



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO.149 OF 2014**

**PATRICK MBUVI MUENDO..... CLAIMANT**

**VERSUS**

**TANA ATHI WATER SERVICES BOARD.....1<sup>ST</sup> RESPONDENT**

**MWALA WATER AND SANITATION COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday, 14<sup>th</sup> October, 2016)**

**JUDGMENT**

The claimant was employed by the 1<sup>st</sup> respondent as a cashier effective 10.03.2009. By the letter dated 08.04.2010 the respondent deployed the claimant to the 2<sup>nd</sup> respondent with immediate effect in the position of the Company Accounts Assistant. By the letter dated 24.05.2010, the 1<sup>st</sup> respondent asked the 2<sup>nd</sup> respondent to absorb the claimant in the 2<sup>nd</sup> respondent's establishment in the position of Accounts Assistant and to cater for the 2<sup>nd</sup> respondent's remuneration effective 01.07.2010. There is no dispute that the 1<sup>st</sup> respondent exercises statutory regulatory function over the 2<sup>nd</sup> respondent in a relationship whereby the 1<sup>st</sup> respondent is the principal and the 2<sup>nd</sup> respondent is the agent.

The claimant continued in the 2<sup>nd</sup> respondent's employment until, by the letter dated 25.02.2014 the 2<sup>nd</sup> respondent wrote redeploying the claimant from the 2<sup>nd</sup> respondent's service to the 1<sup>st</sup> respondent's service. The redeployment letter referred to the warning letter dated 13.02.2014 and the audit report findings of 14.02.2014. By the letter dated 11.04.2014, the 1<sup>st</sup> respondent conveyed to the claimant that by deployment to the 2<sup>nd</sup> respondent, the claimant had been delinked from the 1<sup>st</sup> respondent's payroll and in view of the serious allegations in the 2<sup>nd</sup> respondent's letter dated 25.02.2014, the 1<sup>st</sup> respondent undertook to establish the true position so as to enable the 1<sup>st</sup> respondent to make a final decision on the claimant's redeployment to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent also wrote to the 2<sup>nd</sup> respondent the letter dated 27.06.2014 conveying that the claimant had been delinked from the 1<sup>st</sup> respondent's service and absorbed by the 2<sup>nd</sup> respondent effective 01.07.2010 and the claimant was therefore the 2<sup>nd</sup> respondent's employee and could not be redeployed back to the 1<sup>st</sup> respondent. In view of that letter by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent, the claimant wrote the letter dated 06.10.2014 explaining that he had by email received a scanned copy of the 2<sup>nd</sup> respondent's letter to the 1<sup>st</sup> respondent and that accordingly, he was requesting to resume duty and to be informed his office of deployment by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent failed to act.

The claimant filed the memorandum of claim on 19.11.2014 through Peter M. Muthoni and Company

Advocates. The claimant prayed for judgment against the respondent for:

1. Declarations that the offer of employment and his acceptance of offer dated 10.03.2009 are valid, his unconditional reinstatement and payment of arrears from the calendar month of March 2014 to date.
2. Costs of the case plus interest.

The 2<sup>nd</sup> respondent filed the memorandum of response on 11.12.2014 through Muoki & Company Advocates. The 2<sup>nd</sup> respondent prayed that the suit against it be dismissed with costs. The 1<sup>st</sup> respondent filed the memorandum of response on 11.12.2014 through Anthony M. Mulekyo and prayed that the suit against it be dismissed with costs.

The 1<sup>st</sup> respondent's case was that upon the redeployment and the absorption, the claimant became the 2<sup>nd</sup> respondent's employee and effective 01.07.2010, the employment relationship shifted as the 1<sup>st</sup> respondent and the claimant separated. The 2<sup>nd</sup> respondent's position is that the 2<sup>nd</sup> respondent refused to absorb the claimant as per the letter dated 28.06.2010 requesting the 1<sup>st</sup> respondent to extend the deployment and secondment by paying the claimant's salary until such time the 2<sup>nd</sup> respondent would be able to pay the salaries after achieving some financial stability.

