



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 43 OF 2018

(Before Hon. Justice Mathews N. Nduma)

1. VICTOR OKOTH MATINDE
2. GRACE ADHIAMBO OTIENO
3. ROSE ADHIAMBO ORINA
4. DENVER OKEYO OMOLO
5. KENNEDY ADHIAMBO ADIKO
6. JACK OCHIENG
7. ESTHER ADHIAMBO OBADO
8. VERONIKA ADHIAMBO ONDIGO
9. MOLLY AGUMBE
10. ROBERT APUNDA.....CLAIMANTS/APPLICANTS

VERSUS

1. MIGORI COUNTY GOVERNMENT
2. MIGORI COUNTY PUBLIC SERVICE BOARD...DEFENDANT/RESPONDENT

RULING

1. The Applicants filed a Notice of Motion on 15th February, 2018 seeking the following reliefs –
 - (i) The Honourable Court be pleased to hear this Application *ex-parte* in the first instance.
 - (ii) Pending the hearing and determination of this Application/Claim, order of injunction be issued restraining the Respondents, their agents, representatives/any other person acting through the direction of Respondents from intimidating and/or unlawfully terminating the services of the Applicants.
 - (iii) An order be granted by this Honourable Court that the Applications'/Claimants' right to fair labor practices have been violated by the Respondents for employing them as casual workers for over 4 years.
 - (iv) An order be granted by this Honourable Court compelling the Respondents to employ the Applicants/Claimants on permanent terms.
 - (v) It's in the interest of justice, the Honourable Court do give directions as to the hearing and disposal of this Application/Claim on priority basis.

(vi) The Honourable do issue any other relief it deems fit and/or expedient to grant in the circumstance.

(vii) The cost of this Application be provided for.

2. The application is supported by an affidavit of the 1st, 2nd and 3rd Claimants/Applicants on behalf of the ten (10) Claimants/Applicants stating in the main that they were employed by the Respondents for a period of 4 years as casual workers drawing their salaries at the end of each month.

3. That continued reference to them as casual workers was a violation of their rights under the Employment Act, 2007. That the Respondents have issued both written and verbal threats of terminating their services on the grounds of lack of funds while the Respondent continues to employ new employees on permanent terms. That the newly recruited employees are allocated duties formally allocated to the Claimants.

4. That the court grant the reliefs sought.

Replying Affidavit

5. The application was responded to by a replying affidavit of Christopher O. Rusana the County Secretary of the 1st and 2nd Respondent.

6. The Respondent admits that the applicants are employees of the Respondent but denies that the Applicants were employed as casuals or are currently casual employees as alleged or at all.

7. That the Applicants were first employed in 2012 by the defunct Town Council of Rongo and were issued letters of appointment dated 2nd October, 2012 which inadvertently referred to them as casual and subsequently issued with a 12 month renewable contract vide contracts dated 1st July, 2014 and 1st October, 2014 annexed to the affidavit.

8. That the Applicants were later absorbed by the Respondents from the defunct Rongo County Council and were offered fixed term contracts of 3 months with effect from 1st July, 2014 until 31st September, 2014 which expressly provided that the same would be subject to renewal by the Respondents.

9. That Claimants later signed another standard contract dated 1st October, 2014 that renewed their contracts for a further three months.

10. That the Claimants have remained in the employment of the Respondents under similar fixed term contracts which have been renewed continuously to date by conduct of the parties.

11. By a letter dated 9th September, 2016 the Claimants were also deployed to various stations under the same terms of contract. The letter annexed to the replying affidavit.

12. The Respondent therefore submits that the Claimants/Applicants are not casuals within the meaning of section 2 of the Employment Act, 2007 and are not treated as such.

13. That the Respondent has not verbally or in writing threatened to terminate the employment of the Claimants/Applicants.

14. That the Claimants not being casuals cannot be converted to permanent and pensionable employees in terms of section 37 of the Employment Act, 2007.

15. That the application and the suit is misconceived both in law and fact and it be dismissed with costs.

Determination

16. The issues for determination are as follows:-

(i) What is the legal status of the Claimants/Applicants?

(ii) Whether the Claimants/Applicants are entitled to the reliefs sought.

17. The Claimant/Applicant filed written submissions on 8th March, 2018 in which they reiterate the matters set out in the Notice of Motion and Supporting Affidavit.

18. The Applicants invoke section 7 of the Employment Act, 2007 which provides –

“No person shall be employed under a contract of service except in accordance with the provisions of this Act.”

19. That they have been employed for over 4 years on short fixed term contracts. That upon expiry of the said fixed term contracts they continued to serve and their wages were paid at the end of every successive month. That they were deployed to different stations.

20. The Claimants rely on the case of **Sikuku Nzuvi Ngii v Gacal Merchants Limited [2-15] eKLR** in which the court stated-

“CW1 worked for the Respondent continuously for more than 3 months. Consequently his contract of service ought to have been in writing as required by section 9 of the Employment Act. Without such written contract the employer has burden of disproving the terms of contract verbally alleged by the employee in the court proceedings as provided by section 10(7) of the Employment Act.”

21. In their submissions filed on 22nd June, 2018 the Respondents rely on the case of **Peter Wambugu Kariuki & 16 others v Agricultural Research Institute [2010] eKLR** in which the court stated –

“Casual employee is defined under section 2 of the Employment Act, 2007 to mean a person the terms of whose engagement provide for his employment at the end of each day and who is not engaged for a longer period than twenty four hours, at a time.”

22. The court went ahead to find that the Claimants in that case had served for longer period of time continuously and the employer was bound to reduce their contract of service to writing in terms of section 9 of the Act.

23. The Respondent therefore relies on the finding of the court of appeal in **Krystalline Salt Limited v Kwekwe Mwakele & 64 Others [2017] eKLR** where the court declined to convert employment of a piece rate worker to term contract stating that section 37 of the Act, applied strictly to casual employees and not any other category of employees.

24. The Respondent therefore submits that the provisions of section 37 do not equally apply to employees on fixed term contracts. That the application be dismissed with costs.

25. The court has carefully considered the application, the replying affidavit and the submissions by the parties and has come to the conclusion that, the conflicting facts advanced by the applicant vis a vis those advanced by the Respondent are self-destructive. That this conflict of facts, may only be resolved upon hearing and determination of the suit on the merits.

26. Meanwhile, the Claimants/Applicants bear the onus of proving the facts upon which they rely on a balance of probabilities in terms of section 107, 108 & 109 of the Evidence Act cap 80 laws of Kenya.

27. At this stage of proceedings however, the Claimants/Applicants have presented an arguable case with a probability of success as set out in the case of **Giella v Cassman Brown Limited**, that they may lose their employment if conservatory orders are not granted. That they would as a consequence suffer damages that cannot be remedied fully by way of damages.

28. Therefore, pending the determination of the true status of the employment of the Claimants/Applicants, the court grants interim orders to the Claimants/Applicants as follows:-

(i) The prevailing status quo as between the Claimants/Applicants and the Respondents be maintained pending the hearing and determination of the main suit.

(ii) For the avoidance of doubt, the Claimants/Applicants continue to be employed, and provide services to the Respondents in their present capacities or as otherwise determined by the Respondents until the dispute is resolved on the merits .

(iii) Costs in the cause.

Dated and Signed in Kisumu this 20th day of September, 2018

Mathews N. Nduma

Judge

Appearances

T. T. Ng'ang'a & Associates Advocates for the Claimants/Applicants

M/S. Muga & Muga Associates Advocates for the Respondents

Chrispo – Court Clerk