



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 221 OF 2015

SHADRACK WAIGWA NDUNG’U & 64 OTHERS.....CLAIMANT

VERSUS

NYERI COUNTY GOVERNMENT.....1ST RESPONDENT

NYERI COUNTY PUBLIC SERVICE BOARD....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th March, 2017)

JUDGMENT

The claimants are 65 Youth Polytechnic Instructors whose names are filed in court on 04.12.2015 as per the list granting authority to the 1st claimant to act for and on behalf of the 51 other claimants. The claimants were employed by the Public Service Commission after a competitive recruitment process. Upon recruitment each was issued with a letter of offer of appointment dated 23.05.2011. The letter offered each of the claimants appointment as an Instructor (Youth Polytechnics) on three (3) years contract terms of service with effect from the date the claimant assumed the duties of the post but not later than 06.06.2011. Each of the claimants accepted the offer and they were deployed to serve in the Youth Polytechnics across the County of Nyeri. The terms of service were contained in a standard form local agreement issued to each claimant.

The 3 years’ contract lapsed on 30.04.2014 and the Commission extended the same for six months from 23.05.2014 to 22.11.2014. The contract lapsed on 22.11.2014 and the Commission extended the same for a further 7 months ending 30.06.2015. The contract as extended then expired with effect from 01.07.2015 but the claimants stated that they continued to work up to 04.12.2015.

The 2nd respondent wrote the letter dated 07.08.2015 inviting all the claimants to attend a suitability interview between 12th and 13th August 2015. The claimants attended the interviews, 19 were notified to have been successful as per the letter of 22.10.2015 and the fate of the others was not communicated. About 18.11.2015, the claimants that were successful at the interviews were notified to collect letters terminating their employment as per the letter by the Chief Officer, Education. On 23.11.2015, being 5 days from 18.11.2015, the 2nd respondent published in the print media an advertisement inviting any interested person to apply to be recruited by the County Government of Nyeri as Youth Instructor, Job Group H. The claimants being in-post inquired whether to apply and they were told to apply. The claimants were dissatisfied with that response and they moved to court alleging unfair labour practices contrary to Article 41 of the Constitution of Kenya.

The claimants filed the memorandum of claims on 04.12.2015 through Warutere & Associates Advocates. The amended memorandum of claims was filed on 24.06.2016. They prayed for judgment against the respondent for:

- a) A permanent injunction against the 2nd respondent from subjecting the claimants to interviews for the posts of Youth Polytechnic Instructors.
- b) 6 months’ salaries and allowances at Kshs.26, 523.00 x 65 x 6 months making Kshs. 10, 343, 970.00.
- c) Absorption of the claimants into permanent and pensionable terms of employment.
- d) Costs of the suit.

The respondents' case was based on the amended respondents' response to amended memorandum of claim filed on 03.10.2016 through Wahome Gikonyo & Company Advocates. The respondents prayed that the claimants' suit be dismissed with costs. The respondents' case was as follows:

- a) The claimants were employed by the Ministry of Education, Science and Technology on contract basis and the contract lapsed on 22.12.2014.
- b) Under section 59(1) of the County Governments Act, 2012, the respondents were entitled to establish offices and to appoint persons to hold those offices in the County Government of Nyeri and thus despite the contractual service with the Ministry, the respondent was entitled to undertake the suitability interviews in the manner it was done.
- c) There was no directive from the Transitional Authority for the respondents to absorb the claimants into the county public service and if any such directive existed, the same was not binding as the respondents were entitled to undertake the suitability interviews before absorbing the claimants into the county service.
- d) The claimants' case must therefore be dismissed with costs.

The **1st** issue for determination is whether the claimants are entitled to absorption into the public service of the Nyeri County Government. It is submitted for the claimants that about 02.12.2014, the claimants' employment were in the service of the National Government as initially engaged by the Commission through the line Ministry. The Transitional Authority was the lawful body at all material time mandated to manage transitional issues including the human resources following the promulgation of the Constitution of Kenya, 2010. As per the letter by the Transitional Authority dated 15.12.2014 addressed to all county secretaries and other relevant National Government departments and agencies, it was conveyed that following numerous issues and challenges facing the transition of youth polytechnics staff, a consultative meeting was held on Tuesday, 02.12.2014. The parties present included the Council of Governors (COG), Ministry of Education, Science and Technology (MOEST), Ministry of Devolution and Planning, Transition Authority (TA), Directorate of Public Service Management (DPSM), the County Public Service Board Forum and Public Service Commission. The letter stated that the issues included non-payment of salaries, expiry of contracts, contracts extension and non- payment of service gratuities. The letter stated that it was agreed as follows:

