



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 37 OF 2018

(Formerly Nyeri ELRC No. 458 of 2017)

JAMES KIBURI MUTIA.....CLAIMANT

VERSUS

GOVERNOR MERU COUNTY.....1ST RESPONDENT

MERU COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents and averred that he was employed on permanent and pensionable terms in the County government of Meru as a sub-county administrator on 9th October 2013. He averred that he discharged his duties with outmost zeal, zest, gusto, alacrity, dexterity and circumspection consequential whereto he was transferred to the Governor's office as a senior administrator vide a letter dated 6th January 2015. He averred that his exceptional performance he was subsequently promoted to chief of staff through a letter of 8th February 2015 and he excelled in his performance of the duties of his office. He averred that due to his profoundly outstanding performance, he was appointed in an acting capacity on 10th May 2017 to the position of Meru County Secretary after the resignation of the then substantive office holder. It was averred that he never signed any document to suggest, signify or imply that his employment was contractual. He thus averred that his employment was without a scintilla of doubt permanent, pensionable and that is why he was a beneficiary of the CPF individual scheme where his benefits at the time of suing amounted to Kshs. 1,577,068.65 pegged on 31% of his gross salary. He averred that he was entitled to salary increments each November and that his salary was Kshs. 228,965/- as of October 2017. He averred that he was through a letter dated 21st August 2017 and signed by the 1st Respondent compelled to go on compulsory leave pending a human resource audit. He was required to hand over to the Deputy Governor which he did. He avers that on 23rd November 2017, a termination letter emanating from the office of the 1st Respondent but signed by the acting County Secretary informed him that his engagement with the County government had been terminated. He averred that he was victimised because he came from the Igembe sub-tribe and that other staff that had worked with the erstwhile Governor were unaffected as they ostensibly hailed from the current Governor's sub-tribe. He avers that the Respondents' action of forcing him to go on indefinite compulsory leave and unlawfully sacking him was actuated by *mala fides* and contravened the Claimant's Constitutional rights enshrined in Articles 27, 41(1), & (2) of the Constitution of Kenya. He averred he was entitled to work till the retirement age of 60 years and he therefore sought declarations that the action by the Respondents was unconstitutional and violated the Claimant's labour rights under the Constitution and Sections 43 and 45 of the Employment Act as well as a declaration that the Claimant is entitled to the monthly salary, increments, emoluments, allowances, statutory deductions, pension/retirement benefits calculated cumulatively for 22 years from November 2017 as the Respondents unfairly terminated his services at the age of 38 years while the mandatory statutory retirement age is 60 years. He also sought punitive and exemplary damages for unfair termination of employment, costs of the suit and a certificate of service.

2. The Respondents filed a memorandum of response in which they averred that the Claimant forfeited his permanent and pensionable terms when he accepted and took up the positions of Chief of Staff and County Secretary. The Respondents averred that no county employee, the Claimant included, can be engaged on permanent and pensionable terms unless specifically engaged by the County Public Service Board with the appointment clearly stipulating the permanent and pensionable terms. The Respondents averred that the position the Claimant held fell vacant with the exit of the former Governor as it ran with the term of the said Governor being the appointing authority. The Respondents denied that the Claimant was discriminated against and further stated that they were not issued with any demand or notice of intention to sue.

3. The Claimant filed a reply to memorandum of response and averred that his appointments were because of his sterling performance and that there was no agreement on his part for forfeiture of his permanent and pensionable terms. He asserted that the defence did not raise any defence and that the claim should be allowed as prayed for. Other preliminary steps were taken by the parties such as filing lists of witnesses, statements and copious documents in support of the Claimant's and Respondents' cases respectively.

