



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO 394 of 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**LINNET KHASOHA ABDALLA.....CLAIMANT**

**-VERSUS-**

**VIHIGA COUNTY PUBLIC SERVICE BOARD.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR VIHIGA COUNTY H.E. DR. W.K. OTTICHILO....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Claimant is the County Secretary and Head of Public Service of Vihiga County having been appointed by letter dated 20<sup>th</sup> April 2015 after approval by the Vihiga County Assembly. Prior to the said appointment the Claimant was an employee of the Public Service Commission seconded to Vihiga County as Interim County Secretary by the Transition Authority following competitive recruitment by the said Transitional Authority. She was also competitively recruited by the Vihiga County Public Service Board. Her letter of appointment as Vihiga County Secretary and Head of Public Service does not state the term of her appointment.

On 29<sup>th</sup> August 2017 the Office of the Governor, Vihiga County Government advertised several positions in THE Daily Nation Newspaper calling for qualified persons to apply for the advertised positions. Among the positions advertised was one position of County Secretary, a position which was at the time occupied by the Claimant.

Concerned about the advertisement of her position the Claimant alleges that she immediately sought audience with the 2<sup>nd</sup> Respondent who assured her that the advertisement of her position was erroneous and would be cancelled and that she need not worry. It is the Claimant's averment that on 19<sup>th</sup> September 2017 while still waiting for the advertisement to be cancelled the 2<sup>nd</sup> Respondent served her with a letter sending her on annual leave even though she had no outstanding leave as she had exhausted all her leave. She avers that her efforts to reach the 2<sup>nd</sup> Respondent to explain why she was sent on leave were futile.

On 22<sup>nd</sup> September 2017 the Respondents put up an advertisement notifying persons who had applied for the advertised jobs including the position of County Secretary to attend interviews. The interviews for County Secretary were scheduled for 2<sup>nd</sup> October 2017.

The Claimant was concerned about losing her appointment and filed this suit in which she alleges that the Respondents' actions are designed to edge her out of employment without following due process, that

should that happen she will lose her career that she has built over the past 25 years and she will be crippled economically as she has made financial commitments in the legitimate expectation that she will work until she attains retirement age. In support of this contention the Claimant submitted a copy of her payslip for the month of July 2017 which reflects a deduction to Kenya Commercial Bank of the sum of KShs. 28,800. The Claimant avers that she has been subjected to unfair labour practice, exposed to career stress, mental strain and embarrassment for which she claims damages.

In the Memorandum of Claim dated 22nd September 2017 the Claimant prays for the following orders-

- a. A declaration that the actions of the Respondents of seeking to terminate the Claimant's employment whilst she is on duty and before she attains her retirement age is malicious, illegal, unfair, unlawful and therefore null and void;
- b. An injunction to restrain the Respondents from processing applications so far received for the positions of the Claimant by dint of the advertisement of 29<sup>th</sup> August 2017 and to compel the Respondents to cancel the advertisement and process so far commenced and to permanently restrain the Respondents from unlawfully terminating the Claimant's employment before she attains her retirement age;
- c. An order compelling the Respondents to pay the Claimant punitive damages for breach of contract;
- d. Costs of the claim;
- e. Any other reliefs the honourable court may deem fit to grant.

Contemporaneous with the Claim the Claimant filed a notice of motion under certificate of urgency seeking the following orders-

1. The Honourable Court be pleased to certify this application urgent and admit the same for hearing *ex-parte* for grant of prayer 2 below;
2. The Honourable Court be pleased to issue an order restraining the Respondents and/or their appointed agents from processing applications so far received for the position of the Claimant by dint of the advertisement of 29<sup>th</sup> August 2017 and 22<sup>nd</sup> September 2017 and restraining the Respondents by themselves, agents or assigns or their sympathizers from executing their decision vide the said advertisements and the letter of the 2<sup>nd</sup> Respondent dated 19<sup>th</sup> September, 2017, particularly restrain the Respondents from interviewing any applicant as per the schedule indicated on their website on the indicated date or any other date and restrain the Respondents from interfering with the Claimant's duties as county secretary pending the hearing and determination of this application *inter-partes*;
3. The Honourable Court be pleased to issue an order restraining the Respondents and/or their appointed agents from processing applications so far received for the position of the Claimant by dint of the advertisement of 29<sup>th</sup> August 2017 and 22<sup>nd</sup> September 2017 and restraining the Respondents by themselves, agents or assigns or their sympathizers from executing their decision vide the said advertisements and the letter of the 2<sup>nd</sup> Respondent dated 19<sup>th</sup> September, 2017, particularly restrain the Respondents from interviewing any applicant as per the schedule indicated on their website on the indicated date or any other date and restrain the Respondents from interfering with the Claimant's duties as county secretary pending the hearing and determination of this claim;
4. Costs of the application be provided for.

