



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA
AT MERU
CAUSE NO. 21 OF 2017
(Formerly Nyeri ELRC 502 of 2017)

CALLEN GATUNE FRANCIS alias CALLEN

GATUNE KAMAU.....CLAIMANT

VERSUS

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

PUBLIC SERVICE BOARD

THARAKA NITHI COUNTY.....2ND RESPONDENT

JUDGMENT

1. The Claimant herein is the former Principal Human Resources Officer of the 1st Respondent having been employed by the 2nd Respondent as such from 1st May 2015. On 11th September 2017, she was sent on compulsory leave vide a letter of even date. She was earning a gross salary of Kshs. 85,140/- as at July 2017. In her memorandum of claim filed on 27th November 2017 she averred that in August 2017 she was illegally and without notice demoted to the position of Human Resource Management Officer and her salary slashed to Kshs. 63,200/- before being sent on indefinite compulsory leave effective 11th September 2017. She averred that the compulsory leave is not a fair disciplinary process contemplated by Sections 43 and 45 of the Employment Act and that the action by the Respondents was therefore unprocedural, unfair, unjust, unlawful, null and void *ab initio* contravening the Claimant's right to fair labour practices contrary to Articles 41(1) & (2) (a), and 47(1) and (2) of the Constitution of Kenya. It was averred that the Respondents had failed to pay her salary for the months of August and September 2017 despite the knowledge that she was servicing a loan that stood at Kshs. 2,404,941/- as at the time of filing suit. She thus sought a declaration that the Respondent's letter of 11th September 2017 that sent her on compulsory leave without taking her through the legal disciplinary process was in contravention of the Claimant's rights and fundamental freedoms guaranteed under the Constitution of Kenya 2010 and the statutory rights to fair labour practices secured under the Employment Act and therefore void *ab initio* and of no legal effect. She also sought unpaid salaries and reinstatement to her position of Principal Human Resource Officer I job Group N per her letter of deployment dated 27th April 2015 as well as costs of the suit and interest at court rates.

2. The Respondents filed a defence and counterclaim. In the defence it was averred that the Claimant had no cause of action against the Respondents and that she had set out to perform her contract in an illegal, dishonest and corrupt manner. It was averred that the Claimant was at all material times to this suit serving as the Principal Human Resources Officer I in the 2nd Respondent and that her duties included drafting letters of appointment for the Secretary of the 1st Respondent. The Respondents contended that the Claimant owed the Respondents a fiduciary duty which demanded that she act at all times in the best interest of the Respondents. The Respondents averred that in breach of this duty she fraudulently caused the name of her husband and 108 ghost workers to be inserted in the payroll of the 2nd Respondent so that they may obtain from the Respondents money by false pretences. It was averred that the Claimant was sent on compulsory leave on 11th September 2017 and was interdicted on 26th September 2017. It was averred that the Claimant was charged in a criminal case alongside others after investigations. The Respondent asserted that there was legal provision under delegated authority to the Human Resource Department pursuant to Section 86 as read with Section 75 of the County Governments Act to review the status of the Claimant herein. It was averred that the Claimant was one of the persons facilitating the fraudulent promotion of staff and payment of illegal salaries to ghost workers. By way of counter-claim, the Respondents sought the payment of salaries made to the ghost workers between 27th April 2015 and 11th September 2017. It was averred that there was an indemnity for breach of the contract not to cause it to lose money owing to her negligence and breach of duty and care in discharge of duties. The Respondent thus sought declarations that the Claimant breached her contract of employment and that the 2nd Respondent was entitled to be indemnified by the Claimant for the loss suffered through payment of ghost workers. The Respondents sought payment of the salaries paid to ghost workers as well as interest thereon and costs of the suit.

3. The Claimant testified on 11th May 2018 at Meru. She stated that she worked as the HR Manager of the Respondent and was an employee of the County Government working in the County Public Service Board. She testified that on 11th September 2018 she went to work as usual and was served with a compulsory leave letter signed by Dr. Fredrick Kamunde the County Secretary of the 2nd Respondent. The leave was indefinite. She stated that in August she was demoted from Principal Human Resources Officer to Human Resource Officer without notice and her salary was reduced. She stated that she was accused of smuggling the county seal for use over the weekend. She said that she was not formally called to attend a hearing nor was she informed of any alleged misconduct. She testified that her children were not in school and because she was the bread winner she had received her last salary in July. She had a bank loan and was receiving threats from the bank and guarantors.

