



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

AT NYERI

CAUSE NO. 49 OF 2016

CYPRIAN KINOTI M'MURIUNGI.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF MERU.....1ST RESPONDENT

MERU COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

MERU COUNTY ALCOHOLIC DRINKS CONTROL BOARD.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 18th November, 2016)

JUDGMENT

The claimant was employed as the Chief Officer, Meru County Treasury by the letter dated 25.09.2013. He took oath of office on 26.09.2013 and he was answerable to the County Executive Committee Member responsible for the County Treasury. The appointment was effective 01.10.2013. For the purpose of that appointment, the claimant's secondment to serve the county government for 3 years effective 01.10.2013 (being a secondment from the service of the Kenya National Audit Office) was granted by the Directorate of Public Service Management by the letter dated 01.12.2014. Thus, the secondment was to end on or about 01.10.2016.

By the letter dated 15.04.2014 signed by the Governor, the claimant was transferred to the Governor's office with immediate effect and to report to the county secretary. By the letter dated 20.08.2014 signed by the county secretary, the claimant was transferred from the Governor's office to the office of the Deputy Governor and with immediate effect. By the letter dated 08.10.2014 signed by the Governor the claimant was transferred to the department of Lands, Housing and ICT as Chief Officer. By the letter dated 22.10.2014 signed by the county secretary, that last transfer was withheld until further communication. The claimant was advised to revert back to his previous duties.

By the letter dated 08.01.2015 signed by the county secretary, the claimant was appointed as Director, Administration and Licensing in the newly formed Meru County Alcoholic Drinks Board in the department of Culture, Gender, Youth, Sports and Social Services. The appointment was with immediate effect. By the letter dated 18.08.2015 the Secretary and Chief Executive Officer, Meru County Alcoholic Drinks Board offered the claimant employment in the position of Director, Administration and Licensing, Job Group R to earn a basic pay of Kshs. 132,249.00, house allowance of Kshs.40,000.00 and commuter allowance of Kshs.16,000.00 per month. Following that offer, the county secretary caused the claimant's pay roll data to be moved to the Meru County Alcoholic Drinks Board. The claimant signed on

25.08.2015 rejecting the offer.

In the turn of events the claimant wrote to the county secretary the letter dated 07.07.2015 conveying that his contract of service as a chief officer in the Meru County Government had been breached as he was transferable by the Governor under the provisions of the County Government Act, 2012 in the capacity of County Chief Officer. It was the claimant's position that his deployment to the Meru County Alcoholic Drinks Board had contravened the provisions of the Act on his service as a Chief Officer.

The Meru County Alcoholic Drinks Board wrote the letter dated 22.09.2015 to convey that at the Board's sitting of 22.09.2015 it had been resolved that the claimant be given one month notice and then his services be terminated without any further communication. The claimant's last service at the Board would be on 31.10.2015. The reason for the termination was stated as the claimant's signing on 25.08.2015 rejecting the Board's offer for employment as the Director, Administration and Licensing, Job Group R. By the letter dated 06.10.2015 the claimant requested the county secretary to reinstate him in the service of the county government in accordance with the provisions of the County Governments Act, 2012.

There was no amicable resolution of the dispute. Thus, on 14.03.2016 the claimant filed the statement of claim through Humphrey & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's termination was unfair and unlawful.
- b. Compensation for unfair and unlawful termination.
- c. An order for payment of Kshs.64,099.00 being the amount unlawfully withheld from the claimant's salary plus an additional Kshs.5,000.00 being the claimant's unpaid airtime allowance for October 2015.
- d. An order for specific performance requiring the respondent to remit 31% pension contribution to the department of pensions of the National Treasury to service the claimant's pension from the date he joined the respondent's service.
- e. An order requiring the County Government of Meru to pay the claimant a total of Kshs.11,928,002.00 being salary and allowances in full for the remainder of the claimant's term of employment contract which expires on 30.09.2018 and service gratuity payable at the end of the claimant's contract.
- f. In the place of order (e) above, an order reinstating the claimant to his previous position of chief officer.
- g. Interest thereon.
- h. Costs of the suit.
- i. Any other relief the court deems fit to grant.

The respondents filed the response to the memorandum of claim on 04.05.2016 through Laichena Mugambi & Company Advocates. The respondents prayed that the claimant's case be dismissed with costs.

The **1st issue** for determination is whether the claimant's employment was unfairly terminated by the respondents. First, the claimant declined the offer of appointment by the Meru County Alcoholic Drinks Board to the position of Director, Administration and Licensing, Job Group R. Accordingly, the purported termination of the claimant's employment by the Meru County Alcoholic Drinks Board by the letter dated 22.09.2015 was misconceived because the claimant had not been in the Board's employment and there was no contract of employment between the Board and the claimant. Second, throughout the material