I heard the application *ex-parte* on 25<sup>th</sup> September 2017 and issued orders that the application be heard

*inter-partes* on 28<sup>th</sup> September 2017. When the parties came for hearing of the application on 29<sup>th</sup> September 2017 they recorded a consent that the Claimant's position will not be filled pending hearing of the application.

The Respondents filed a Replying affidavit of **Hon. Dr. Wilbur Ottichilo** sworn on 5<sup>th</sup> October 2017 in which he avers that he has powers under section 44(1) of the County Government Act to competitively source for university graduates with a minimum of 10 years' experience in administration and management and the advertisement for the position of chief secretary complied with the statutory requirements. He further deposes that the Claimant does not possess the minimum qualifications as she does not have a university degree, that what is in the Claimant's Curriculum Vitae is a Masters Degree titled 'Diploma' from Patrice Lumumba Peoples Friendship University in Moscow, Russia, while the Claimant alleges that she pursued a Degree in Linguistics and Literature which she completed successfully leading to the award of a Masters of Arts in Philosophy/Linguistics. The deponent wonders how the Claimant was awarded a Masters without an undergraduate degree. Dr. Ottichilo deposes that the Claimant has never submitted certification from the Commission for University Education to authenticate the certificate.

It further the deposition of Dr. Ottichilo that under section 44(3) of the County Governments Act the functions of the County Secretary are to be performed subject to the direction of the executive committee but the Claimant has on several occasions sent out circulars on her own motion without approval of the county executive committee purporting to annul executive decisions of the Governor. He deposes that it is for these and other reasons that are still under investigation that the claimant's holding of the office of County Secretary is illegal and unconstitutional.

Dr. Ottichilo deposes that section 44(4) which provides that the County Secretary resigns by giving 30 days' notice to the Governor implies that the Governor may also terminate the County Secretary's employment by giving her 30 days' notice. He further deposes that although the Claimant's letter of appointment does not indicate she was employed on contract the advertisement for the job pursuant to which she was appointed stated that the terms of service was contract.

It is Dr. Ottichilo's further deposition that under section 42(1) the County Secretary holds office only until a new executive Committee is appointed and that under Article 179(7) whenever a vacancy arises in the office of governor the executive committee members appointed under clause (2)(b) cease to hold office. He further deposes that under section 42(2) of the County Governments Act a new executive committee is to be constituted within 21 days from the date of swearing in of members of the County Assembly.

When the application came up for hearing *inter-partes* on 28<sup>th</sup> September 2017 the parties recorded a consent to the effect that the Respondents shall not fill the position held by the Claimant pending the determination of the application. The parties further agreed to proceed by way of written submissions once the Respondent filed a response to both the application and the claim. The parties however did not file written submissions in time and on the date when the case was fixed for mention to confirm compliance with directions and take date for judgment the parties opted to make oral submissions.

Mr. Nyamweya instructed by N.E. Mogusu & Associates appeared for the Claimant while Mr. Sore instructed by GSLAW LLP appeared for the Respondents.

### **Submissions for the Claimant**

Mr. Nyamweya submitted that the Claimant did not dispute the power of the Respondent to terminate the employment of the Claimant but the manner in which it was exercising the power. He submitted that advertising the position of the Claimant amounts to termination of her employment without following due process. He submitted that under section 44 of County Governments act the Respondents can only terminate the Claimant's employment in compliance with the terms of her appointment. He submitted that she was on permanent and pensionable terms as reflected in her payslip.

