explanation from the respondent but the letter was not responded to. The respondent did not respond to a reminder dated 6<sup>th</sup> February 2014.

On 24<sup>th</sup> January 2014, the claimant was summoned to a meeting by the Acting Clerk of the County Assembly of Nyamira, which he attended but the meeting ended in disarray after an argument between the claimant and the Members of the County Assembly Service Board who were in attendance. It is worth noting that the letter dated 24<sup>th</sup> January 2014 inviting the claimant to the meeting did not indicate its agenda.

The claimant avers that he reported to the County Assembly for duty daily but was never assigned duties. The claimant was acquitted of the charges of assault without being put on his defence by a ruling delivered on 15<sup>th</sup> December 2014.

In his statement of claim dated 19<sup>th</sup> and filed on 28<sup>th</sup> March 2014, he seeks the following remedies –

- (a) An order of mandatory injunction directing the respondent to receive, install and/or allow the claimant to take up or assume his office as Sergeant At Arms and discharge the duties of that office as per the appointment letter dated 19<sup>th</sup> November day of 2013.
- (b) Salaries and other allowances due and payable to the holder of the office of Sergeant At Arms with effect from the date of appointment to the date of judgment or restoration into office as Sergeant At Arms.
- (c) General damages.
- (d) Costs of the claim.
- (e) Interest at court rates.

The respondent filed a defence to the claim on 15<sup>th</sup> May 2014 in which it admits offering the claimant employment as stated in the statement of claim but avers that the offer was subject to the claimant undergoing vetting and other laid down procedures before being allowed to start discharging his duties, that the claimant was summoned by the Nyamira County Assembly Service Board for vetting but refused to answer questions put to him necessitating an abrupt end to the meeting.

The respondent denies that it refused to confirm restore or install the claimant into office and blames the claimant for his misfortunes. It denies that the claimant is entitled to salary and allowances of the office of Sergeant At Arms on grounds that the claimant did not assume the office. It prays that the suit be dismissed with costs.

At the hearing of the case, the claimant testified on his behalf while the respondent called one witness DAVID OMBEGO, a Legal Officer in the Office of the Speaker, Nyamira County Assembly. The parties thereafter filed and exchanged written submissions.

## **Determination**

The facts of the case having not been disputed, the only issues for determination is whether the claimant is entitled to the prayers sought.

### **1. Mandatory Injunction**

The claimant prays for orders directing the respondent to receive install, restore and/or allow the claimant to take up or assume the Office of Sergeant At Arms. The respondent on the other hand states that the office has been filled by a Senior Sergeant At Arms and an Assistant and is not available for the claimant to be reinstated.

From the evidence on record, the claimant was issued with a letter of offer of employment and reported for duty on 2<sup>nd</sup> December 2013. The respondent had nothing to do with his arrest on that day and his subsequent arraignment in court on a charge of assaulting a Member of County Assembly of the same County Assembly which was his employer.

The claimant was called for a meeting of the County Assembly Service Board where the Speaker told him that he had been summoned to respond to an assault case between him and the Member of County Assembly. The claimant stated during cross-examination that his response to the Speaker was that he could not respond because the matter was in court. In the words of the respondent's witness, the meeting ended in disarray. This was not denied by the claimant.

The claimant was acquitted of the charges against him on 15<sup>th</sup> December 2014 long after this suit had been filed. At the time of filing suit, his assault case was still pending before the Chief Magistrate's Court in Nyamira.

It is under these circumstances that the claimant was not cleared to take up the functions of his office as Sergeant At Arms at Nyamira County Assembly.

A mandatory injunction in an employment matter in the context sought by the claimant is a reinstatement. The court in considering whether such a remedy is merited has therefore to consider the factors set out in Section 49 (4) of the Employment Act, which are—

- (a) the wishes of the employee;**
- (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**
- (c) the practicability of recommending reinstatement or re-engagement.**
- (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;**
- (e) the employee's length of service with the employer;**
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;**
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;**
- (h) the value of any severance payable by law;**
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;**
- (j) any expenses reasonable incurred by the employee as a consequence of the termination;**
- (k) any conduct of the employee which to any extent caused or contributed to the termination;**

**(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and**

**(m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.**

The claimant herein had not started performing the functions of his office as Sergeant At Arms at the time of his arrest. He had only just reported for duty and was undergoing orientation. The person he is alleged to have assaulted was a Member of the County Assembly in which he was appointed to Sergeant At Arms.

I have considered the circumstances, under which the claimant's employment with the respondent ceased, his conduct that contributed to those circumstances, the fact that he had not taken up the functions of his office before his arrest and the nature of the criminal charges against him.

The respondent is not responsible for what befell the claimant. I do not find the remedy of mandatory injunction appropriate in the circumstances of this case and I decline to grant the same.

## **2. Payment of Salaries and Allowances**

The second prayer by the claimant is for payment of salaries and allowances from date of appointment to date of judgment. As is evident from the uncontested facts of this case, the claimant did not perform the functions of his office. He was prevented from doing so by circumstances that the respondent was not responsible for. He did not render any services to the respondent for which he would be entitled to any payment. The prayer is therefore not merited and is dismissed.

## **3. General Damages**

Having found that the respondent was not responsible for the claimant's situation, the prayer for damages does not lie against the respondent. General damages by definition are supposed to compensate a litigant for injuries suffered by the litigant and are payable by the person responsible for the injury or wrongs suffered by the litigant. Having found that the respondent was not liable for the claimant's loss of employment, the claimant is not entitled to any damages from the respondent. The claim for damages is therefore dismissed.

## **Conclusion**

In conclusion, I find that the claimant has not proved his case against the respondent with the result that the entire suit is dismissed. Each party shall bear its costs.

**DATED AND SIGNED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF APRIL 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF MAY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**