



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT KISUMU
CAUSE NO. 320 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ANDREW TUBEI MULATI.....CLAIMANT

VERSUS

ENOCK WAMALWA KIBUNGUCHY.....1ST RESPONDENT

PARLIAMENTARY SERVICE COMMISSION.....2ND RESPONDENT

RULING

Before me for determination is an application dated 9th December 2014 by the Respondent in which he is seeking the following orders:-

- “1. That the Honourable Court do certify the matter as urgent and dispense with service in the first instance;***
- 2. That the Honourable Court do grant leave to the Respondent herein to enjoin the Parliamentary Services Commission (PSC) as the Co- Respondent herein as the proper employer of the Claimant;***
- 3. That in lieu of the Orders in 2 above the Honourable Court do dismiss the presence of the Respondent as the Respondent herein;***
- 4. That in lieu of the order in 2 above, the Honourable Court do grant leave to the 1st Respondent to serve Summons and issue cross notice upon the said PARLIAMENTARY SERVICES COMMISSION (PSC);***
- 5. That the costs of the application be provided for.”***

The application is premised on the grounds that:-

- “a) The Respondent is a Member of Parliament of Likuyani Constituency;***
- b) That He is authorized at law to execute documents on behalf of the Parliamentary Service Commission;***
- c) That an alleged contract was executed on behalf of the Parliamentary Services Commission***

who should be the proper Respondent herein;

d) The Respondent/Applicant has been sued in his personal capacity.”

The application is supported by the affidavit of M. M. YAKULULA sworn on 9th December 2014. In the affidavit the said M. M. YAKULULA states that he is the Manager of Likuyani Constituency Development Fund Office and the officer authorized to execute documents on behalf of the Parliamentary Service Commission at constituency level. He states that he is aware that the Parliamentary Service Commission has two sets of employees, those employed to manage constituency fund and projects on behalf of the Parliamentary Service Commission and personnel/staff who manage its offices at parliament and constituency level. He depones that the Claimant belonged to the latter category and was attached to the Member of Parliament’s personal office based in Eldoret. He states that the Claimant reported to him and was under his supervisory authority. He depones that he wrote several warning letters to the Claimant in respect of poor execution of work, copies of which have are annexed to the affidavit.

The Claimant opposed the application and filed a replying affidavit in which he states that he was never employed by the Parliamentary Service Commission but by the Respondent herein, Hon. E.W. Kibunguchi. He further states that Mr. Yakulula is a stranger to the proceedings herein. He states that Mr. Yakulula was the Manager of Likuyani Constituency Development Fund while he, the Claimant, was a clerk at the same office. He depones that he was not employed at the Respondent's Eldoret office which is a private office, as alleged in the affidavit of Mr. Yakulula. He further states that for the entire period he was in employment of the 1st Respondent his salary was paid by Likuyani Constituency Fund and not the Parliamentary Service Commission. He states that he stands to suffer irreparable harm should the application be allowed. He prays that the same be dismissed.

The 2nd Respondent filed grounds of opposition to the application as follows:-

- “1. THAT the Application contravenes the mandatory procedures of joinder of parties to a suit Order 1 Rule 15 of the Civil Procedure Rules 2010 and is therefore fatally defective;**
- 2. THAT the orders sought in the Application offend the established principles of privity of contracts;**
- 3. THAT the application herein is a mere red herring that will not assist the Court in disposal of the real issues in dispute;**
- 4. THAT the orders sought in the Application are against public policy and granting them would open the floodgates of suits against the 2nd Respondent;**
- 5. THAT the Application is bad in law, fatally defective, an abuse of the process of Court and ought to be struck out with costs.”**

The 2nd Respondent also filed written submissions with its grounds of opposition in which it sets out its submissions in respect of each ground of opposition.

The application was heard on 18th July 2016. Mr. Angu Kitigin appeared for the 1st Respondent/Applicant, Ms Soita held brief for Mr. Kirwa for the Claimant while Mr. Mwendwa appeared for the 2nd Respondent.

