



**REPUBLIC OF KENYA**

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

**CAUSE NO 72 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**SIMON MUKULO.....CLAIMANT**

**-VERSUS-**

**THE COUNTY GOVERNMENT OF KAKAMEGA .....RESPONDENT**

**JUDGEMENT**

The Claimant Simon Mukulo was employed by the County Government of Kakamega as Ward Administrator, Shirugu-Mugai Ward, Job Group 'N' in the Department of Public Service and Administration, office of the Governor, by letter dated 4th November, 2014. This followed his application for the position as advertised in the Standard Newspaper of 16th October, 2013 in which the Respondent, the County Government of Kakamega, had advertised for a total of 60 posts. The Claimant was short listed and taken through a competitive interview process before being issued with the letter of appointment.

Paragraph 2 of the letter stated that;-

*"You will serve on probation for a period of six months and your confirmation to permanent and pensionable terms will be subject to your performance during this period and submission of a report of satisfactory performance by your immediate supervisor. While in service either party may terminate service by giving one month notice to the other or by giving one month gross salary in lieu of notice."*

*The remuneration attached to this position is Kshs.48,190 x 2,400- 50,590 x 2,550 -53,140 x 2,700 -55,848 x 3,000- 58,840 x 3,150- 61,990 , 3,300 - 65,290 pm. You will enter the scale of Kshs.48,190 (Minimum) and your incremental date will be 1st November, 2015 onward.*

*You will be eligible to:*

- *House allowance Kshs.24,000/-*
- *Commuter allowance Kshs.8,000/-*
- *Leave allowance Kshs.6,000/-*
- *Annual leave entitlement of thirty (3) days*

The letter required the Claimant to confirm acceptance by signing a copy of the same which he did on 5th November, 2014. He also wrote a letter of resignation from his previous job as House Master with Jesuit Refugee Services (JRS), Kakuma Project on the 5th November, 2014.

On 7th November 2014, the Claimant was surprised to see another advertisement in the Standard Newspaper of that day by the Respondent re-advertising for several jobs including the position in which he was employed. The candidates for the advertised positions were short listed and interviews scheduled for 5th March, 2015.

The Claimant contends that the advertisement of the position of Ward Administrator, Shirugu-Mugai Ward by the Respondent constitutes a termination of his employment. In his memorandum of claim filed on 4th March, 2015 the Claimant seeks the following reliefs;

1. That the Honourable Court be pleased to find the summary dismissal and/or termination withholding of the Claimant's dues by the Respondent to be unjustified unlawful, unfair , wrongful and/or illegal.
2. That the Honourable Court orders the Respondent to pay the Claimant's statutory entitlements and/or terminal dues with interest at court rates.
3. General damages.
4. In the alternative the Honourable Court to order that the Claimant be reinstated to his employment as the Ward Administrator shirugu-Mugai Ward Malava Sub County of County Government of Kakamega.
5. In addition this Honourable Court is prayed to award costs of this claim to be borne by the Respondent.

Together with the Memorandum of Claim the Claimant filed a motion under certificate of urgency seeking the following orders;

1. ***THAT*** this application be certified as urgent and be heard *ex parte* in the first instance.
2. ***THAT*** pending the inter-parties hearing of this application the Respondent either by its self or acting through his agents, officials, and/or representatives, be restrained by a temporary injunction from conducting interviews, re-advertising, the post of or employing a Ward Administrator Shirugu-Mugai Ward in Malava Sub County of County Government of Kakamega.
3. ***THAT*** pending the hearing and final determination of this claim the Respondent either by its self or acting through his agents, officials and/or representatives be restrained by a temporary injunction for conducting interviews, re-advertising, employing the post of Ward Administrator Shirugu-Mugai Ward in Malava Sub County of County Government of Kakamega.
4. ***THAT*** pending the hearing and final determination of this claim the Respondent either by its self or active through his agents, officials and/or representatives be restrained by a temporary injunction from interfering with Claimant's/Applicant's line of duties while in the course of his employment as the Ward Administrator Shirugu-Mugai Ward in Malava Sub County of County Government of Kakamega.
5. ***THAT*** the honourable court be pleased to grant any other orders as shall meet the ends of justice.
6. ***THAT*** the cost of this application be provided for.

The Respondent filed a Memorandum of Response in which it denied the allegations in the Memorandum of claim. It specifically denied having any employment relationship with the Claimant or terminating such employment relationship. The Respondent further denied owing the claimant any terminal benefits.

The Respondent admits advertising the position of Ward administrators, carrying out interviews, selecting

the claimant and issuing a letter of appointment to him on 4th November 2014 but avers that such letter was null and void on grounds that;

(i) That although Kakamega County has 60 Wards with specific names the applicant's said letter of appointment did not indicate which Ward the applicant was appointed to represent save that he was to report to Malava Sub-County Administrator. Malava Sub-County has 7 Wards and non - disclosure of the applicant's Ward rendered the appointment null and void.

(ii) The advertisement seeking applications from qualified candidates was in respect of Ward Administrators Job Group M, as per 'SM 1.'" However, in his said letter of appointment, it was alleged that the applicant was appointed as Ward Administrator Job Group N. There is no such post as Ward Administrator Job Group N in the county public service and if it is there the same has never been advertised.

(iii) That on 5/11/2014 when the applicant was issued with said letter of appointment he was aware of the defects highlighted herein above but did not raise any objection or seek for clarification or correction of the errors when he knew or ought to have known that this was false, misleading, ambiguous and criminal in nature as he prepared himself to enjoy privileges of Job Group N when he was not entitled to the same.

(iv) That the applicant failed to fill and submit the statutory forms and original academic certificate for verification, endorsement and authentication thus rendering the letter of appointment unenforceable.

