



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 1 OF 2018

(Before D. K. N. Marete)

JOYCE CHEPKOECH KEMEL.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF BOMET.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD-BOMET COUNTY...2ND RESPONDENT

COUNTY SECRETARY COUNTY

GOVERNMENT OF BOMET.....3RD RESPONDENT

GOVERNOR COUNTY GOVERNMENT OF BOMET.....4TH RESPONDENT

JUDGEMENT

This is a petition dated 13th March, 2018.

The 1st and 2nd respondents in separate Replying Affidavits sworn on 17th May, 2018 oppose the petition and pray that it be struck out or dismissed with costs.

The 3rd respondent in her 3rd Statement of Grounds of Opposition to the Notice of Motion Application and 3rd Respondent's Statement of Grounds of Opposition to the Petition both dated 14 May, 2018 also oppose the petition and prays that it be struck out.

The 4th respondent remains mum on the subject.

The petitioner's case is that she is an employee of the 1st Respondent working as Deputy Director Accounting Services (Budgets). It is her further case that she has been working with the County Government of Bomet and held various positions as finance officer since march, 2014.

It is the petitioner's further case that on 29th September, 2012, her contract as a Finance Officer was extended for a further three months. She, in the meantime, was to undergo a series of promotions culminating to that of Deputy Director Accounting services (Budget) budget for a period of one and half years with effect of 9th May, 2016.

She further avers that during the continuance of this contract, she was only paid for this contract and not the one of 30th September, 2015 which was also still running. Again, for the entire period worked on some instances she would work without a written contract.

The petitioner's case is that she worked for the month of February, 2018 but has not been fully paid for the same. It is also her averment that during her stint of service, some workers on contract had been absorbed into permanent and pensionable status as had become the practice and norm.

Her other case is that this petition comes out in her personal capacity and that of several other employees who have been cheated by the 1st respondent that their services would be converted into permanent and pensionable after putting in time of contract.

Her further case is as follows;

12. **THAT** during the period under which the Petitioner worked for the county Government of Bomet, some of the workers who had worked on contract were absorbed on a permanent and pensionable status and it had become a practice and norm.

13. **THAT** the Petitioner is apprehensive that the Respondents herein would wish to terminate her contract and go against their word of absorbing me on a permanent and pensionable status like they have done with several other employees who were on contract and employ other people.

14. **THAT** it is only fair and equitable for employees who were contract are to be first absorbed on permanent and pensionable terms by the Respondent and or reasons given by the respondents as to why they can't do since it's their mandate to carry out fair labour practices before they recruit new ones in their position.

15. **THAT** the acts and or decisions of the Respondent by not paying the petitioner's salary for the month of February 2018 and absorbing her and several other employees on contract on permanent and pensionable terms is discriminatory in nature.

16. **THAT** the Respondents once threatened to terminate the petitioner's services in the month of November, 2017 and had even asked her to prepare and hand over but as she was doing so, the Respondents recalled her and told me to continue working.

17. **THAT** the Petitioner upon being recalled in the month of November, 2017 by the Respondents who proceeded to engage her and pay her salary for the subsequent monthly salary meant a totally different Contract all together.

18. **THAT** the Petitioner served the Respondents with loyalty and diligence until February, 2018 when the Respondents wrongfully and unlawfully dismissed her and refused to pay her the full terminal benefits inclusive the salary for the month of February, 2018. The full terminal dues includes;

- a) Unpaid salary for the month of February, 2018 Kshs.158,850/=
- b) One month salary in lieu of termination notice Kshs.158,850/=
- c) Unpaid leave for the years between 2013 – 2017 (4yrs*Kshs.158,850) Kshs.635,400/=
- d) Gratuity/service pay (Kshs.158,850.00*4yrs) Kshs.635,400/=
- e) 12 Months wages compensation as per section 15 of the Labour Institution Act (12 Mths*158,850.00)Kshs.7,624,800/=

TOTAL Kshs.9,213,300

19. **THAT** the petitioner and several other employees have been unfairly treated and over looked ever since the 4th Respondent took over office.

