



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2106 OF 2014

FREDRICK ODHIAMBO NDEDE.....CLAIMANT

- VERSUS -

MAKUENI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

MAKUENI COUNTY GOVERNMENT.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 7th December, 2018)

JUDGMENT

The claimant filed a memorandum of claim on 24.11.2014 through Ochieng' Opiyo & Company Advocates. The claimant prayed for orders:

- a) Damages for unlawful suspension and breach of the claimant's constitutional rights under the Constitution.
- b) Any other relief that the Honourable Court may deem fit to grant in the circumstances.
- c) Costs of the claim.

The respondent appointed Nyamu & Nyamu Advocates by the notice of appointment dated 04.12.2014. The respondent did not file a defence but filed final submissions said to be on points of law. Thus the facts of the case as per the claimant's account are not in dispute.

The claimant was appointed to the position of Town Clerk or County clerk by the Public Service Commission by the letter dated 04.05.2009. He was deployed to serve at the County Council of Ole Kejuado as Clerk effective 01.04.2009 and later transferred to the County Council of Makueni as clerk. The Constitution of Kenya 2010 was already in operation and the claimant by the letter dated 25.02.2013 was deployed as the interim county secretary for Makueni County effective 12.02.2013. The letter set out the claimant's duties in that interim capacity and further stated, **"Your terms and conditions of service will be as per your current appointment in the Public Service. You will be deployed on temporary basis to the county and will continue drawing your salaries and all other allowances from your current parent Ministries/ Department. However, you will be paid an Allowance of Kshs. 75, 000.00 (seventy five thousand) per month for extra responsibilities given to you."**

By the letter dated 15.05.2013 the Governor, Makueni County, Prof. Kivutha Kibwana, suspended the claimant from office with immediate effect. The suspension was under section 30 and 31 of the County Governments Act, 2012. The letter stated in part, **"The suspension is to pave way for investigations on how a sum of about Kshs. 132 Million received from LATF in the month of March 2013 was spent on projects other than those designated and without any involvement of or information of the Governor or the Deputy Governor who were already in office. Similar spending was traced to a sum of Kshs. 154 Million received in the month of October 2012."** The letter required the claimant to report to the office of the County Secretary Dr. John Muteti on 16.05.2013 at 8am for hand-over. The letter concluded that if investigations found the claimant without blame, he would be reinstated to his position immediately.

The claimant replied by his letter dated 16.05.2013 and stated that the money in issue had been spent in accordance with the law and he cited the relevant statutes in that regard.

By the letter dated 10.06.2014 the claimant was invited to appear before the Makueni County Public Service Board on 17.06.2014 at 8am. Subsequent to the meeting the show-cause letter dated 01.07.2014 was issued setting out 9 allegations against the claimant alleging misappropriation of the funds in issue. The same was stated to amount to gross misconduct. The claimant was to reply in 7 days with liberty to seek in writing, the extension of the time or assistance in that regard.

The claimant replied to the show-cause letter by his letter dated 08.08.2014. Thereafter the claimant testified that he did not receive any further communication.

The claimant's case is that the suspension letter was contrary to Articles 47, 41 and 50 of the Constitution of Kenya 2010. Further while on suspension the respondents failed to pay the claimant quarter salary and full house allowance effective May 2013. Further the respondents had violated the claimant's contractual right under clause 30(a) of the prevailing collective agreement which provided that suspension should not exceed a maximum of three months. The claimant being a public officer it was his case that he was protected under Article 236(b) of the Constitution. Further, under section 58 of the County Governments Act the disciplinary powers over the claimant were vested in the County Public Service Board, the 1st respondent, and the Governor lacked authority to suspend the claimant.

The 1st issue for determination is whether the Governor had authority to suspend the claimant. The letter dated 25.02.2013 was clear that during deployment of the claimant as county secretary, the terms and conditions of service were as per his prevailing appointment in the public service. The deployment was temporary and the claimant continued to draw salaries from his parent Ministry being the Ministry for Local Government. The Court finds that as at the time of suspension the temporary deployment was in place and the claimant's service was subject to provisions of section 138 of the County Governments Act. During the transitional period the claimant was subject to disciplinary control by the Commission and more particularly in accordance with the County Public Service Human Resource Manual issued by the Commission in May 2013. Clause D.28 (1) of the Manual provides that the powers of disciplinary control and removal of county public officers from the service are vested in the county public service boards or authorised officers as specified in the County Government Act. As submitted for the claimant under section 58 of the County Governments Act the disciplinary powers over the claimant were vested in the County Public Service Board, the 1st respondent, and the Governor lacked authority to suspend the claimant, suspension being an interlocutory disciplinary measure during a preferred disciplinary process.

The Court therefore returns that the suspension was unreasonable because it was without relevant authority in law and therefore, the claimant's right under Article 47(1) was violated as it conferred him the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. The statutory sections as cited in the suspension letter did not apply and the suspension was unlawful. To the extent that it was unlawful, it amounted to unfair labour practice in violation of Article 41 (1) on fair labour practices. It was unfair that a suspension was imposed against the claimant by the 2nd respondent without statutory authority to do so or in usurpation of statutory authority vested in the county public service board and the Commission.

