



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 37 OF 2016

**IN THE MATTER OF ARTICLES 3, 6, 10, 27, 41, 47, & 50 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

IN THE MATTER OF SECTIONS 59 & 10 OF THE EMPLOYMENT ACT NO. 10 OF 2007

AND

**IN THE MATTER OF SECTIONS 3, 55, 47 AND 59 OF THE COUNTY GOVERNMENTS ACT
NO. 17 OF 2012**

AND

IN THE MATTER OF SECTIONS 3 & 4 OF THE INTERGOVERNMENTAL RELATIONS ACT

GEORGE O. OGEKA

ZIPPORAH WAITHERA

EUNICE WAHU MWANGI

NAOMI WARUGURU MAINA

CATHERINE NYAWIRA

MARY ANDESO SARAH

CHILAT REBECCA CHEMUTAI

WAIHENYA AYUB NGUNU

PAUL KIPSIGEI KOSKEI

EDDAH WANGUI WARUI

ZIPPORAH MWEMBI

SARAH WACHERA GATHII

PETER MUCHIRI MATANDI

JEPKOSGEI EVERYNE.....PETITIONERS

VERSUS

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

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The Petitioners were employed as Instructors (Youth Polytechnics) on 3 year fixed term contracts by the Ministry of Youth Affairs and Sports severally through letters dated 23 May 2011 and 28 November 2011.

2. When the contracts expired, the Ministry of Education, Science and Technology informed them severally of the extension of the contracts for 6 months effective 25 May 2014 on Local Agreement Terms.

3. Further extensions were made in April 2015 for 6 more months.

4. Because of devolution of certain functions to the county governments, a meeting was held on 2 December 2014 between the stakeholders including the Council of Governors, Ministry of Education, Science and Technology, Ministry of Devolution and Planning, the Transition Authority, Directorate of Public Service Management, the County Public Service Board Forum and the Public Service Commission.

5. At the meeting it was agreed that

(i)

(ii) The MOEST in consultation with the PSC and the National Treasury extend the contracts for 1274 instructors whose contracts expired in November 2014 up to 30th June in order to bridge the shortfall of qualified teaching staff in youth polytechnics.

(iii) The county governments to make budgetary provisions to absorb the ESP staff into their County establishments on permanent and pensionable terms in the next financial year on expiry of the ESP Programme.

(iv)

6. The Chairman of the Transition Authority, in a letter dated 15 December 2014 informed all County Secretaries (and other government functionaries) formally of the agreement.

7. Pursuant to the agreement by the stakeholders, the 1st Respondent granted to the Petitioners 1 year fixed Local Agreement contracts on 1 July 2015 instead of absorbing them into the *permanent* and pensionable establishment.

8. It appears that attempts by the Petitioners to be taken on *permanent and pensionable terms* hit a brick wall for on 4 November 2016 they moved Court alleging that only some of them had been granted *permanent* and pensionable contracts; they had not been paid wages from 1 June 2015 up to 30 June 2016, and violation of their rights by the failure to absorb them on *permanent* and pensionable terms.

9. The Petition was accompanied with a motion under certificate of urgency in which the Petitioners sought an order directing the 1st Respondent to issue them with pay slips for July to October 2016 and payment of salary arrears.
10. The Court declined to issue any order *ex parte* and the Petitioners were directed to serve the motion and Petition (it appears that the 1st Respondent wrote to the Petitioners on 15 November 2016 extending their contracts for 1 year (these contracts are slated to expire on 30 June 2017)).
11. According to an affidavit of service filed in Court on 28 November 2016, all the Respondents were duly served and they acknowledged service.
12. However, the 1st Respondent did not file any document in response to the motion and/or Petition while the Attorney General opted to file a Notice of Preliminary Objection on the ground that the Petition contravened Article 187(2) of the Constitution and section 33 of the sixth schedule of the Constitution.
13. On 30 November 2016 when the motion was called out for *inter partes* hearing, Mr. Wamaasa for the Petitioners informed the Court that he wished to abandon the motion and also sought a hearing of the Petition on a priority basis.
14. During the same appearance, the 4th Respondent intimated that it would file a preliminary objection.
15. The Court acceded to the Petitioners request and scheduled the hearing of the Petition for 7 December 2016. The 4th Respondent was also directed to file and serve the objection.
16. The objection was taken before the hearing of the Petition and the Court upheld it thus releasing the 4th Respondent from the proceedings.
17. Because the 1st to 3rd Respondents had not filed any process, the Court allowed the hearing to proceed and one of the Petitioners, George Onyango Ogega testified.
18. It is not in dispute that certain functions carried out by the National Government were devolved with the coming into effect of the Constitution, 2010. The functions included youth polytechnics.
19. It is also not in dispute that a meeting of all the responsible governmental agencies was held on 2 December 2014 and an agreement was reached.
20. As already alluded to, among the raft of resolutions was that all *Economic Stimulus Programme* (ESP) staff be absorbed on *permanent and pensionable* terms with effect from 1 July 2015.
21. The Petitioners were part of the ESP staff which included health care staff (both this Court and the Court of Appeal have determined similar disputes concerning the health staff in *Kenya National Union of Nurses v Public Service Commission of Kenya & 2 Ors* (2015) eKLR, *Gideon Bore & Ors v Baringo County Public Service Board & 3 Ors* (2016) eKLR), *Kenya National Union of Nurses v Council of Governors & 6 Ors* (2016) eKLR and *Muranga County Public Service Board v Grace N. Makori & 178 Ors* (2015) eKLR).
22. The Court has also considered the testimony by one of the Petitioners that some of their colleagues were granted permanent contracts and which testimony was not controverted.
23. On the basis of the agreement reached by agencies and the Council of Governors, there is no lawful reason why the 1st Respondent has refused to grant the Petitioners *permanent and pensionable* contracts.
24. The Court in effect finds that the declaration sought by the Petitioners is merited.
25. The Court was informed from the bar that the salary arrears (July 2015 to June 2016) which formed

part of the cause of action had been paid, and therefore it will not consider that limb of the Petitioners case.

Conclusion and Orders

26. The upshot of the foregoing is that the Court orders that

(a) A declaration do and is hereby issued that the Petitioners should be employed by the 1st Respondent on permanent and pensionable terms with effect from 1 July 2015.

27. Because of the expected continuity of employer/employee relationship, Court orders that each party bears own costs.

Delivered, dated and signed in Nakuru on this 17th day of March 2017.

Radido Stephen

Judge

Appearances

For Petitioners Mr. Wamaasa instructed by Wamaasa & Co. Advocates

Respondents did not participate

Court Assistants Nixon/Daisy