



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 299 OF 2018**

**BETWEEN**

**KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT**

**VERSUS**

**1. COUNTY GOVERNMENT OF TANA RIVER**

**2. TANA RIVER COUNTY PUBLIC SERVICE BOARD.....RESPONDENTS**

**RULING**

1. The Claimant Union filed this Claim on 27<sup>th</sup> April 2018. The Claim is brought on behalf of 36 Employees of the Respondents. These Employees were recruited before the establishment of the 2<sup>nd</sup> Respondent. After the establishment of the 2<sup>nd</sup> Respondent, the Employees were interviewed by the 2<sup>nd</sup> Respondent, and continued to work. It is alleged that in August 2017, a new Governor was elected to head the 1<sup>st</sup> Respondent.

2. Following the election of the new Governor, in August 2017, it was alleged that the 36 Employees were employed irregularly. They were subsequently issued notices of termination. They allege that out of 36, 28 Employees slammed with the notices of termination are of Oroma ethnicity, while the new Governor is of different ethnicity. They see the notices of termination as being discriminatory, based on ethnicity. They allege the notices are in violation of Article 10, 27[4] and 232 of the Constitution of Kenya, and Section 5 of the Employment Act 2007. The Claimant, on behalf of the Employees, prays for the following orders in the main Claim:-

- a) The Respondents' action is declared unfair and un-procedural.
- b) The notices of termination dated 7<sup>th</sup> March 2018 issued to 36 Employees are withdrawn.
- c) Costs to the Claimant.

3. The Respondents filed a Replying Affidavit sworn by the Secretary to the 2<sup>nd</sup> Respondent, Eunice Juma, on 9<sup>th</sup> May 2018. She states that the 2<sup>nd</sup> Respondent was constituted in the year 2013. It set out immediately, to exercise its mandate, which includes appointment of persons to hold office in the County Public Service. In 2015, the Board was informed that the County Secretary and other Senior Staff were employing casual, temporary and permanent Staff without the authority of the 2<sup>nd</sup> Respondent. The County Secretary ignored the advice of the Board and went on an employment spree. As of December 2015, 36 Employees had been recruited through this spree. The 2<sup>nd</sup> Respondent asked the Deputy County Director of Human Resources to show cause, why, action should not be taken against him for these irregular activities. The Deputy Director held the position that he acted on the advice of the County Secretary. Subsequently, the 2<sup>nd</sup> Respondent investigated the matter and concluded 36 Employees were irregularly employed. The matter also came to the attention of the Ethics and Anti-Corruption Commission and is under investigation. After intense deliberations, the Board decided to terminate the contract of the 36 Employees and issued the notices dated 7<sup>th</sup> March 2018.

4. The Claimant obtained an *ex parte* order of temporary injunction restraining the Respondents from terminating the affected Employees' contracts. The order was granted by the Court sitting at Nairobi, during the Court Easter Vacation, on 27<sup>th</sup> April 2018.

5. The Application was heard by the Court sitting at Malindi in the presence of the Parties, on 18<sup>th</sup> July 2018.

6. The Claimant submits some of the Employees were employed before the establishment of the 2<sup>nd</sup> Respondent. After the Board was

constituted, all Employees were re-evaluated. A suitability test followed. It was found that some Employees did not fit in the positions they were serving in. They were subsequently placed in the positions matching their skills. It was only after the election of a new Governor, that the 36 Employees were discriminated against on the basis of their ethnicity, and issued notices of termination. County Secretary employed these Employees and also issued notices of termination. The Employees served in continuity. The Claimant has Recognition Agreement and Collective Bargaining Agreement with the Respondents. The Union should have had notice of termination. The Board allowed the Employees to go on working. The Claimant submits that if the 36 Employees joined service through political goodwill, they cannot be blamed. Nobody runs away from political goodwill. If the Court so pleases, it may refer the matter to the Ministry of Labour for conciliation.

7. The Respondents submit that even after the Court indulged the Claimant to file a proper Affidavit in support of the Application, the Claimant brought in documents which are not sealed in accordance with the Oaths and Statutory Declaration Rules. The Respondents, relying on the **High Court at Kisii, Petition No. 10 F of 2017 between Jeremiah Nyangwara Matoke v Independent Electoral and Boundaries Commission & 2 Others [2017] e-KLR**, urge the Court to reject the documents attached to Claimant's Supporting Affidavit.

8. Section 77 of the County Governments Act, requires decisions of County Public Service Boards, on employment of County Public Servants, are appealed against, at the Public Service Commission of Kenya. The Claim is premature, the Claimant having not exhausted the mechanism under Section 77 of this Act.

9. The County Public Services Board was constituted in 2013. It has exclusive mandate to employ staff. County Secretary is not a Member of the Board under Section 58 of the County Governments Act. The County Secretary appointed most of the 36 Employees. There was pressure to appoint certain Officers. The 2<sup>nd</sup> Respondent issued the Deputy Director of Human Resources notice to show cause, why, action should not be taken against the Deputy Director for these irregular appointments. The matter was brought to the attention of the Ethics and Anti-Corruption Commission. The 36 Employees were political appointees. They did not have minimum qualifications. They were given reasons for termination. They were issued 30 days' notices, reasons notwithstanding. They were heard. The Respondents complied with the Employment Act 2007. Even if there were Employees appointed before the Board was constituted, the Secretary did not have the mandate to appoint. Schedule 6 of the Constitution of Kenya gave transitional guidance. Until the Boards were established, the Public Service Commission of Kenya remained the body responsible for recruitment of County Public Servants. The Respondents urge the Court to dismiss the Application with costs.

#### **The Court Finds:-**

10. When the Application came before the Court for *inter parte* hearing on 11<sup>th</sup> June 2018, it was found that the Claimant had not filed a proper Supporting Affidavit, and Supplementary Affidavit. The Supporting Affidavit sworn by Jeremiah Mutia on 26<sup>th</sup> April 2018, did not have any documents attached to it. Instead, the Claimant made reference to documents attached to the Statement of Claim. In response to the Replying Affidavit, the Claimant filed a document referenced 'Response to the Respondent's Replying Affidavit.' The Court expunged this document from the record. The Claimant was directed to answer to the Replying Affidavit through a Supplementary Affidavit, and file Supporting Affidavit attaching documents sought to be relied on, in arguing the Application.

11. Unfortunately, the Claimant appears not to have filed a Supporting Affidavit, and Supplementary Affidavit as directed. There is a single Affidavit, which is titled 'Claimant's Replying Affidavit to the Respondent's Response to our Memorandum of Claim.' This is not what the Claimant was directed to file. The single Affidavit contains documents which do not have seals of the Commissioner for Oaths.

12. The Court agrees with the Respondents that the documents contained in the fresh Affidavit filed by the Claimant, do not bear the seals of the Commissioner for Oaths. Rule 9 of Oaths and Statutory Declarations Rules, stipulates: "All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification." The importance of this Rule is stated in **Jeremiah Nyangwara Matoke v. Independent Electoral And Boundaries Commission & 2 Others [2017]**. Where the Employment and Labour Relations Court [Procedure] Rules 2016 refer to Affidavit, such Affidavit must be in the form stipulated under the Oaths and Statutory Declarations Act/ Rules. Section 20 of the Employment and Labour Relations Court Act which allowed the Court to disregard rules of evidence has been repealed. The documents attached to the Claimant's freshly filed Affidavit are loose fly sheets, which do not meet the standard of exhibits, which the Court can place reliance on.

13. The Court has also encountered difficulty in understanding the Claim in full, on the ground that Employees, on whose behalf the Claim is made, have not been named in the Statement of Claim, or on the defective Affidavits on record. It was incumbent upon the Claimant to name the Grievants, in the Statement of Claim. It is not sufficient to allude to 36 Employees, without giving specific names in the Statement of Claim. The verifying Affidavits on record are sworn by only 2 of the Employees alleged to be the Grievants. The Affidavits were not filed with the Statement of Claim, but way after the Statement of Claim. The 2 deponents do not allege to speak for other Grievants. The Court has not been shown who are the Grievants, in the Pleadings filed by the Claimant.

14. Section 77 of the County Governments Act, states that a Person who is dissatisfied by a decision of the County Public Service Board, or by a decision of a Person in exercise, or purported exercise of disciplinary control against any County Public Officer, may appeal to the Public Service Commission against the decision. The Public Service Commission shall entertain among others, any employment decision relating to recruitment, selection, appointment, and qualification to any Office. After the decision of the Public Service Commission is made, the affected Officer has a second chance to seek review of the Appeal decision.

15. The Claimant complains about a decision made by the County Service Board against 36 Employees. The decision relates to recruitment and qualifications of the 36 Employees. This decision ought to have been appealed against to the Public Service Commission, and if not satisfied with the initial decision of the Public Service Commission, the Claimant ought to have sought review before approaching the Court. Courts have consistently held that where there is a statutory or contractual internal dispute resolution mechanism regulating Parties' relationships, that mechanism must be exhausted in event there is a dispute, before resort to Court. In the High Court case **Alice Mweru Ngai v. Kenya Power & Lighting Company Ltd [2015] e-KLR**, it was held: "where the law grants jurisdiction to other Organs of Government to handle specific grievances, the Court must respect and uphold the law...involvement by the Court would be an unwarranted intrusion into the jurisdiction of the other Organ." The Claimant has not exhausted the mechanism established under Section 77 of the County

Governments Act before invoking judicial intervention. The Claimant has not given any explanation to the Court why there was no Appeal or Review upon Appeal, to the Public Service Commission. The Claimant said nothing in response to the submission by the Respondents on exhaustion of the appellate/review procedure. The Claimant does not allege it was, in way hindered in exercise of this statutory mechanism, justifying direct approach to Court. The Claim is premature.

