



**Yaseen v Judicial Service Commission (Cause 1318 of 2017)
[2017] KEELRC 444 (KLR) (7 November 2017) (Ruling)**

Naim Bilal Yaseen v Judicial Service Commission [2017] eKLR

Neutral citation: [2017] KEELRC 444 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1318 OF 2017

M MBARŪ, J

NOVEMBER 7, 2017

BETWEEN

NAIM BILAL YASEEN CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. The ruling herein relates to two applications, one filed by the claimant and dated 12th July, 2017 and the other filed by the respondent and dated 25th July, 2017.
2. On the application dated 12th July, 2017 filed by the claimant through a Notice of Motion and under the provisions of article 23 of the constitution, section 3(1) and (3) of the Industrial Court Act, 2011 [Employment and Labour Relations Court Act, 2011] and Rule 16 of the Industrial Court Rules 2010 [Employment and Labour Relations Court (Procedure) Rules, 2016] and sections 4, 6, 7 and 8 of the Fair administrative Action Act, 2015 and seeking for orders that;

Pending the hearing and determination of this application and or suit, a conservatory order does issue to stay the decision contained in or implementation or execution of the letter dated 7th July, 2017 addressed to the claimant by the Judicial Service Commission, the respondent herein.

Pending the hearing and determination of this application and or suit the claimant be reinstated to employment at the Judicial Service Commission on the same terms and conditions of employment."

3. The application is supported by the claimant's affidavit and on the grounds that in violation of the law, the respondent has determined his employment and acted in bad faith, with malice and in a biased



manner by releasing him to his former employer when there is no longer a relationship[between the claimant and his former employer. Such action amounts to unfair termination of employment and which renders the claimant unemployed and hence shall occasion him and family irreparable loss. The respondent denied the claimant the right to fair hearing in violation of fair administrative action and the rules of natural justice.

4. In his affidavit, the claimant avers that the respondent being a constitutional commission established under the constitution of Kenya, 2010 (JSC). Before the claimant joined the JSC he worked with Immigration Department, Ministry of State for Immigration and Registration of Persons (the Ministry). By an advertisement in the Daily Nation of 14th October, 2011, the JSC advertised for the position of Director of Public Affairs and Communication. On 2nd February, 2012 the claimant was offered the position and letter issued to this effect setting out the terms and conditions of service would be communicated in due course.
5. As the said terms and conditions of employment had not been communicated to the claimant and to avoid him losing his status as a permanent and pensionable employee of the Ministry, he applied for secondment to JSC which was approved and he was released for 3 years only. Such time was to end on 1st June, 2015.
6. While the claimant was employed by the JSC, a decision was made that his employment should not be on contract basis but on permanent and pensionable terms. as is the norm this was documented in various records and the claimant completed form for new employees and he joined the defined benefits scheme and in the letter to the bank. Upon the determination that the claimant was on permanent and pensionable employment with the JSC he immediately ceased being on secondment from the Ministry. His pension's dues were directed to the JSC and Judicial Service Staff Superannuation (Defined Benefits) Scheme that is managed by Alexander Forbes Financial Services (E.A) Limited as opposed to the Director of Pensions which applied while the claimant was under the Ministry.
7. With the employment by the JSC the claimant got an enhanced salary package with benefits to self and family and termination of such employment will cause him irreparable loss.
8. On 11th July, 2017 the claimant received letter dated 7th July, 2017 from the JSC informing him that he had been released back to the ministry. Such communication amounts to termination of his employment with JSC as the terms changed when he became the JSC employee on permanent and pensionable terms and his secondment has since lapsed as of 1st June, 2015. There is a legitimate expectation that upon becoming a permanent and pensionable employee of the JSC, such employment can only termination by retirement or through other lawful means.
9. Before the JSC took action against the claimant, there was no notice, hearing or chance to argue his case and thus the same amounts to termination of employment. There is no guarantee that the claimant will be received back by the Ministry which has since ceased remittance of 31% of his basic salary to the director of pensions. To return would mean a reduced salary which is not just or fair in the circumstances. The claimant stands to suffer irreparable loss and damage unless the orders sought are granted.
10. In reply the JSC on 25th July, 2017 filed a Replying Affidavit sworn by Anne A Amadi and who avers that as the Secretary to the JSC, there are constitutional and statutory provisions governing the appointment and recruitment process by the JSC pursuant to article 172(2) of the constitution, 2010 and the Third Schedule of the JSC Act, 2011 and the regulations thereto. Under section B.33 of The Human Resource Policy and Procedures Manual for Public Service, secondment of officers from civil service to other organisations is for a period not exceeding three years and must be approved by