She prays as follows;

a) **THAT** this honourable court do make an order of injunction restraining the respondents either by themselves, employees, servants or agents from terminating the employment of the Petitioner as the termination is unlawful and caused irreparable harm to the Petitioner as it interfered with her rights under the Constitution of Kenya, 2010 particularly the rights under Article 41(1) and (2) of the Constitution.

b) **THAT**, this honourable court do make an order of injunction restraining the respondents either by themselves, employees, servants or agents from terminating the employment of the Employees on Contract as the termination is unlawful and irreparable harm will be caused to all Employees on contracts who always hoped for a permanent and pensionable status.

c) **THAT** the Respondents be restrained and prohibited from employing replacement labour or employees in the same positions to perform the same or similar work as the Petitioner.

d) **THAT** this Honourable Court do find that there was a Contract between the 1st Respondent and Petitioner which was unlawfully terminated by the Respondents.

e) **THAT** this Honourable Court do find that the Contract between the Petitioner and the 1st Respondent dated 30th September, 2015 was not paid in full and the 1st Respondents to pay all the unpaid periods therein.

f) **THAT** the Respondents be restrained and prohibited from employing replacement labour or employees in the same positions to perform the same or similar work as the Employees on contract before absorbing those on contract on permanent and pensionable terms.

g) **THAT** an injunction do issue against the respondents against termination or dismissal of the Petitioner from her employment without following the law and her terms and conditions of employment.

h) **THAT** an injunction do issue against the respondents against termination or dismissal of the Employees on contract from the

employment without following the law and their terms and conditions of employment.

i) **THAT** the honourable court be pleased to vary the terms of service of the petitioner and employees on contract in the service of the respondents and in so doing declare the employees to be employed on terms and conditions of service consistent with the Employment Act.

j) **THAT** the honourable court be pleased to declare that the respondents violated the petitioner and Employees on Contracts rights to fair labour practices namely reasonable working conditions including permanent terms and conditions of service as protected under Article 41 (1) of the Constitution and the provisions of the Employment Act, 2007.

k) An order for judicial review to quash any decision of the 1st, 2nd, 3rd or 4th Respondents made in failing to pay the Petitioner's salary for the month of February, 2018 and termination of the Petitioner's Contract pursuant to the flawed, biased and unreasonable investigations of the 1st Respondent.

l) An award of damages for pain and suffering, humiliation and distress visited upon the petitioner by the Respondents.

m) That this honourable Court be pleased to order the Respondents to issue the Petitioner with a Certificate of Service.

n) **THAT** this Honourable Court be pleased to order the Respondents to reinstate the petitioner to her Job as the Deputy Director Accounting services.

o) In the Alternative and in addition to prayers a-m above, the Petitioner prays that Judgement be entered as against the respondent for breach of contract as follows;

I. Unpaid salary for the month of February, 2018 Kshs.158,850/=

II. One month salary in lieu of termination notice Kshs.158,850/=

III. Unpaid leave for the years between 2013 – 2017 (4yrs*Kshs.158,850) Kshs.635,400/=

IV. Gratuity/service pay (Kshs.158,850.00*4yrs) Kshs.635,400/=

V. 12 Months wages compensation as per section 15 of the Labour

Institution Act (12 Mths*158,850.00)Kshs.7,624,800/=

TOTAL Kshs.9,213,300

p) That the Respondents to pay costs of the petition.

q) **THAT** this Honourable court be pleased to grant any other orders and/or relief befitting the circumstances.

The respondents case is that the employment of the petitioner was illegal and non competitive the same having been borne out of the machination of the county executive in disregard of law and procedure. This was also without consultation and involvement of the 2nd respondent, the body legally mandated to recruit and fill positions in the county per section 59 County Governments Act. This is as follows;

14. **THAT** I verily believe that the petitioner herein falls in the category of former employees whose engagement with the county government was declared unconstitutional null and void by this honourable court vide its judgement dated 17th October 2017. Annexed hereto and marked AJT2 is a copy of the judgement of the honorable.

23. **THAT** it is now a well-established fact that the then County Executive through the human resource department in particular one Ms. Ann C Turgut and the former chief officer administration one Mr. Kileson Mutai played a pivotal role in circumventing the law and awarding contracts including the ones displayed by the petitioner herein without adherence with the law. The petitioner benefitted from the said conspiracy.

24. **THAT** I am advised by my advocates on record, advise I believe to be sound, the said Ann Turgut and Kileson Mutai committed acts of abuse of office by using their offices to improperly confer appointment letters to the petitioner without obtaining the requisite authority of the public service board.

25. **THAT** I have also been advised by my advocates on record, which information I verily believe to be true, that legally there is no dispute whatsoever to warrant court's intervention. The petitioner is trying to relitigate albeit, through the backdoor, issues that have been determined in the judgement aforementioned.

