



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 67 OF 2018

(Formerly Nyeri ELRC 354 of 2017)

JONES MUNENE MPUTHIA.....CLAIMANT

VERSUS

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

THARAKA NITHI COUNTY

PUBLIC SERVICE BOARD.....2ND RESPONDENT

JUDGMENT

1. The Claimant avers that he was employed by the Respondent on 27th June 2013 as an Economic Advisor for a 5 year contract. He avers that while serving as the economic advisor he was appointed as acting head of HRM on or about 6th June 2014 by the County Secretary of the 1st Respondent Dr. Fredrick V. Kamunde. The Claimant averred that he was given additional duties by the then Governor of Tharaka Nithi County S. N. Ragwa. He averred that his contract was terminated by the Chairman of the 2nd Respondent on 8th September 2017 the date of the election prematurely as the 5 year contract had not lapsed. He averred that he was not afforded an opportunity to defend himself and the termination was illegal, unprocedural, malicious and that he suffered psychologically and subjected to depression. He had a loan at Barclays Bank of Kenya Chuka Branch advanced to him on the basis of his contract of employment. He thus sought a declaration that the dismissal was unfair, 11 month's salary being the balance of the term of his contract with the 1st Respondent, a declaration that he was entitled to gratuity at the rate of 31% of the annual basic pay for each year served, general damages for unfair dismissal, costs of the suit together with interest at court rates for the sums and any other relief the court may deem fit to grant.

2. The Respondents filed a defence to the claim and averred that the Claimant had no cause of action and that his suit was an abuse of the court process. The Respondents averred that under the Constitution, the term of the governor during the first election under the new Constitution was reduced in accordance with the effective date of operationalization of the county government. The Respondents averred that the employees serving the Governor personally had their contract varied to the same extent by operation of law. The Respondents averred that the contract of the Claimant was subject to the pleasure doctrine owing to the personal nature of the service by the Claimant to the Governor who lost the August 8th election. The Respondents sought the dismissal of the claim with costs.

3. The Claimant testified as did the Chairman of the 2nd Respondent Stephen Nthiga Mitugo. The parties filed written submissions and the Claimant in his submissions stated he was entitled to his salary for the unexpired term of his contract and gratuity at the rate of 31% of his annual salary for the 5 years. The Claimant submitted that the Respondents pleadings had suggested that the Claimant was enjoying two salaries but in evidence adduced did not prove this allegation. The Claimant submitted that his duties were those of an economic advisor and did not entail the handling of the Governor's diary or that he was to serve under the pleasure doctrine. The Claimant submitted that the pleasure doctrine is not tenable in terms of the law – the Constitution of Kenya 2010, the Employment Act and the Labour Relations Act and Rules made under these Acts. He thus submitted he was entitled to the gratuity and the payment of the salary for the term he had lost as well as costs of the suit.

4. The Respondents submitted that the Claimant served the former Governor of the 1st Respondent and upon the retirement of the said Governor in the general elections that followed on 8th August 2017, the services the Claimant rendered could not be transferred to the present Governor. The Respondents citing **Halisbury's Laws of England 4th Edition Vol. 9 para 566-569** and the Court of Appeal decision in **Kenya Breweries Limited v Kiambu General Transport Agency Limited [2002] 2 EA 398** submitted that the variation of the contract of the Claimant was permissible in terms of the principle governing variations of contract. The Respondents submitted that the appointment of the Claimant was irregular as the provisions of Sections 65, 66 and 59(1) of the County Governments Act were not complied with as the Claimant was not appointed by the County Public Service Board as required by law. The case of **Eunice Jepkoech Siria v County**

Secretary, Uasin Gishu County [2017] eKLR was cited for the doctrine of pleasure and that the Claimant was not entitled to the additional safeguards under the Employment Act. On the remedy sought, the Respondents submitted that under the provisions of the County Governments Act, the Claimant was required to appeal to the Public Service Commission in terms of Section 77 first as held in the case of **James Tinai Murete & Others v County Government of Kajiado & 22 Others [2015] eKLR** and that of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** was cited for the proposition that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. The Respondent urged the dismissal of the Claimant's claim with costs.

5. The claim is challenged on the grounds that the Claimant ought to have appealed to the Public Service Commission in terms of Section 77 and that the contract effluxed on account of the pleasure doctrine. The Court of Appeal had this to say in the case of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu [2015] eKLR**:-

We are of the considered view that the Section 31(a) grants power to a Governor to dismiss a member of the County Executive Committee at any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously.

6. Similarly the Claimant's employ though indicated to be at the pleasure of the Governor was to be terminated without arbitrariness. In the case before me, the Claimant was served with a dismissal letter on 8th September 2017 which stated that he had ceased holding the office with effect on 8th August 2017 on the basis of the pleasure doctrine. In the case of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu (supra)** the demise of the pleasure doctrine was captured in these words:-

"..In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution."

7. The social compact in the preamble of our Constitution finds expression throughout the letter and spirit of the document. Article 1(3) and (4) and Article 2(1) of the Constitution provide as follows:-

1. (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at— (a) the national level; and

(b) the county level.

2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

8. The letter of the Constitution is a clear expression of the sovereign will of the people of Kenya. We wish to be governed in a system of laws in line with the aspirations of the Constitution of Kenya. Under the pleasure doctrine, the crown or public servants served at the pleasure of the crown. The opposite of that is what we now have expressed under Article 41, 47 and the Employment Act. Prior to termination of services, some modicum of due process must be established. Whereas it is clear the personal servants of an outgoing Governor cannot be retained by the incoming one unless the incoming Governor hires them, the process of disconnecting the service of such an employee cannot be an abridgement of the rights that inhere in Article 41. The Claimant herein was served with a letter that spelt the end of his contract at a date past. The practice of issuing letters backdating the termination of a contract is archaic. It must stop. The letter could easily have been effective the date of issuance or to a date following the date the letter was written. In the claim before me, the Claimant seeks the payment of the balance of his contract. In the case of **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR** Rika J. citing the decision of Ojwang J. (as he then was) in **Menginya Salim Murgani v Kenya Revenue Authority** stated the following:-

The court observed that the plaintiff was able bodied, intellectually and professionally well-endowed man, likely to find occupational engagement outside the defendant's employ. The court applied the principle then confined to civil law that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration.

Similarly, the Claimant herein cannot anticipate enjoying remuneration for a period he did not work. He is not entitled to the payment of the sums due for the balance of his contract some 11 months or so. He was entitled to gratuity at the rate of 31% of his basic salary for each year of service. He earned a basic salary of Kshs. 132,249/- per his payslip exhibited in the claim meaning that he was entitled to Kshs. 204,985.95 as gratuity. As his dismissal was not in keeping with the law, he will receive payment of 2 month's salary as compensation being Kshs. 376,498/- as well as costs of the suit.

It is so ordered.

Dated and delivered at Meru this 8th day of November 2018

Nzioki wa Makau

JUDGE