- the Ministry for Public Service. any request for extension of the secondment period from the host organisation must be made to the authorised officer in writing one month before the scheduled period expires and the authorised offer reserves the right to recall the staff prior to the end of secondment.
11. The claimant was serving on secondment in the Judiciary from the Ministry of Information and Communications on secondment with effect from 1st June, 2012 and ending 31st May, 2015.
 12. By letter dated 12th November, 2009 the Ministry of Information and Communication appointed the claimant on probationary terms. By letter dated 25th May, 2011 the Ministry confirmed the claimant into permanent and pensionable terms with effect from 6th December, 2009.
 13. On 4th October, 2011 the JSC advertised for Director of Public Affairs and Communication. On 30th May, 2012 the Ministry approved the secondment to the JSC of the claimant. By letter dated 4th June, 2012 the Ministry approved the claimant's secondment to the JSC for a period of 3 years and ending 31st May, 2015 and his 31% basic pay being pension was to be remitted to the Director of Pensions.
 14. The claimant was thus appointed by the JSC on secondment and not as a permanent employee. The claimant did not apply for secondment to avoid losing his conditions and terms of employment as alleged. The claimant would have had to resign to be employed by the JSC.
 15. By a memo dated 5th June, 2012 the office of the Chief Registrar Judiciary informed the director of human resource and administration that the claimant had reported to the office on 31st May, 2012. By a personal data form dated 6th June, 2012 the claimant confirmed he was on secondment to the judiciary and by letter dated 15th January, 2013 the Ministry informed the claimant that the authorised officer had approved his secondment to the JSC for 3 years and the same would lapse on 31st May, 2015 whereupon he was to report back to assume his duties with immediate effect.
 16. The claimant's secondment to the judiciary came to an end and he has irregularly been serving as Director of Public Affairs and Communication.
 17. A scrutiny on the claimant's record by the JSC is that there is no extension of his secondment period by the Ministry; an amount of 31% of his basic salary had not been remitted to the Director of Pensions as required; the terms of engagement by the judiciary were not stipulated as permanent but being on secondment; and the claimant was erroneously placed on permanent provident terms without supporting documents.
 18. By letter dated 7th July, 2017 the JSC informed the claimant that it had resolved at its meeting on 3rd July, 2017 to release him back to the Ministry with immediate effect as his secondment to the judiciary had lapsed on 31st My, 2015. His benefits were therefore to be processed and therefrom a deduction of what the claimant owed the judiciary.
 19. By a salary advice dated 13th July, 2017 the judiciary advised the claimant that his secondment ended with effect from 7th July, 2017 and that he would only be paid up to such date and his name removed from the pay roll.
 20. The claimant has attached annexure 'NBY-6' for Dismus Omondi Obondo whose designation is different from what the claimant held with the judiciary. Letter dated 5th September, 2012 to manager, Kenya Commercial Bank annexure 'NBY-6' is not for the benefit of the claimant.
 21. Upon the expiry of his secondment with the judiciary, the claimant did not ask for the extension on the same. The judiciary did not request for the extension of the 3 years of secondment as required in the Regulations.



22. The claimant failed to inform the court that the Ministry by letter dated 9th June, 2015 had notified him that his secondment to the judiciary had lapsed with effect from 31st May, 2015. The claimant was under an obligation to return to the ministry as his parent employer. The claimant continued to serve in the judiciary unlawfully and without due procedure after the 31st May, 2015. It is within the mandate of the respondent to review any appointments or replacements of employees in the judiciary and regularise the placement in accordance with the law.
23. The release of the claimant back to the ministry is not an unfair administrative action. This is a duty and obligation of the JSC to rectify the irregular employment of the claimant after 31st May, 2015 by releasing the claimant as his secondment had lapsed and no request for extension had been made.
24. The application by the claimant has no merits and the orders issued by the court restraining the respondent should be discharged.
25. On the second application by the respondent, Judicial Service Commissions (JSC) dated 25th July, 2017 and filed on 28th August, 2017 the same based on the provisions of article 172(1) of the constitution, 2010, section 3(c) and 4(j) of the Judicial Service Act, section 12(3)(viii) of the Employment and Labour Relations Court Act, Rules 17(1), (2), (3), (7) and (8) of the rules thereto and seeking for orders that;

