



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT KISUMU

CAUSE NUMBER 10 OF 2013

[Consolidated with Cause No. 311 of 2016]

BETWEEN

- 1. DANIEL NGARIBA MARWA**
- 2. MOSEDA DANIEL MORONGE**
- 3. JOHN MWITA**
- 4. MOSES CHACHA MOKAMI**
- 5. TOBIAS MOKERERI**
- 6. NAOMI MWITA MOGERE**
- 7. BONIFACE BARU SABAI**
- 8. CHARLES MWITA MAROA**
- 9. DANIEL MANG'ERA**
- 10. VINCENT N. NYAMOHANGA**
- 11. CHACHA NGARIBA PETER**
- 12. THOMAS MACHUNGU MAROA**
- 13. JOSEPH RIOBA MWITA**
- 14. SAMWEL WANGWI**
- 15. EMMANUEL MOGOSI RAGITA**
- 16. JOHN CHACHA MWIKWABE**
- 17. JONES WEISI KO RIOBA**
- 18. JOSPHAT MAKOMBE**
- 19. ANNE W. JAMES**
- 20. ESTHER MONCHARI**
- 21. CHRISTOPHER NYAMOHANGA MOGORE**
- 22. MATHEW OLUOCH MIBARI**

23. DANIEL BUNYIGE MAKUBO
24. SAMSON GIBORE BURUNA
25. PETER NYANGURU BERI
26. AGNES NYAMOHANGA RIOBA
27. JOSEPH MOTABWA
28. JOSEPH MARWA
29. SIMON JUMA OKUNDI
30. JERUSA KWAMBOKA CHACHA
31. EUNITA MAROA
32. JULIUS N. MWITA
33. ALFRED M. CHACHA (Cause No. 311/2016).....CLAIMANTS

VERSUS

1. COUNTY GOVERNMENT OF MIGORI
2. MIGORI COUNTY PUBLIC SERVICE BOARD.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Kirenga & Company Advocates for the Claimants

Mwamu & Company Advocates for the 1st Respondent

Omonde Kisera & Company Advocates for the 2nd Respondent

JUDGMENT

1. This Cause was initiated as a Miscellaneous Cause, by 52 former Employees of the now defunct, Municipal Council of Kehancha.
2. The Pleadings have severally been amended, culminating in Re-Amended Statement of Claim, filed on 31st July 2018.
3. The number of the Claimants has through these amendments whittled down to 33 Claimants whose names are shown in the title to this Claim, from the original number of 52.
4. The Respondents filed a joint Reply to the Re-Amended Statement of Claim, on 7th September 2018.
5. The Claim was heard on 7th November 2018 and 14th November 2018. Evidence for the Claimants was given by the 10th Claimant, Vincent Nyamohanga, while Migori County Secretary and Head of County Public Service, Christopher Odhiambo Rusana gave evidence for the Respondents.

Claimants' position

6. The Claimants state, and testify through Claimant Number 10, that they were employed on temporary contracts by Kehancha Municipal Council, in different positions, between January 2008 and October 2012. Their first salary was Kshs. 3,000 monthly, and last salary was Kshs. 5,000 monthly.
7. The Claimants state Kehancha Municipality was succeeded by the County Government of Migori, under the Constitution of Kenya adopted in 2010, and the County Governments Act 2012. The new County Government inherited all the assets and liabilities of Kehancha Municipal Council. The Claimants became Employees of the County Government of Migori.

8. They state that they continued to serve under the County Government in the same jobs they served, under the Municipal Council. They argue that they became regular Employees by operation of the Law. But the County Government of Migori refused to convert them, into permanent and pensionable Employees.

9. On 31st March 2015, the Respondents abruptly terminated the Claimant's contracts without notice, valid reason or reasons, and without a fair hearing.

10. They seek Judgment against the Respondents in the following terms:-

- a) An order reinstating the Claimants to their former positions.
- b) An order of temporary injunction barring the Respondents from replacing, dismissing, interdicting and/or interfering with the Claimants' employment position pending hearing and determination of this suit.
- c) A declaration that the Claimants are qualified to be confirmed as permanent, salaried and pensionable Employees of the Respondents.
- d) In the alternative, the respective Claimants are paid damages for wrongful termination of employment by the Respondents.
- e) An order directing the Respondents to confirm the Claimants as permanent Employees in their current positions.
- f) In the alternative the Court do vary the terms of service of the Claimants with the Respondents and declare the Claimants as permanent Employees of the Respondent, employed on terms and conditions of service consistent with the Employment Act.
- g) Certificate of Service to issue to each Claimant.
- h) An order awarding the Claimants appropriate monthly wages from the date of employment and the same to be assessed by the Court.
- i) An order be made that the Claimants are entitled to payment of due leave days and or leave allowances, and that the same are assessed by the Court.
- j) An order compelling the Respondents to compensate the Claimants for working on Sundays and Public Holidays without pay.
- k) Costs of the Claim and interest.

