



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.225 OF 2015**

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

**KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF BOMET.....1ST RESPONDENT**

**BOMET COUNTY PUBLIC**

**SERVICE BOARD.....2ND RESPONDENT**

**THE TRANSITIONAL AUTHORITY OF KENYA.....3RD RESPONDENT**

**THE PUBLIC SERVICE COMMISSION OF KENYA.....4TH RESPONDENT**

**JUDGEMENT**

This matter was originated vide a Memorandum of Claim dated 3rd August, 2015.

It enlists the following as issues in dispute;

*1.1 This is the claim for wrongful and unlawful action of the respondent which is likely to result in loss of employment of the claimant's members' employment and/or illegal declaration of redundancy of the claimants by the respondents without following the contract of employment, the law and the constitution.*

*1.2 The second claim is like hood failure to pay the claimants their lawful wages for period worked without any justification and/or lawful excuse.*

*1.3 The third claim is interfering with the claimant's members' terms and conditions of employment without following the due process of the law.*

*1.4 The fourth claim is failing to grant the claimants a conducive working environment by creating fear and despondency by initiating a process to replace the claimant's members without providing for them or their safety as to placement and work.*

*1.5 The fifth claim is depriving the interested parties a source of livelihood without following the laid down law.*

*1.6 The sixth issue is the unlawful actions of the respondents which is prohibited by law and is bound to infringe to the constitutional rights of the interested parties' rights to gainful employment.*

The 1st and 2nd respondents in a Respondent's Statement of Response to the claim dated 26th August, 2015 deny the claim and pray that the same be dismissed with costs.

*The claimant's case is that the claimant's members' were previously employed through the Public Service Commission at the Local Authorities within Bomet County and after the general elections held on 4.3.13 and by operation of the Constitution of Kenya, 2010, the County Government Act, the Employment Act Cap 266 and the transition to Devolved Government Act were transferred to the Respondent.*

The claimant's further case is that her members were deployed at the County Assembly of Bomet from various local authorities within Bomet County by virtue of the County Government Act after the general election held on 4th March, 2013. They have to date worked diligently for the 1st and 2nd respondents.

It is the claimant's other case that on 17th July, 2015 the respondents placed an advertisement in the national dailies inviting applications for positions currently being held by members of the applicant. It is their other case that it is improper to conduct such recruitment without staff rationalisation, employment and audit for a determination of vacancies available for advertisement. She has written letters of objection to the respondent on this to no avail.

The claimant's avers and submits that this action by the respondent is a violation of the Constitution of Kenya, 2010 and contravenes S. 59, 61, 62, 63 and 72, 74 and 75 of the County Governments Act, 2012. This is also a contravention of S. 6 of the Guide Book for Governors. The respondents lack the legal and contractual authority to act as they purport to do unless a staff audit, rationalisation, placement and deployment are conducted to determine vacancies available. They should therefore now be prevented from such acts. This is expressed as follows;

*3.8 "The claimants members are likely to lose their employment without due process of the law or following their terms and conditions of employment hence they are likely to face extreme hardship and injustice by the actions of the respondent and unless the respondent are restrained, the claimants' legal and constitutional rights shall continue to be infringed upon."*

She prays for;

*1. An injunction against respondent, its agents, officers or persons acting under their instruction from carrying on with any interviews scheduled for 4.8.15 or other date, recruitment or employment of any staff to the County Assembly before staff rationalization and deployment to determine the vacancies that cannot be filled by the interested parties.*

*2. An injunction against the respondent from termination and/or dismissal of the claimants from their employment without following the law and their terms and conditions of employment.*

*3. A declaration that the actions of the respondents their agents,*

*4. representatives or assigns contravenes the Constitution of Kenya, County Government Act, Employment Act and the interested parties' terms and such actions are directly prohibited by law.*

*5. An order directing the respondent to first take staff rationalization of the staff working in the Bomet County Assembly and determine vacancies that exist and thereafter place advertisements for only those positions that cannot be filled by the current staff form the claimants membership.*

*6. Costs of this suit plus interests at court rates.*

The 1st and 2nd respondent's case is that the claimant has no *locus standi* to institute this suit as there is

no Collective Bargaining Agreement (CBA) and or Recognition Agreement between the parties to this cause. Further, the claimant has failed to answer to this pleading the list of its members represented and therefore cannot claim a blanket representation of all staff of the defunct local authorities.

The 1st and 2nd respondent's other case is that the suit as filed discloses no reasonable cause of action as some of the staff for the now defunct local authorities seconded to the County Public Service Board have applied for the advertised jobs.