The interim conservatory order issued on 13th July, 2017 restraining the respondent from recruiting and or replacing any person for the position of director public affairs and communication, removing the name of the claimant from the payroll or denying him any allowances, benefits or privileges and reinstating the respondent [claimant?] to employment on the same terms and conditions of employment be discharged and set aside.

26. The application is supported by the annexed affidavit of Anne A Amadi and on the grounds that as the secretary to the JSC has authority to support the application. The claimant was serving in the judiciary on secondment from the ministry from 1st June, 2012 and lapsed on 31st May, 2015. By letter dated 9th June, 2015 the Ministry informed the claimant that his secondment had lapsed with effect from 31st May, 2015 and was required to report back to the ministry with immediate effect. The claimant withheld this information from the JSC and only became aware of the same on 16th February, 2017 when the chairperson of the Public Service Commission forwarded the same upon request of the JSC.
26. Other grounds in support of the application are that by letter dated 7th July, 2017 the JSC informed the claimant that following its meeting of 3rd July, 2017 it had been resolved that he be released back to his parent employer, the ministry as his secondment had lapsed.
27. The claimant is guilty of material non-disclosure and continues to enjoy the interim orders issued by the court on 13th July, 2017 whilst the orders sought to be discharged and set aside as his secondment to the judiciary lapsed and has been serving in the judiciary irregularly.
28. The interim orders issued on 13th July, 2017 were to allow the claimant remain in office and allow the respondent to reply herein and inter parties herein on 26th July, 2017. On the due date the court allowed the claimant to file a Further Affidavit in 7 days and attend hearing on 31st July, 2017. On the due date the court was not sitting and the duty judge directed hearing on 19th September, 2017. Interim orders have been extended since.
29. The JSC seek the interim orders be discharged as the claimant is guilty of material non-disclosure when he obtained interim orders herein. Had he disclosed that he had been advised his secondment had lapsed via letter of the Ministry and dated 9th June, 2015 the orders issued should not have arisen. The



- office of Directorate of Public Affairs and Communications is a crucial department in the judiciary as the director is responsible for the development and implementation of an internal and external communication policy and would be in the public interest for the court to discharge the interim orders. The respondent being a constitutional commission funded by the public is accountable to the public and thus in the public interest to have the JSC remove the claimant from the payroll.
30. The claimant replied to the JSC application by his Replying Affidavit sworn on the 5th September, 2017 and replies that the application seeking to discharge the interim orders of 13th July, 2017 and based on alleged material non-disclosure does not disclose to the court that the letter dated 9th June, 2015 was not brought to the attention of the claimant as such letter though addressed to him was to be delivered through the office of the Chief Registrar, Judicial Service Commission, Nairobi. Failure to deliver the letter or act on it is not on the claimant but upon the JSC which is liable for the omission. The alleged letter is not acknowledged by the claimant or the JSC as is the practice upon receipt of all official communications.
 31. The respondent has come to court with unclean hands as there is disobedience of the court orders. On 11th August, 2017 the claimant reported to work only to find the lock to his office had been changed and he had no access. An email was sent the secretary, JSC but there was no response. On 14th August, 2017 the claimant's advocate wrote to the respondent on this action which amounted to contempt of court. This amounts to the respondent's disrespect and disobedience of the court process and do not deserve the orders sought.
 32. Both parties filed written submissions.
 33. The claimant submits that upon his employment by the JSC and together with other employees employed at the same time, they were given permanent and pensionable terms of employment. Following his secondment from the Ministry, the JSC failed to deduct and remit the 31% from his salary and due to the Director of Pension. The respondent has made various communications nothing that the claimant is in their permanent and pensionable terms of employment. In the pay slips issued to the claimant, all note he is permanent and pensionable. The enrolment of the claimant to the JSC staff benefits scheme and failure to remit the due pension dues to the director of pensions confirm the employment with the JSC.
 34. The claimant also submits that under articles 41, 47 and 236 of the constitution, 2010 the JSC by sending him letter dated 25th July, 2017 ambushed him out of his employment contrary to fair labour practices, fair administrative action and he became a victim of discrimination for having performed his duties in accordance with the law and thus his removal from office is in violation of the constitution.
 35. The claimant has relied on the following authorities and cases, prof. Francis M Njeru versus Jomo Kenyatta University of Agriculture and Technology [2013] EKLK; Prof. Olive M Mugenda 7 another versus Okiya Omtata Okoiti & 4 others [2016] eKLR; Kenya breweries Ltd & others versus Washington Okeyo [2002] eKLR; Elizabeth Washeke & 62 others versus Airtel networks (k) Ltd & another [2013] eKLR.
 36. The respondent submits that at all material times the claimant was the employee of the ministry from 6th December, 2009 until 4th October, 2011 when JSC advertised and offered the claimant the position of director of public affairs and communications. The ministry by letter dated 30th May, 2012 approve the request to second the claimant to the JSC for 3 years and ending 30th May, 2015. By letter dated 9th June, 2015 the ministry informed the claimant that his secondment had lapsed and he was to return to his duties. The claimant failed to disclose this communication to the court.