4. In cross examination she stated that she was the liaison between the County Service Board and the secretariat drafting policy documents for the Board. She testified that she was not the head of payroll and that the payroll manager was Lydia Wangui Gatheru. She conceded she had a duty to perform her contract legally and that her duties did not include employ of ghost workers. She stated that the day she was charged she was sent on compulsory leave and had not received any letter of interdiction. She was shown the letter of interdiction exhibited in an affidavit in reply and stated that she was seeing it for the very first time. She testified that she could not respond to something she was not aware of and had not seen. She confirmed that criminal proceedings are still ongoing and that she knew Simon Tigania Kamau who was her husband. She testified that he does not work at the county office and that she was not aware that he is a ghost worker. She denied being in possession of the seal and stated that the seal was always in the custody of the personal secretary Mercy Mutegi. She stated that when Mercy went on leave the seal was handed over to her as Mercy was going on leave. She then denied having the seal and testified that when she wrote the statement before the Police she was under duress and had been ambushed in a well-orchestrated move. She stated that the statement at the Police was not written by her but by a policeman and that she signed it. She was emphatic that she did not produce the seal from her handbag. She was unaware of the audit report undertaken by the Respondent and stated that her salary was reduced in August 2017 and that she was not being paid.

5. The Claimant was re-examined and she was unsure who had prepared the audit report and reading noted that she did not know the source of the names. She testified that she was still facing charges at Chuka in the criminal trial and that she had to wait for the verdict. She was categorical that she has not been invited to appear before a disciplinary committee. She stated that she never received any letter of interdiction nor had she been invited for the staff audit. That marked the end of the Claimant's testimony.

6. The Respondents called Alexander Muratha as HR Asst. Director to the 2nd Respondent. He testified that the Claimant was employed by as a Principal HR Officer I and was interdicted upon a criminal charge in Chuka Law Courts in Cr. 789/17. He stated that the charge as for the offence of illegally and unprocedurally employing workers. She is on half salary and had not handed over as expected by handing over the instruments of her office as expected. She was accused of smuggling the seal to her home for illegal purpose and that she was interrogated by the Police and gave a statement on 11th September 2017 and confirmed that she had the seal on her person and produced it upon being asked to. He testified that the Claimant had the duty of implementing the decisions of the Public Service Board and for instance would upon the Board deliberating after an interview and passes a resolution, she, as head of the secretariat would implement by picking up the minutes and drafting the letter of appointment and hands over the letter to the persons employed and gives copies to HR. He stated that there were ghost workers and 108 persons had been identified as being irregularly employed. He testified that this would be taken as the work of the Claimant and it was assumed to be her work. He stated that the person listed as number 108 was the Claimant's husband, a ghost worker and the head count in September had revealed the irregularities. The workers had no records at HR and the Respondents had in the counterclaim sought the salaries that had been paid to these workers as there had been a loss of public resources.

7. In cross-examination, he testified that the letter to the Claimant sent her on compulsory leave and the said letter was issued by the County Secretary on behalf of the County Public Service Board. He conceded that the letter did not indicate that he was acting on delegated authority. He agreed that under the provisions of Section 59 of the County Government Act it was the Board to interdict. He stated that the list of ghost workers did not indicate who compiled it but the mere fact that the name of her husband was among the ghost workers implicated her. He testified that the procedure for employment was straight forward – the departments of the county government may identify a need for staff and once the request is approved there are applications received upon advertisement, shortlisting and then interviews where the minutes of the County Public Service Board would indicate the deliberations. He stated that the Claimant does not participate and the names of the successful applicants are forwarded to the HR department which forwards them to payroll. He was the one to ok the payroll and that the names were entered without knowledge of the human resources. He testified that the person who inserted the names is the one who employed them. He stated that the person who issued the letters is the one who inserted the names. He stated that the Claimant by virtue of her office had no authority to appoint. He testified that the Claimant was charged and the case is ongoing. He stated that the relevance was that the same way she was using the county seal was the same way she inserted the names. He testified that she was demoted after she was sent on compulsory leave which was followed by interdiction.

