



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 107 OF 2015

(Before D. Marete)

WIAM KIPCHIRCHIR CHEPKWONY.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF KISII..... 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF KISII COUNTY..... 2ND RESPONDENT

JUDGEMENT

The matter is brought to court by way of a claimant/complainant's Memorandum of Claim dated 20th March, 2015. It does not disclose an issue in dispute on its face.

The respondents in their Respondent's Response to Claimant's Memorandum of Claim deny the claim and pray that the same be dismissed with costs.

The claimant/complainant's case is that he was employed in the national government pub service in 1997 and rose through the ranks to become Town Clerk. He was transferred to the defunct Municipal Council of Kisii on or about 27th Apr 2013. On 21st May, 2013, the Interim County Secretary – Kisii County in gross breach of the law governing employment, interdicted him.

It is the claimant's further case that immediately after the general election in 2013, a scheme was hatched at the work place by one, Johnstone Ndege, to have him removed from office. This was actuated through harassment and frustration. This was carried out as fows;

- a) Forceful removal from County institution rental house where the claimant lived.*
- b) None inclusion of the claimant in the Kisii Countransition team.*
- c) Failure by the Secretary to the nsition Authority to issue the claimant/complainant with a letter designating him as a collector and spendefvenue.*
- d) Being forced to move staff and every important council perty from 1st floof the Townll to the ground flooithout due process.*

It is the claimant's other case that on interdiction he was placed on half salary for the months of June and

July, 2013 and in August, 2013, a pays was issued to him but no payment was made. It is the claimant's further case that the Acting County Secretary acted outside his mandate as he (claimant) had taken due leave and further that the 2nd respondent had not been constituted by then.

He prays as follows;

a) That the respondents' directive jointly and severally interdicting the claimant/complainant through a letter ref. Kisii/c/2/15 (1) dated 21.05.2013 declared as null and void anitio.

b) Payment of costs to the claimant/complainant.

The 1st and 2nd respondent denies the claim as presented and specifically the allegations at paragraph 5 (a) (d) of the 1st respondent's response as follows;

a). There was no forceful removal of the claimant from county institutional house as the claimant was merely given a notice to vacate the house to pave way for accommodation for the Deputy Governor and other senior staff and the claimant voluntarily vacated the house upon receipt of the notice.

b). The transition authority constituted the transition team for every county and the respondents had control as to who was to be a member of that team. Further there was no legal obligation which required that the claimant be included in the transition team.

c). There was no legal obligation requiring the secretary to specifically issue a letter to the claimant designating him as a collector and spender of revenue and in fact doing so would have been illegal. The provisions of article 207 of the Constitution of Kenya 2010 and Section 109 of the Public Finance Management Act requires that all revenue collected on behalf of the County be deposited in the County Revenue Fund and the same shall not be withdrawn except as provided for in the same provisions of law.

d) The claimant was not forced to move staff and party from 1st floor to ground floor but was politely requested to do so to create office space for the Governor and his immediate staff.

The 1st respondent further justified the interdiction of the claimant as follows;

a) The claimant constantly refused to cooperate with the incoming team of elected leaders and specifically refused to conduct orientation to the new staff members without any just cause.

b) The claimant engaged in the exercise of destroying, altering and hoarding vital documents and records without any just cause.

c) The claimant constantly absented himself from duty without permission and without just cause.

d) The claimant granted himself leave without approval from his superiors at a crucial time when his presence in office was necessary and purported to extend such unauthorized leave in an effort to frustrate the smooth transition to devolved system of governance in Kisii County.

e) The claimant was for no justifiable cause rude and insolent to new staff including the interim county secretary

