



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 46 OF 2017

(Before D. K. N. Marete)

ROBERT KIPKIRUI NGETICH.....1ST APPLICANT
JOSEPH BERNARD SIGEI.....2ND APPLICANT
BERNARD KIPNGENO TONU.....3RD APPLICANT
KIPRONO CHIRCHIR PETER.....4TH APPLICANT

VERSUS

THE COUNTY PUBLIC SERVICE BOARD BOMET.....1ST RESPONDENT
CHAIRMAN COUNTY PUBLIC SERVICE BOARD OF BOMET.....2ND RESPONDENT
COUNTY SECRETARY AND HEAD OF PUBLIC SERVICE.....3RD 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 and 2nd respondents deny the claim and pray that it be dismissed with costs.

The claimants case is that the claimants are employees of the 1st respondent serving as Community and Area Administrators and that their appointment letters are variously dated 15th October, 2015, 28th November, 2016 while others are dated 18th April, 2017, all dependent on their designations. They also earn monthly salaries well known to the respondent.

The claimant’s further case is that by an advertisement in the daily Standard Newspaper dated 5th March, 2015, the 1st respondent advertised vacancies for the post of Community and Area Administrators thereby calling upon qualified persons to make applications.

The claimant’s other case is that upon this advertisement the claimant forwarded applications whereupon the 1st respondent shortlisted persons for interviews. This process was delegated to the Human Resource Department for articulation and action. The claimants were thereupon issued with letters of appointment indicating their terms and conditions of employment.

The 1st respondent, acting on unfounded and misplaced reasons is now intends on terminating the employment of 350 hardworking claimants for no good reasons. This is based on fabricated rationale and reasoning.

They pray 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 mandatory order against the 1st and the 2nd Respondents to issue confirmation letters to the claimants.*
- c) In the alternative, the Respondent be ordered to pay monetary compensation to the claimant equivalent to 25 year's salary.*
- 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 and 2nd respondents deny the claim. They particularly deny paragraphs 6 and 7 of the claim and aver that if there was such delegation then the same delegated authority did not include the formal appointment of the selected candidates since the same is a function exclusively reserved for the 1st respondent pursuant to section 59(1) (b) of the County Governments Act, 2012. Thus delegated authority would only have covered the processing of the recruitment while the final appointment rests with the 1st respondent. The contents contained in paragraphs 6 and 7 are therefore denied and the claimant is put to strict proof thereof.

The respondent's other case is a denial of the recruitment or even intend to terminate the services of the claimants as pleaded in paragraphs 8, 9, 10 and 11 of the claim. They also deny the claim and all relief sought thereof.

The respondent's further case is that this suit is an afterthought, ill conceived, premature and brought out in bad faith. It is also fatally defective for non joinder of parties and particularly non inclusion of the County Secretary.

The matter came to court on 2nd October, 2017 when the parties decided on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether there is an intended termination of the employment of the claimants by the respondents?
2. Whether the claimants were procedurally employed by the respondent?
3. Whether the respondents should issue the claimants with confirmation of employment letters?
4. Whether this court should appoint a conciliator to mediate the process and issues in dispute?
5. Whether the claimants are entitled to other relief as sought?
6. Who bears the costs of this claim?

The 1st issue for determination is whether there is an intended termination of the employment of the claimants by the respondents. The claimants in their written submissions outline the factual basis of their case. They also filed the following as issues for determination;

(a) Whether the Claimants are employees/permanent employees of the County Government of Bomet in accordance with law;

(b) Whether the impending termination of employment of the Claimants is lawful and fair and in accordance of with the Constitution, Employment Act and other relevant statutes;

(c) Whether the impending termination of employment of the Claimants is in breach of the principle of legitimate expectations;

(d) Whether the Claimants were serving at the pleasure of the former county governor and were subject to termination in the event of change in the holder of Bomet gubernatorial position.

(e) Whether the Claimants are entitled to the prayers sought.

The claimants submit that they are legitimate employees of the County Government of Bomet by virtue of the employment through a recruitment process culminating in an issue of appointment letters by the County Secretary acting on the authority of the respondents.

The claimants seek to demonstrate a case of breach of the constitutional provisions of fair administrative action by relying on the authority of **Silas Kipruto and another v County Government of Baringo and another (2014) eKLR** where the court observed as follows;

‘...the usual employment practice is to replace new officers upon recruitment and appointment to probationary service and if probation is successful served, confirmation in appointment would follow. In the circumstances of the case, the court finds, and as submitted for the claimants, that “confirmed” could only mean absorbed in the service of the County Assembly on applicable permanent terms of service. The court finds that the claimants were absorbed into the County Assembly service. The court further finds that the absorption decision once made by the Board exhausted the Board’s jurisdiction in that respect and the claimants became entitled to remain in the permanent service as absorbed unless the employment was lawfully terminated’

This is further amplified by the authority of **Margaret Lorna Kariuki v Embu County Government (2015) eKLR** where Ongaya, J. observed thus;

“The court therefore holds that any public authority must be exercised in accordance with the Constitutional tests including the power to remove a public or state officer from office like it was anticipated and legitimately expected by the petitioner in the present case. In making that holding, the court further holds that statutes or other written laws and policies need not repeat the cited constitutional tests whenever authority or power is vested or conferred upon a person or body. The cited constitutional provisions are of universal application and not mere flowers in the constitutional text that readily wither in our constitutional practices; in the opinion of court, they are provisions that must bloom into seeds of vitality that enhance our constitutional practices and lifestyle.”