time the claimant was employed as a chief officer in the Meru County Government. As testified by the claimant, accepting the offer of employment would have meant condoning the termination of the employment as a chief officer. The claimant had not applied for appointment as Director, Administration and Licensing, Job Group R. Third, as a chief officer, the claimant was entitled to be deployed and to be removed from office in accordance with the provisions of the County Government Act, 2012. Under section 59 (1) (c) the County Governments Act, 2012 the County Public Service Board exercised disciplinary control over the claimant as a chief officer because section 45(2) of the Act declares that the office of a county chief officer shall be an office in the county public service. The evidence is that throughout the service the claimant was formally designated and appointed to hold the office of chief officer, no disciplinary proceedings were preferred against him by the County Public Service Board and, the claimant's contract of service was not terminated in accordance with the provisions of the contract or the County Governments Act. The court finds that the Governor was entitled to reassign the claimant as a chief officer and further that the claimant's services as chief officer could only be terminated in accordance with the provisions of the Act and the terms of the contract. Such termination never took place. Fourth, the court returns that the claimant was entitled to consider himself terminated when the county government failed to respond to his demand that he be reinstated and deployed in accordance with the provisions of the County Governments Act, 2012. The court finds that the termination was unfair for want of a valid reason as envisaged under section 43 of the Employment Act, 2007; for want of compliance with provisions of the County Government Act, 2012 on the service of chief officers; and generally for the respondents' unreasonable administrative actions that adversely frustrated the service of the claimant as a chief officer. While making that finding the court follows the holding in **Margaret Lorna Kariuki –Versus- Embu County Government [2015]eKLR** that the Employment Act, 2007 applies to state and public officers unless it is established that better terms and conditions of service applied. In this case there are no established better safeguards for termination than are provided for under the Employment Act, 2007 such as valid reasons in section 43 and notice and hearing in section 41 of the Act. Further the court finds that the termination was unfair, the claimant desired to continue in employment as chief officer and the aggravating factor that the county government failed to respond to the claimant's concerns professionally and in accordance with the applicable law. The court has noted that the claimant in a way failed to protest when the county secretary initially deployed him to the Board and the court considers that by that failure the claimant in a way contributed to his ultimate predicament. The court has also considered the mitigating factor that the claimant has since reverted to his service at the national government. Accordingly, to balance justice under section 49(1) (c) of the Employment Act, 2012, the claimant is awarded 6 months' compensation for the unfair termination making **Kshs. 1,237,032.00** at Kshs. 206, 172.00 per month being the last gross pay as chief officer in April 2015 (less lawful tax). While making that finding the court upholds its holding in **Cecilia Wangechi Ndung'u – Versus- County Government of Nyeri and Another [2016]eKLR** in the judgment delivered on 23.09.2016 thus, **“Thus, whereas the service by state officers or public officers is governed by special provisions as may be contained in individual contracts of service, the constitutional or legislative provisions, and lawful circulars or policy provisions, where there is no specific provision or inferior provisions exist, the court holds that the minimum terms and conditions of service and the minimum principles governing employment as provided in the Employment Act, 2007 and other statutes as may generally apply to employment and labour relations will be invoked to apply to the service of state officers or public officers as the case may be.”**

With respect to the other remedies as prayed for, the court returns as follows:

- a. The claimant is entitled to payment of **Kshs.64, 099.00** being the amount unlawfully withheld from the claimant's salary plus an additional **Kshs.5, 000.00** being the claimant's unpaid airtime allowance for October 2015 as prayed for. The claimant has filed the relevant payslips and it is clear that while being appointed as a chief officer he was nevertheless paid lower than agreed when the respondents unilaterally deployed him to serve at the Board.
- b. The court considers that reinstatement and payment for the unexpired term are not justified prayers in the circumstances of this case especially that the claimant confirmed that he had already reverted back to his service in the national government. As submitted for the respondents, under section 73 of the County Government Act, 2012 the claimant has reverted to his service prior to the

secondment and in the court's opinion that is a mitigating factor in favour of the respondents against reinstatement or payment for unexpired term of the contract of service as prayed for.

c. The claimant prays that the respondents are ordered to remit 31% of the pay to national pensions department to service the claimant's pension. As submitted for the respondents, the letter of secondment was clear that the county government was to pay the claimant's salary and allowances and the claimant was to ensure that he remits 31% of his equivalent civil service basic salary to the Director of Pensions to service the claimant's pension. The court finds that the claimant is liable to personally remit the 31% of his prevailing civil service basic pay as directed in the letter for the period he was on secondment ending 31.10.2015 or such subsequent date when he reverted back to Kenya National Audit Office. The prayer will therefore fail.

d. The court returns that the claimant is entitled to gratuity as per the terms of service for chief officers and for the period of service as chief officer from 01.10.2013 to 31.10.2015.

In conclusion judgment is hereby entered for the claimant against the respondents for:

a. The declaration that the termination of the claimant's contract of service as a chief officer was constructive and unfair.

b. The 1st respondent to pay the claimant **Kshs.1,306,131.00** by 15.12.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.

c. The declaration that the claimant is entitled to be paid gratuity by the 1st respondent as per the prevailing terms of service for chief officers and for the period of service as chief officer from 01.10.2013 to 31.10.2015 and to be paid by 15.12.2016 failing interest at court rates to be payable from the date of this judgment till full payment.

d. The 1st respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 18th November, 2016.**

BYRAM ONGAYA

JUDGE