Mr. Nyamweya submitted that the 2<sup>nd</sup> Respondent is not the authority to dispute the qualifications of the Claimant, that it is not disputed that she went through a competitive process before she was employed and that in any event the Governor is bound to comply with the provisions of Chapter 10 of the Constitution which provides for human dignity, accountability and transparency before terminating the employment of the Claimant. He urged the court to grant the prayers of the Claimant.

### **Respondent's Submissions**

Mr. Sore submitted that the statute prescribes the minimum qualifications of County Secretary to include a first degree which the Claimant does not possess. He submitted that this is an illegality that the Claimant has not controverted. He submitted that the practice is the it is the Claimant to provide certification from Commission of Higher Education.

Mr. Sore further submitted that a County Secretary is a member of the County Executive Committee (CEC) as Secretary as sated by the Court of Appeal in the Case of County Government of Nyeri & Another v Cecilia Wangeci Ndungu. He submitted that CEC members are in office only until a new one is in place. He submitted that the positions have been advertised so that at the end of the process the officer can vacate. He submitted that the Claimant's contention that her recruitment is permanent and pensionable cannot hold as the advertisement for the position expressly stated that it was on contract terms. A copy of the advertisement was exhibited in the replying affidavit but not identified. He further submits that her letter of appointment does not state the terms of her appointment to be permanent and pensionable and that a payslip does not provide for terms of appointment. He further submitted that the 1<sup>st</sup> Respondent is not the appointing authority and its documents cannot provide for the terms of the Claimant. He submitted that the law is clear that the Governor appoints and if the Claimant is not qualified the contract is against statute.

Mr. Sore further submitted that the position of County Secretary is like that of Cabinet Secretary in the National Government under Article 154(1) of the Constitution which is an office in the public service. He submitted that section 44 states it is an office in public service. He submitted that the terms of all members of the CEC come to an end at the end of the Governor's term as was stated by the Court of Appeal in the case of Cecilia Wangeci Ndungu. Mr. Sore submitted that CEC is defined under section 2 of the County Governments Act which makes reference to Article 179 of the Constitution.

### **Claimant's Rejoinder**

In a brief rejoinder Mr. Nyamweya submitted that the Claimant has not been asked to prove the validity of her qualifications, that the County Secretary is not a member of CEC and does not leave office with the members of the CEC. He further submitted that the position of County Secretary cannot be compared with those of Cabinet Secretary as the constitution did not devolve presidential powers to governor but rather it is executive functions that are devolved, that the Constitution creates the position of Cabinet Secretary while section 44 of County Governments Act creates the position of County Secretary. He submitted that section 44 has not been declared unconstitutional. He submitted that section 44 provides that the County Secretary is the head of public service and section 59 sets out the powers of the County Public Service. On terms of service he submitted that the Claimant's letter of appointment does not state she is permanent and pensionable but refers to public service regulations. He submitted that the Claimant has legitimate expectations. He submitted that Article 10 of the Constitution demands that the Respondent follows due process.

### **Determination**

I have considered the pleadings and submissions of the parties. The issues that arise for determination in my view are the following:

1. What are the terms of employment of the Claimant;
2. Whether the Respondents' actions amounted to constructive dismissal of the Claimant;

3. Whether the Claimant is entitled to the prayers sought.

There are other issues not directly compacting the main issues in dispute that ought to be dealt with first.

The Claimant raised the issue about the failure of the 2<sup>nd</sup> Respondent to file a response to both the Claim and application. It was the Claimant's position that the 1<sup>st</sup> Respondent admitted the facts and allegations in the Claim.

The Claim does not accuse the 1<sup>st</sup> Respondent of committing any wrong against her. The 1<sup>st</sup> Respondent had nothing to respond to in the circumstances as all allegations of the Claimant are in reaction to the actions taken by the 2<sup>nd</sup> Respondent. There is therefore nothing in the Claim for the 1<sup>st</sup> Respondent to Respond to. I do not find its failure to respond to be tantamount to admitting the allegations in the Claim and I find the Responses by the 2<sup>nd</sup> Respondent to sufficiently cover the 1<sup>st</sup> Respondent.

