



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

**AT KISUMU**

**PETITION 27 OF 2015**

***(Before Hon. Lady Justice Maureen Onyango)***

**GABRIEL SMITH OTIENO AWITI.....CLAIMANT**

**-Versus-**

**1. HOMABAY COUNTY ASSEMBLY**

**2. COUNTY ASSEMBLY SERVICE BOARD .....RESPONDENTS**

**JUDGEMENT**

The Petitioner herein Gabriel Smith Otieno was employed as Senior Sergeant at Arms of Homabay County Assembly following a competitive process preceded by an advertisement in the National Daily Papers and an interview for the position. His appointment was effective from 1st July, 2014. In his petition which was filed together with a motion under certificate of urgency seeking conservatory orders, the petitioner seeks the following reliefs;

- 1) A DECLARATION that the 1st and 2nd Respondents have infringed upon the Petitioner's right to fair labour practices.
- 2) A DECLARATION that the conduct and actions of the 1st and 2nd Respondent are in violation of the Petitioner's inherent dignity and the right to have that dignity respected and protected;
- 3) A DECLARATION that the Petitioner's right to life is imminent threat of violation and/or infringement in consequence of the actions of the 1st Respondent;
- 4) A DECLARATION that the Respondents are in violation of **Article 47(1)** and **(2)** of the Constitution of Kenya entitling the Petitioner to a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;
- 5) A perpetual mandatory injunction and/or the prerogative of prohibition do issue restraining the 1st and 2nd respondent's either by themselves or through their agents and/or servants from recruiting, hiring and employing any person in pursuant to the advertisement in the daily nation dated 23rd October, 2015.
- 6) General damages for pain and suffering and loss of amenities;
- 7) Such further orders as the Court may deem just.

The Respondents filed a joint response to the petition in which they deny violating any rights of the petitioner. The Respondents also filed a replying affidavit of OTIENO BOB KEPHAS, the clerk of Homa Bay County Assembly and Secretary to the County Assembly Service Board.

On 8th December, 2015 when the Petitioner's motion came, up for hearing the parties agreed to abandon the same and to proceed with the petition by way of written submissions. The parties thereafter filed and exchanged written submissions.

## **Facts**

This petition was provoked by an advertisement in the Daily Nation of 23rd October 2015 by the County Assembly of Homa bay the first Respondent herein inviting suitably qualified persons to apply for various positions including the post of Office of the Chief Sergeant at Arms. It is the Petitioner's position that he is already employed by the Assembly Service Board of Homa Bay County as Chief Sergeant at Arms and the advertisement is intended to replace him thereby terminating his employment without regard to due process, and that the same is actuated by spite, ill will and malice. It is further the petitioner's position that the advertisement is a threat to his legitimate expectation to be treated with dignity and respect and is intended to create a hostile working environment for the him.

The Respondents on the other hand state that the petitioner applied for, was interviewed and recruited in the position of Senior Sergeant at Arms by letter dated 26th May, 2014 which the Petitioner accepted. It is the Respondents' contention that when the Petitioner's appointment was due for confirmation in his position of Senior Sergeant at Arms after successful completion of probationary period of 6 months as stated in his letter of appointment, the Clerk to the County Assembly erroneously wrote a letter confirming the petitioner to the position of Chief Sergeant at Arms dated 8th December, 2014. Upon realising the error the Clerk to the County Assembly immediately wrote a letter dated 8th December, 2014, the same date, explaining the inadvertent error and revoking the letter of confirmation to the position of Chief Sergeant at Arms. The Petitioner however refused to receive the revocation letter.

It is the Respondents' position that the inadvertent confirmation cannot confer the position of Chief Sergeant at Arms to the Petitioner as he was never appointed to the said position.

## **Submissions**

In his written submissions the Petitioner states that the alleged letter of revocation of his confirmation to the position of Chief Sergeant at Arms was never served upon him, that the position of Chief Sergeant at Arms is not vacant and the advertisement was malicious. He submits that the Respondents' are estopped from denying that the petitioner was employed in the position of Chief Sergeant at Arm by virtue of their conduct and words.