29. **THAT** it is also clear beyond peradventure that the petition bears the hallmark of a representative suit disguised as a personal claim. The reference to "other employees" is baffling and amounts to a blanket condemnation of the respondents and a mischief as it leaves it to the court to guess and/or figure out the employees in question.

30. **THAT** I verily believe that the petitioner fall in that category of unlawfully employed persons who ought to have been loaded to ensure the County Government complies with the aforesaid Public Finance Management Act ceilings on recurrent expenditures and earlier court orders on the same.

The 1st respondent acknowledges that the petitioner amongst other workers exited the services of Bomet County in december, 2017. This is because the 1st respondent in compliance with the orders of court dated 13th november, 2017 in Kericho ELRC Cause No.51 of 2017 suspended its letters of separation with members of staff whose contracts were found to be unlawful vide Kericho ELRC Petition No. 8 of 2016 pending hearing and determination of the suit. The claimant's case was dismissed on 15th December, 2017 in ELRC Cause No. 51 of 2017 and the petitioner ceased to be on the county payroll since december, 2017.

The 1st respondent's further case is that the employment of the Petitioner was always irregular and unlawful and this has been litigated in various similar

nature litigation, to wit, Kericho ELRC 8/2016, 46/2017, 48/2017, 50/2017 and 51/2017 in all of which this court has made a determination on the issues in dispute.

The 3rd respondent faults the petition for being improperly instituted or pleaded with reasonable position and further that the same lacks merit, is fatally defective for reasons that;

(i) *The petitioner has totally failed to set out in her main Petition and Notice of Motion application with a reasonable degree of precision the complaints, the provisions said to have been violated by any of the Respondents commensurate with remedies sought.*

(ii) *Some of the prayers/orders sought by the Petitioner as pleaded at prayer j); k), l) and o) are not material to the Petitioner's case and/or cause of action.*

(iii) *The prayer for reinstatement of the petitioner as pleaded at prayer n) of the main petition would amount to subjecting the Respondents to servitude.*

(iv) *The Petitioner has not disclosed any constitutional violations and/or contravention of rights or fundamental freedoms of the petitioner provided for in the constitution as required under rule **3(1) and 4(1) of the constitution (Protection of Rights and Fundamental Freedoms) practice and procedure Rules 2013** to warrant the remedies sought.*

(v) *The bulk of constitutional provisions pleaded at paragraph, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Petition are not supported by any evidence.*

(vi) *The petitioner's claim is otherwise an abuse of the court's process; the same was duly litigated through **Kericho ELRC No. 21 of 2017**.*

Further, the 3rd respondent deconstruct the petition as follows;

2. *THAT the Petition as filed and pleaded at paragraph 1, 10, 14, 19, prayer (j) of the main petition, paragraph 10, 18, 22 and 24 of the supportive affidavit thereto offends the provisions of Rule 4(2) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and Procedure Rules 2013 and section 9 of the Industrial Court Procedure Rules 2016. The same borders between a Representative suit and a public interest while in actual fact, the petitioner herein is acting in her own interest and not on behalf of other employees who were engaged on contract.*

3. *THAT the petitioner is not entitled to any of the reliefs sought for having come to court of equity with unclean hands on account of material non-disclosure on grounds that;*

(i) *The petitioner deliberately concealed before Court that she was no longer on employment in the County Government of Bomet as at the time of instituting this case thereby being granted ex-parte orders that have the effects of employing the Petitioner through this honourable court's orders.*

(ii) *The petitioner intentionally failed to inform court that she was not paid her January, 2018 salary through Bomet County payroll.*

(iii) *The petitioner failed to disclose to court that all the salary payment made to her after the lapse of her contract of employment for the month of November, and December, 2017 was pursuant to these honourable court orders in Kericho **ELRC No. 51 of 2017**.*

The issues for determination therefore are;

1. Whether the petitioner as filed is a representative suit?
2. Whether the petitioner as pleaded the petition with reasonable precision?
3. Whether the petitioner is an employee of the County Government of Bomet?

4. Whether the respondents are in breach of the Constitutional Rights of the Petitioner?

5. Whether the claimant was procedurally employed by the respondents?

6. Whether this instant suit is an abuse of the process of court?

The 1st issue for determination is whether the petitioner as filed is a representative suit. The 3rd respondent at paragraph 2 of his Statement of Grounds of Opposition to the petition faults the petition for being a mixed grill of a representative suit and a public interest suit whereas it is indeed a suit based on the personal interest of the petitioner.

She further faults the petition for being non-disclosive of the actual constitutional violation meted out to herself by the respondent. The remedies sought are therefore unwarranted for lack of evidence in support of such wild allegations. She therefore prays that this petition be struck out with costs.

I agree with the 3rd respondent on her submissions above. From the onset, the petitioner brings out a mixed grilled case bordering on her employment rights which she emphatically pursues as a petition but also adds that this is a representative suit and brought out on behalf of a cadre of employees by the 1st respondent's who were undergoing the same fate as herself. She does not however catalogue the other members of the representative suit or comply with the law and procedure on this.

The petitioner in her petition cites violation of Articles 27, 28, 29 (c) (f), 47, 41(1), 48, 19 (2) and 20 (a) and (b) of the Constitution of Kenya, 2010. Yet the petitioner does not give any evidence or detail of actual violations as these applied to her case. She maintains and leaves a hollow illustration of constitutional violations contrary to 3 (1) and 4 (1) of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

On this, the respondent relies on the authority of **Mumo Matemu –vs- Trusted Human Rights Society Alliance & 5 Others (2013) eKLR** and **Anarita Karimi Njeru v Rep (19179) KLR 154 at page 156** where the court observed as follows;

“We would however again that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

I agree. This also swallows the 2nd issue for determination.

The 3rd issue for determination is whether the petitioner is an employee of the County Government of Bomet. This is a non-issue. The petitioner seeks reinstatement into the employment of the 1st respondent. This would mean that she is not currently in employment. This factor has been variously canvassed and submitted on by the 2nd respondent who posits that the petitioner was removed from the county payroll in December, 2017 on account of various decisions by this court that set out and streamlined the manner and process of employment in the County Government of Bomet.

It is the respondent's submission that the petitioner lost her employment as a consequence of this court having established that certain cadre of the employees of the County Government were irregularly employed without regard to the law, process or even the involvement of the 2nd respondent. This would at all times render the termination of the employment of the petitioner lawful and not in breach of the Constitution. This answers issue No.s 4 and 5.

The 6th and last issue for determination is whether this instant suit is an abuse of the process of court. A look at the petition and its supporting evidence illustrates a desperate attempt at making sense out of no sense. It is not ably founded on any evidence illustrating the allegations forming the bedrock of the petition. This is the genesis of the case and submissions of the 3rd respondent. It is however complemented by the able submissions of Mr. E. M. Orina, counsel for the 1st respondent who sums this as follows;

*21. We submit that it is disingenuous and laughable for the petitioner claims to have been recalled to resume work for the 1st Respondent by an unnamed party but fails to adduce any evidence in support thereof. The petitioner has averred that she was engaged at a senior level by the 1st Respondent and was at some point the Deputy Director of budget. We submit that in such a position the petitioner must have been aware of the law governing employment in the county public service and thus cannot purport to have been an innocent party as she claims in her submissions. In the South African case of **Hudson and Another v South African Airways Soc Limited (J 545/13 & J 543/13)**. Where the labour court of South Africa in addressing an issue in relating to parties relying on an employment contract that was executed ultra vires held thus:*

89. I agree with the Respondent that the Applicants who were formerly employed at a senior level by the Respondent ought to have known that the recruitment process falls within the legislative framework that is applicable in similar circumstances at the public entity. (emphasis added)

90. These legislative prescripts are peremptory and applicable to a public entity.

91. The Applicants were party to appointments that they were aware or ought to be aware were unlawful, impermissible and void ab initio.

The respondents describe the petition as an attempt at a second bite of the cherry. This is because despite the various litigation on the position of irregularly hired staff at the County of Bomet, (of which the petitioner should have been aware), and despite the pleas by the

respondents, the petitioner still clung on to a defenseless situation and suit. This indeed is an explicit case of an abuse of the process of court.

I am therefore inclined to dismiss the petition with costs to the respondents.

Delivered, dated and signed this 26th day of June, 2018.

D.K. NJAGI MARETE

JUDGE

Appearances

1. Mr. Mugumya instructed by P. Sang & Company Advocates for the petitioner.
2. Mr. Orina instructed by E.M. Orina & Company Advocates for the 1st respondent.
3. Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Company Advocates for the 2nd respondent.
4. Mr. Matwere instructed by Andrew N. Matwere & Company Advocate for the 3rd respondent.
5. No appearance for the 4th respondent.