The court has considered the pleadings, the evidence and the submissions and makes findings on the issues in dispute as follows:

1. The court finds that by the letter of offer of appointment dated 10.03.2009 the claimant accepted the employment and was subsequently deployed to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent per the letter dated 08.04.2010. The court further finds that by the 1<sup>st</sup> respondent's letter dated 24.05.2010 and copied to the claimant, the claimant got absorbed in to the 2<sup>nd</sup> respondent's service effective 01.07.2010. The communication between the respondents in exclusion of the claimant, in the opinion of the court, could not vitiate that absorption especially that the 2<sup>nd</sup> respondent acknowledges that it is the 1<sup>st</sup> respondent's agent. Further, by conduct of assigning the claimant duties and paying the salary after the absorption date, the court finds that the claimant could only be deemed as the 2<sup>nd</sup> respondent's employee by reason of the absorption effective 01.07.2010 and the purported redeployment back to the 1<sup>st</sup> respondent by the letter of 25.02.2014 was clearly an afterthought coming long after the claimant had become the 2<sup>nd</sup> respondent's employee. It is notable that for over 3 years beginning 01.07.2010 the 2<sup>nd</sup> respondent had acknowledged the fact of absorption and cannot be allowed to turn back to that position upon which the claimant and the 1<sup>st</sup> respondents have showed to have relied upon and substantially shifted their previous employment relationship and pecuniary wellbeing.

2. The letter redeploying the claimant to 1<sup>st</sup> respondent dated 25.02.2014 amounted to the termination of the claimant's employment. The termination was constructive and unfair because redeployment was an invalid reason under section 43 of the Employment Act, 2007. The 2<sup>nd</sup> respondent as the employer following the absorption effective 01.07.2010 was entitled to exercise all human resource authority over the claimant including disciplinary control. The court considers that redeployment was not available and the 2<sup>nd</sup> respondent did not invoke disciplinary proceedings involving a notice and a hearing as envisaged in section 41 of the Act and the termination was constructive as the claimant was entitled to consider himself terminated in view of the 2<sup>nd</sup> respondent's action.

3. In terms of section 49(4) of the Employment Act, 2007 the court considers that the claimant is keen to continue in employment, the claimant had served the 2<sup>nd</sup> respondent for over 3 years, and that following the constructive termination the claimant was not paid any terminal benefits. The

claimant's detailed terms of service with the 2<sup>nd</sup> respondent remained at large. There are no established mitigating factors by the 2<sup>nd</sup> respondent attributable to the unjustified termination. Accordingly, the court considers that the claimant is entitled to the reinstatement and to continue in employment unless lawfully terminated from the 2<sup>nd</sup> respondent's employment.

In conclusion judgment is hereby entered for the claimant against the 2<sup>nd</sup> respondent for:

1. The declaration that the offer and acceptance letter of 10.03.2009 was valid.
2. The declaration that the claimant is entitled to unconditional reinstatement and payment of his arrears from March 2014 to the date of this judgment and to continue in employment of the 2<sup>nd</sup> respondent unless lawfully terminated in accordance with the applicable law.
3. For purposes of order 2 above the claimant to compute the amount of money due and file and serve the 2<sup>nd</sup> respondent in 7 days with a view of recording the quantum in court on a convenient mention date.
4. The 2<sup>nd</sup> respondent to pay the judgment sum by 31.12.2016 failing interest at court rates to be payable until full payment.
5. For further purposes of order 2 the claimant to report to the 2<sup>nd</sup> respondent's chief executive officer not later than 01.11.2016 for assignment of duty and to continue in employment as accounts assistant or commensurate position with full benefits until otherwise lawful termination of the contract of employment.
6. The 2<sup>nd</sup> respondent to pay the claimant's costs of the suit and each respondent to bear own costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 14<sup>th</sup> October, 2016.**

**BYRAM ONGAYA**

**JUDGE**