The Petitioner relied on the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & Others [2014]eKLR** where the Court of Appeal cited with approval the decision in **Serah Njeri Mwobi v John Kimani Njoroge C.A No.314 of 2009** and stated -

*'the doctrine of estoppel operates as a principal of law which precludes a person from asserting something contrary to what is implied by previous action or statement... It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as of no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced.'*

It is submitted for the Petitioner that the same reasoning was adopted by the court in the case of **Charles kibiru v Nairobi Water & Services Limited (2013)eKLR**. The Petitioner further relies on **Kevin Lindgren in his paper Estoppel in Contract (UNSW Law Journal Volume 12 Page 154, 1989)**, citing

the case of **Thompson v. Palmer (1933) 49 CLR 507** where the court held that *"the object of estoppel in pais is to prevent an unjust departure by one person from assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to other's detriment."*

It was further submitted for the Petitioner that *"The object of estoppel is to preclude the conscientious departures by a party from an assumption for which he or she bears some responsibility, and which has been adopted by another as the basis of the basis of a course an act or an omission which would operate to that other party's detriment if the assumption were not adhered to."* (per **Rilley Joellen "Estoppel in Employment Context: A solution to Standard Form Unfairness?"(2007)UNSWLRS 49.**

It is submitted that the Respondents made a promise to the petitioner which he acted upon to his detriment and they should not allowed to run away from it, that advertising for the position when it is not vacant is unfair labour practice.

For the Respondents it is submitted that the Petitioner has not controverted the explanation by the Respondents about the inadvertent confirmation of the Petitioner to the Office of Chief Sergeant at Arms nor has he produced evidence of alleged malice on the part of the Respondents, that he did not file a further affidavit to controvert the facts deponed in the Replying Affidavit of Otieno Bob Kephias, the Clerk to the County Assembly and Secretary to the County Assembly Service Board. It is further submitted for the Respondents that the Petitioner has admitted in his affidavit and petition that he was employed in the position of Senior Sergeant at Arms and that the position of Chief Sergeant at Arms is in a higher rank than that in which the petitioner was employed based on evidence adduced by the Respondents. It is submitted that the Petitioner is not entitled to the prayers sought.

### **Determination**

I have carefully considered the pleadings and the documents filed by the parties together with the written submissions filed on their behalf. The issues for determination are whether the Respondents have infringed on any constitutional rights of the Petitioner, and if so, whether the petitioner is entitled to the remedies sought.

The Petitioner's case is based on estoppel. In the case of **Gatirau Peter Munya** (Supra) which the petitioner has relied on, the court stated that *"for estoppel to arise there must be a representation which is acted upon by the other party, to his detriment."*

In the present case parties are in agreement that the petitioner was employed as senior Sergeant at Arms, but at the point of confirmation after serving the probation period, he was served with a letter of confirmation to the position of Chief Sergeant at Arms. Although the Respondents state that this was an error which was discovered the same day and a letter written to the petitioner correcting the error, and withdrawing the impugned letter of confirmation to the position of Chief Sergeant at Arms, the Petitioner in his written submissions denies that any such correction or withdrawal of the letter of confirmation was made.

Whether the position is as stated by the Petitioner or by the Respondents, the relevant issue is whether the letter of confirmation was acted upon by the Petitioner to his detriment. In his affidavit in support of the notice of motion the petitioner states that he signed the letter of confirmation on 10th February, 2015 together with the Terms and Conditions of Service. I have looked at the terms of service in both the letter of appointment and the letter of confirmation and note that apart from the job title, the rest of the terms are the same.

The Respondents attached to the replying affidavit copies of the petitioner's payslips for September and October 2005 which state his designation as Senior Sergeant at Arms. The Petitioner has not complained that after he was confirmed to the position of Chief Sergeant at Arms he was still paid as Senior Sergeant at Arms.

I find that the Petitioner did not suffer any detriment arising from the letter confirming him to the position

of Chief Sergeant at Arms as he continued to enjoy similar terms and was still recognised in his payslip as Senior Sergeant at Arms. For this reason the doctrine of estoppel is not applicable to his case as the Petitioner has not proved that he acted on the letter of confirmation to his detriment.

The other issue that is relevant is whether a person can be confirmed in a position that he was never appointed to. Such confirmation would be in conflict with Article 232 (i) (g) which provides for values and principles of Public Service to Principles of Public Service to include fair competition and merit as the basis of appointments and promotions and therefore the confirmation would be unconstitutional and null and invalid as provide in Article 2(4) of the Constitution which provides that any act or omission in contravention of the Constitution is invalid.

For the foregoing reasons, I am inclined to believe the Respondents' position that the letter of confirmation of Petitioner to the position of Chief Sergeant at Arms to which he was never appointed was an error. The petitioner has not provided any evidence of malice alleged against the Respondents. The Respondents who are corporate personalities are incapable of being malicious and the petitioner has not demonstrated that any of the Respondents had reason to be, or indeed was, malicious. I find the allegations by the Petitioner unfounded.

### **Remedies**

The petitioner prayed for the remedies as set out hereinabove. Having failed to prove that the Respondents have infringed his rights of fair labour practice and dignity upon which the petition is anchored, he is not entitled to any of the remedies sought. For these reasons the petition must fail and I accordingly dismiss it. Each party shall bear its costs.

**Dated and signed and delivered this 29th day of September, 2016**

**MAUREEN ONYANGO**

**JUDGE**