4. The hearing took place on 8th May 2018 in the County of Meru. The Claimant testified that he hailed from Igembe, Meru County and that he was jobless though he previously was employed by the 2nd Respondent. He was a sub-county administrator from October 2013. He referred to the 11 documents he had exhibited as part of his evidence and his statement filed in November 2017 which he relied on as his evidence. The documents that formed part of his evidence included the letters he was issued by the 2nd Respondent and from the 1st Respondent's office. He stated that he was not taken through the disciplinary process before the termination of his services. No warning or show cause letter was issued. His letter of termination dated 23rd November 2017 did not have any reason given in the letter. His appointment letter to sub-county administrator was dated 9th October 2013 and it provided that the Claimant was on permanent and pensionable terms. He testified that he was deployed to the County Government because of his exemplary performance. He referred to his payslip and stated that he was on permanent and pensionable terms and that his tenure could not end with the term of the Governor. He had 22 years to serve before the retirement age of 60. He thus sought compensation in terms of his claim of 30th November 2017.

5. Before the cross examination, counsel for the Respondents Mr. Kibanga protested the fact that the matter had commenced before he had arrived and he stated that he was disappointed by the course taken by his colleague Mr. Carlpeters Mbaabu. The court notified him that it was the court itself that had ordered that the matter proceeds at the time it had been allocated after counsel for the Claimant had informed the court that his colleague was held up before the Magistrates' court. He apologised for his assumption that his colleague had insisted on proceeding in his absence an apology the court readily accepted. He had only missed a portion of the initial testimony. He nevertheless proceeded to cross-examine the Claimant as follows.

6. The Claimant testified in cross examination that he was deployed on 9th October 2013 in the position of sub-county administrator. He was appointed after an interview and the deployment was by the County Public Service Board. He stated that on 6th January 2015 he was deployed to the office of the Governor as a senior administrator, a transfer by the Public Service Secretary at the time, from the office he held. On 18th February 2015 he was appointed Chief of Staff. He was referred to the letter of 18th February 2015 which was the letter of appointment by the Governor to position of Chief of Staff. He stated that this was not a fresh appointment and that he was still in the office of the Governor and that his transfer had been from Tigania. The letter appointing him as Chief of Staff set out his duties and responsibilities and his duties were additional and the administrative function was still there. He testified that there was an increment in salary due to the additional duties and he was appointed by his boss at the time, the Governor. He was appointed in an acting capacity and stated that he received payslip when he was first employed and the payslip indicated that he was a sub-county administrator. His payslip did not indicate senior administrator but the designation changed when he was appointed Chief of Staff and it showed that he was on permanent and pensionable terms. He stated that he did not complain as his appointment was an operational appointment. The position of Chief of Staff had more remuneration as it had additional duties and he had not been picked from outside. He testified that he was not in acting capacity as the Chief of Staff and according to him there were added responsibilities and this was a promotion. He stated that the Governor has personal staff, a Personal Assistant and an advisor to the Governor. Those were the ones he could remember. Regarding the Chief of Staff, he stated that it depended on the mode of appointment. He testified that his appointment as Chief of Staff by the Governor was not personal. The economic advisor is personal, the political advisor is personal and the personal staff such as cook, driver and secretary are employed by Governor but paid by the County. He said his position would be personal if he was not permanent and pensionable. He stated that the tenure was not to come to an end at the end of the term of the Governor. If a new Governor wanted him to remain he would remain. He denied that he was personal staff of the Governor and stated that his duties were different from those of a PA and the engagement was not by the Board. He testified that the County continued to pay his pension and that his letter of deployment did not say he was permanent and pensionable. He sought the payment of his dues for 22 years as he had more years of service left and that he was to continue working as it was a constitutional right. He stated that the new Governor ordered HR and finance audits and that he went on leave during the audits. He stated that he was 38 and jobless and that getting a job is not easy.

7. In re-examination he testified that he was 38 years at the time of termination and 60 years is the mandatory retirement age. He would have worked for 22 years to retirement and those were the years he sought in the retirement. His position was not terminable by term of the Governor and that his terms would not have remained permanent and pensionable if he was a personal employee of the Governor. The terms of personal staff were completely different and the letter of deployment as Chief of Staff did not say his terms had changed from permanent and pensionable. He stated that the letter of termination did not say he was employed on permanent and pensionable terms.