8. In re-examination he testified that the County Secretary is the head of the Public Service and the Claimant was the head of secretariat which drafted letters of employment. He stated that the letter of interdiction was a task of dealing with an employment issue, discipline, promotion as well as. The interdiction is to last till the end of the court case at Chuka. He sought the counterclaim to be allowed.

9. The Claimant filed submissions on 17th July 2018 and the Respondents filed their submissions on 6th August 2018. The Claimant submitted that the issues for determination were

- i. Whether the compulsory issued was valid
- ii. Whether the interdiction letter was lawful
- iii. Whether the Claimant was in breach of fiduciary duty

The Claimant submitted that the County Public Service Board gave exclusive jurisdiction to *inter alia* exercise disciplinary control over and remove persons holding or acting in those offices as provided for under this part. From the foregoing, it was her contention that only the County Public Service Board has the mandate to exercise disciplinary control over county employees. She argued that the purported

delegation to the 2nd Respondent's County Secretary Dr. Kamunde was for all intents and purposes void *ab initio* as Section 59(1)(c) of the County Governments Act 2012 gave exclusive jurisdiction to *inter alia* exercise disciplinary control over and remove persons holding or acting in those offices as provided for under this part. It was her contention that the powers of the 1st Respondent were not delegated to the 2nd Respondent's County Secretary Dr. Fredrick N. Kamunde and that the purported compulsory leave letter was for all intents and purposes issued by a person without authority thus *ultra vires*. The Claimant submitted that the interdiction letter was unlawful for the same reason. It was submitted that the Claimant did not breach her fiduciary duty and that she was not found culpable for the 108 ghost workers allegedly discovered from the 1st Respondent's staff audit. She submitted that the annexure as well as the charge sheet do not prove that she violated her fiduciary duty nor does the charge of abuse of office at Chuka Law courts do so. It was submitted that the Respondents' witness did not produce any letter that could be linked to the Claimant as being authored by her in the employ of the 108 ghost workers and contended further that the list was unsigned. The Claimant submitted that the counterclaim was not proved to the required standard of proof and that no valid reasons were given to discharge the evidential burden cast upon the Respondents under Sections 43 and 47(5) of the Employment Act 2007. The Claimant submitted that she had proved that her rights and freedoms as guaranteed under Article 41 (1) and (2) of the Constitution of Kenya 2010 were violated and she was not accorded her right to fair administrative action as enshrined under Article 47(1) and (2) of the Constitution. Reliance was placed on the case of **Simon Waringa Namakhwaba v Mr. Ajanja (Chairman) & Samanani Azam t/a Hoggers 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 salary for March 2013, the Respondent was in breach of contract*. It was submitted by the Claimant that the Respondents unlawfully withheld the Claimant's salary without due process. It was submitted that the employee on suspension is entitled to earn wages. The case of **Makenzie v Smith (1996) IRLR, 345** was cited in support of the contention that suspension without pay amounts to breach of contract. The Claimant thus sought the grant of her prayers per the claim before court and the dismissal of the Respondents' counterclaim.