The 1st and 2nd respondent's aver that none of the seconded officers have been removed from Bomet County government public service contrary to the terms and conditions applicable to the officer at the date immediately before the establishment of Bomet County government and or contrary to the law applicable to the said officers discharging their duties in relation to the relevant function of the Bomet County Government and in any event, the guidelines For Transition Of Staff To Counties do not prevent Bomet County Government from appointing and or absorbing a seconded officer to the County Public Service.

The 1st and 2nd respondents within a myriad of other defences at paragraph 2.4 in the Statement of Response threatens and actuates the raising of a preliminary objection for striking out with costs this cause on a point of law. The matter came to court variously until the 24th November, 2015 when the parties agreed on a disposal and determination by way of written submissions.

The issues for determination therefore are;

1. Whether the 1st and 2nd respondents are in breach of the law in purporting to advertise and recruit staff for the County?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this application?

The 1st issue for determination is whether the 1st and 2nd respondents are in breach of the law in purporting to advertise and recruit staff for the County. The parties hold diametrically positions on this. The claimant in her written submissions dated 1st December, 2015 reiterates their case as expressed in the claim. She raises four issues for determination as hereunder;

- a) Whether the respondents had a legal basis or contractual authority to place an advertisement for positions currently being held by the members of the claimant?*
- b) Whether the respondents were legally obligated to first take staff rationalization before placing an advertisement for staff recruitment?*
- c) Whether an injunction should be granted against the respondent from termination and or dismissal of the claimant members from their employment?*
- d) Whether the actions of the respondent contravened the Constitution of Kenya, 2010, the County Government Act and member's terms and conditions of work?*

It is the claimant's submissions that the advertisements by the 1st and 2<sup>nd</sup> respondents were conducted in bad faith and without regard of the interest and job security of her members. By this action the respondents deem the positions held by the grievants vacant whereas this is not so. The legitimate expectation on the grievants is to continue in employment unless and until this is negated on a sound ground based on the law.

The claimant sought to rely on the doctrine of legitimate expectation as espoused in the authority of **Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 7 Others (2014) eKLR** where the court held as follows;

*“...demonstrates that he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communication to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or he has received assurance from the decision maker that they will not be withdrawal without giving him first an opportunity of advancing reasons for contending that should not be withdrawn.”*

The claimant’s members harbored a legitimate expectation of remaining in employment of the 1st and 2nd respondent until this was determined.

The doctrine of legitimate expectation has now been incorporated into employment relationships in the authority of **Isabel Wayua Muasu v Copy Cat Limited (2013) eKLR** the court defined legitimate expectation as follows;

*“Legitimate expectation has been a principle well referred to in public law but the English Courts over a decade ago imported it into the employment relationship. I believe this is because of the implied term of trust and confidence expected of an employer and employee.”*

This is applicable and would not be denied to the grievants and claimant’s members in this cause. The claimant’s further deride the respondents submissions against the applicability.

It is the claimant’s further submission that the CBA entered into with the defunct local authorities continues to be in force and binding to the County Government of

Bomet by virtue of Section 58 of the Urban Areas and Cities Act as hereunder;

*“an act matter, thing lawfully done by a local authority before the commencement of this act and this contract arrangement, agreement, settlement, trust, bequest, transfer, division, distribution or succession affecting any service delivering trade of any form sale or dealings on land or any other matter affecting assets, liabilities or property belonging to any local authority whether movable or immovable shall unless and until effected by the operation of this Act continue in force and be vested in a body established by law.”*

The law has accommodated this change by the registration of the County Government Workers Union mandated to pursue the interest of the workers of *inter alia*, the defunct local authorities. Moreover, the conduct of the respondents attests to a continued operation of the CBA by virtue of continued deduction and remission of union dues to the claimant union.

The claimant’s other submission is that other respondents have no authority to disturb the employment of the claimant’s members by virtue of the authority of the Transition Authority which in S. 6.6 of the Guide Book for Governors provides as follows;

*What happens to local authority staff in the county? Are they seconded to the county, or transferred?*

*Local authorities were abolished when the Local Government Act was repealed, on the announcement of final results for the county elections. The functions of local authorities are functions of the county governments. Staff of local authorities, who are public servants appointed by or under delegation from the PSC, automatically become county government staff.*

Again,

*Section 2.2 of the Guidelines on Management of Public Officers Seconded to County Governments extrapolates further as follows; Staff of Former Local Authorities a) By virtue of Section 138 of the County Government Act and Section 57 of the Urban Areas and Cities Act, officers who were serving in the former local authorities are deemed to be seconded to the counties. B) The officers will remain seconded and secondment will cease upon absorption into the county government public service or release of an officer by the county government to the national government. Section 138 (5) CGA.*

The county governments again are mandated by the authority of Transition Authority to determine areas of deficit and surplus, to carry out thorough review of work structures, system processes, staffing levels and determining those who should be retained, transferred, merged, abolished, contracted out or privatized, and undertaking a comprehensive work load analysis to establish staffing methods and finally matching the existing staff to the established structures as held in the authority of **Kenya County Governments Workers Union Vs. Kisumu County Assembly Public Service Board 20 eKLR**. This would also call for incorporation of the CARPS programme that invokes a carry out of staff audit of public service and county government employees in order to establish existing gaps.