11. Cross-examined, the Claimants stated the contracts issued by the Municipality were for 3 months. They were renewed. There was no document evincing renewal. The Claimants obtained orders from the Court barring the Respondents from terminating their contracts. They filed contempt proceedings after the Respondents went ahead and terminated their contracts. The application failed.

12. They were required to undergo suitability tests, after County Government came into place. They did not recall when they attended suitability test. A report was generated from the exercise and adopted by the County Assembly of Migori. The Claimants did not dispute the report.

13. The Claimants concede they have not pleaded specific figures as terminal benefits. They left employment over 3 years ago. They have seen other persons working in their former positions.

14. The Respondents advertised vacancies left by the Claimants. The Claimants were not prevented from applying for their previous jobs. Majority of the Claimants were Revenue Officers. Other Employees included Security Guards.

15. They were asked to sign new contracts by the Respondents, as shown in the letter of termination dated 31st March 2015. They were advised by their Advocate not to sign new contracts, because the Respondents required them to surrender their original documents to the Respondents, upon execution of the new contracts. The contracts on offer were for 3 months. The Claimants testified they did not know what the Respondents were expected to do, in the face of the Claimants' refusal to sign new contracts.

16. They did not know if they were found suitable under the suitability test exercise. They were not sure if they would still be in employment if they had agreed to sign new contracts. They would not accept new contracts today, if the same conditions are imposed on them by the Respondents. Redirected, the Claimants' position was that the new contracts did not offer them permanent and pensionable status.

Respondents' position

17. The Respondents state, and testify through Head of Public Service Migori County, Christopher Odhiambo Rusana, that it fell upon the County Governments under the County Governments Act, to identify and employ qualified Employees of the previous Municipal Councils. These Employees were not to be automatically transferred to the new County Governments.

18. The Claimants were asked by the Respondents to produce their original letters of employment, to be considered for employment by the County Government; they failed to do so. The Respondents could not retain them. They are not entitled to damages for wrongful termination.

19. There were guidelines from the Transitional Authority on the status of the former Employees of the Municipal Councils. They were to undergo suitability test, to determine if they would be taken in by the County Government.

20. The Respondents undertook suitability test. A Report was generated, and adopted by the County Assembly, becoming the policy of the County Government.

21. The Claimants were temporary Employees of the defunct Kehancha Municipality. Their contracts were not shown to have been extended in writing.

22. The Claimants were offered contractual employment. They declined these contracts. The Respondents could not employ persons who had declined contracts. It would be expensive to the Public to grant the prayers sought. It is not feasible to reinstate them, and declare them permanent and pensionable. They refused to present their original documents to the Respondents. They refused to sign contracts.

23. The County Public Service Board, has already employed other Revenue Clerks, and filled other positions previously held by the Claimants. The Claimants acknowledge the positions were advertised.

24. There are guidelines set by the Transitional Authority, and the Treasury, on transitioning of assets and liabilities from the Municipal Councils to County Governments. The process is not complete. The County Government cannot be deemed to have taken over the Claimants from Kehancha Municipality.

25. The issue of notice before termination does not arise, because the Claimants were taken through a fair process before they left employment. Their contracts, where valid, terminated upon lapse of the given term periods. The Respondents did open job advertisements. The Claimants did not apply. The Public Service Board is an equal opportunity Employer.

26. Cross-examined, Rusana told the Court he was aware there was a Report generated after the suitability test. Some of the Claimants were listed in the Report produced before the Court by the Claimants. The Claimants earned Kshs. 5,000 monthly, as of the date they left employment. Termination letter is dated 31st March 2015.