10. The Respondents in their submissions stated that the Claimant had set out to perform her contract of service in an illegal, dishonest and corrupt manner and that this court would not enforce a contract of service which was performed in an illegal manner. It was submitted that the Claimant breached her fiduciary duty by allowing her husband and 108 workers to be inserted in the payroll of the 2nd Respondent so that they may obtain from the latter money by false pretences as the Claimant's husband and the 108 others were paid salaries as if they were staff of the 2nd Respondent. It was stated that a staff audit was carried out which revealed the existence of the ghost workers and the Respondents looked to the Claimant to restore to the 2nd Respondent all the monies it has paid to ghost workers as a result of the Claimant's breach of fiduciary duty and the duty of care. The Respondents cited the case of **Mapis Investments (K) Ltd v Kenya Railway Corporation, Nairobi Civil Appeal No. 14 of 2005** (unreported) which forbids the enforcement of illegal contracts when the illegality comes to the attention of the court. It was submitted further that in allowing the insertion of ghost workers in the payroll was a crime, tort or fraud upon the Respondents and against public policy. She therefore had a contract that was unenforceable. **Cheshire, Fifoot and Furmson's Law of Contract, 16th Edition pages 450-501** was cited in support of this submission on the unenforceability of a contract that was steeped in illegality. Emphasis was laid on a passage that appears at page 462 which states that: *There is no need to stress the obvious fact that an agreement is illegal and void if its object, direct or indirect, is the commission of a crime or a tort. The rule has been applied in many places as for instance where the design was to obtain goods by false pretences, to defraud respective shareholders, to disseminate obscene prints, to publish a libel...or to rig the market...an agreement made with the object of defrauding or deceiving a 3rd party is illegal*. The Respondents also cited the Penal Code and gave the meaning given to the words obtaining by false pretence and cheating. The Respondents cited the case of **Nabro Properties Limited v Sky Structures Limited (2000) Vol. 2 KLR 299** which held that no party is allowed to benefit from its wrong. The Respondents contended that the Claimant is seeking to benefit from her illegal actions/crimes. The Respondents contend that in view of the provisions on appeals to the Public Service Commission, the suit was premature and relying on the case cited **James Tinai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR** submitted that the correct approach would have been to file a complaint with the Public Service Commission in the first instance. It was submitted that there was no room for election as to the avenue to pursue rights. The Respondents submitted that the counter claim was for allowing and for the proposition relied on the authority of the treatise by **Andrews Burrows, The Law of Restitution, 3rd Edition OUP 2012 pages 517 to 518**, where the author holds that *a public authority that makes payment or renders a non-money benefit ultra vires is entitled to restitution. The main authority on this point is Auckland Harbour Board v R* where the Privy Council held that a sum of Pounds 75,000 paid by the Ministry of Railways *ultra vires* was recoverable. The second authority relied on was **Lord Goff and Professor Gareth Jones, The Law of Restitution, 7th Edition, Sweet & Maxwell 2007, Chapter 22**. The Respondents submitted that the law and facts clearly demonstrate that the Claimant is guilty of gross misconduct which entitles the Respondents to terminate her employment. On the counterclaim it was submitted that the court should find in favour of the Respondent, dismiss her claim and enter judgment per the counterclaim.

11. The Claimant has been arraigned in a court of law where the charges laid are in regard to the accusation made on her conferring a benefit to the ghost workers. That is the correct forum to determine her guilt or otherwise. In the case before me, the issues for determination are distilled as follows:-

- i. Whether the Respondents have followed due process in her suspension or dismissal
- ii. Whether the Claimant's salary is due and payable
- iii. Whether the Claimant is liable to the Respondents for the loss of funds on account of the ghost workers
- iv. Who is to bear the costs of the suit

12. The Claimant was suspended after the public seal of the 2nd Respondent was allegedly retrieved from her and following a staff audit which revealed there were 108 ghost workers. The charges laid against her by the Respondents in this suit are that the Claimant was culpable in the hire of these ghost workers and that she procured the insertion of the names of the illegal staff on to the payroll thus causing the Respondents loss to which they look to her for restitution in the counterclaim. Whereas interesting arguments were made on the untenable position of a contract for an illegal purpose, the treatise by the Respondents on this point was off center. In the law of Contract as stated by **Cheshire, Fifoot and Furmson's Law of Contract (supra)**, *an agreement is illegal and void if its object, direct or indirect, is the commission of a crime or a tort...an agreement made with the object of defrauding or deceiving a 3rd party is illegal*. The Respondents surmise of the point is erroneous as the contract the Claimant entered into was not for the object of either directly or indirectly committing of a crime or tort. The agreement was not made with the intention of defrauding or deceiving a third party. Indeed, if the provisions of the contract of

employment was intended for an illegal purpose, this court would not hesitate to hold the Claimant to have been bent on an illegal purpose from the get-go. The long and short of this is that the Respondents did not properly place the matter of the contract the Claimant has. The Claimant is accused of actions that are in breach of her contract. On her part she contends the Respondents have illegally removed her from her position and exercised their managerial prerogative to her disadvantage and in an unconstitutional manner. The Claimant was at the time of the laying of charges serving as an employee of the Respondents in the 1st Respondent. She was the Principal Human Resources Officer and asserts that she was sent on compulsory leave contrary to the law. The objects and purposes of the County Governments Act 2012 are *inter alia*