- a) The county governments make arrangements to pay the permanent and pensionable youth polytechnic staff being 590 across the counties with effect from September 2014 as per IPPD data forwarded by the MOEST since the budget for their personnel emoluments was transferred to the counties as part of County Allocation of Revenue Act, 2013 after verification of their details.
- b) The MOEST in consultation with 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.
- c) The MOEST to release to the counties funds for capitation for youth polytechnic trainees and for Youth Polytechnic Board of Governors employed instructors as conditional grants to the counties.
- d) The MOEST to expedite the payment of service gratuity for the 1274 whose contracts have expired.
- e) The MOEST to release to the counties funds for capitation for youth polytechnic trainees and for Youth Polytechnic Board of Governors employed instructors as conditional grants to the counties.

The letter concluded by requesting the county secretaries to ensure smooth transition of the staff in the county governments and to avoid disruption of service delivery.

In line with that agreement as communicated by the Transitional Authority, the Public Service Commission (PSC) acted and issued the letter dated 21.01.2015 Ref. No. PSC/5/1/ (39) conveying the Commission's decision that the listed 1274 Youth Polytechnic Instructors III Job Group H whose appointment on local agreement terms ended in November 2014 be extended for a further period of 7 months . Thus, the contracts were running up to 30.06.2015 and thereafter effective 01.07.2015, the instructors would be absorbed into the permanent and pensionable staff of the county government as agreed and conveyed by the Transitional Authority.

To answer the **1st** issue for determination, the court returns that the claimants were entitled to be absorbed into the permanent and pensionable service of the respondents with effect from 01.07.2015. In that regard, the court finds that it was specifically agreed that the county government was to make budgetary provisions to absorb the claimants in their County establishments on permanent and pensionable terms of service effective 01.07.2015.

While making that finding the court has considered the submission made for the respondents that the Transitional Authority lacked legal power to direct the respondents to absorb the claimants into permanent and pensionable terms of service. The court finds that the Transitional Authority did not impose or dictate anything to the county governments in that regard but merely conveyed the agreed terms and steps that were to be taken by the National Government and the county governments with respect to the staff in the claimants' circumstances. The court further follows **Murang'a County Public Service Board -Versus- Grace N. Makaori & 178 Others [2015]eKLR** where the Court of Appeal (Waki, Nambuye & Kiage JJ.A)

held that under Article 189 (1) (a) of the Constitution, the National and County Governments relate to each other on the basis of cooperation and it cannot be otherwise if the two levels of Government are to function optimally and effectively to the benefit of Kenyans; so that the Constitution employs functional and institutional integrity rather than autonomy – as per Articles 189 and 6 of the Constitution. Thus the court finds that the process was consultative and the powers and functions of the Nyeri County Public Service Board as conferred in section 59 of the County Governments Act, 2012 and as founded upon Articles 234(3) (b) and 235 of the Constitution was not usurped in any manner. The court further follows the holding of the Court of Appeal in the cited case that what was clear was that the Council of Governors in that case had agreed to the absorption policy and the individual county governments were thereby bound to implement that policy. In the present case, the Council of Governors and the County Public Service Board Forum had agreed to the absorption policy and the court finds that it was not open for the respondents to frustrate the claimants' legitimate expectation to be absorbed in permanent and pensionable service in line with the agreed countrywide government policy both at National and County levels.

The **2nd** issue for determination is whether the claimants' right to fair labour practices as enshrined in Article 41(1) and (2) of the Constitution of Kenya, 2010 was contravened. The court finds that the right was contravened. First, the court has found that the agreed and legitimate expectation by the claimants to be absorbed into the permanent and pensionable service was frustrated in the manner the respondents handled the claimants' continued employment. Second, the claimants had been hired competitively and they possessed all the requisite qualifications to continue in the respondents' employment so that the imposed suitability interviews or reapplication for the same job were unfair labour practices which obviously contravened the agreed absorption policy. Third, all arrangements including provision of the resources to facilitate the absorption had been put in place and there would be no reason for the respondents to fail to act accordingly. Finally, the claimants' job was of a permanent nature, RW confirmed the claimant's services were needed and there was continued need for claimants' services. RW testified that the respondents had necessary resources in their budgetary provisions to pay and the respondents had advertised 39 vacancies for the 8 Youth Excellency Centres. The court considers that the positions held by the claimants had not been abolished and even if that was to be the case, then the right to be absorbed was not thereby wholly vitiated as the claimants would have to be absorbed and then redundancy law would apply where necessary. In any event, the court returns that the agreed policy at National Government and county governments' levels was that the claimants had to be absorbed into the county governments' public service and the court further holds that the county governments had no option to vary their staff compliments by abolishing the offices the claimants held; the agreement was that the county government makes budgetary allocations for the absorption of the claimants effective 01.07.2015.

