



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 21 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

SAMUEL OGONJI AND 31 OTHERS.....CLAIMANT

-Versus-

KISUMU COUNTY GOVERNMENT..... 1ST RESPONDENT

KISUMU COUNTY PUBLIC SERVICE

BOARD2ND RESPONDENT

FINAL JUDGMENT

By a Statement of Claim dated 10th February 2014 and filed on even date, the Claimants sought the following remedies against the Respondents:

- (a) An order or permanent injunction restraining the respondents, agents, servants or from recruiting replacing the claimants from their initial position to employment until the claimants are confirmed as permanent and pensionable employees.
- (b) It is now prayed that the honourable court be pleased to find unlawful termination and the continued withholding of the Claimants' dues by the respondents to be unjustified, unlawful, unfair wrongful and illegal, be pleased to order the respondent to pay the claimants statutory entitlements.
- (c) It is humbly prayed that this honourable court be pleased to order for reinstatement of employment and confirmation of claimant as permanent and pensionable employees.
- (d) In addition this honourable court is prayed to award costs of this suit to be borne by the respondent [sic].

Together with the Claim the Claimants filed a notice of motion in which they prayed for the following orders –

1. That this application be certified urgent and the same be heard ex parte in the first instance dispensed within the first instance.
2. That this honourable court be pleased to grant temporary injunction restraining the respondent, their servants, agents, employees or any person duly authorized by them to act on their behalf from replacing, removing and or interfering with the Claimants' employment in any manner whatsoever

until the application is heard and determined.

3. That this honourable court be pleased to grant orders of temporary injunction restraining the respondent, their servants, agents, employees or any person duly authorized by them to act on their behalf from replacing, removing and or interfering with the claimant employment in any manner whatsoever until the suit is heard and determined.

4. That the honourable court be pleased to grant a mandatory injunction compelling the respondents to reinstate the applicants back to work unconditionally pending the hearing and determination of the reference.

5. That the cost of this application be provided for.

In the ruling delivered on 30th April 2014 the court ordered status quo on the basis that the mischief sought to be prevented had already been done. The Respondents were thus restrained from replacing the Claimants until the suit is heard and determined.

By an application dated 24th February 2015 the Claimants prayed for temporary orders of injunction to restrain the Respondents from replacing, removing and or interfering with the employment of the Claimants pending determination of this suit. Since it was not clear whether or not the Claimants were still in employment, the Court ordered the County Labour Officer Kisumu to investigate and prepare a report to establish whether the Claimants were indeed still working as alleged in the application. The report was filed in court on 27th June 2016. The report is reproduced below for its full tenure and purport.

“Investigations revealed that the claimants were employees of the defunct local authorities i.e. Town Council of Muhoroni, County Council of Kisumu and the Town Council of Ahero.

With the advent of County Governments after the 2013 General elections, the County Government of Kisumu took over the services of the claimants with effect from 1st October 2013. The defunct local authorities had initially engaged them as casuals by offering them three months contracts that were renewable upon expiry.

The County Government of Kisumu therefore adopted the three months contracts which they honoured until 31st December 2013. Vide an internal memo dated 22/01/2014 (Appendix A) from the County Revenue officer (Mr. Charles A. Sechere) addressed to all revenue officers (Nyando, Ahero, Muhoroni and Seme), the revenue officers were to receive all the accountable documents in casuals' possession because their services were no longer required as their contracts had not been renewed.

This therefore confirms that the services of the casuals were terminated with effect at the end of December 2013 upon the expiry of their contracts.

FINDINGS

- The Claimants were not casuals as defined by the employment Act 2007 which defines a casual as ***‘a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time’***. From this definition of who a casual is, it is quite apparent that the claimants were not casual employees.
- Investigations also confirmed that the claimants are actually working but they have not been paid since January 2014.