The 1st respondent's further case is that the claimant was placed on half salary pending the determination of his disciplinary case and was required to remain in his duty station and show cause within fourteen (14) days. Instead, the claimant failed to show cause and defied conditions of the letter of interdiction and left his duty station without the necessary authority thereby absconding from duty. Payment of half salary was stopped after the claimant failed to turn up for a headcount exercise of all public officers and defunct local authorities' staff conducted between 31st July and 2nd August, 2013 by the Interim Human Resource Manager pursuant to the circular of the Transition Authority (Ref. TA/7/3/vol.1(67) dated 24th July,

2013. This is as follows;

9. *The 1st respondent denies the allegations contained in paragraph 8 of the Memorandum of Claim and avers that the claimant's purported leave was unlawful as the same was not approved and in any event even if leave is a right of an employee, the same is taken at the convenience of the employer depending on wood which conditions the claimant failed to observe.*

10. *The 1st respondent avers that though the claimant was never stopped from reporting at his place of work pending the determination of disciplinary procedures, the claimant completely absconded from duty without permission and unlawfully took away his personal employment file and has to date not contacted the respondents for the resolution of the matter thereby exposing himself to the possibility of dismissal.*

11. *The 1st respondent avers that the claimant opted to appeal to the public service commission the interdiction decision instead of showing cause and the claimant's appeal is yet to be determined and consequently the institution of this suit is premature and should therefore be stayed pending the decision of the public service commission or be dismissed altogether being an abuse of the court process.*

The respondent's other case is that it conducted two headcount exercises in August, 2013 and February, 2014 where all employees, including those facing disciplinary proceedings were required to be present but the claimant did not participate. Those who failed this test were deemed ghost workers. Further, in October, 2014, the National Government and all the County Governments through the initiative of the Intergovernmental Steering Committee for Capacity Assessment and Rationalization of the Public Service (CARPS) conducted the widely publicized biometric registration of all public officers servicing in both the National and county governments institutions and at the end of the exercise those who did not register were automatically removed from the payroll. The claimant is one of those who did not turn up for the exercise and is therefore not entitled to claim any salary payment even on this ground alone.

The 2nd respondent's case is that it is not suited as a respondent to this suit as the allegations in this claim relate to events and matters that transpired before the constitution of the 2nd respondent and that the claimant has not addressed her on any claim. She therefore denies the claim for being a stranger to the same.

The 2nd respondent's further case is that it conducted two headcounts in August, 2013 and February, 2014 which involved all employees including those undergoing disciplinary proceedings. The claimant did not participate and those who did not so participate were deemed ghost workers. Again, in the months of September and October, 2014 the National Government and all the County Governments through the initiative of the Intergovernmental Steering Committee for Capacity Assessment and Rationalization of the public service conducted the widely publicized biometric registration of all public officers servicing in both the national and county governments institutions. At the end of the exercise those who did not register were automatically removed from payroll. The claimant did not turn up for this exercise and is therefore not entitled to any. She therefore disclaims liability for any grievances of the claimant.

The issues for determination therefore are;

1. Whether the interdiction of the claimant by the respondent should be declared null and void *ab initio*?
2. Whether the 2nd respondent is non-suited in this cause?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the interdiction of the claimant by the respondent should be declared null and void *ab initio*? The claimant submits a case of nullity of the interdiction on grounds that at the time of interdiction, the institution of the 2nd respondent was not legally and constitutionally in place. It is the claimant's submission that the termination by one, Johnstone O. Ndege, Interim Country

Secretary is not legal again for reason that the office of county secretary was not in place at the time.

The 1st respondent in a myriad of grounds in opposition to the claim argues and submits that the claimant's interdiction was due and warranted by virtue of his various misconduct including absconding duty. He left his work station without authority and refused or ignored to participate in the much publicized headcounts by himself and the national government. This led to his removal from the payroll and consequential stoppage of his salary.

This matter came for hearing on 26th May, 2016 when the parties testified in support of their respective cases. I must, however, point out that this evidence amounted to a side show as the real issue is not one of justification for interdiction or the lack of it. It is a test on the efficacy, competency and legacy of the interdiction. This is what I intend to pursue hereinafter.