(j) provide, pursuant to Article 200 of the Constitution, for—

(i) the manner of nomination or appointment of persons to, and their removal from, offices in county governments, including the qualifications of voters and candidates;

(k) prescribe, pursuant to Article 235 of the Constitution, uniform norms and standards, for—

(i) establishing and abolishing offices in the county public service;

(ii) appointing persons to hold or act in those offices, and confirming appointments; and

(iii) exercising disciplinary control over and removing persons holding or acting in those offices; and...

13. The objects clearly indicate the Respondents have the power to undertake the exercise of dealing with issues that arise at the workplace. The Claimant could be demoted or promoted or asked to serve in an acting capacity and even get confirmed to her position. This is within the managerial prerogative and well within the mandate of the Respondents consonant with the law. The official who sent her on compulsory leave is imbued with statutory authority to do so. A Board acts through persons and the authority it exercises does not have to be reiterated in every communication that emanates from the Board. The Claimant was on suspension in the eyes of the Respondents until she was charged in the court at Chuka. The natural reading of this is that her position at the Respondents is imperiled by her charges and somehow fell aside upon her charge. Nothing could be further from the truth. An employee of the Respondents is entitled to the safeguards under the Employment Act including but not limited to the rights under Article 41 of the Constitution. Section 41 of the Employment Act makes for provision in relation to the removal from office of an employee. This is distinct from the provisions of the Public Service Commission Act which relates to complaints on the appointment of a person to the Public Service. Indeed, for issues to do with the criteria for appointment and manner of appointment the first call is the appeal to the PSC and this Court would only receive the matter after the appeal process in PSC. Regarding the dismissal, suspension or removal from office, this court is the proper and natural forum in line with Article 41 and the Employment Act. The Respondents have an obligation under Section 75 and 76 of the County Governments Act to take disciplinary action against any public officer in their employ in consonance with the Constitution and the rules of natural justice. I find and hold that the Claimant was not subjected to the safeguards under these provisions of the law. Sections 75 and 76 of the County Governments Act as read with Section 41 of the Employment Act indicate the Claimant was aggrieved by the decision to place her in limbo upon her being accused of the fraud perpetrated against the Respondents. She ought to have received at the least the accusation, an opportunity to defend herself and ultimately the outcome of the determination by the employer. Having failed to do so, the Respondents fell afoul of the law precipitating the suit. In as far as relief goes, the Claimant seeks a declaration that the letter sending her on compulsory leave without a disciplinary process was unlawful, unfair, unjust and contrary to the rules of natural justice. She is entitled to due process even where a suspension is to take effect. No such step was taken by the Respondents and though there seems to have been a basis for the suspension, the manner it was undertaken was clearly in breach of statute. She has not sought reinstatement and the court therefore makes a declaration that the suspension of the Claimant was not in accord with the provisions of the law and the natural consequence of this is that she is entitled to damages. She did not pray for any other than her withheld salary from August 2017. When an employee is on suspension, one is entitled to half salary. She is not currently on suspension and therefore the sum she is entitled to is half pay from the date of suspension till removal from office through a dismissal letter.

14. Regarding the counterclaim, the Respondents did not avail any figure of the sums allegedly lost due to the alleged illegal actions of the Claimant. No proof was availed of a letter authored to the ghost workers where the seal she was accused of ferrying home on weekends for illegal acts was availed. In as far as the counterclaim goes, it is unproved and I accordingly dismiss it with no order as to costs. As the Claimant has been successful on one aspect of the claim, she is entitled to costs limited to a half of the scale fees.

It is so ordered.

Dated and delivered at Nyeri this 18th day of September 2018

Nzioki wa Makau

JUDGE