

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 457 OF 2017

HEZRON MWAMBIA KARONG'A.....CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

1. The Claimant/Applicant seeks through the Notice of Motion Application dated 8th December 2017 the salaries withheld from August 2017 to November 2017. The motion was opposed and the Respondents filed affidavits in reply. In the affidavits it was deposed that the Claimant was wrongly suited as the remedies he sought did not lie. The Respondents assert that as the Claimant's employment came to an end, he was not entitled to payment beyond the termination date.

2. Parties were to file submissions and this was done on 4th July 2018 by the Respondents/Applicants and on 10th July 2018 by the Claimant/Respondent. In the submissions by the Respondents, it was argued that the suit was based on a fraudulent suit as the Claimant was employed on an illegal contract as the county secretary was not permitted under the County Government Act 2012 to appoint persons to any office of the 1st Respondent. It was also argued that the Claimant has not and cannot establish the requirements for the grant of a mandatory injunction. It was argued the maxim of he who comes to equity must do so with clean hands. The Respondents position was that the termination of the Claimant's employment on 8th September 2017 was lawful. Reliance was placed on the cases of **Giella v Cassman Brown (1973) E.A. 358** on the principles for the grant of an injunction as well as the case of **Kamau Muchuha v Ripples Ltd. Court of Appeal at Nairobi, Civil Application No. 126 of 1992** and **Shepherd Homes Ltd v Sandham (1971) Ch. 349** on mandatory injunction. It was argued that for the mandatory injunction to be granted there must be clear and exceptional circumstances. The cases of **National Bank of Kenya v Duncan Owuor Shakali, Civil Appeal No. 9 of 1997** and **Eric V. J. Makokha & 4 Others v Lawrence Sagini & 2 Others [1994] eKLR** were also cited as was the case of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** and the Ruling of Rika J. in **Prof. Gitile Naituli v University Council Multimedia University College & Another Cause No. 1200 of 2012**. It was submitted that the Employment Act did not intend to take away the managerial prerogatives of employers. In addition it was the Respondents position that the Claimant's case falls under the rule in **Mapis Investment (K) Ltd v Kenya Railways Corporation Court of Appeal at Nairobi Civil Appeal No. 14 of 2005** on the unenforceability of illegal contracts. The Respondent thus urged the application dated 8th December 2017 by the Claimant be dismissed with costs.

3. The Claimant submitted that he was entitled to prayers in the motion seeking to be paid salaries and allowances withheld since August 2017 pending the hearing and determination of this suit. The Claimant relied on the case of **Simon Waringa Namakhabwa v Mr. Ajanta (Chairman) & Samanani Asam t/a Hoggors Limited [2018] eKLR** where Radido J. held that *an employee is entitled as of right to earn wages and therefore by not paying the Claimant the salary for March 2013, the Respondent was in breach of contract*. The Claimant submitted that the Respondents unlawfully withheld his salaries without due process. It was asserted that the Claimant was still in employment and not suspended and even he was suspended he would still be entitled to earn wages. The Claimant submitted that his application was merited and he was entitled to the orders sought.

4. The Claimant's motion is one that seeks what is in the nature of a mandatory injunction. The Claimant asserts that because he was not suspended he is entitled to receive a salary and even if he was suspended he would still be entitled to a salary. He relied on the case of **Simon Waringa Namakhabwa v Mr. Ajanta (Chairman) & Samanani Asam t/a Hoggors Limited**. The Respondent is opposed and raised the issue of an illegal contract. It was asserted that the court cannot sanction the illegal contract by allowing payment of wages to the Claimant.

5. The Respondents relied on a series of cases some of which are worth dissecting. The case of **Mapis Investment (K) Ltd v Kenya Railways Corporation** was cited for the proposition that the court could not sanction the unenforceability of an illegal contract. The Respondents position on this is entirely erroneous. The court is yet to hear the merits of the matter as to enable it to make a determination that the Claimant's contract is illegal so as to bring the enforcement of that contract within the purview of the rule in Mapis. The Respondent argues that the grant of the orders sought would in essence be a grant of a mandatory injunction. I tend to agree as the orders are not anywhere far from draconian or far reaching. The Claimant has moved court for relief relating to his contract of service with the Respondent. That is a matter that is pending before the court and given that the threshold in **Giella v Cassman Brown (supra)** and the case of **Kamau Muchuha v Ripples Ltd. (supra)** relating to mandatory injunctions has not been met, I would be reluctant to order the payment of salaries and allowances pending the hearing and determination of the suit. As the dispute is fairly fresh, any relief the Claimant is entitled to including withheld salaries can be granted at the time of judgment which barring such interlocutory motions, will be fairly soon if parties take directions for hearing and obtain a date. As the motion was unsuccessful the court will dismiss the motion but each party is to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 25th day of September 2018

Nzioki wa Makau

JUDGE