



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2470 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**MARK EWESIT EWOI.....1<sup>ST</sup> CLAIMANT**  
**MATHEW ESINYEN LOGURALE.....2<sup>ND</sup> CLAIMANT**  
**AMINA ALI EWOI.....3<sup>RD</sup> CLAIMANT**  
**AGNES EKIRU MANA.....4<sup>TH</sup> CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF TURKANA.....1<sup>ST</sup> RESPONDENT**  
**THE TURKANA COUNTY PUBLIC SERVICES BOARD..2<sup>ND</sup> RESPONDENT**  
**THE GOVERNOR TURKANA COUNTY.....3<sup>RD</sup> RESPONDENT**

**AND**

**CAUSE NO. 2443 OF 2017**

**EKAI EMMANUEL EKENO.....CLAIMANT/APPLICANT**

**VERSUS**

**TURKANA COUNTY PUBLIC SERVICES BOARD.....1<sup>ST</sup> RESPONDENT**  
**THE GOVERNOR TURKANA COUNTY**  
**HIS EXCELLENCY HON. JOSPHAT NANOK.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

This judgment is in respect of ELRC Cause No. 2470 of 2017 and ELRC Cause No. 2443 of 2017. The claimants in Cause 2470 of 2017 are claimants no. 1 to 4 while claimant in Cause No. 2443 of 2017 is claimant no. 5 in this judgment.

**Background**

The claimants were all appointed as Chief Officers of the County Government of Turkana as follows –

The 1<sup>st</sup> claimant MARK EWESIT EWOI was appointed as chief Officer – Lands, Physical Planning and Urban Area Management by letter of offer of employment dated 8<sup>th</sup> May 2014.

The 2<sup>nd</sup> claimant MATHEW ESINYEN LOGURALE was appointed as Chief Officer – Tourism, Trade and Industry by letter of offer of employment dated 23<sup>rd</sup> December 2013.

The 3<sup>rd</sup> claimant AMINA ALI EWOI was appointed as Chief Officer – Education, Human Resource Development, Culture and Social services by letter of offer of appointment dated 23<sup>rd</sup> December 2013.

The 4<sup>th</sup> claimant AGNES EKIRU MANA was appointed Chief Officer – Health Services and Sanitation by letter of offer of appointment dated 22<sup>nd</sup> December 2013.

The 5<sup>th</sup> claimant EKAI EMMANUEL EKENO was appointed Chief Officer – Infrastructure (Road, Transport and public Works) and Housing by letter of offer of appointment dated 8<sup>th</sup> April 2014.

All the letters of offer of appointment did not state the term of the contract although the title of all letters read “*OFFER OF EMPLOYMENT ON CONTRACT TERMS*”. According to the IPPD DATA CAPTURE SHEET – STAFF REGISTER RECORD, the end date for the contracts was captured as their fifth anniversary of the contracts meaning that the contracts were for a term of five (5) years.

Following the general elections held on 8<sup>th</sup> August 2017, the 1<sup>st</sup> respondent posted advertisement in the national daily newspapers calling for applications from qualified person for positions of chief officers, including the positions held by the claimants. A total of 13 persons were interviewed and nominated for positions of Chief Officer in the 13 departments as set out in the advertisements. The nominees were to appear before the County Assembly of Turkana for vetting between 8<sup>th</sup> and 15<sup>th</sup> December 2017.

The claimants were aggrieved by the advertisement of their positions before expiry dates of their contracts and by their statements of claim dated 15<sup>th</sup> December 2017 (in ELRC Cause No. 2470 of 2017) and memorandum of claim dated 14<sup>th</sup> December 2017 in Cause No. 2443 of 2017, the claimants aver that the respondents have by advertising their positions as chief officers and nominating other persons to fill those positions breached their fundamental rights under Articles 25, 41, 47 and 2367 of the Constitution and Sections 41, 43 and 45 of the Employment Act. They seek the following remedies –

In Cause 2470 of 2017 the claimants pray for –

a) A declaration that Respondents' recruitment processes and actions

herein involving the advertisement, shortlisting, interviewing, nominations, vetting and or approval thereof pending appointment of positions held by the Claimants are unlawful, illegal, null and void.

b) An order of injunction do issue against the Respondents restraining them from terminating the contracts of employment of the Claimants for the positions of Chief Officers before expiry thereof without due process.

c) General damages for mental anguish and suffering and unnecessary anxiety.

d) Costs of this cause

e) Any other relief(s) the court may deem fit to grant

In Cause 2443 of 2017 the claimant prays for –

a) A declaration that the actions of the respondents of seeking to terminate the claimants employment before his contract expires is malicious ,illegal, unfair, unlawful and therefore null and void.

b) An injunction to restrain the respondents from processing applications of appointment received for the positions of the clamant by dint of the advertisement dated 30<sup>th</sup> August 2017 and to permanently restrain the respondents from unlawfully terminating the claimant's employment before the expiry of his five-year contract.

c) That the advertisement of the claimant's position is unlawful and illegal.

d) Punitive and exemplary damages.

e) Any other statutory entitlement

f) Entire costs of the cause and interest thereon.