(v) That the applicant's appointment was conditional. As per the letter of appointment, the applicant's appointment would only take effect upon formally reporting on duty. Although the applicant indicated on the letter of appointment that he would report for duty on 5/11/2015 the applicant did not and has never reported to duty at his designated of work and or before his supervisor as the Malava Sub-County Administrator has never confirmed in writing that applicant actually reported on duty. The applicant is put to strict proof to the contrary.

(vi) As per Claimant's Annexure 'SM 5" the applicant confirms that on 5/11/2014 when he accepted the offer of appointment he was still in employment with Jesuit Refugee Services. Therefore, legally the applicant had no capacity to create and employer-employee relationship with the respondent.

(vii) That it is not clear whether the applicant finally resigned from the said Jesuit Refugee Service. 'SM 5" does not show that the employer received or stamped the alleged resignation. If it was never hand 'delivered the applicant has not annexed a certificate of posting to confirm the alleged resignation.

(viii) That pursuant to the invalidation of the letter of appointment by the foregoing reasons, misdescription of job group and applicant's failure to report on duty, a re-advertisement was put up on 7-11-2014 before the applicant formally resigned from his previous employment but no short listing was done until mid-February 2015.

The Respondent further avers that there was no legitimate expectation by the Claimant as he did not complain of denial of access to the designated place of work, that there is no proof that the Claimant reported for work on 5th November, 2014 as indicated in his letter of appointment.

The respondent further aver that advertising for vacant posts, short-listing and interviewing of candidates is not the mandate of the respondent but of County Public Service board which has not been enjoined in these proceedings and the orders sought cannot be granted.

The respondent states that under section 75 of the County Governments Act the County Public Service Board can review a recruitment exercise to determine whether it meets the constitutional, statutory and

other reasonable requirements. The decision whether to re-start a recruitment process or re-advertise the same position is solely and exclusively the discretion of the County Public Service Board.

The Respondent further avered that it did not breach sections 41, 42(4) and 47(6) of the Employment Act as there was no employment relationship created between the Claimant and the Respondent, and even if there was any the Claimant cannot complain about unfair termination.

The case was argued by way of written submissions after the Claimant abandoned his application.

The issue for determination are whether an employment relationship was created, whether there was termination of the employment relationship, if any was created, and whether the Claimant is entitled to any of the remedies sought.

On the first issue, both parties do not deny that the Claimant went through a competitive selection process that culminated in the Respondent issuing a letter of appointment to the Claimant for the position of Ward Administrator and posted him to Malava Sub-County.

The argument by the Respondent that the Claimant had no capacity to take up the job because he was still an employee of Jesuit Refugee Services is not valid as there was no requirement that he resigns from his previous employment before being appointed. The argument that the appointment was null and void on grounds that he was sent to Malava sub-County with 7 wards is also not valid as his letter of appointment clearly shows that he was to report to the Malava Sub-County Administrator whose responsibility it was to deploy the Claimant. Neither is the argument that the job group for the position was 'M' and not 'N' to which the Claimant was appointed valid, as the Claimant is not the one who appointed himself to that position and an error, if that be what it was, does not vitiate a contract as it can be rectified.

The argument that the Claimant was guilty of laches, or that the contract lapsed can also not be valid as the Claimant's letter of appointment expressly provided that he was to report within two months and the position was re-advertised before the two months lapsed.

I find that an employment relationship was created upon the Claimant's acceptance of the letter of appointment signified by his signing of the letter on 5th November, 2014.

The next issue is whether there was termination of the employment relationship. I do not find evidence of termination as the claimant was not given an opportunity to report for duty following re-advertisement of the position only two days after he accepted the same and before the reporting period of two months lapsed. This was more of a case of frustration of contract after its acceptance thus making it impossible for the Claimant to report for duty.

Section 41, 42(4) and 47(6) of the Employment Act are therefore not applicable to this case as it is not a case of unfair termination of contract, but one of withdrawal of the contract after it had been accepted.

The final issue is whether the Claimant is entitled to any of the remedies sought. The Claimant prayed for unspecified statutory entitlements and/or terminal dues. There having been no employment relationship, no terminal dues were due to the claimant. The prayer for reinstatement can also not lie as there was no termination of employment contract that is capable of reinstatement.

The Claimant prayed for general damages. The Claimant avers that he resigned from his previous job upon receiving the letter of appointment from the Respondent. The Respondent argues that the Claimant did not report for duty. As I have already held above the claimant's contract was frustrated before the expiry of the period within which he was expected to report.

I find that the claimant suffered loss by losing his previous job on the expectation of taking up employment with the Respondent. He also had legitimate expectation that if he complied with his part of the contract he would earn the salary indicted in the letter being a gross of Shs.86,190 per month (basic and allowances).

For the foregoing reasons it is my opinion that the claimant is entitled to damages for breach of contract by the Respondent. I award him an equivalent of 6 months gross salary in the sum of shs.517,140.

The Respondent raised a further issue of non-joiner of the County Public Service Board which as argued by the Respondent, is the legal entity responsible for recruitment of county public service employees and is a legal entity with capacity of suing and being sued.

Article 176 of the constitution provided that the County Government consists of the County Assembly and County Executive. The Public Service Board is part of the County Government. A suit against the County Government cannot be defeated merely because it does not mention the organ within the County which is charged with recruitment as this constitutes a mere technicality that can be corrected. Ultimately it is the County Executive that is liable to pay any award that arises out of this claim and the Respondent has not been prejudiced by the failure of the claimant to specifically name the county Public Service Board.

### **Conclusion**

The end result is that judgement is entered for the Claimant against the Respondent in the sum of Shs.517,140.

The Respondent shall also pay Claimant's costs.

**Judgment dated, signed and delivered this 10th March, 2016.**

**MAUREEN ONYANGO**

**JUDGE**