



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAKURU**

**PETITION NO. 10 OF 2015**

**GIDEON BORE.....1ST PETITIONER**  
**ZIPPORAH MWANGI..... 2ND PETITIONER**  
**JULIUS CHEBYEGON.....3RD PETITIONER**  
**CHERUIYOT KIPKOSGEY.....4TH PETITIONER**  
**JOSEPH KAPKAI.....5TH PETITIONER**  
**NICHOLAS PERIMOI.....6TH PETITIONER**  
**BERNARD CHEBII.....7TH PETITIONER**  
**BENSON KIPKOECH BETT.....8TH PETITIONER**  
**DAVID KIPKOSGEY RONO.....9TH PETITIONER**  
**LUKA KANDIE.....10TH PETITIONER**  
**PAUL BIEGON.....11TH PETITIONER**  
**FRANCIS MASESE.....12TH PETITIONER**  
**RODGERS KIPKAZI.....13TH PETITIONER**  
**HESBON CHEBOI.....14TH PETITIONER**  
**FRDRICK OLEWE.....15TH PETITIONER**  
**LEAH KIPKABUT.....16TH PETITIONER**  
**JOHN GITHAIGA.....17TH PETITIONER**  
**SARAH CHEBET.....18TH PETITIONER**  
**ROSEBELLA KIPKORE.....19TH PETITIONER**  
**PAUL NGETICH.....20TH PETITIONER**

FAITH MATHENGE.....	21ST PETITIONER
SAMMY KOMEN.....	22ND PETITIONER
STEPHEN RONO.....	23RD PETITIONER
DANIEL KIPRUTO.....	24TH PETITIONER
CHRISTINE KOSGEY.....	25TH PETITIONER
MICHA CHELIMO.....	26TH PETITIONER
JULIA KIPSONGOL.....	27th PETITIONER
JOEL ROGONY.....	28TH PETITIONER
BEATRICE CHEBO.....	29TH PETITIONER
REBECCA TUWEI.....	30TH PETITIONER
JANE KIPRUTO.....	31ST PETITIONER
ANDREW KETER.....	32ND PETITIONER
ELIZABETH ANJICHI.....	33RD PETITIONER

v

BARINGO COUNTY PUBLIC SERVICE BOARD.....	1ST RESPONDENT
TRANSITION AUTHORITY.....	2ND RESPONDENT
PUBLIC SERVICE COMMISSION.....	3RD RESPONDENT
MINISTRY OF EDUCATION, SCIENCE & TECHNOLOGY.....	4TH RESPONDENT

IN THE MATTER OF ARTICLES 3,6,10,27,41,47 & 50 OF  
THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 5, 9 & 10 OF THE  
EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF SECTIONS 3, 55, 57 & 59 OF THE  
COUNTY GOVERNMENTS ACT

**AND**

**IN THE MATTER OF SECTIONS 3 & 4 OF THE  
INTERGOVERNMENTAL RELATIONS ACT**

**JUDGEMENT**

1. The 33 Petitioners were appointed as Instructors (Youth Polytechnics) by the Permanent Secretary, Ministry of Youth Affairs and Sports (as an authorised officer) through letters dated 23 May 2011 on 3 year contracts.
2. Consequent upon the appointments, the Petitioners were issued with local agreement contracts (some Petitioners had earlier contracts/appointments).
3. In the course of serving the contracts, some fundamental structural changes occasioned by the Constitution of 2010 were being implemented and in this regard the functions of vocational training and early childhood were transferred to the County Governments through Gazette Notice No. 116 of February 2013 and Gazette Supplement No. 116 of 9 August 2013.
4. The responsible agencies however experienced challenges in the implementation of the transfers and a meeting was held on 2 December 2014. Present included the Permanent Secretary, Ministry of Education, Chairman of the Committee on Education of the Council of Governors, Secretary, Public Service Commission, Chairman of the Transition Authority and others.
5. Among the resolutions agreed by the agencies/organs were that the contracts of the Instructors at Youth Polytechnics be extended up to 30 June 2015; the payrolls be transferred to County Governments; the County Governments absorb the Instructors on permanent and pensionable terms with effect from 1 July 2015 and the Ministry of Education/Treasury release funds for capitation/pay gratuity up to 30 June 2015.
6. It appears from the 2nd Respondent's letter dated 27 October 2015 that the Treasury did not release funds as agreed and in the same vein, the Counties did not absorb the instructors on permanent and pensionable terms
7. In the meantime, the Petitioners contracts which had expired (sometime in 2014), were extended by the 4th Respondent through letters dated 14 August 2014 for 6 months on the same terms and conditions.
8. When the 6 month contracts lapsed, the County Government of Baringo, pursuant to a decision of the 1st Respondent appointed the Petitioners as Youth Polytechnic Instructors on 1 year contracts effective 1 July 2015 (it would seem these contracts will expire(d) on 30 June 2016).
9. The appointments on 1 year fixed term contracts aggrieved the 33 Petitioners and on 18 September 2015, they commenced legal proceedings against the Respondents alleging violation of several constitutional and/or employment rights.
10. The gravamen of the Petitioners complaints are that the 1st Respondent ought to have absorbed them on permanent and pensionable terms and not short term contracts and that the short term contract were discriminatory.
11. According to an affidavit of service sworn by one Julius Juma, Advocate of the High Court and filed in Court on 25 January 2016, the 1st Respondent was served and acknowledged service on 21 September 2015 while the 2nd, 3rd and 4th Respondents were served and individually acknowledged service on 23 October 2015.