Mr. Kitigin submitted that the employment contract signed by the Claimant was under the seal of the Republic of Kenya, and defines the employer as the Parliamentary Service Commission. He submitted that the contract is a document prepared by the Parliamentary Service Commission for Members of Parliament for purposes of recruitment of staff, that members of parliament are constitutional office holders and in contracting personnel they do so on behalf of the Parliamentary Service Commission. He stated that the constituency offices are created by regulations made under the Parliamentary Service Act, 2015 and set terms for the staff. He submitted that under Section 2(3) of the Judicature, the contract

signed by the Claimant is outside common law. He submitted that the Claimant worked under a Constituency Manager which is an office established under the rules and the 1st Respondent was not an agent of the 2nd Respondent. He urged the Court to allow the application.

Ms Soita for the Claimant submitted that the Claimant was employed by the 1st Respondent who at the material time was the Member of Parliament. She submitted that the employment contract was executed by the 1st Respondent and the Claimant's salaries were paid by the said 1st Respondent as is evident from the statement of Accounts for the period 1st September 2013 to 16th April 2014 annexed to the pleadings. She submitted that there was never any contractual relationship between the Claimant and the 2nd Respondent. She however submitted that the Claimant will have no problem with the joinder of the 2nd Respondent to the proceedings as the Claimant will not be prejudiced in any way by the joinder.

Mr. Mwendwa for the 2nd Respondent opposed the application and relied on the grounds of opposition dated 7th March 2016, the affidavit sworn by Agnes Kamoni on 20th January 2016 and written submissions dated 27th January 2016. He further relied on the decision of the Court of Appeal in **Mombasa Civil Appeal No. 59 of 2014 between Parliamentary Services Commission , George Okoth Owuor and 2 Others, and the Parliamentary Service (Constituency Office) (Regulations) 2005.**

He submitted that Article 127 of the Constitution establishes the Parliamentary Service Commission and sets out its mandate being to ensure effective management of parliamentary staff. He submitted that pursuant to that mandate the Parliamentary Service Commission developed standards to guide operation of constituency offices under Parliamentary Service Act No. 185A. That also pursuant to that mandate the Parliamentary Service Commission developed standard contracts for for use in recruitment of staff for constituency offices. He submitted that such contracts are not under seal of the Republic of Kenya and is not executed by the Parliamentary Service Commission but is a standard document used by members of parliament and senators for purposes of contracting staff at constituency level.

Mr. Mwendwa submitted that the 2nd Respondent is a corporate body with its own corporate seal. He submitted that the Claimant's contract was executed between the Claimant and the 1st Respondent and a copy was forwarded to the 2nd Respondent only for purposes of acknowledgement of the existence of the contract, for purposes of release of funds and for audit purposes with respect to such funds. He stated that it is only for such purposes that the 2nd Respondent is mentioned in the contract.

Mr. Mwendwa further submitted that it was not the intention of parties that the 1st Respondent signs the contract on behalf of the 2nd Respondent . He submitted that the 2nd Respondent is not involved in the recruitment of, supervision or termination of constituency staff.

He submitted that the application is an abuse of Court process by a party running away from its responsibility, that the 1st Respondent was provided with funds by the 2nd Respondent to pay the Claimant and that the 1st Respondent and the Claimant are the proper parties to this suit.

Determination

I have considered the pleadings and submissions by the parties. The issue for determination is who was the employer of the Claimant between DR. ENOCK W. KIBUNGUCHY and the PARLIAMENTARY SERVICE COMMISSION.

According to the contract signed by the Claimant which is attached to Memorandum of Claim as Appendix 1, the parties are described as follows

“CONTRACT BETWEEN A MEMBER OF PARLIAMENT AND A MEMBER OF STAFF OF THE COUNTY OR CONSTITUENCY OFFICE”

The contract is signed by HON. E. W. KIBUNGUCHY MP and describes his occupation as “MP LIKUYANI”. The letters of warning dated 10th October 2013 and 16th December 2013 are both signed by M. M. YAKULULA, Constituency Office Manager and are copied to HON. DR. KIBUNGUCHY,

MP LIKUYANI. They are not copied to Parliamentary Service Commission or any other office. The letterhead upon which the letters of warning are written are titled:-

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

OFFICE OF THE CONSTITUENCY OFFICE

MANAGER, LIKUYANI.