The Respondents also raised the issue of qualifications of the Claimant and the validity of her appointment on grounds that she was not interviewed for the position. From the evidence on record, the Claimant was interviewed and selected for the position of Interim County Secretary by the Transitional Authority. This fact is not denied by the Respondent. The Transitional Authority must have found the Claimant suitable for the position in accordance with the requirements of the County Governments Act. She was supposed to return to the National Government upon the County Government recruiting its county secretary but it is the county Government who wrote to the Transition Authority asking to retain her as substantive county secretary having found her suitable for the job. No complaints were addressed to the Claimant regarding her qualifications by either the former or the current government. The Respondents can therefore not use the issue of qualifications as a defence in this suit when the Claimant has not been asked to respond to the same issues and when it is not the reason for the advertisement of her position. This also applies to her qualifications. Nobody asked the Claimant to produce a certificate from the Commission of Higher Education to prove that the qualifications she holds are not a degree or equivalent. She cannot be accused of failing to produce that which she has not been asked to produce.

The second issue raised by the Respondents is that the Claimant is a member of the County Executive Committee and her term comes to an end upon a new County Executive Committee coming into office. Membership of County Executive Committee is provided for under Article 179 of the Constitution as follows-

*179. (1) The executive authority of the county is vested in, and*

*exercised by, a county executive committee.*

*(2) The county executive committee consists of—*

*(a) the county governor and the deputy county governor; and*

*(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.*

*(3) The number of members appointed under clause (2) (b) shall not exceed—*

*(a) one-third of the number of members of the county assembly, if the assembly has less than thirty members; or*

*(b) ten, if the assembly has thirty or more members.*

*(4) The county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively.*

*(5) When the county governor is absent, the deputy county governor shall act as the county governor.*

*(6) Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.*

*(7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause*

*(2) (b) cease to hold office.*

It is evident from the foregoing that the County Secretary is not a member of the Executive. His appointment and removal from office are as provided for in section 44 of the County Governments Act. The office does not fall vacant by operation of law as provided for the CEC Members.

### **Term of Office of Claimant**

The letter of appointment of the Claimant does not state what her term of office. The Claimant alleges she is on permanent and pensionable terms as stated in her payslip while the Respondent argues her appointment is on fixed contract terms as specified in the advertisement for the job. With the conflicting information the Court is unable to determine whether the Claimant was on fixed term contract or on permanent and pensionable terms of employment.

It is the duty of an employer to set terms and conditions of employment. The Respondents' predecessor unfortunately failed to specify this very important term of employment. In view of the fact that the advertisement of the position of county secretary indicated that it will be on contract terms the Claimant is deemed to be serving on contract terms.

### **Termination of employment of County Secretary**

Section 44 of the County Governments Act provides for appointment of County Secretary as follows:

#### ***Appointment of county secretary.***

*44.(1) There is established for each county the office of the county secretary who shall be secretary to the county executive committee.*

*(2)The county secretary—*

*(a) shall be competitively sourced from amongst*

*persons who are university graduates with at least ten years experience in administration and management;*

*(b) shall be nominated from persons competitively sourced under paragraph (a) by the governor and, with the approval of the county assembly, appointed by the governor; and*

*(c) may, subject to the conditions and terms of appointment, be dismissed by the governor.*

*(3) The county secretary shall —*

*(a) be the head of the county public service;*

*(b) be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee;*

*(c) convey the decisions of the county executive committee to the appropriate persons or authorities; and*

*(d) perform any other functions as directed by the county executive committee.*

*(4) The county secretary may resign from office by giving thirty days written notice to the governor.*

As expressly provided in section 44(2)(c) a county secretary may be removed from office by the Governor. However such removal must comply with the rules of natural justice and are subject to the terms and conditions of appointment. In the present case the Claimant's terms of appointment do not set out her terms of appointment. The court must therefore consider if the action of the 2<sup>nd</sup> Respondent was reasonable and complied