37. The respondent also submits that under the constitution and statutory provisions and regulations of Public Service following the secondment of the claimant to the JSC, the principal employer remained the Ministry and when the secondment period ended he was due to return as directed by the JSC in its notice and putting into account letter requiring him to report back dated 9th June, 2015. The secondment was not extended and as such, the claimant was due to return to his parent employer.
38. On the orders granted by the court on 12th July, 2017 the same should be discharged as there is no prima facie case to justify the orders. The prayers seeking to be reinstated is final and should only issue upon both parties going into a full hearing and as required under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
39. The respondent has relied on the cases of *Giella v Cassman Brown* [1973] EA; *Mrao Limited v First American bank Limited* [2003] KLR; *Trusted Society, of Human Rights Alliance v nakuru Water and Sanitation Services Company & another* [2013] eKLR; *Fred A Odhiambo v Attorney General & another* [2013] eKLR; *Alfred Nyungu Kimungui v Bomas of Kenya* [2013] eKLR.

On the emerging issues for determined I summarise them as follows;

Whether the orders issued on 13th July, 2017 should be discharged;

Whether the respondent should be restrained from recruiting and or employing any person in the position of Director Public Affairs and Communication or removing the name of the claimant from the payroll or denying him any allowances and benefits or privileges that he enjoys by virtue to his employment;

Whether the orders sought by the claimant should issue pending hearing and determination of his claims against the respondent.

40. The claimant has made reference to his Supplementary Affidavit but this is not on file. However on issues raised in both applications, I find material sufficient to determine the issues arising.
41. The question of secondment of an employee from one employer to another was considered by this court in the context of secondment of employees between the national government to the counties in the case of *Public Service Commission versus County Government of Bomet et al* [2016] eKLR where the court held that;

Secondment of public officers though not specifically addressed under the Employment Act, 2007 is given meaning under articles 187(2) read together with 189(1)(b) of the constitution, on the transfer of functions from the various levels of Government recognising the responsibility to assist, support and consult and, as appropriate, implement the legislation of the other level of government; and to this end, the 6th schedule at section 15, the transfer of National functions to County governments. I find The County Government Act is one such legislation to this end.

42. Therefore where the JSC has power to hire own employee, such right is given meaning under the provisions of the Judicial Service Act, 2011 when they advertised and offered the claimant employment.
43. Rationale to the above is as held in *David Barasa v British Peace Support Team & Another* [2016] eKLR that;

A Secondment in its nature is where a principal employer with the consent of the employee concerned, second the employee to another department/agency or as the executing



authority determines, accepting the employee in the same service for a particular service or for a period of time. Such an employee remains subject to the terms and conditions of any contract entered into with his consent including that of the principal employer as well as the rules and regulations of the employer where he is so placed. [Emphasis added].