8. The Claimant called the County Public Service Board Chairman in office since 2013 one Patrick Gichunge Mwambia who testified that the Claimant had not been employed on contractual terms as sub-county administrator. He stated that the Claimant was interviewed by the Board he chaired and appointed as sub county department. The terms were permanent and pensionable and he never heard of any complaint after the Claimant was deployed. He stated that the deployment as Chief of Staff was perhaps due to the sterling performance of the Claimant. He stated that the termination of the Claimant was unfair, illegal, discriminatory and unlawful.

9. In cross-examination he stated that he became Chairman in 2013 and that he was still the Chairman as far as he was aware as there was a matter before court. He was not sure if he could discuss it as it involved the EACC case about abuse of office that was withdrawn. He was suspended when the current Governor took over alongside one member of the Board. He stated that there could be someone in his position and he confirmed that the last he sat was in November 2017 before he was suspended. He asserted that he had no grudge against the Respondents and that he was still the Chairman of the Board. He stated that he knew of the County Pension Fund (CPF) but he was a member of the Lapfund. He testified that it was not possible to hold two substantive offices and that the office of the sub-county administrator is a substantive job. He did not know if the Chief of Staff is a substantive office and that all he knew is that the County Service Board is not involved as the Chief of Staff is the prerogative of the Governor.

10. In re-examination he testified that he was not aware of the Claimant holding two substantive jobs in Meru County. He stated that it was the prerogative of the Governor to appoint Chief of Staff and the Claimant did not lose his terms and that this was a promotion which was the work of the supervisor and not the Board. It was not wrong for the Governor to promote the Claimant to Chief of Staff. He stated that his case had terminated in his favour with an acquittal and that he had no grudge against the Governor. He testified that employees of the County chose between the Laptrust or Lapfund and only the Claimant could say which of the two he picked.

11. The Respondent called Claire Regina Kagwiria who is the Secretary of the Public Board. She testified that the Chairman when she joined was the Claimant's witness Mr. Mwambia. She stated that he is not the chairman as he was interdicted in August 2017. She testified that the

senior position promotions come from the County Human Resource Advisory Committee to the County Public Service Board for approval of such a promotion. She stated that the Board gives authority and the Secretary would write a letter to the relevant chief officer to effect promotion. She was aware that the Claimant was employed as sub county administrator and was not promoted to any other job and he never wrote to the job to inform it of any change in designation. She was aware he was appointed by Governor to office of Chief of Staff. She stated that was a new position with new terms and was a direct appointment. The Chief of Staff is a personal appointee of the Governor and the Governor has the discretion to make the appointment. The Chief of Staff is a personal employee of the Governor per the Transitional Authority advisory and the staff exit with Governor upon removal of the Governor or exit from office. She stated that the Claimant was staff of the Governor when he was terminated alongside others. The director of communications, gardener, staff at the home of the Governor, the PA all left. They had not received any other complaint. She testified that there are 2 types of pension and P & P pension is where staff pay 12% and County contributes 15% and payment is at retirement age of 60 and then there is gratuity where County contributes 31% of basic and once the term of contract is over the gratuity is paid. She testified that gratuity is for the contract employee and pension is for permanent and pensionable employees. She stated that the employees in the Governor's office are contract employees and that their contract is pegged to the term of the Governor. She testified that the Claimant contributed to the one of P & P before he changed his terms in 2015. He assumed the office that is contractual of Chief of Staff and the 31% came in when he changed his terms to contract.

12. In cross-examination she testified that the advisory from the Transitional Authority had an appendix. She stated that the advisory did not specifically state the office of Chief of Staff is a personal officer of the Governor. She stated the appendix was a Gazette Notice and it was even in the newspaper. She stated that the appendix does not contain the letterhead of the Transitional Authority or signature of the Transitional Authority. She stated that the document was the same one used to appoint the Claimant and on being referred to the letter of appointment as Chief of Staff she confirmed that the letter did not refer to the letter from Transitional Authority of the appendix. She testified that the Claimant was on new terms and the terms had changed from P & P to contract. She testified that the payslip for October 2017 was erroneous as indicates P & P. She said that the office of Chief of Staff is more senior to sub-county administrator and the Chief of Staff is in a more different office and the duties are purely administrative. It was an appointment not a promotion as the appointment of by Governor are his prerogative and there is no challenge to his appointment. She stated that the Claimant did not write to the Respondent to advise that he had relinquished the P & P terms to contract. She testified that she knew a chief of staff named Mutwiria who is working as a director administration. She stated that he did not lose his position by appointment by the Governor. She stated that the Claimant was from the Igembe sub-tribe and the Governor from Imenti sub-tribe. She testified that the dismissal letter was done by a delegated officer and that the indefinite leave memo was signed by the Governor himself. She was not aware of the re-appointments and that the appointment of the Claimant was a direct appointment by the Governor.

13. In re-examination she testified that the appointment of the Claimant was not a promotion but was discretionary appointment by the Governor of his staff. She stated the duties of the Chief of Staff are in the office of the Governor while those of a sub-county administrator are in the civil service. She said there was no sub tribe left out in the current administration and the former administration and as such there was no discrimination. She stated the staff in the Governor's office all left regardless of where they came from in the County.

14. The parties were to file submissions and the Claimant filed submissions on 23rd May 2018 and the Respondents filed their submissions on 30th May 2018 and the Claimant filed a reply on 13th June 2018. The main thrust of the submissions by the Claimant was that his employment was permanent and pensionable and not contractual as alleged and purported by the Respondents. The Claimant submitted that if he was a personal staff of the Governor he would have left on 8th August when the new Governor was elected and would not have been among the senior staff sent on compulsory leave by the 1st Respondent. The Claimant also submitted that his letter of appointment could have clearly indicated that he was on a contract to run along the term of the Governor who appointed him. He submitted that there is no law, policy or guideline that required the Claimant to forfeit his permanent and pensionable terms to contractual. The Claimant submitted that he was not subject of the Human Resource Policies and Procedures which were in effect from 2016 as these were not to apply retroactively. The Claimant submitted that his dismissal was not procedural or lawful. He relied on the case of **Janine Buss v Gems Cambridge International School Limited [2016] eKLR** where the court held that it was mandatory to follow the procedure in Section 41 of the Employment Act before termination of an employee and give lawful and fair reasons for the same. The Claimant submitted that he was entitled to the quantum he had sought in his claim as well as punitive damages based on the aforesaid case. He also relied on the case of **Anthony Kelly Mwema v Airtel Networks Kenya Limited [2017] eKLR** for the leave allowance claim.

15. The Respondent submitted that the Claimant admitted that he held two substantive positions a situation that was untenable. The Respondent submitted that if the Claimant was entitled to any relief it would be limited to 12 months in terms of Sections 49 and 50 of the Employment Act. Reliance was placed on the case of **Sheikh Abubakar Bwanakai Abdallah v Judicial Service Commission & Another [2017] eKLR** where the court held the amount on compensation for wrongful dismissal was limited to salary for 12 months.

16. In his reprise the Claimant submitted that it was not averred in the Respondents' memorandum of response that the Claimant held two distinct positions and that position was not testified upon by any of the witnesses or put to the Claimant. The Claimant asserted that the issue was being raised for the very first time in submissions and relying on the case of **Samson Emuru v Ol Suswa Farm Ltd [2006] eKLR** the Respondents were bound by their pleadings. The Claimant submitted that he earned one salary at a time and the payslips indicated permanent and pensionable all through. The Claimant submitted that on the allegation that he forfeited his employment as a sub-county administrator was far fetched as he sought to be compensated and not reinstated and that for example when a teacher is promoted to head teacher or principle he still remains a teacher and even if removed as principal or head retains the position of teacher. He thus sought the award of the claim as prayed.

