



**THE REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT BUNGOMA**  
**CAUSE NO. 1 OF 2017**

**[formerly Kisumu Cause No. 3 of 2017]**

**JOSEPHAT MULONGO WEKESA.....APPELLANT**

**AND**

**THE CLERK COUNTY COUNCIL OF LUGARI.....RESPONDENT**

**M/S Kassim Sifuma & Co. Advocates for Claimant**

**M/S Okara for Respondent**

**JUDGMENT**

1. The appellant being dissatisfied with the judgment of M.L. Nabibya , AG SRM delivered on 27<sup>th</sup> December, 2012 filed an appeal on grounds that:

- i. The Learned trial Magistrate erred in law and fact when she held that the plaintiff/appellant had not proved his case on the balance of probability.
- ii. The learned trial Magistrate erred in law and fact when she held that failure to prove that there was advertisement renders the whole process leading to employment of the plaintiff/appellant fatal.
- iii. The Learned trial Magistrate erred in law and fact when she held that the plaintiff/appellant is not entitled to the prayers sought in the plaint.
- iv. The Learned trial Magistrate erred in law and fact when she totally overlooked the plaintiff/appellant's evidence.
- v. The Learned trial Magistrate erred in law and fact when she held that the plaintiff/appellant had failed to prove that there was advertisement.

2. The appellant prays:

- (a). That the appeal be allowed with costs and the Lower court's judgment be set aside.

(b). That the plaint be allowed and the superior court does assess damages in breach of contract.

3. The case by the appellant set out in the amended plaint was that on or about the 7<sup>th</sup> day of September, 2007, the plaintiff received an appointment letter from the defendant to take up the post of a clerical officer SS 14 after successful application for the job.

The plaintiff stated that despite reporting to the work station on 1<sup>st</sup> October, 2007, the defendant did not confirm the position.

4. That the plaintiff made several attempts to take up the position in vain, hence this suit.

The plaintiff prayed for immediate confirmation to the position of clerical officer SS14 as per the letter of appointment and costs of the suit.

5. The suit was opposed vide a statement of defence dated 24<sup>th</sup> November, 2008 in which the respondent denied existence of the post of clerical officer SS 14 which fell vacant necessitating appointment and the respondent further denies knowledge of the alleged reporting to work by the plaintiff on 1<sup>st</sup> October, 2007 or at all.

The respondent further stated that failure by the plaintiff to disclose which of the several work stations of Lugari County council, the job was situate was fatal to the claim. Respondent prayed that suit be dismissed for non- disclosure of any cause of action.

6. In the impugned judgment, the learned Magistrate found as a matter of fact that there was a vacant position for clerical officer, to be filled upon advertisement of the post.

7. The learned Magistrate further found that the plaintiff had failed to prove that the vacant position had been advertised to allow for a recruitment of persons to fill the position.

8. The learned Magistrate also found that the court was not satisfied that the proper procedure for recruitment was followed and that failure by the claimant to prove that the post was advertised for before he was offered the opportunity by the then town Clerk was fatal and for that reason, the court found that the plaintiff had not proved the case on a balance of probabilities and dismissed the case with costs to the defendant.

### **Determination**

9. The court has carefully considered the pleadings by the respondents and the evidence on record adduced before the Lower Court and upon considering submissions by the parties has come to the inevitable conclusion as follows:-

(a). The defendant in its statement of defence did not challenge the recruitment of the plaintiff, on the basis that the procedure followed to recruit the plaintiff was wrong in that the vacant position of clerical officer SS 14 was not advertised before the plaintiff was recruited.

(b). The learned Magistrate therefore erred in introducing a defence that had not been pleaded at all by the respondent.

(c). The learned Magistrate also clearly erred in law and fact, by finding that the appellant had not proved his case on a balance of probabilities, on the face of direct evidence by the plaintiff (**PW1**) who was called to an interview on 4<sup>th</sup> September, 2007 and on 8<sup>th</sup> September, 2007, he was given a letter of appointment dated 7<sup>th</sup> September, 2007, signed by the Clerk of County Council of Lugari Mr. J.J. Ochumbo which letter was produced before court.