44. The above position is given more emphasis in the case of *Rev. John Mugania v Kenya Methodist university & Prof. Mutuma Mugambi*, Cause No.133 of 2013 the court held that;

... secondment refers to temporary leave of absence from service of the principal employer to serve any other employer as the parties may agree or may grant permission for such temporary absence. During the secondment, the person proceeding on secondment must conclude a valid contract of employment with such other employer. The employer during secondment is responsible, within the terms of the contract of employment, to meet the salary and other benefits of the person so seconded. The person on secondment is obligated to work for such employer and pay loyalty to the employer, within the terms of the contract, throughout the secondment period. The secondment transaction does not, in absence of an agreement to that effect, transfer to the employer, liabilities for pension of the person on secondment, unless this is expressly so stated prior to the secondment."

45. Thus the clarity now built herein that the claimant requested for secondment from his principal employer, the ministry and such request was approved and given a time period of 3 years and ending 31st May, 2015 recourse should have been given to such authority and approval before the claimant moved on with his continued service with the JSC after such time lapse. Though the letter now attached by JSC and dated 9th June, 2015 requiring the claimant to report back to his line ministry and employer is not acknowledged as received by him, the duty was upon the claimant to regularise his secondment with the JSC before his principal employer and Ministry wrote to him.

46. The court is moved to discharge orders issued on 13th July, 2017 on the grounds that there was failure to disclose material facts by the claimant. That the claimant failed to set out that his employment with the respondent was on secondment from the Ministry for 3 years and such time has since lapsed and he has been recalled back by letter dated 9th June, 2015 which he did not attach to his application and had this been done, the interim orders issued and restraining the respondent from replacing him and removing him from the payroll should not have issued.

47. In his application, the claimant has confirmed that by advertisement in the media on 14th October, 2011 by the JSC for the position of Director of Public Affairs and Communication he applied and was interviewed and on 9th March, 2012 he was offered the position. the terms for such employment were to be provided in due course.

48. At paragraph 7 of the Claimant's Supporting Affidavit dated 12th July, 2017 he avers that in order not to lose his status as a permanent and pensionable employee with his then employer and Ministry, he applied for secondment to JSC and which application for secondment was approved and he was released to the JSC for 3 years only. Such time was to end on 1st June, 2015.

49. The letter of secondment of the claimant to the JSC is dated 15th January, 2013 under the hand of the Permanent Secretary, Ministry of Information and Communications. For the period of secondment, the claimant through the JSC was directed that;

... please ensure that you remit 31% of your equivalent Civil Service basic salary to the Director of pension, to service your pension. The account particular is detailed here below for remitting 31% pension contribution through EFT/RTGS."