Together with the claims, the claimants filed notices of motion under certificate of urgency seeking the following orders –

In Cause 2470 of 2017 the claimants seek –

1. This application be certified as urgent and be heard ex parte in the first instance as relates to prayers number 2, 3 and 4.

2. An order of temporary injunction do issue restraining the Respondents herein from terminating the contracts of employment of the Claimants for the positions of Chief Officers before expiry thereof without due process pending the hearing and determination of this application.

3. An order of temporary injunction do issue restraining the 3rd Respondent from appointing any other persons into the positions of Chief Officers currently held by the Claimants pursuant to their ongoing contracts of employment pending the hearing and determination of this application.

4. Pending the hearing inter-partes of this application, Orders 2 and 3 hereinabove do issue ex parte and in the interim.

5. Costs of this application be provided for.

In Cause 2443 of 2017 the claimant seeks –

1. This matter be certified as urgent and service thereof be dispensed with in the first instance.

2. The honourable court be pleased to issue an order restraining the respondents and/or their appointed agents from processing applications for appointment received for the positions of Chief Officer-Infrastructure (Roads, Transport and Public works) and Housing by dint of the advertisement of 30<sup>th</sup> August, 2017, particularly restrain the respondents from interfering with die claimants duties as chief officer-infrastructure (Road, Transport & Public works) and Housing pending the hearing and determination of this application inter-partes.

3. The honourable court be pleased to issue an order restraining the respondents and/or their appointed agents from processing applications for appointment received for the position of Chief Officer Infrastructure (Roads, Transport and Public Works) and Housing by dint of the advertisement of 30<sup>th</sup> August, 2017, particularly restrain the respondents from interfering with the claimants' duties as chief officer Roads infrastructure (Road, Transport and Public Works) and Housing pending the hearing and determination of this claim.

4. Costs of this application be provided for.

When parties appeared before the court for hearing of the applications the court ordered status quo in Cause 2470 of 2017 and an order restraining the filling of the position of the claimant in Cause No. 2443 of 2017.

The respondents filed response to the claim. The respondents further filed replying affidavits and notices of preliminary objections. On 30<sup>th</sup> January 2018, the court consolidated the applications, claims and preliminary objections and directed the parties to proceed by way of written submissions.

### **Issues for determination**

1. Whether this court is clothed with jurisdiction to determine this case.
2. Whether the contracts of the claimants were for five-year terms or were defective for a lack of term of the contract.
3. Whether the respondents breached the constitutional rights of the claimants
4. Whether the claimants are entitled to the orders sought.

### **1. Jurisdiction**

The respondent has in the notice of preliminary objection contested the jurisdiction of this court to hear these applications. It is the respondent's argument that the claims are misconceived, incompetent and premature for contravention of the mandatory process set out in Section 77 of the County Governments Act and Sections 85 to 89 of the Public Service Commission Act and further that the claims have abated by virtue of Section 86(2) of the Public Service Commission Act 2017.

The claimants on the other hand submit that these are procedural technicalities that are adequately covered under Articles 159(2) of the Constitution, Sections 3, 20(1) and 29(1) of the Employment and Labour Relations Court Act and Section 1A, 1B and 3A of the Civil procedure Act. It is the further submission of the claimants that Section 77 of the County Government Act as well as Sections 85 to 89 of the Public Service Commission Act relate to disciplinary actions or decisions of County Public Service Boards against county employees and provide an avenue of appeal to the Public Service Commission, that this is not the case herein as the claimants are enforcing their rights enshrined in the Constitution.

I agree with the claimants. They have not been taken through any disciplinary process by the County Public Service Board to warrant their appeal to the Public Service Commission. Their appointment was further not by the County Public Service Board. The appointment letters were written by the Governor under powers donated to the Governor under Section 45(1) of the County Government Act. The Chief Officers are therefore not subject to Section 77 of County Government Act or Sections 85 to 89 of the Public Service Act.

The preliminary objection is therefore without merit and is dismissed.

## 2. Terms of Contracts of the Claimants

It is not in dispute that the letters of appointment of the claimants though bearing the title “EMPLOYMENT ON CONTRACT TERMS” do not specify the term of contract. The claimants have produced extracts from their employment records that refer to end of contract term as the 5<sup>th</sup> anniversary of their contracts. For the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> claimants the contract end date is 31<sup>st</sup> December 2018 while for the 5<sup>th</sup> claimant the contract end date is 9<sup>th</sup> May 2019. These dates fall on the 5<sup>th</sup> anniversary of their contracts.

The respondents have in their response and submission not denied that the contract end/date is provided for in the Integrated Payroll and Personnel Database (IPPD) records but aver that the records do not constitute or in any way alter the terms of the claimant’s contracts and are not sufficient or an adequate basis for interfering with already subsisting terms.

