



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 48 OF 2017**

***(Before D. K. N. Marete)***

**JACKSON CHERUIYOT RONO.....CLAIMANT**

**VERSUS**

**COUNTY SECRETARY BOMET.....1ST RESPONDENT**

**BOMET COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT**

**JUDGEMENT**

This matter is brought to court by way of a Statement of Claim dated 21st September, 2017. It does not disclose any issue in dispute on its face.

The 1st respondent in a 1st respondent Statement of Response to the claim dated 9th October 2017 denies the claim and prays that it be dismissed with costs. This is likewise for the 2nd respondent in her Statement of Response dated 19 instant.

The claimant's case is that he was employed by the Teachers Service Commission on 18th April, 1990 and served the said commission for nearly 26 years.

The claimant's further case is that subsequently, he made an application to the Bomet County Government to serve as an Education Officer whereby his application was accepted and the 1st respondent issued him with a letter of appointment as County Youth Officer, Job Group P on 10th February, 2014. On such appointment, the claimant approached the Teachers Service Commission who offered to release him the County Government of Bomet on permanent and pensionable terms and indeed did this on 26th February 2016 after being cleared on 6th May, 2015.

The claimant's other case is that despite release, the 1st respondent was hesitant to give a letter of authority confirming his release on permanent and pensionable terms. She continued shifting goal posts and dilly dallying on the subject despite the claimant's request for such clarification.

The claimant again avers that the 1st respondent is now hatching untoward methods and grounds for termination of his employment which (employment) he now claims. It is the claimant's further position that the 1st respondent's conspiracy and fabrication to get him out of employment is discriminative, illegal and constitutional and *in toto* offends the principles of natural justice.

He prays as follows;

a) *A declaration that the intended termination of the Claimant's employment would be unlawful and against the rules of natural justice and contrary to the provisions of the Constitution and Employment Act, 2007.*

b) *A stay order against the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents to stay the termination notice.*

c) *In the alternative, the Respondent be ordered to pay monetary compensation and pension.*

d) *The Court to appoint a conciliator to mediate the process.*

e) *Any other relief this Honourable Court may deem fit to grant and in accordance to equity and on principles of natural justice.*

f) *Costs of the claim be provided for.*

The 1st respondent's case is a denial of the claim. It is her averment that the claimant is not an employee of the Bomet County Public Service Board for reasons that;

a) *The claimant was not legitimately identified in an open, transparent and accountable process.*

b) *The claimant's employment was irregular as position which the claimant was holding in county public service was not advertised.*

c) *The claimant's employment was ultra vires. There was no competitive recruitment of the claimant.*

d) *The claimant's employment is devoid of public participation.*

The respondent's further case is that inspite of the irregularity and nullity of the claimant's employment for want of form and process, the claimant was employed on a term contract which lapsed on 31st September, 2017 and the claimant was served with a notice of non renewal of the same. On this basis, this suit discloses no cause of action against herself and prays that it be struck out with costs.

Lastly, the 1st respondent denies jurisdiction of this court for reason that there is no employer employee relationship *inter partes*. She proposes to raise a preliminary objection to this extent at an opportune time in these proceedings.

The 2nd respondent also denies the claim. She denies the claim on employment and the particulars thereof as narrated in paragraphs 5, 6, 7, 8, and 9 of the claim and avers that if there was any purported appointment of the claimant, the same was unlawful for contravening the expressed provisions of part VII of the County Governments Act, 2012.

In the penultimate and total denial of the claim the 1st respondent sums the matter thus;

9. *The respondents reiterate that the suit is ill grounded, misconceived and arises out of an unlawful contract since the County Government Act empowers the 2<sup>nd</sup> respondent with all powers to deal with matters of employment of staff within the County, a task which the 2<sup>nd</sup> respondent denies having done so with respect to the claimant.*

The issues for determination therefore are;

1. Whether the claimant has, at all material times, been a lawful employee of Bomet County Public Service Board.

2. Which is the applicable law regarding the claimants employment in the County Government

Public Service?

3. Whether the claimant is entitled to the relief sought?

4. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant has, at all material times, been a lawful employee of Bomet County Public Service Board. The claimants in their written submissions outline the factual basis of their case. They also filed the following as issues for determination;

a) *What was the meaning and effect of the letter for dismissal dated 22<sup>nd</sup> September 2017.*

b) *Whether the petitioner's dismissal was in contravention of the cited constitutional and statutory provisions.*

c) *Whether the judicial review order of certiorari is available in this case.*

d) *Whether the petitioner is entitled to the remedies as prayed for.*

The claimant variously attempted to answer the issues he raised above in support of his case. He answers these affirmatively in his favour. He forments and submits a case of dismissal in contravention of Articles 10, 41, 47, 50 (1) and 236 of the Constitution as read with section 41 of the Employment Act, 2007 that entitles him to notice and hearing before termination. The claimant, however, fails to address the salient issue of whether there was indeed any termination of employment in the first place. We choose to address this at a later stage in this judgement.