17. The Claimant was employed by the County Service Board in a position that was headed sub-county administrator. He asserts that he never relinquished his position of sub-county director much like a teacher promoted to position of principal, education officer or head teacher. In his claim, he stated that he was permanent and pensionable (P & P). He averred that at the time of his dismissal his pension was in excess of 1.5 million shillings and that this was pegged at 31% of his gross salary. A chief of staff position in any Government structure is a critical one as it is the office that organises the order of government business at the top of the executive ladder. It is not a junior position and most certainly is not one that is perpetual in nature. A Chief of Staff like Rahm Emmanuel was appointed by President Barack Obama on assumption to office when the popular vote tallied with the collegiate vote. The office the Claimant held was therefore one which necessitated appointment by the Governor. The Governor has discretion as to who he will pick for the position and has latitude on who gets appointed. The incoming Governor has the option to retain the Chief of Staff or replace him. The Claimant was initially appointed as a sub-county administrator. This position unlike that of a teacher is not after graduation with a degree in Education (like that of a teacher) It is not a

professional position but a position to which people with different skill sets can be appointed. The Claimant was undoubtedly young at the point he entered the civil service and had hopes to work until the age of 60. That is not a tenured position and when he took the appointment to the office of the Governor the game changed a bit. He was not appointed to the position by the County Public Service Board that had appointed him to the position of sub-county administrator. His own submissions on the position he held vis-à-vis the one he ultimately held runs counter to his argument that he did not hold two substantive positions. He was the Chief of Staff of the Governor and not a sub-county administrator. He left the position at Tigania and despite the fact that his payslips were reading P&P, he was earning 31% gratuity. That is only earned when one is on contract. His employment with the County of Meru came to an abrupt end in November 2017. He received a letter which terminated his service with the County. He was paid one month salary in lieu of notice. He did not take this well and asserts that he was victimised on account of his ethnicity. I had never known there were sub-tribes among the Ameru. I thought there were only clans. I learnt through the case that he sees the Governor in the prism, not of a Meru leader but a man from Imenti, and he coming from Igembe feels he was unfairly targeted for removal as Chief of Staff. That is ridiculous reasoning in County that boasts of many tribes calling it home and a home of luxurious views of the beauty of Kenya. I will not even attempt to enumerate the many tribes that emanate from this County. What would their take be? They would be as appalled that the tribal card is being played on a matter that relates to contractual obligations between the Claimant and the 2nd Respondent. I do not think that the present or previous County Government pays heed to tribes in appointment merit being the consideration as well as being Kenyan. The 1st Respondent was not a necessary party to these proceedings and his joinder was mischievous. The Claimant was no doubt entitled to some degree of respect in the manner of dismissal. The 2nd Respondent had an obligation to offer a reason for the dismissal. This was lacking as there was initially an audit being carried out. What were the findings? Are these findings what caused the dismissal of the Claimant or was it because the Governor wanted someone else as Chief of Staff? The Claimant makes a good case for redeployment which the 2nd Respondent could have undertaken. He however does not seek reinstatement or redeployment. He instead seeks payment of the sums he would have earned for the remaining 22 years of service before retirement. That would be reaping where he did not sow as the County would be burdened with paying salaries with no service in return. The Claimant ought to have been given a certificate of service as provided under the Employment Act. The authorities cited have been considered but none of them addressed the issue of the extensive payments beyond the service of the Claimant. As far as abridging of the law and rights of the Claimant, the case of **Janine Buss v Gems Cambridge School Limited** (*supra*) was on point. The Claimant is therefore entitled to compensation as his dismissal did not follow the dictates of Section 41 of the Employment Act. I will however cap the compensation to 3 months as the dismissal was with notice albeit without reasons being advanced. The Claimant will have costs of the suit as well.

18. In the final analysis I enter judgment for the Claimant against the 2nd Respondent for:-

- i. Kshs. 686,895/- as compensation for 3 months for the unlawful dismissal
- ii. Certificate of service
- iii. Costs of the suit

It is so ordered.

Dated and delivered at Meru this 6th day of July 2018

Nzioki wa Makau

JUDGE