12. The Attorney General entered appearance for the 3rd and 4th Respondent on 20 November 2015, while the 1st Respondent did not bother to enter appearance or file an answer to the Petition.

13. When the Petition came up for directions on 25 January 2016, none of the Respondents was represented. On the application of the Petitioners, the Court directed that the Petition be determined on the basis of the record and submissions. Timelines as to filing of submissions were given.

14. The Petitioners filed their submissions (and a further affidavit by the 1st Petitioner) on 10 February 2016, while the 3rd and 4th Respondents submissions were filed on 29 February 2016.

15. Because of the materiality and relevance of a document introduced through the further affidavit, the Court will admit and consider it (significance will emerge shortly).

16. The Court will adopt the issues for determination as framed by the Petitioners in their submissions.

### **Whether Petitioners are entitled to be employed on permanent and pensionable terms**

17. The Constitution of Kenya 2010 re-engineered the governance and public service in this country.

18. Some functions which were being carried out by the National Government were devolved to new units of governance, County Governments.

19. Among the devolved functions was vocational training under which the Petitioners fell.

20. There were challenges and on 2 December 2014, a meeting involving all the primary stakeholders/agencies was held. The County Governments were represented by the Chairman of the Council of Governors Committee on Education.

21. Among the raft of resolutions was that all Economic Stimulus Programme (ESP) staff be absorbed on permanent and pensionable terms with effect from 1 July 2015. The Petitioners were part of the ESP staff which included health care staff (both this Court and the Court of Appeal have determined similar disputes concerning the health staff in Kenya National Union of Nurses v Public Service Commission of Kenya & 2 Ors (2015) eKLR, Kenya National Union of Nurses v Council of Governors & 6 Ors (2016) eKLR and Muranga County Public Service Board v Grace N. Makori & 178 Ors (2015) eKLR).

22. Instead of absorbing the Petitioners into its permanent and pensionable staff, the 1st Respondent gave them 1 year contracts.

23. From the papers on record, it would appear that the Treasury or National Government had not made appropriate budgetary allocations to allow the absorption of the Petitioners, but the 1st Respondent did not appear in Court to make that submission.

24. In the view of the Court, the County Governments were represented in the meeting of 2 December 2014, and the 1st Respondent cannot have any lawful reason to decline or fail to absorb the Petitioners into its permanent and pensionable terms establishment.

25. It is bound by the resolution of 2 December 2014, and if there are budgetary constraints, it has not demonstrated that it took up the issue with the Treasury or any appropriate organs.

26. The Petitioners filed a further affidavit exhibiting an out of court sort of settlement in which the 1st Respondent was offering them appointments on permanent and pensionable terms from 1 July 2016.

27. That is all very well except that unless the Petitioners have all appended their acceptance of the agreement to be effective 1 July 2016, the appointments into permanent and pensionable terms ought to have been backdated to 1 July 2015.

28. With the conclusion reached, it is not necessary in the Court's view, to examine issue 2 as framed by the Petitioners.

29. Before concluding, the Court notes that Scheme of Service relied on by the Petitioners provided for job group H as an entry grade, and that there are specific requirements for appointment to grade J which include a Training of Trainers Certificate and a Diploma (requirements which the Petitioners did not demonstrate to possess).

### **Conclusion and Orders**

30. The upshot of the foregoing is that the Court finds merit in the Petition and issues declarations/orders

(i) That the Petitioners are entitled to be absorbed by the 1st Respondent in its regular establishment on permanent and pensionable basis.

(ii) That the 1st Respondent do implement the decision of the Intergovernmental consultative forum made on 2 December 2014 to absorb the Petitioners on permanent and pensionable basis from 1 July 2015.

31. Petitioners to have costs.

**Delivered, dated and signed in Nakuru on this 22nd day of July 2016.**

**Radido Stephen**

**Judge**

Appearances

For Petitioners Mr. Juma instructed by Julius Juma & Co. Advocates

For 1st Respondent (did not appear/participate)

For 2nd Respondent (did not appear/participate)

For 3rd & 4th Respondents Mr. Nguyo, Senior

Litigation Counsel, Office of the Attorney General

Court Assistant Nixon