Again there is no reference on the title of the warning letters to the Parliamentary Service Commission. The letter to show cause dated 10th February 2014, is on similar letterhead, signed and copied in the same manner as the letters of warning. The letter of dismissal is signed by Hon. Dr. Enock W. Kibunguchy, MP.

Under the Parliamentary Service (Constituency Offices) Regulations, 2005, provides for staffing of Constituency offices at Regulation 21 to 24 as follows:-

STAFFING OF CONSTITUENCY OFFICES

21. A constituency office shall have the following staff -

(a) a constituency office Manager;

(b) a Secretary;

(c) a constituency office Assistant;

(d) a driver; and

(e) two guards

22. (1) Members shall, with the concurrence of the Commission, initiate recruitment of all the constituency office staff whose terms of employment and salary scales shall be determined by the Commission.

(2) The staff recruited pursuant to this regulation shall not hold any post in a political party;

(3) Notwithstanding the provisions of paragraph (1), the staff recruitment shall not be paid house allowance, overtime allowance or any honorarium.

23. (1) Subject to regulation 22(3), the terms of service for constituency staff employees shall be a maximum of five years contract and upon termination of such contract a member of staff shall be eligible for payment of contract gratuity at the rate of 25% of his or her basic salary.

(2) On earlier termination of any contract for the constituency staff, the contract gratuity shall be determined on a pro rata basis.

24. Each staff shall sign a contract in three counterparts with the member retaining one, the staff the other and the last one being submitted to the clerk.

The regulations further define staff as “**an employee or employees of a member working for the member in the constituency office**”.

As submitted by Mr. Mwendwa for the Parliamentary Commission, the mandate of the Commission

under Article 127 of the Constitution does not include staffing of Constituency Offices of Members of Parliament.

The Claimant denied having any relationship with the Parliamentary Service Commission insisting that his employer was the 1st Respondent and that he had no intention to sue the Parliamentary Service Commission.

Mr. Kitigin's argument that the employment contract of the Claimant was between the Claimant and the 1st Respondent on the one part and the 2nd Respondent on the other is not supported by the facts of this case or by the law. The contract was not prepared by the Parliamentary Service Commission. The Commission only provided a format for the contract. The only relationship between the commission and the constituency office is that it provides the funds for running the constituency office and the constituency office must submit copies of all employment contracts of staff as proof of the existence of such staff so that funds can be disbursed to the constituency office for payment of salaries as well as all other qualifying expenditure of the constituency office.

In **Mombasa Civil Appeal No. 59 of 2014: Parliamentary Service Commission V. George Okoth Owuor & 2 Others**, the Court of Appeal held that there was no privity of contract between the Parliamentary Service Commission and the 1st Respondent who was an employee of the Changamwe Parliamentary Constituency Office.

Mr. Kitigin's argument that the decision of the Court of Appeal in the above case is distinguishable from the present case is an attempt to split hairs in an otherwise very clear decision. In that case George Okoth Owuor was employed by the 3rd Respondent as a security guard in the Changamwe Parliamentary Constituency Office, while the 2nd Respondent was the Constituency Office Manager. The trial Court found that the Appellant, the Parliamentary Service Commission was liable as employer on grounds that it provided the funds to the Constituency Office for payment of the staff including Owuor.

On appeal the Court of Appeal held that there was no privity of contract between the Commission and Owuor and further that the Commission had discharged its mandate by releasing funds to the Constituency Office for payment to Owuor. The Court of Appeal decision therefore determined the issue of whether or not the Commission was the employer of Parliamentary Constituency Office staff, which is also the issue in this case.

For the foregoing reasons I find no merit in the application and dismiss the same with no orders for costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE