



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 403 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

**HILLARY MAKHULU.....CLAIMANT**

**VERSUS**

**1. COUNTY GOVERNMENT OF BUSIA**

**2. THE GOVERNOR BUSIA COUNTY.....RESPONDENTS**

**J U D G M E N T**

1. The suit commenced vide a Memorandum of Claim on 11<sup>th</sup> October, 2017. The Claimant seeks the following reliefs:-
  - a. The Respondent be ordered to issue the Claimant with a certificate of service.
  - b. A declaration that backdating termination of the claimant and purporting to recover the salary for July and August 2017 was unlawful for want of compliance with the law.
  - c. In the alternative payment for damages in terms of paragraph 12 of the claim.
  - d. Costs of this suit.
  - e. Interest on (a) above
  - f. Any other relief that the court may deem fit and just in the circumstances.
2. The Claim was responded to by a replying affidavit filed on 24<sup>th</sup> October, 2017. A proper response to a memorandum of claim is a statement of response in terms of Rule 13 of the Employment & Labour Relations Court (Procedure) Rules 2016.
3. The court shall however consider the replying affidavit as the substantive response to the claim.
4. The parties dispensed with the interlocutory notice of motion filed together with the claim and oral testimony and agreed to file final submissions to dispose of the main suit.

**Determination**

5. The claimant wrote a letter dated 16<sup>th</sup> June, 2017 to the Respondent making specific demands to the 2<sup>nd</sup> Respondent within a given time frame. The Claimant concluded the letter by stating:-

***“In the event that none of the above proposals is desirable to you, kindly consider relieving me of my duties effective 30<sup>th</sup> June, 2017”***

The Respondent did not respond to the letter by the 30<sup>th</sup> June, 2017.

6. The Respondent considered the letter as a resignation.
7. The Claimant however wrote to the 2<sup>nd</sup> Respondent informing him that he intended to stop serving as a member of the Executive Committee with effect from 27<sup>th</sup> September, 2017. The Respondent however responded to the letter stating that the claimant had ceased to be a County Executive Committee Member effective 30<sup>th</sup> June, 2017 the date of his resignation.
8. The issue in dispute is whether the claimant had effectively resigned on 30<sup>th</sup> June, 2017 or he was entitled to serve up to 27<sup>th</sup> September, 2017 with full pay and benefits.
9. The Respondent purported to recover Kshs.740,000 from the salary of the Claimant when he went to clear, being equivalent to the salary for July and August 2017.
10. The claimant seeks a declaration that the action by the Respondent amounted to unfair termination of employment and should be condemned to damages in that respect.
11. The Claimant prays for the full terminal benefits in terms of his contract of employment.
12. A careful reading of the letter by the Claimant dated 16<sup>th</sup> June, 2017 shows that there was no unequivocal resignation by the Claimant effective 30<sup>th</sup> June 2017. The simple interpretation of the letter is that the claimant demanded certain named steps to be taken by the Governor, failing which, the Governor should 'consider relieving' the Claimant from his duties as County Executive Committee Member in charge of education and vocational training.
13. The Governor did not accede to any of the options demanded by the Claimant but instead continued to pay the salary of the Claimant for the months of July, and August 2017.
14. There was no resignation by the Claimant as a matter of law and fact, and the Governor is estopped from recovering the salaries already paid to the Claimant.
15. At the same time the governor did not terminate the employment of the Claimant. The Claimant resigned vide a second letter dated 21<sup>st</sup> September, 2017 in clear and unequivocal language as follows:-

***“Having made up my mind not to serve in subsequent executive committee and further pursuant to section 42(2) of the County Government Act 2012, I hereby notify you that I shall cease to be a member of the Executive Committee in charge of Education and vocational Training effective 27<sup>th</sup> September, 2017.”***

16. In conclusion, the court finds that the Claimant voluntarily resigned from his position effective 27<sup>th</sup> September, 2017. The Governor was not at liberty to recover the salary already paid to the claimant for the months of July and August, 2017.
17. The Claimant has also failed to prove on a balance of probabilities that his employment was unlawfully terminated by the Respondent.
18. Accordingly, judgment is entered in favour of the Claimant as against the Respondents as follows:-
  - a. Payment of terminal gratuity in terms of contract of service in the sum of Kshs.5,964,400.
  - b. Payment in lieu of 32 days untaken leave in the sum of Kshs.493,333.
  - c. September Salary in the sum of Kshs.370,000.
19. The letter of appointment provided for payment of gross salary. The Claimant has failed to prove on a balance of probabilities that he was entitled to payment of a separate house allowance per month as claimed or at all. The Claim for house allowance is therefore dismissed.
20. The total award to the claimant is Kshs.6,827,733.
  - d. The award of Kshs.6,827,733 is payable with interest at court rates from date of filing suit till payment in full.
  - e. The Respondent to pay half (½) the costs of the suit.

**Dated and Signed in Kisumu this 12th day of July, 2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

M. M. Omondi for Claimant

Mr. J. P. Makokha for the Respondents

Chrispo – Court Clerk