On a preponderance of the evidence adduced and relating to this subject, this matter is in favour of the claimant. This is because in the first place, disciplinary matters relating to seconded officers from the national government to the county governments were the province of the Public Service Commission of Kenya. Again, the interdicting officer was not a creature of the Constitution or statute and therefore lacked the capacity and competency to effect a legitimate interdiction of the claimant from employment.

In a letter dated 26th July, 2013 to the claimant, the Transitional Authority of Kenya on a query of this interdiction by the claimant answered as follows;

1. The County Governments Act (CGA) at Section 138 (1) provides that any public officer appointed by the Public Service Commission (PSC) and serving in a county on the date of the constitution of that county government shall be deemed to be in the service of the county government on secondment from the national government.

2. Section 138 (6) of the CGA goes on to provide that the appointment of a public officer by the Public Service Commission includes appointment of a public officer on powers delegated by the Commission. This therefore means that officers appointed to defunct local authorities are also deemed to be in the service of the county government on secondment from the national government.

3. The County Public Service Board is the body mandated to exercise disciplinary control over county public officers in accordance with Section 59 1 (c) of the CGA. Further, according to the guidelines on Management of the Public Officers Seconded to County Government as issued by the Public Service Commission, the County Public Service Board shall be responsible for disciplinary action of officers seconded to the county public service. Before the County Public Service Board is established however, the disciplinary matters for officers of the former local authorities shall be handled by the Public Service Commission or the state departments responsible for devolution matters under delegated authority.

In the event the above procedure was not followed in your disciplinary case therefore, kindly take up the matter with the PSC, which has all the jurisdiction on disciplinary matters of county public officers.

This is a recitation of the law relating to the subject, the County Governments Act, 2012. Any action short of this would be untenable and unlawful.

The preamble to the County Governments Act, 2012 comes out as follows;

AN ACT of Parliament to give effect to Chapter Eleven of the Constitution; to provide for county governments' powers, functions and responsibilities to deliver services and to connect the people.

The commencement date of the Act is provided in Section 1 as follows;

1. shall come into operation upon the final announcement of the results of the first elections under the Constitution.

This means that the County Government Act, 2012 was operational at the time of interdiction of the claimant by the Acting Interim Secretary of the 1st respondent in May, 2013. The long and short of this is that the interdiction of the claimant by the Acting County Secretary was not feasible in the circumstances. It was a nullity for want of capacity, competency and legality. I therefore find a case of unlawful interdiction of the claimant and hold as such.

The 2nd issue for determination is whether the 2nd respondent is non-suited in this cause. The 2nd respondent in defence distances herself from liability in the going on in this cause for having been non-existent and therefore non-participatory in the interdiction of the claimant. She therefore submits a case of being absolved from any loss and liability arising out of this cause. The claimant, however, rebuffs this and submits that at the time of moving to court on 25th March, 2015 the 2nd respondent had been constituted and was in place. She cannot therefore disclaim liability in the circumstances. I agree. I therefore find that the 2nd respondent is liable to the claimant in so far as this claim is concerned. I also note that the 2nd respondent is an integral component of the 1st respondent. Their umbilical cord is not severable. This is even evidenced in the common approach to their defence in this cause which attempts to separate mid-course.

On a finding of unlawful interdiction of the claimant by the respondents the claimant becomes entitled to the relief sought.

I am therefore inclined to award the claim and order relief as follows;

- i. That the respondent's directive interdicting the Claimant's/Complainant's interdiction through a letter ref. Kisii/C/2/15 (1) dated 21.05.2013 be and is hereby declared null and void *ab initio*.
- ii. That the claimant be and is hereby ordered to resume duty/report to work on 20th July, 2016 at 8:00 hours.
- iii. The costs of the claim shall be borne by the respondents.

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

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Sigira instructed by Siele Sigira & Company Advocates for the claimant.
2. Mr. Onsembe instructed by Julius O. Opini Advocates for the respondent.