In the case of **County Government of Nyeri v Cecilia Wangeci Ndungu** the Court of Appeal cited with approval the decision of the Supreme Court of India in **BP Singhal v Union of India and Another** where the court stated:

*The President in exercising power under Article 156(1) should act in a manner which is not arbitrary, capricious or unreasonable. In the event of challenge of withdrawal of the pleasure, the*

*court will necessarily assume that it is for compelling reasons. Consequently, where the aggrieved person is not able to establish a prima facie instance of arbitrariness or malfeasance, in his removal the court will refuse to interfere*

The Court of Appeal further referred to the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1974) 2 ALL ER 680** in which **Lord Green** expressed himself as follows with relation to unreasonableness:

*“It is true, the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word “unreasonableness” in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant in the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting “unreasonably”. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.”*

Article 47 (10) of the Constitution provides for a right fair administrative action as follows:

**47. (1) Every person has the right to administrative action that is**

**expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is**

**likely to be adversely affected by administrative action, the person has**

**the right to be given written reasons for the action.**

*(3) Parliament shall enact legislation to give effect to the rights*

*in clause (1) and that legislation shall—*

*(a) provide for the review of administrative action by a court or,*

*if appropriate, an independent and impartial tribunal; and*

*(b) promote efficient administration.*

The Respondents have not denied the Claimant’s averments that her position was advertised on 29<sup>th</sup> August 2017 when the position was not vacant and without any notification to her or that upon inquiry she was assured by the 2<sup>nd</sup> Respondent that the advertisement was a mistake and will be withdrawn. The Respondents have further not denied that the Claimant was sent on compulsory leave by letter dated 19<sup>th</sup> January 2017 even though she had exhausted her leave days. Advertisement of a position that is not vacant amounts to constructive dismissal of the holder of the position. It also amounts to denial of fair administrative action as envisaged in Article 47 of the Constitution and to *Wednesbury unreasonableness*. The 1<sup>st</sup> Respondent ought to have notified the Claimant about the intention to terminate her employment in terms of section 44(2)(c) of the County Governments Act and given her reasons for so doing. He ought to have given her an opportunity to express herself regarding those reasons and taken them into account before considering the termination and the advertisement of the position.

From the foregoing I find that the action of the 1<sup>st</sup> Respondent amounts to constructive dismissal and is therefore unlawful.

### **Whether the Claimant is entitled to the prayers sought**

The Claimant prayed for a declaration that the actions of the Respondents in malicious, illegal, unfair and unlawful and therefore null and void. I hereby do declare the actions of the Respondents in advertising the Claimant's position unfair and unreasonable. I have considered the prayer to declare the actions of the Respondents null and void. The position held by the claimant is very critical to both the county and the governor. The county secretary is the head of county public service. The other roles of the county secretary as spelt out in section 44 being secretary to the county executive committee and conveying executive decisions. The county secretary also performs other functions as directed by the County Executive Committee. For this role to be carried out effectively there must be harmony and good working relations between the County secretary and the governor as well as all members of the County executive committee who are all appointed by the governor.

Taking all these into account it is not in the public interest or in the Claimant's own interest to force impose her on the Governor who has expressed his intentions to replace her following his election in August 2017. There is already strained relations between the Governor and the Claimant which would hurt service delivery to the people of Vihiga County. For these reasons I find that this is not a case suitable for the orders sought by the Claimant. I will instead deem the actions of the 2<sup>nd</sup> Respondent as unfair dismissal and grant the Claimant compensation under section 49 of the Employment Act. Taking into account all circumstances of the case, I award her 12 months' gross salary. In addition the Claimant is entitled to gratuity for the period served and to notice of one month.

### **Conclusion**

In conclusion I find the action of the Respondents to amount to constructive dismissal of the Claimant and award her the following-

1. One month's salary in lieu of notice at Kshs. 274,000
2. Compensation Kshs. 3,288,000
3. Gratuity from 1<sup>st</sup> June 2014 to 30<sup>th</sup> November 2017
4. The Respondents will pay Claimants costs.

**Dated signed and delivered in Nairobi this 7<sup>th</sup> Day of November 2017.**

**Maureen Onyango**

**Judge**