The **3rd** issue for determination is whether the claimants are entitled to the remedies as prayed for. The court has found that it was unfair labour practice to require the claimants to apply or undergo suitability interviews for the job they had already been properly recruited for and the claimants are entitled to the injunction as prayed for. The court has found that the claimants are entitled to absorption into permanent and pensionable terms of service effective 01.07.2015. RW testified that the claimants left service as from 01.07.2015 and that there was no evidence that they worked up to December 04, 2015. The six months' service for the period November 2014 to June 2015 was clearly extended by the PSC and the MOEST was to provide the necessary pay and gratuity. Thus the court finds that under the agreed arrangements the National Government through MOEST was liable to pay the claimants' salaries, allowances, and gratuity as per the prevailing ESP terms and conditions of service up to 30.06.2015. CW confirmed that the National Government had since paid that outstanding remuneration and the prayer in the amended statement of claim was said to be for the period 01.07.2015 to 04.12.2015, the last day the claimants said they were on duty.

The court finds that there was evidence by claimants that they worked after 30.06.2015 until 04.12.2015. The court has particularly considered the communication between the parties in August 2015 on the suitability interviews, the communication to some of the claimants that they were successful at the interviews and the subsequent withdrawal of the letters of appointment flowing from the said successful interview. The court has also considered the communication between the parties in November 2015 where the respondents advised the claimants to apply for the jobs as was advertised despite their being in-post. The court finds that all that communication was invariably communication between an employer and serving employees. Thus the court returns that there is every reason and evidence to show that the claimants worked up to 04.12.2015.

In that regard, the claimants would be entitled to be absorbed in permanent and pensionable terms of service effective 01.07.2015 and the period between 04.12.2015 to the date they report on duty on 20.03.2017 be treated as leave without pay so that there will be no break in their service for purposes of computing the period of their pensionable service. Accordingly, the claimants are entitled to pay of salaries and allowances for Youth Polytechnic Instructors III Job Group H from 01.07.2015 to 04.12.2015 by 01.05.2017 failing interest to be payable thereon at court rates from the date of the suit 04.12.2015 till full payment. While making that finding the court finds that allegations that the claimants deserted duty effective 04.12.2015 was unfounded because no disciplinary action was taken out against the claimants in that regard. The court finds that the material on record clearly shows that there had been suitability interviews as submitted for the claimants and whose outcomes were found unfair on the part of the claimants.

In conclusion judgment is hereby entered for the claimants against the respondents for:

- a) The permanent injunction against the 2nd respondent from subjecting the claimants to interviews for the posts of Youth Polytechnic Instructors III, Job Group H.
- b) The respondent to pay each claimant salary and allowances attached to Youth Polytechnic Instructors III, Job Group H as per the payment for the permanent and pensionable officers in that job group for the period 01.07.2015 to 04.12.2015, and to pay by 01.05.2017 failing interest to be payable thereon at court rates from the date of the suit 04.12.2015 till full payment; for which purpose the claimants will compute, file and serve the amount due in 7 days for recording the quantum on a convenient date.

c) The declaration that the claimants are absorbed into the service of the respondents on permanent and pensionable terms of employment effective 01.07.2015 and the period between 04.12.2015 to the date they report on duty on 20.03.2017 be treated as leave without pay so that there will be no break in their service for purposes of computing the period of their pensionable service.

d) Flowing from order (c) above each claimant to report to the respective station of duty, as deployed as at 01.07.2015, and to be assigned duties effective 20.03.2017 at 8.00am; and the 1st respondent's county secretary and the 2nd respondent's secretary to ensure full compliance.

e) The respondents to pay the claimants' costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 17th March, 2017**.

BYRAM ONGAYA

JUDGE