The claimant further submits establishing a case for issue of injunction as prayed by complying with the authority of **Giella Cassman Brown & Company Limited 1975 E.A 358** which at page 360 provides as follows;

- a) *The applicant must show a prima facie case with a probability of success.*
- b) *Applicant must prove that he will suffer irreparable injury unless interlocutory injunction is granted.*
- c) *If the court is in doubt, it will decide the application on a balance of probability.*

She prays that the claim be allowed.

The respondents in their written submissions dated 7th December, 2015 also reiterate their defence and cite seven issues for consideration as follows;

- 1) *Whether there exists in law a collective bargaining agreement between the claimant, the 1st and 2nd respondents?*
- 2) *Whether the claimant has locus standi and/or capacity to bring/institute these proceedings for and on behalf of the staff of the now (defunct) local authorities seconded to bomet county government public service.*
- 3) *Whether the 1st and 2nd respondents lack the legal or constitutional authority or basis to advertise as it did and ought to be prevented from such acts.*
- 4) *Whether the 1st and 2nd respondents are legally obligated to first take a staff rationalization program (carps) before carrying out any job advertisements.*
- 5) *Whether the job advertisement s dated 17th July, 2015 was in contravention of the cited constitutional and statutory provisions.*
- 6) *Whether the order of injunction is available in this case.*
- 7) *Whether the claimant is entitled to the remedies as prayed for.*

The respondents again argue their issues for determination in their favour and opine that the claimant is not entitled to the remedies as prayed in the claim. They pray that this be struck out with costs. The transition to devolved governments shall remain a thorn in our governance and political systems for quite a while. This is because of societal perceptions and inclinations to patronage beside personalization of public administration and governance. Despite the imagined failures of the Transitional Authority during its three year tenure of office, we must credit the institution for steering devolution and instituting sanity into the system. This was by regular guidelines and instructions that mitigated the likely adverse practices and their impact on the transition to devolved governments. In spite of these guidelines and concerted efforts, ours was a pursuance of sectarian interests as opposed to public policy and aspirations. This is the possible case here.

The claimant has established an overwhelming case of instability and confusion that would arise should the 1st and 2nd respondents be allowed to have their way in the circumstances of this case. This would hurt the basic rights of the claimant's members' in relation to their employment in the public service. The respondents again are in total contravention of the constitution and law besides the various guidelines issued with a view to fostering expedient management of employment and the status of seconded employees to the units of devolvement. This is not sustainable. I therefore find that the respondents are in breach of the law in purporting to advertise and recruit staff for the County and hold as such. So far for the 1st issue for determination.

On a finding of breach of the 1st issue for determination, the claimant has her case and is entitled to the relief sought. And this answers the 2nd issue for determination.

I am therefore inclined to allow the claim, declare and order as follows;

*i.* That an injunction be and is hereby issued against the 1st and 2<sup>nd</sup> respondents, its agents, officers or persons acting under their instruction from carrying on with any interviews scheduled for 4<sup>th</sup> August, 2015 or any other date, recruitment or employment of any staff to the County Assembly before staff rationalization and deployment to determine the vacancies that cannot be filled by the interested parties.

*ii.* That an injunction be and is hereby issued against the 1st and 2<sup>nd</sup> respondent's from termination and or dismissal of the claimants from their employment without following the law and their terms and conditions of employment.

*iii.* A declaration be and is hereby issued that the actions of the 1st and 2nd respondents, their representatives or assigns contravene the Constitution of Kenya, County Government Act, 2012, Employment Act, 2007 and the interested parties terms and therefore prohibited by law.

*iv.* That an order be and is hereby issued directing the 1st and 2<sup>nd</sup> respondent's to first and foremost take staff rationalization of the staff working in the Bomet County Government and determine vacancies that exist and thereafter place advertisements for only those positions that cannot be filled by the claimants membership.

*v.* That the cost of the claim shall be borne by the respondents.

And this clears all the issues for determination.

Delivered, dated and signed this 19th day of July 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Otieno instructed by Brian Otieno & Company Advocates for the claimants/applicants.
2. Mr. Andrew Matwere advocate for the 1st and 2nd respondents.
3. M/s Janet Langat for the 4th respondent.
4. No appearance for the 3rd respondent.