50. This thus build clarity on the nature of employment between the claimant and the JSC. This was on secondment from the Ministry to the JSC for a specified period, terms and conditions. The term ended on 31st May, 2015 and the letter dated 6th June, 2015 in its contents is not denied save that the claimant asserts that he did not receive such letter having been sent through the JSC. There is no acknowledgment of receipt by him.
51. To support his application the claimant asserts that in the course of his employment with the JSC a decision was made that his employment was not on contract but on permanent basis. This was documented in various letters, documents and communications particularly the Completion Form by new employees, the pay slip, respondent letter to Kenya Commercial Bank and the claimant was joined into the staff defined benefits scheme.
52. The JSC as an independent institution has the power to hire its own employees. This power is constitutional and based on its constitutive statute, the Judicial Service Act, 2011. Therefore, through the advertisement for the position of Director of Public Affairs and Communications on 14th October, 2011 the claimant was offered the same vide letter to him and dated 9th march, 2012. Noting his circumstances and the offer made, the claimant took the option to apply for a secondment from the Ministry to join the JSC and he was allowed 3 years and ending 31st May, 2015.
53. The claimant's employment thus remained with the Ministry and not the JSC. The letters relied upon and noting communication on his personal data, pay slip, letter to Kenya Commercial Bank and inclusion to the staff defined benefits scheme, in my view do not change the employment status of the claimant from the Ministry to the JSC. The benefits that went with the secondment were granted without discrimination against the claimant and the same do not confer an employment status between him and the JSc at any given time. See Captain Jorim Owino Nyamor and Captain Abdi Ali hersi Idle versus kenya Airways Limited, Cause No.1621 of 2015 where the court held at paragraph 113 that;
- ... The applicable banking rules and procedures for a mortgage and loans cannot change the terms and conditions of employment. A letter to a third party such as a commercial bank does not change the terms and conditions of the CBA or an employment contract between an employer and employee.
54. As correctly noted by the respondent in submissions, the pay slip of the claimant attached to his application belong to a third party. The letter to Kenya Commercial Bank in noting that the claimant is serving on permanent and pensionable terms is correct, with his secondment from the ministry; the permanent and pensionable terms of the claimant with his parent employer did to change. Such is a fact that the JSC could admit as it was not upon the JSC to make the change. At all material times, The claimant remained a permanent and pensionable employee of the Ministry.
55. In his submissions, the claimant made extensive reference to the case of Mary Nyangasi Ratemo & 9 others v Kenya Police Staff Sacco Limited & another [2013] eKLR and I have gone through this case and find fundamental differences with his case. The claimant had an offer of employment by the JSC, he opted for a secondment from his parent employer and thus did a written request for secondment which was approved and given a time period. This is unlike in the cited case where the employees continued in service without any documentation, request, approval or written instructions and hence the application of sections 10 and 13 of the Employment Act, 2007. The claimant's case has a documentary trail which support his employment with the line ministry and the condition of secondment to the JSC.
56. The claimant, now with knowledge and information of letter directing him to report back to his employer on the lapse of his secondment must abide. Such cannot be put in abeyance after receipt of



letter dated 7th July, 2017 by his receiving employer and JSC that he has been released to the parent employer, the Ministry. With such notice, effectively the claimant's secondment with the JSC which in essence lapsed on 31st May, 2015 was regularised and with his return to the parent employer, such cannot be defined as an unfair labour practice.

57. For the time the claimant has been in the service of the JSC and up and until the court issued interim orders which have remained in force, the claimant has offered service for which he ought to receive his due payments, allowances and benefits. As employment is not terminated and remain with the parent employer the ministry, the apprehension that the claimant will be unable to take care of self and family does not arise. The claimant has well served the JSC and his return to the parent employer and another arm and or department of government should not be a matter for denial of his right to undertake his duties and paid the due salary. See *Severine Luyali v the Minister Foreign Affair & International Trade & 3 others* [2014] eKLR.
58. Section 19 read together with section 21 of the Employment Act, 2007 requires that lawful deductions from a salary be effected by the employer and particularly with regard to statutory deductions, such must be done from source bad before an employee can receive the due salary or wage. In the communication by the Ministry and the parent employer of the claimant dated the claimant was required to remit his pension dues to the Director of Pensions and the accounts to which such was payable set out in the letter by the Permanent Secretary. Though this is set out for the claimant to remit, the employer is vested with the duty to deduct and remit statutory deductions.
59. Without going into the merits of the same and noting the matters set out in the Memorandum of Claim, the Statement of Defence and Counter-Claim and appreciating that the claimant was introduced to the JSC staff benefits Scheme, I will leave it at that. Save to add, the claimant in his release back to the line ministry and employer, and communication dated 9th June, 2015 and sent through the office of the Chief Registrar, Judicial Service Commission on the secondment of the claimant which was not acted upon by the respondent/JSC for the claimant to cease all his duties under JSC and revert to the line ministry as required, he should not be victimised for filing this suit. I find the suit has good basis, putting into account the notice dated 7th July, 2017 as issued and the letter dated 9th June, 2015 only having come to the attention of the claimant within these proceedings. I refer the parties to the provisions of section 46(h) of the Employment Act, 2007.
60. However, where the claimant requires time to regularise payment of any liabilities owing to the JSC, such is a matter that can be addressed between the parties upon reasonable notice. The cause in issue herein being that of employment, the claimant shall be paid for time served with the attendant benefits and allowances.

Accordingly orders issued on 12th July, 2017 are hereby vacated and such addressed both applications dated 12th July, 2017 and 25th July, 2017. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2017.

M. MBARU

JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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