It is their submissions that the impending termination of the employment of the claimants vide the Governors Press Release dated 15th September, 2017 is unlawful and unconstitutional for failure to comply with Articles 47, 50 (2) (b) and (c) and Article 10 (b) of the Constitution.

The claimants also seek to rely on section 45 (2) and (5) of the Employment Act, 2007 as follows;

35. That the reason for termination is valid, that the reason for termination is fair concerning the employee’s conduct, capacity or compatibility or based on the operational requirements by the

employer and that the termination was conducted in accordance to fair procedure. With regard to the said section 45 (2), the court of Appeal in the case of **International Planned Parenthood Federation v Pamela Ebot Arrey Effiom (2016) eKLR** stated as follows in paragraph 23;

“...Section 45 of the Employment Act proscribes unfair termination of employment. A termination of employment by an employer is unfair in terms of section 45, if the employer fails to prove;

“(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair.

37 ...In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider –

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

The respondents in their written submissions dated 22nd October, 2017 submit a case of irregular employment of the claimants by forces outside the 1st respondent and without any authority, or at all. It is their submission that sometimes in 2014 Bomet County enacted a legislation known as Bomet County Coordination of Government Functions Act, 2014 which provided for the creation of offices in further devolved units including those of area and community administrators but those positions were not legally or competitively filled.

It is the respondents further submission that in pursuance of such recruitment it advertised for these positions and on receipt of massive applications delegated the recruitment exercise pursuant to section 86 of the County Governments Act. The delegatee, the County Secretary, County Government of Bomet bungled the recruitment process by incessantly refusing to adhere to the terms and conditions of the recruitment process and various instructions from the 1st respondent thereby ending up with an illegitimate bunch of employees. These were recruited outside the authority of the 1st respondent. This is further emphasized as follows;

q. That the unilateral recruitment and promotions of county personnel by officers of the County

Executive was being done opaquely with the sole intention of favouring political supporters while disregarding merit, fair competition and diversity;

t. That is also a fact that one Ann Turgut and Geoffrey Langat the director of human resources and acting County Secretary respectively, played a pivotal role in circumventing the law and awarding employment contracts without adherence with the law as shown in the contracts attached to the claim which they signed and executed;

u. That the claimants thus benefitted from the said conspiracy;

v. That the press statement dated 15th September 2017 issued by the Governor of Bomet County has not been sanctioned by the respondents at all and does not meet the threshold of a termination notice;

w. That the statement also restates the legal position that the function of constituting and abolishing offices in the county public service exclusively vests under the board pursuant to section 59 of the County Government Act;

z. That the claimants have failed to disclose any employer-employee relationship with the respondents;

cc. That the 2nd respondent has been wrongly enjoined in the instant suit since section 57 of the County Government Act provides that the board can only be sued in its corporate name and further that the board is not bound by the individual decisions of its chairperson;

The respondent further submits a case of absence of a cause of action in the claimants' case. This is as follows;

*...having submitted on the 1st and the 2nd issue as above, the question that begs now is **whether there is indeed a cause of action in this suit. (What is the cause of action in this suit?)***

*A cause of action has been defined in **Black's law dictionary** as follows:-*

"A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property or enforcement of a right against another party."

The factual elements needed for a specific cause of action can come from:-

- a. Constitution;*
- b. Statute;*
- c. Judicial precedent or*
- d. Administrative regulation.*

Has the claimants satisfied the above elements of a cause of action? The answer is NO, in view of the following reasons:-

1. The claimants have not established any constitutional and /or statutory right violated by the 1st and the 2nd respondents;

*2. No Judicial precedent has been violated. In fact, if the claimant's claims are to be allowed as presented, then there would be an automatic violation of the orders of court in **Kericho E&LR Cause No. 73 of 2016. Kenneth Kiprotich Koech and Another Vs. Governor Bomet County and 4***

others and the ceiling capping wage bill at 35% pursuant to section 25 of the Public Finance Management Regulation;

3. *The 1st and 2nd respondents have not violated any administrative regulation that confers any right to the claimants. The contracts presented by the claimants on record have not been violated by the 1st and the 2nd respondents;*

4. *The claim and the application in its entirety raises not any right that has been breached and or infringed upon by the 1st and 2nd respondents;*

5. *The reliefs sought in the claim have out rightly relied on biased unsubstantiated misapprehension of facts, hearsay and rumors to institute the claim which renders it fatally lame and prematurely mediated and as such ought to be dismissed with costs at the earliest opportune time.*

The long and short of the respective cases of the parties is that there was no lawful employment of the claimants by the 1st respondent. This is because, as is submitted by the respondent herein above, the employment of the claimant's was agreeable only in breach of the law. It *in toto* went against the dictate of the Constitution in the County Governments Act, 2012 in terms of responsiveness and adherence to the law.

The claimants' case is hollow. It is a case against an intended termination of the employment of the claimants. The termination is as yet not due. The respondents deny the case and submit lack of a cause of action in the circumstances. Is there a cause of action resulting in the claimants resort to court? Do they have an employment term capable of or threatened with termination? This is a fluid situation. The claimants have not established any sustainable cause of action as is submitted by the respondents. I therefore find that the employment of the claimants was unlawful *ab initio*. And this answers the onset twin issues for determination.

With the finding on issue No.1 and 2 above, the other issues for determination dissipate into nothingness. They are not material for any determination. They are overtaken by events.

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 Sigei Bett & Company Advooates for the claimants.
2. Mr.Kirwa instructed by Mwakio Kirwa & Company Advocates for the respondent.