



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 378 OF 2015

FRANCIS KANJA MUCHINA

CLAIMANT

v

COUNTY GOVERNMENT OF NYANDARUA

RESPONDENT

JUDGMENT

1. Francis Kanja Muchina (Claimant) was appointed by the Governor, County Government of Nyandarua through a letter dated 28 January 2015 as the County Secretary.
2. Come 8 October 2015, the Governor, in a move stated as *meant to enhance on service delivery and accelerate completion of the development projects in my government* revoked the Claimant's appointment as County Secretary and Head of Public Service and instead appointed him as County Executive Committee member in charge of Communication, Legal, ICT and Intergovernmental Affairs.
3. The Claimant was aggrieved with the action of the Governor and in a response of even date expressed his displeasure and stated that due process was not followed, and therefore he was declining the new appointment.
4. On 1 December 2015, the Claimant commenced legal action against the County Government of Nyandarua contending that the revocation of his appointment as County Secretary was illegal and unfair.
5. At the same time, the Claimant lodged a motion seeking interim relief. The Claimant on the same day filed an *Amended Notice of Motion*.
6. On 7 December 2015, the Court granted interim relief staying the replacement of the Claimant.
7. The Respondent filed its Response on 16 December 2015.
8. When the amended motion came up for *inter partes* hearing on 17 December 2015, the parties agreed that the hearing of the main Cause be expedited.
9. The parties agreed on 18 December 2015 that the Cause be determined on the basis of the record and submissions. They agreed to 2 issues as being in contention, *whether there was unfair termination of employment and appropriate remedies*.
10. The Claimant filed his submissions on 10 February 2016, while the Respondent filed its submissions on 8 March 2016.
11. The Court has given due consideration to the pleadings, documents filed and the submissions.

Whether Claimant's employment was unfairly terminated

12. The appointment of a County Secretary is anchored in section 44 of the County Governments Act. The Secretary serves as the Secretary to the County Executive Committee (cabinet at the county government level).

13. As to the dismissal of a County Secretary, Section 44(1)(c) of the same Act provides that the County Secretary

may, subject to the conditions and terms of appointment, be dismissed by the governor.

14. The letter appointing the Claimant to the position of County Secretary indicated that the terms and conditions of engagement would be as set out by the Salaries and Remuneration Commission.

15. Apart from a Circular setting out the Reviewed Remuneration for Selected Positions in the Executive Arm of the County Government, the parties did not place before Court any document setting out the substantive terms and conditions of service upon which the Claimant was serving.

16. Failing contractually agreed terms and conditions of service, and considering that the parties were in an employment relationship, the Court must look at the Constitution, the primary statutes governing the operations of the Counties and their staff, employment generally and the common law.

17. In terms of Article 260 of the Constitution, a County Secretary is a public officer.

18. And being a public officer, the County Secretary is entitled to benefit from the protections assured all public officers by Article 236 of the Constitution which provides that

A public officer shall not be-

(a)

(b) dismissed, *removed from office*, demoted in rank or otherwise subjected to disciplinary action without due process of law.

19. The Claimant was being removed by the Governor from the office of County Secretary to that of a member of the County Executive Committee and in terms of Article 236, the Governor ought to have followed some process. That was not done.

20. And further, in my considered view, the County Secretary though a secretary to the County Executive Committee (County Cabinet) is not a county executive committee member. His (her) role within the architecture of the County government is well cut out and is distinct from those of the county ministers.

21. It is also telling that the appointment and removal processes for the county ministers and County Secretary are different.

22. Under the common law, a unilateral variation of contract without consent amounts to breach of contract (see *Harlow v Artemis Ltd* (2008) IRLR 629; *Rigby v Ferodo Ltd* (1987) IRLR 516; *Security and Facilities Division v Hayes* (2001) IRLR 81).

23. The Governor's action, in fundamentally altering or varying the term and or office under which the Claimant was serving was unlawful, and was in breach of contract and in effect the action amounted to a constructive dismissal.

24. The above conclusions address issues 1, 2 and 5 as set out in the Respondent's written submissions.

Legitimate expectation

25. The Claimant contended that he was underpaid and asserted that he should have been granted a wage of Kshs 300,000/-, which was near the Kshs 311,000/- he was earning at his previous employer instead of the lower Kshs 225,000/-.

26. The body mandated to fix and/or advice on the remuneration of state/public officers is the Salaries and Remuneration Commission.

27. The Salaries and Remuneration Commission through the circular dated 31 July 2014 set out the remuneration applicable to several offices within the County Government structure.

28. Unless the remuneration the Claimant was earning was not within those bands set by the Salaries and Remuneration Commission, the Claimant cannot be heard to complain. The rates in any case were set before the Claimant took up the position and he ought to have been diligent enough to find out the rates of pay within the county public service before accepting the offer.

Appropriate remedies

29. The Claimant sought some 3 declarations and in the alternative salaries and terminal dues for a period of 5 years.

Declaration revocation of appointment as county secretary was illegal and ultra vires

30. The declaration sought by the Claimant would not be an appropriate remedy in this case despite the finding that the action of the Governor was unlawful.

Declaration Claimant is still the County Secretary

31. Similarly, granting this declaration would not be appropriate as the Respondent already indicated an intention to repudiate the contract of employment.

Underpayments

32. The Court declines to grant this head of relief as the remuneration was within the bands set by the Salaries and Remuneration Commission.

Compensation

33. The Court has found the Claimant was constructively dismissed and therefore compensation would be an appropriate and effective remedy.

34. The Claimant's letter of appointment dated 28 January 2015 did not indicate the duration of employment but he served for slightly less than one year.

35. Considering the period of service, the Court is of the view that compensation equivalent to 6 months gross wages the Claimant was earning at time of separation (Kshs 225,000/-) would be fair.

Conclusion and Orders

36. The Court finds and holds that the Claimant's employment was unfairly terminated on account of constructive dismissal and awards him and orders the Respondent to pay him

(a) Compensation Kshs 1,350,000/-

37. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 23rd day of September 2016.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Githui instructed by Githui & Co. Advocates

For Respondent

Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates

Court Assistant

Nixon