27. The Respondents advertised vacancies in 2013. The Claim was filed in 2013. Rusana was not aware of an order of the Court, barring termination. Shown the order, Rusana conceded the order was issued, and received by the Respondents. The Respondents did not issue Claimants notice of termination prior to the letter of 31st March 2015. They did not pay salary in lieu of notice. Today, Revenue Clerks are paid between Kshs. 20,000 and Kshs. 25,000 as monthly salary. Claimants earned Kshs. 5,000 on termination.

28. Migori Governor Okoth Obado, in his State of the County Address made on 27th March 2014, acknowledged there were over 250 Workers under the County Government, who were categorized as casual. He stated that these Workers had worked for as long as 10 years, and were technically permanent.

29. Redirected, Rusana told the Court that the Governor's speech did not bind the Respondents. Advertisement of vacancies did not in any way, bar the Claimants from applying.

The Court Finds:-

30. The Claimants were employed by Kehancha Municipal Council on temporary 3-months contracts between the year 2008 and 2012.

31. The contracts were renewable. There is no document on record showing that the contracts were renewed upon expiry of the 3 months. There is evidence from both sides however, showing the Claimants went on working, and were still in employment, during and after the transition from Municipal Council to County Government in 2012/2013.

32. They continued working until 31st March 2015, when the County Public Service Board, terminated their contracts.

33. The issues raised may be condensed as follows:-

- a) Whether the Respondents were under legal obligation to employ the Claimants on permanent and pensionable terms.
- b) Whether termination was justified and fairly carried out.
- c) Whether the Claimants merit the prayers sought in the Re-Amended Statement of Claim.

34. The Court shall adopt the unorthodox approach, by looking at the remedies first.

35. The first prayer for reinstatement has no support in evidence, and is unreasonable and impracticable. The Parties agree Claimants' previous jobs were advertised and filled up. The County Government is already committed to paying salaries to its current Employees. There is no extra work for additional staff. Reinstatement would not be financially sustainable to the County Government. There are no vacancies. Secondly Section 12 [3] [vii] of the Employment and Labour Relations Court Act, allows the Court to grant reinstatement within 3 years from the date of termination. Over 3 years have passed, since the Claimants' contracts were terminated. Even if the Court finds termination was unfair therefore, the remedy of reinstatement in the circumstances, would be unreasonable, impracticable and against the law. The prayer for reinstatement is declined.