PAYMENTS DUE TO CLAIMANTS

It is quite apparent that the claimants' contracts which expired on 31st December 2013 were not renewed by the County Government. If indeed they do not require the services of the claimants, then the following

should be *paid to them as terminal dues*;

- *Salary due to them as from January 2014 to date*
- *One month's salary in lieu of notice*
- *Accrued leave if any*
- *Underpayment of wages for those whose salaries are below the statutory minimum wages as conformed from their appointment contracts*
- *Service gratuity if the claimants do not belong to any pension scheme or are not contributors to the NSSF."*

The Report was accepted by the parties and by consent of the parties the report was adopted as a basis for settlement of the Claim. On 28th July 2016 the court made the following orders:

1. The report of the labour officer dated 24th of June 2016 is adopted by consent.
2. The County Labour Officer Kisumu is directed to calculate the amount payable to each of the claimants consequent upon the report and file a report with the calculations within (30) thirty days.
3. Mention on the 13th September, 2016.

The report of the County Labour Officer tabulating the terminal dues of each Claimant was filed in court on 13th September 2016 and adopted as judgement of the Court on 11th October 2016.

The basis for the settlement was payment of salaries for the whole of 2014, 2015 and 8 months in 2016. The judgement was in the total sum of Kshs. 5,120,000.

It is upon this background that I now proceed to determine the issues still pending in this case

Claimants Submissions

In the submissions filed on behalf of the Claimants it is urged that the Claimants were not casual employees but were regular employees who have been in the service of the Respondents for 5 years and 9 months enjoying all privileges and salary increments and that some of the Claimants have worked for more than 10 years.

It is submitted for the Claimants that upon the promulgation of the Constitution of Kenya 2010 and the enactment of the County Governments Act, 2012 the County Government of Kisumu and the Kisumu County Public Service Board took over all the assets and liabilities of the Kisumu County Council, Nyando County Council, Ahero Town Council and Muhoroni Town Council, that after the Respondents took over the running of the former Councils in the month of April 2013 the Claimants continued to serve in their various capacities and their salaries were duly paid by the Respondents. It is submitted that the Respondents renewed the contracts of the Claimants in or about the month of April 2013.

It is submitted that the Claimants made numerous requests to be confirmed to permanent and pensionable terms but the Respondents failed to do so. That on 6th January 2014 the Respondents terminated the services of the Claimants without due process compelling them to file this suit.

The Claimants pray that the Claimants terms be converted under section 37(4) of the Employment Act. The Claimants relied on the decision of the Court in the case on *Kenya County Governments Workers Union v County Government of Nyeri*, the case of *Kenya Shoe and Leather Workers Union v Bata Shoe Company Limited* and the case of *Muran'ga County Public Service Board v Grace N. Makori*

Respondents Submissions

For the Respondents it was submitted that the Claimant were contracted as casual employees by the

defunct Kisumu County Council, Nyando County Council, Ahero Town Council and Muhoroni Town Council. The casual employees were engaged in a temporary contract of service subject to renewal after three months. After the promulgation of the Constitution of Kenya, 2010, the County Government of Kisumu inherited all the assets and liabilities of all the town and county councils within its jurisdiction. The claimants allege their employment was terminated on or about 6th January 2014 by the respondents. According to the audit report of August 2013 by the Transition Authority, the report noted that 3721 staff members were to be transferred from the defunct local authorities to the county government. The report however, failed to provide explicitly that the casual employees were contracted as permanent employees of the defunct local authorities.

It is the submission of the Respondents that this case is *res judicata* as final judgment has been delivered and the Claimants awarded compensatory damages in the sum of Kshs. 5,120,000 which the Respondents paid on 13th March 2017 and the Claimants should be stopped from litigating for a second time.

It is submitted that the orders sought would be prejudicial to the Respondents and would impede the operations of the Respondents in serving its citizens. It is submitted that the services of the Claimants were on temporary contract basis and the Claimants are estopped from trying to be engaged on permanent and pensionable terms. The Respondents urged the court to take judicial notice of the extensive budgetary deficits county governments are faced with, and submitted that recruiting the Claimants on permanent terms would be oppressive and amount to injustice.

It was submitted that the County Labour Officer's Report had made a finding that the contracts of the Claimants had expired on 31st December 2013 and were not renewed, and that they should be paid terminal dues as recommended in the report. It is submitted that the Court is *functus officio*.