(d). There was also unchallenged evidence by the plaintiff under cross examination that the position

had been advertised on the notice board of the Council among other jobs that had been advertised. The Learned Magistrate also erred in making a finding of fact that the position had not been advertised contrary to the evidence adduced before him.

10. **PW2 Ibrahim Rombola Kayasa**, told the court under oath, that at the time he was the chairman of Lugari County and had received a complaint from the plaintiff that he had been appointed as a clerk by the Council by Mr. Achumbo, the then County Clerk. That a new County Clerk, Mr. Godwin Ole Sarun had been appointed and had refused to recognize the appointment of the claimant.

11. The witness corroborated the evidence by the plaintiff, that the Council had advertised for the job of Clerk SS 14. He confirmed that advertisements were done on the notice board then between the year 2005 – 2007.

12. **PW3, Mr. Joseph Juma Ochumbo**, also testified before court that he was the acting Clerk of the Lugari County Council, until he retired in the year 2007. He told the court that the Council advertised for the position of clerical officer scale 14 in the Treasury Department on the notice Board. According to the council procedure, various candidates applied and he employed Josephat Mulongo the plaintiff herein. That the vacancy and the budget for the position was approved by the Minister for Local Government. That he confirmed the appointment through a letter of appointment dated 7<sup>th</sup> September, 2007 in his capacity as the acting clerk. That the appointment letter was dated 1<sup>st</sup> September, 2007

13. **DW1, Caleb Mutali Okumu**, testified in the defence. He was an Administrative Officer of the respondent in the year 2000. He contradicted the evidence by **PW1, PW2** and **PW3** that the Council had advertised and approved recruitment of a clerical officer in the Treasury. That no copy of the advertisement was produced by the plaintiff. He said that the budget for the positions had not been approved.

14. **DW1** admitted that the clerk was the CEO of the County Council, and was his supervisor. **DW1** had no documents to prove the procedures he testified about. He admitted under cross examination that Council could also advertise for positions on the Notice Board. He also admitted that the letter of appointment was by the then clerk, Mr. Ochimbo and at the time of signing the letter, he was still in office.

15. The learned Magistrate does not explain why she disregarded overwhelming evidence by **PW1, PW2, PW3** and partly corroborated by **DW3** that it was sufficient and procedurally proper to advertise for positions on the public notice board.

16. The court finds that the finding by the learned Magistrate was against overwhelming evidence that the plaintiff had applied for the position of clerical officer grade SS 14, he was called for an interview with others, was appointed to the position and produced a letter of appointment to that effect.

17. The learned Magistrate clearly misdirected herself in law and fact in finding that the plaintiff had not discharged the burden of proof on the balance of probabilities.

18. It is trite that the duty of the first appellate court is to review the evidence and reach an Independent conclusion as to whether to uphold the decision of the subordinate court or not bearing in mind that it neither heard or saw the witnesses testify. See *Selle Vs. Associated Motor Boat Company Ltd. [1968 E.A. 123* and *Williamson Diamond Ltd. Vs. Brown [1970] E.A.*

19. The court is aware that as an appellate court, it should not interfere with the findings or decision of a lower court unless it is demonstrated that in reaching its decision, the lower court made an error of law or took into account irrelevant consideration or that the court based its decision on no evidence or misrepresentation of the evidence see *Peter Vs. Sunday Post Ltd. [ 1958] E.A. 424.*

20. In the present case, the learned Magistrate reached a decision contrary to the preponderance of evidence that the plaintiff had proved all material particulars of his case and was entitled to judgment in

his favour.

21. Accordingly the court allows the appeal and makes the following orders:

(a). The appeal is allowed with costs in this and the lower court and the judgment of the lower court is set aside.

(b). The court directs the respondent and its successor in law, Kakamega County Government to immediately confirm the appointment of the plaintiff, to the position of Clerical Officer SS 14 or to its equivalent position in the Kakamega County Government with effect from the date of judgment by the Lower court on 27<sup>th</sup> December, 2012.

**Dated at Bungoma this 1st day of December 2017.**

**HON. MATHEWS NDERI NDUMA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**BUNGOMA.**