36. Strangely, the Claimants pray for an order of temporary injunction in their Re-Amended Statement of Claim. The Rules regulating proceedings of this Court do not allow the Court to issue temporary injunction as a substantive remedy. The prayer is declined.
37. The Claimants seek an order that they are paid appropriate monthly wages from the date of employment. It is not clear from their evidence, if this is the prayer under which underpayment of salary is pursued. They have not established what appropriate wages, from the date of employment, are sought. There are no specific figures pleaded. They have not directed the mind of the Court to any wage instrument, contract, law, collective agreement, or wage guideline, justifying this prayer. They worked under contracts, concluded with the defunct Kehancha Municipality, which were specific to them. They have no reason to look at salaries currently paid to their successors, and allege they were underpaid. The prayer for appropriate monthly wages, from the date of employment, has no legal or factual foundation and is declined.
38. They ask the Court to find that they are entitled to leave days, and/or leave allowances. They place the burden of establishing the number of days, and amount of allowance on the Court. They ought to have provided the Court with details of annual leave entitlement, specifying the periods they were supposed to go on annual leave, and failed to go on annual leave. They do not again, avail to the Court any contractual document or wage instrument, granting them leave allowance. It is not even clear from the Re-Amended Statement of Claim if what is sought is annual leave pay, or leave allowance.
39. The prayer for compensation for working on Sundays and Public Holidays is equally befuddled. There are no figures attached to the prayer. The number of days in question is left for the Court to determine, without any assistance from the Claimants. The mode of computation of the proposed compensation is not suggested to the Court. The prayer is not awardable.
40. The remaining prayers are that: it is declared the Claimants are qualified to be confirmed as permanent salaried and pensionable Employees of the Respondents; they are alternatively paid damages for wrongful termination; they are confirmed as permanent and pensionable; alternatively the Court varies terms of service and declares the Claimants are Employees of the Respondents on permanent terms, employed on terms and conditions consistent with the Employment Act; Certificates of Service to issue; and lastly costs of the Claim.
41. The prayers relating to treatment of the Claimants as permanent and pensionable Employees, rest on the prayer for reinstatement. As the Court has rejected that prayer, the peripheral or related prayers on treating the Claimants to be permanent and pensionable Employees of the Respondents, must similarly collapse.
42. The Claimants were offered contracts by the County Government, which they rejected. They explained that they were advised by their Advocate not to sign, because the Respondents would take custody of their original documents, upon their signing. The Court did not understand why the Claimants refused to take what was offered by the County Government. It is common for Employers to ask for, Employees' original or certified documents on recruitment. It is foolhardy for an Employee to decline to execute a contract of employment, based on frivolities such as were advanced by the Claimants, and upon termination for such refusal, turn around and allege unfair termination.
43. Section 37 of the Employment Act 2007 does not require that where an Employee works for an number of continuous working days which amount in aggregate to the equivalent of not less than one month; or performs work which cannot reasonably be completed within a period or a number of working days amounting to the equivalent of 3 months, is treated as permanent and pensionable as the Claimants argue.
44. The provision only requires that the contract of service of the Casual Employee shall be deemed to be one where wages are paid monthly, and section 35 [1] [c] shall apply to that contract of service. The Claimants were being offered contracts which would have brought their employment within this provision. They rejected those contracts. They have no reason to ask the Court to find that they were entitled to permanent and pensionable terms.
45. Section 138 of the County Governments Act, regulates transition of staff from the former Municipalities to County Governments. If Employees of the Municipalities were appointed by the Public Service Commission of Kenya, they would continue to serve in the County Governments on secondment. The Claimants did not show the Court that they were appointees of the Public Service Commission of Kenya, while serving Kehancha Municipality. What they established was that they worked for the Municipality on 3-months temporary contracts. Their temporary letters of employment were contested in Court. Rusana did not sign some of these letters. The Claimants were not clear on their appointment by the Municipality. There is no evidence to suggest they were employed through the Public Service Commission of Kenya, or under delegated authority of the Public Service Commission of Kenya, so as to be deemed to be employed by the County Government. The County Government of Migori did not have any obligation in law, to retain the Claimants.
46. It is the mandate of the County Public Service Board, under Section 59 of the County Governments Act, to establish and abolish County Public Service Offices; appoint persons to fill these Offices; retain disciplinary control over County Public Servants; and develop coherent human resource planning. The County Public Service Board seems to the Court to have acted in accordance with this mandate, in offering the Claimants 3 months' contracts, in conducting suitability tests, and in terminating the Claimants' contracts once they rejected what was offered. The Court would be standing in the way of the County Public Service Board in developing coherent human resource planning, by granting the prayers sought by the Claimants. In this Court's decision ***Kenya County Government Workers Union v County Government of Tana River & Another, [2018] e-KLR***, the Court upheld the mandate of County Public Service Board, to manage and develop coherent human resource planning.
47. Section 77 of the County Governments Act creates a dispute settlement mechanism, for persons dissatisfied with employment decisions taken by County Public Service Boards. The provision requires dissatisfied persons to appeal the decision of the County Public Service Board- on issues such as recruitment, selection, appointment, qualification of Employees- to the Public Service Commission. The letter of termination of 31st March 2015 contains a decision of such nature, as would be appealable to the Public Service Commission of Kenya. The Claimants did not invoke this mechanism. In the High Court of Kenya decision ***Alice Mweru Ngai v Kenya Power & Lighting Company Limited [2015] e-KLR***, it was held: " where the law grants jurisdiction to another organ of Government to handle specific grievances, the

Court must uphold and respect the law...involvement by the Court would be an unwarranted intrusion into the jurisdiction of the other organ...” The Claimants ought to have exhausted the dispute resolution mechanism created by the County Governments Act.

48. Lastly, the Claimants submitted that there was a similar dispute such as theirs, which was resolved in favour of the Employees by this Court. The Court is not bound by that decision, which the Court understands, resulted from conciliation by the Ministry of Labour. There are glaring legal issues which do appear to have been addressed in the conciliation exercise, in recommending absorption of Employees of the Municipal Council to the County Government, in the decision relied on by the Claimants. The Court is not bound by the Conciliation Report, or by the decision of the Court made pursuant to such a Report.

IT IS ORDERED:-

a) *The Claim is rejected.*

b) *No order on the costs.*

Dated and signed at Mombasa this 22nd day of November, 2018

James Rika

Judge

Dated, signed and delivered at Kisumu this 6th day of December, 2018

Mathews Nderi Nduma

Judge