The 2nd respondent's submission is succinct and comes out thus;

*The facts are clear on this issue. We submit that the recruitment of the claimant was not open, it was not advertised, it was not a competitive recruitment, it was devoid of public participation, it was illegal and it was null and void as ordered ... in Petition No.3 and 8 of 2016, matters determined by this Court.*

In further support of her case the 2nd respondent submits that the claimant is a beneficiary of an illegal contract and cannot seek solace on such sinking sand. Further, the claimant does not demonstrate the provisions of the Constitution violated against himself and how this was done. On this, the 2nd respondent seeks to rely on the authority of **Anarita Karimi Njeru v Rep (19179) KLR 154 at page 156** where the court observed as follows;

*"We would however again that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."*

The respondent again relies on the authority of **Cyprian Kubai v Stanley Kanyonga Mwenda HMISC 612/02** where the court observed as follows;

*"An Applicant moving the court by virtue of Section 60, 65 and 84 of the Constitution (old) must be precise and to the point not only in relation to the section, but also to the subsection and where applicable the paragraph and*

*subparagraph of the Section out of 71 to 83 allegedly contravened plus the relevant act of that contravention so that the Respondent knows the nature and extent of the case to respond to, to enable the Respondent prepare accordingly and also to know the exact extent and nature of the case it is handling."*

It is the respondent's case that all this time, his employment was unprocedural and in violation of the constitution and therefore cannot be a basis for constitutional protection. She employs and relies on maxim of equity that *he who comes to equity must come with clean hands*. This court cannot stand in to enforce that which was illegal *ab initio*. I agree.

The 2nd respondent further brings out a case of the authority of the County Public Service Board in dealing with employment issues in a county as envisaged under Article 235 of the Constitution as follows;

*235.(1) A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for –*

*(a) Establishing and abolishing offices in its public service;*

*(c) Appointing persons to hold or act in those offices, and confirming appointments; and*

*(c) (c) exercising disciplinary control over and removing persons holding or acting in those offices.*

Further, and in an elongated recital of the County Governments Act, 2012, the 2nd respondent display her unequivocal authority on issues employment at the county government as follows;

*86. (1) The County Public Service Board may delegate, in writing, any of its functions to any one or more of its members and the county secretary, county chief officers, sub county or ward administrator, village administrator, city or municipal manager and town administrators”.*

*Sec 59 (1) (b) provide that;*

*“ the function of the County Public Service Board shall be, on behalf of the County Government, to-...*

*..(b) appoint persons to hold or act in offices of the County Public Service including in the Board of cities and urban areas within the county and confirm appointments;*

*75. If it comes to the attention of the County Public Service Board that there is reason to believe that any process or decision under this part may have occurred in an irregular or fraudulent manner, the County Public Service Board shall investigate the matter and, if satisfied that the irregularity or fraud has occurred, the County Public Service Board may –*

*a) Revoke the decision;*

*b) Direct the concerned head of department or lawful*

*c) Take any corrective action including disciplinary action.*

The upshot of the above submissions therefore is that the appointment of the claimant herein was unprocedural and as such there is no employee-employer relationship between the claimant and the 2nd respondent herein. I agree.

Does the claimant establish a case of termination of employment? My answer is no. In support of his case, the claimant displays a letter 22nd September, 2017 titled, *Expiry of Contract*. This is as follows;

*22<sup>nd</sup> September 2017*

*Jackson Cheruiyot Rono*

***RE: EXPIRY OF CONTRACT AND RELEASE.***

*This is to notify you that your contract will expire on 30<sup>th</sup> September, 2017, however a decision has been reached by the County Government to release you back to the Teachers Service Commission with immediate effect, that is, for the date of this letter.*

*You will however be paid one month's basic salary in lieu of notice. Meanwhile we thank you for the service you have rendered to the County Government of Bomet during your contract period and wish you all the best in your future endeavours.*

*Yours sincerely,*

*Signed*

***Wesley K. Sigei.***

***For: County Secretary and***

***Head of County Public Service***

This is not indicative of termination of employment. I agree and pursue the respondents case that this letter was a notice of termination of expiry and non renewal of subsisting contract *inter partes*. It cannot by any imagination be construed as termination of employment.

Coupled with the nature of engagement and employment of the claimant by the respondent as eloquently narrated by the respondents above I find that the claimant was never as such a lawful employee of the 1st respondent. This is because, like he submitted by the respondents, procedural and legal requirements for his employment were never pursued or effected. A case of termination of employment does not also arise in the circumstances. And this answers the 1st issue for determination.

The 2nd issue for determination is the applicable law regarding the claimants employment in the County Government Public Service. This has been ably thrashed by the parties. The submissions of the parties highlight this adequately. It was always the mandate of the County Public Service Board to recruit and deploy the claimants in terms of his authority under sections 57, 58,63, 66 and 67 of the County Governments Act, 2012. This also agrees with Article 232 (1) (g) of the Constitution of Kenya, 2010 which requires fair competition and merit in appointment to public office. These were not met in the circumstances of this case.

Moreover, the claimant does not clearly set out a case of outright release to the County Government. This is merely alleged. The following averments in his affidavit cast a further shadow on this;

*10. THAT I am both husband and father of five children most of whom are still schooling in different institutions in this country, so therefore it goes without saying that I have procured loans in different banks which I continue to service till date. Loan statement marked 'JCN04'*

*11. THAT this termination bring anguish and uncertainty to family specifically my children, and the termination notice marked, 'JCN 05'*

Firstly, and as hitherto observed, there is no case of termination of employment in the circumstances. This was an illegitimate arrangement subsisting as employment. It is not capable of termination. Secondly, the tone of the averments cited above does not display a case of dislocation from employment but rather fear of the consequences of imbalance of the *status quo*.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of December 2017.

**D.K.Njagi Marete**

## **JUDGE**

### Appearances

1. Mr. Bett instructed by Sigey Bett & Company Advocates for the claimants.
2. Mr. Mutai instructed by K. N Mutai & Partners Advocates for the 1st respondent.
3. Mr Matwere instructed by Andrew N. Matwere, Advocates for the 2nd respondent.