The respondents argue that the IPPD records though introduced to manage payroll in the civil service, are marred by inaccuracies. They have relied on the case of **GEORGE KURIA KAMANDA -V- TEACHERS SERVICE COMMISSION & ANOTHER [2015] eKLR**, and **JANE MOKEIRA MOGOI -V- NYAMIRA COUNTY PUBLIC SERVICE BOARD [2017] eKLR** where it was noted that the claimant’s respective IPPD records had errors regarding date of birth.

The two cases referred to deal with dates of birth records and not terms and conditions of service. They are not relevant in this case where the particulars in issue are missing from the contracts but are available in the IPPD records.

The IPPD records are the employment records of the 1<sup>st</sup> respondent. They are generated by the 1<sup>st</sup> respondent. The argument that they are entered by a clerk and contain errors is not plausible as it is not possible for there to be no uniform error in all the files. The fact that the records reflect an end of contract date means it was intended to introduce the same in the contracts.

The respondents’ argument that these employment records cannot be used to alter the terms of a contract are also misplaced as these records are complementing or supplementing information that is missing in the contracts, and not altering the contracts. The respondents have not submitted to the court the missing information. Being the author of the contracts and custodian of the employment records, the respondents cannot escape by merely stating that the records are not trustworthy while not supplying the information that is contrary to those in the records, or what in their opinion is the correct position.

Having stated in the letters of appointment that the contract is for a fixed term without stating what the term is and having entered into the IPPD records, the contract end date, I find that the contracts of the claimants were for a fixed term of five years as reflected in their employment records kept by the respondents. I further find that the contracts are valid up to the 5<sup>th</sup> anniversary thereof unless terminated lawfully before the expiry dates thereof.

## 3. Whether the respondents breached the rights of the claimants

The claimants aver that by advertising their jobs before the expiry thereof, the respondents violated their fundamental rights under Articles 24, 41, 47, 50 and 236 of the Constitution and Sections 41, 43 and 45 of the Employment Act.

In the case of County Government of **NYERI & ANOTHER -V- CECILIA WANGECHI NDUNGU [2014] eKLR**, the Court of Appeal stated as follows under paragraph 44, 45 and 46 of the judgment –

*“44. The Employment Act was enacted to govern the relationship of an employer and employee under a contract of employment. Part VI provides an elaborate due process to be followed in the case of termination/dismissal of employees. It provides for the right to be notified of the intention to dismiss and a fair hearing.*

*45. Article 260 of the Constitution defines a State Officer as a person holding a state office....*

*46. We are of the considered view that the Employment Act does not apply to State Officers. A State Officer’s terms and conditions of service are regulated by the Constitution or the relevant Statute, principles of fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a State Officer is not subject to the provisions of the Employment Act.”*

The claimants herein are state officers as defined in Article 260 of the Constitution and the Employment Act does not apply to them. The Constitution and their letters of appointment define the terms of appointment of the claimants.

Article 236 of the Constitution provides for protection of public officers as follows –

### **Protection of public officers.**

#### **236. A public officer shall not be—**

**(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or**

**(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.**

Although the County Government Act provides for the recruitment of County Chief Officers, there is no provision for their removal from office. The only powers of the Governor under the Section is to nominate County Chief Officers from among persons competitively sourced by the County Public Service and to reassign County Chief Officers.

The letters of appointment of the claimants do not provide for their removal leaving that to the provisions of the Constitution and natural justice.

The respondents argue that the applicants were aware of their removal and applied for reappointment upon the advertisement of their positions. They further argue that the claimants came to court as an afterthought only after failing to secure apportionments following their applications. It is further the respondents' argument that the removal of the claimants was intended to pave way for new persons to hold those positions with a view to injecting fresh leadership and carry out the mandate of providing effective and competitive service delivery.

The respondents did not inform the claimants of the intention to terminate their employment and replace them. The fact that they applied for the jobs that were advertised did not absolve the respondent from complying with the law and informing them of the reasons for their replacement. They were not given an opportunity to respond to the reasons for their removal as required by the Rules of Natural Justice, Article 47 of Article 236. The intended removals were therefore in contravention to their rights to be informed of the reasons for removal and to be given an opportunity to defend themselves.

I find that the intended removal of the claimants was unconstitutional in terms of Articles 41, 47 and 236.

Having found the intention to remove the claimants from office to be unconstitutional, I hereby issue an injunction restraining the respondents from terminating the appointment of the claimants before their term of office expires without due process.

I further declare the advertisement of their positions null and void for reasons that the positions were not vacant.

I however decline to grant any general damages as the claimants will continue to earn their salaries and allowances as if there was no interruption in their service by the advertisements.

The claimants are not entitled to punitive damages as they have not proved malice, recklessness or deceit on the part of the respondents.

The County Government of Turkana shall pay the claimants' costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF AUGUST 2018**

**MAUREEN ONYANGO**

**JUDGE**