On whether the Claimants are casual employees the Respondent submitted that an employer has the legal authority to vary the terms of a contract and relied on sections 9 and 39 of the Employment Act (which in the opinion of the court have no relevance to the issue at hand). It is submitted that the documents relied upon by the Claimants show that they were casual employees contracted by the predecessors of the Respondents and the Claimants cannot be heard to allege that they should be permanent and pensionable employees. It was submitted that it is not for the courts to re-write contracts for parties. It is submitted that it was never the intention of the Respondents engage the Claimants on permanent terms.

The Respondents relied on the following authorities:

Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd [1975]AC 581 on *res judicata*; ***Election Petition No.S 3,4 & 5 OF 2013 Raila Odinga & Others v IEEBC & Others*** on the doctrine of *functus officio*; ***Vice-Chairman & Managing Director v R. Varaprasad & Others [2003] LLR 707 SC*** on principle that it is not for courts to re-write the terms of contract between parties, ***Margaret O. Ochieng v National Water Conservation & Pipeline Corporation*** and ***Angela Nafula Khamala v Zacharia Barasa T/A Siama Traders*** on renewal of casual contract.

Determination

I have carefully considered the pleadings and submissions of parties. I have also considered previous proceedings including the reports of County Labour Officer and the judgement entered by consent of parties adopting the report of the County Labour Officer.

In this court's ruling of 30th April 2014 the Respondents were restrained from replacing the Claimants pending determination of this case and in the Report of the Labour Officer forwarded by letter dated 24th June 2016 and filed on 27th June 2016, it was the finding of the County Labour Officer that the Claimants were still in employment though their contracts had not been renewed nor had they been paid from 31st December 2013 when the contracts expired. That was the basis of the consent judgment upon which the Claimants were paid salary from January 2014 to August 2016. The tabulation was done during the month of September 2016, hence the payments up to August 2016. The case is therefore neither *res judicata* or

the court *functus officio* as submitted by the Respondent. The issues in the Claim were not all addressed by the consent judgment nor was the implementation of the county labour officer's report made in full.

The Respondents are against the confirmation of the terms of the Claimants to permanent terms, but besides the averments about budgetary constraints which they have asked the court to take judicial notice of, they have not stated that the jobs held by the Claimants are not necessary or that the jobs are not of a permanent nature. Their averments in the submissions that the audit report of August 2013 by the Transition Authority did not explicitly provide that casual employees were contracted as permanent employees is neither confirmed by evidence nor has it been denied that the number of 3721 staff members transited from the former councils did not include the Claimants. The evidence on record reflects that the Respondents indeed admitted the Claimants into their employment and issued them with employment letters on what was referred to albeit erroneously, as casual contracts.

The Respondents' arguments about the court should not re-write contract terms for parties flies in the face of the very explicit provisions of section 37 of the Employment Act and especially sub-section (4) which provides that:

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

The foregoing point to the fact that the Claimants are still in the employment of the Respondent and are working but not being paid salaries. I find that the Claimants who were engaged as enforcement officers or revenue collectors perform duties that are essential and of permanent nature and their engagement for long periods on what the Respondents refer to as casual terms constitutes unfair labour practice which is prohibited under Article 41 of the Constitution. I also make a finding that the Claimants are not casual employees but are regular staff of the Respondents by virtue of operation of law under section 37 of the Employment Act.

The financial position of the Respondents which the court has been urged to take judicial notice of is not amongst the facts set out in section 60 of the Evidence Act which the court may take judicial notice of and therefore must be proved. In any event the financial position of an employer is not a factor for the court to take into account in making a determination on the status of employment of an employee.

Conclusion

Having made a finding that the Claimants are regular staff of the Respondents, I make the following orders:

1. That the Respondents do pay the Claimants wages not paid from September 2016 to October 2017, to be tabulated by the County Labour Officer Kisumu within 30 days based on statutory minimum rates of pay applicable.
2. That the Respondents do immediately issue to the Claimants letters of appointment absorbing them into regular terms of employment with effect from 1st November 2017.
3. Respondents shall pay Claimants costs of this suit which the court assesses at a global figure of Kshs. 500,000 only.

Dated signed and delivered in Kisumu this 19th day of October 2017

Maureen Onyango

Judge