The 2nd issue for determination is whether the claimant and the respondents were in a contract of employment or were in employer – employee relationship. Considerable submissions were made for the parties in that regard. The Court finds that there was no doubt that the claimant and the respondents were in employer-employee relationship. The Court follows its opinion in the judgment in Elizabeth Nzinza Masaku-Versus-County Government of Nakuru and Another [2014]eKLR, thus, **“The 1st issue for determination is whether the petitioner was an employee of the respondents. The 2nd respondent has been eloquent on this issue thus, that the petitioner was a public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming into force of the County Government Act, 2012. Further, the petitioner was serving Nakuru County on the date of constituting of the county government of Nakuru so that she is deemed to be in the service of county government on secondment from the national government. The 2nd respondent's case was that under the transitional provisions, the law deemed the petitioner to be an employee of the county government but on interim and not permanent basis. The court agrees with that line of submission. The court finds that the petitioner was deemed to be an officer of the county government under section 138 of the County Government Act, 2012. Under Article 176 (1) of the Constitution, the county government consists of the county assembly and the county executive. It was submitted for the 1st respondent that there was no employer-employee relationship between the 1st respondent and the petitioner. The court finds that such submission was misconceived and the court finds that by operation of section 138 of the Act, there existed employment relationship between the claimant and the respondents. To answer the 1st question for determination, the court finds that the petitioner was an employee of the respondents. Needless to state, in view of that finding, the court further finds that its jurisdiction over the dispute is obvious.”**

The 3rd issue for determination is whether the claimant is entitled to remedies as prayed for. The prayer is for damages for unlawful suspension and breach of the claimant's constitutional rights. It was submitted for the claimant that the Court adopts the ruling of Mbaru J. delivered on 08.10.2015 so that the salaries due and unpaid from June 2013 to the date of submissions (02.11.2018) be paid being a total of 54 months times the claimant's monthly gross pay of 154, 580.00 making **Kshs. 8, 347, 320.00**. Further, for the unlawful suspension and breach of constitutional rights the claimant should be paid 12 months' gross salaries making **Kshs. 1, 854, 960.00**.

The Court finds that the ruling by Mbaru J having been delivered the parties would be bound accordingly subject to any variation by way of a review or appeal as may be preferred by the parties. The Court will therefore not revisit that ruling as it is on record and the Court's jurisdiction in that regard was exhausted. Nevertheless, it was submitted for the respondent that the respondents would not be liable to pay the claimant under the order by Mbaru J or other order because there was no employee-employer relationship between the parties. The Court has already found that there was employer - employee relationship and for avoidance of doubt under section 138(1) of the County Governments Act it was clear that upon formation or establishment of the county government the claimant was deemed to be on secondment to the county government with the same terms of service prevailing prior to the establishment of the county government. The Court returns that upon the deeming of the secondment the effect was that the respondents became fully responsible for paying the claimant until the secondment ended in terms of section 138(5) of the Act. Further the Court returns that it was misconceived to submit for the respondent that the claimant was an employee of the Transitional Authority under section 17 of the Transition to Devolved Government Act – as the court has found that section 138 of the County Governments Act fully applied to the claimant as a public officer employed by the Public Service Commission, deployed as an interim county secretary, and then deemed to be an officer of the county government on secondment once the county government was established or formed.

The claimant puts the measure of the damages for violation of the constitutional rights to 12 months compensation. The measure appears to be based on section 49 of the Employment Act, 2007 as the maximum measure of compensation in cases of unfair termination of the contract of service but which was not the case in the instant proceedings. For the respondent it was submitted that the claimant was to seek refuge by going back to his employer the Public Service Commission but he has failed to do so. The Court finds that reverting back to the Commission in terms of section 138(5) of the County Governments Act would require a release of the claimant by the respondents for that purpose and which release has not taken place and as it appears, due to the suspension and the ensuing disciplinary process. The claimant prayed for any other just relief and the Court finds that a declaration that the claimant is entitled to be released back to the Public Service Commission for

appropriate further action by the Commission and subject to applicable transitional law and transitional lawful policies will meet ends of justice in the case.

The Court has been referred to the ruling by Mbaru J. delivered on 08.10.2015 and the full effect of the order flowing from that ruling. The full effect of the order is to place the claimant in a position of full benefits from his contract of service as if the suspension never took effect. In view of that consideration and in absence of submissions to justify award of damages for the violation of the rights as found, the Court returns that the ends of justice have already been served sufficiently.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the deployment as interim county secretary by the Public Service Commission having been overtaken by events, the claimant is entitled to be released by the respondents back to the Commission, as per applicable transitional law including section 138(5) of the County Governments Act and transitional lawful policies applicable, for appropriate action by the Commission with respect to the claimant's service as a public officer.
- b) The respondents to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 7th December, 2018.

BYRAM ONGAYA

JUDGE