16. Without appearing to fully dispose of the merits of any Appeal the Claimant may deem appropriate to file before the Public Service Commission, the Court wishes to make some comments on the substance of the Claim.

17. First comment is that, it is the role of the County Public Service Board, under Section 59 of the County Governments Act, to establish and abolish County Public Offices; appoint Persons to fill Public Offices; retain disciplinary control over County Public Servants; and develop coherent human resource planning.

18. Many of the Employee on whose behalf the Claim is allegedly brought, were appointed by the Acting County Secretary Mohamed A. Mwatunza in the year 2014. The County Secretary does not have the mandate to appoint County Public Servants. This mandate is given to the County Public Service Board. The Secretary to the Board is a Public Service Secretary [CPS] of good professional standing, nominated and appointed by the Governor, under Section 58 of the County Governments Act. Mohamed A. Mwatunza was not the County Public Service Board Secretary so appointed, and mandated to sit in the Board. He made the appointments without involvement of the Board.

19. There are letters from the Board, even before the inauguration of the current Governor after August 2017, showing the Board protested against usurpation of its mandate in employment of staff by the County Secretary. Eunice Juma, Board Secretary and Chief Executive Officer wrote several letters to the County Secretary complaining that the County Secretary acted in contravention of the law, by appointing Public Servants. The Chairman of the County Public Service Board made similar communication. The letter to show cause, addressed to the Deputy Director of Human Resources, is dated 7<sup>th</sup> January 2016. The reply is dated 1<sup>st</sup> February 2016. He stated in his reply that he was under political pressure to issue appointment letters without involving the Board. All these letters were written before elections of August 2017. It is not correct therefore to attribute the clean-up of the County Workforce, to a political event that took place in August 2017.

20. Section 138 of the County Governments Act provides for transition of Employees from the former Local Governments, the Public Service Commission, the Transition Authority, to the County Public Service Boards. The transition procedure is as follows:-

- Employees already in service under appointment by the Public Service Commission, before the coming into force of the County Governments Act [upon the announcement of the 1<sup>st</sup> elections results under the Constitution of Kenya 2010], would be deemed to be in the service of the County Government on secondment from the National Government, with terms of service as at that date.
- Officer's terms or benefits would not be altered to the Officer's disadvantage.
- Officer would not be removed from service except in accordance with the prevailing applicable law, terms and conditions of employment.
- Officer's terms and conditions could be altered to Officer's advantage.
- Officer appointed by the Public Service Commission would continue to discharge his functions in relation to the relevant functions of the County Government.
- The body responsible for Transition, would in consultation with the Public Service Commission and relevant Ministries, facilitate redeployment, transfers and secondment of staff to the National and County Governments.
- The County Public Service Boards [once in place], or other lawful authorities, would not be precluded from redeploying, promoting or appointing Officers on secondment or transfer to other Public Offices in the County.
- The period of secondment would cease, upon the transfer of the Officer from the National Government to the County Government, or upon release of the Officer by the County Government to the National Government.
- Appointment of Officer by the Commission included appointment on powers delegated by the Commission.

21. The Claimant did not show that any Employees said to have been employed before the Board came into being in the year 2013, were validly appointed by the County Secretary under any of the transitional provisions. None were employed by the Public Service Commission, any lawful authority responsible for Transition, or by the County Public Service Board. The County Secretary seems to have gone on an employment spree, particularly from the year 2014, when the mandated County Public Service Board was already in place. The Claimant seems to concede employment was highly irregular through its submission that political goodwill is needed for one to be appointed to the Public Service. The dispensation of political goodwill in this case smacks of corruption on the part of the County Secretary and the former Governor. These Officers should correctly be persons of interest, to anti-corruption authorities. The Court does not see anything wrong with the Board moving to clean up the County Workforce.

22. There is need however to ensure that in doing so, the Respondents shall pay heed to all the provisions of the Employment Act 2007, relating to termination of employment. In dismissing the Claimant's Application for temporary injunction, the Court must not be understood to have concluded, that the intended termination of the affected Employees' contracts, is completely fair. The process is incomplete, having been suspended through the orders of the Court, pending hearing and determination of the Application herein. The Respondents are free to move on with the process, but should always be aware of the obligations imposed on the Employer by the Employment Act 2007, in undertaking such a process. In short, this Ruling does not preclude the Claimant from instigating a Claim for unfair termination in the future. It all depends on the course the dispute takes from here.

IT IS ORDERED:-

***a. The Application dated 26<sup>th</sup> April 2018 filed by the Claimant is hereby dismissed.***

*b. Costs to the Respondents.*

**Dated and delivered at Mombasa this 27<sup>th</sup> day of September, 2018.**

**James Rika**

**Judge**