



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

**CAUSE NO. 669 OF 2014**

**(Test Suit)**

**MATHEW NJOROGE NGUGI**

**CLAIMANT**

**v**

**COUNTY GOVERNMENT OF NYANDARUA**

**1<sup>ST</sup> RESPONDENT**

**NYANDARUA COUNTY PUBLIC SERVICE BOARD**

**2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The parties herein agreed to some 6 issues to be determined by the Court and because the facts are not strongly disputed, the Court will address the issues and discuss such of the facts as are material to the answering of the questions posed (issues as agreed by the parties were not precise enough to reflect the real factual and legal issues in dispute).

2. On 5 April 2016, the Court directed that because Nakuru Causes Nos 655 of 2014; 668 of 2014; 678 of 2014; 692 of 2014; 734 of 2014; 736 of 2014; 722 of 2014 and 702 of 2014 raised similar issues, the instant Cause would serve as a test suit.

**Competency of the Cause**

3. The Respondents had challenged the competency of the Cause on the ground(s) that the Claimant had not sworn the verifying affidavit accompanying the Memorandum of Claim and also presented an affidavit by the Claimant deposing that he did not instruct the commencement of the proceedings by the advocate on record.

4. The Respondents also filed a motion to have the Cause struck out on the general ground of competency which the Court directed would be taken up as part of the main Cause.

5. Mathew Ngugi (Claimant) gave sworn testimony and stated that he visited the offices of his current advocate on record and gave instructions for the filing of the Cause.

6. The Claimant also testified that he signed the verifying affidavit annexed to the Memorandum of Claim.

7. As to a letter dated 23 March 2014 addressed to the Chairman of the 2<sup>nd</sup> Respondent suggesting that he never instructed the advocate on record, the Claimant stated that he was called by the Chairman and instructed to copy the contents in his handwriting and sign the same under pressure.

8. The Claimant further stated that after the letter, he was brought to Nakuru by the 2<sup>nd</sup> Respondent's Chairman and given a prepared affidavit to sign. He signed the affidavit disowning this Cause, swearing the verifying affidavit and denying having instructed the filing of the Cause on the promise that he would be offered permanent employment.

9. The Claimant was cross examined in some detail on this question and maintained his stance.

10. Because the Claimant owned the verifying affidavit in Court and also acknowledged to having instructed an advocate to file the present Cause, and the Respondents failure to bring the Chairman of the 2<sup>nd</sup> Respondent to shed light on the contention by the Claimant that he acted under pressure in disowning the proceedings, the Court reaches the conclusion that the Claimant did indeed instruct an advocate to commence the proceedings and also swore the verifying affidavit.

**11. Whether there is a legal provision requiring the County Government to absorb casual labourers from the defunct Local authorities.**

12. The real legal issue under this head is continuity of service from the defunct County Council of Nyandarua to County Government of Nyandarua.

13. It is a fact which needs no proof that Local authorities which were succeeded by County Governments had employees who were taken on board by the County Governments.

14. Section 138 of the County Governments Act made provision for the deeming of public officers appointed by the Public Service Commission as public officers within the county government set up and/or as public officers on secondment.

15. The Claimant in the present case did not prove that he was employed by the Public Service Commission prior to the coming into place of the County Governments and therefore this question must be answered in the negative.

16. If there exists any other statutory framework governing the transfer of staff such as the Claimant from the defunct local authorities to the County Governments, the Claimant did not bring any such framework to the attention of the Court either in the pleadings or during testimony.

17. The conclusion therefore can only be that the Claimant was on a distinct and separate contract with the Respondents, separate from the contract with County Council of Nyandarua.

18. The contention therefore that the Claimant was on casual employment for 10 years, and that the Respondents would be liable for any legal injuries during the tenure of employment under the County Council of Nyandarua has no legal basis.

**Whether Claimant was a casual employee**

19. County Governments came into being pursuant to the Constitution 2010 and they were constituted after the 2013 General Elections.

20. Employment relationships between the County Governments and employees including those purportedly inherited are subject to the prevailing laws, both of general application and specific application.

21. Starting with the law of general application, the Employment Act, 2007 envisages different types of lawful contracts.

22. These include oral contracts, casual employment, fixed term contracts or contracts of an indefinite tenure (the so called permanent contracts).

23. In circumstances where a casual employee serves for continuous working days amounting in the aggregate to more than one month and the work cannot be completed in less than 3 months, section 37 of the Employment Act, 2007 deems such employment as monthly term contract.

24. The Claimant testified that he joined the Respondent in 2010 on a monthly renewable contract.

25. He produced 2 contracts referenced *engagement on casual terms* dated 8 January 2014 and employment as a casual worker dated 24 September 2014.

26. Both contracts indicated that the Claimant would be on 3 month contract(s) on monthly wages.

27. In so far as the Claimant was not paid at the end of the day but was getting monthly pay (accumulated or not) and in so far as the contracts provided the duration, the Claimant was not a casual employee as envisaged under section 2 of the Employment Act, 2007.

### **Law of limitation and unpaid salary arrears**

28. The Claimant alleged in the Memorandum of Claim that he (a watchmen) was underpaid (below the prescribed minimum wage). The Claimant pleaded that the Kshs 7,000/- he was earning was below the prescribed minimum wage.

29. The period of underpayment was not disclosed considering that the prescribed minimum wages are ordinarily reviewed every year around May.

30. But in so far as underpayment of wages comprises both a criminal offence and a continuing injury, the relevant date for asserting limitation would be within 12 months from when the injury (underpayments) ceased.

31. The most current contract exhibited by the Claimant was for 3 months and was to run from 1 September 2014 while the Cause herein was filed on 18 December 2014. Limitation therefore does not arise.

### **Remedies**

32. The Claimant sought 2 substantive remedies:

**(i) An order directing the respondents to immediately engage the claimant as a permanent employee of the county**

33. The nature of the contract issued by the Respondent to the Claimant is strictly not unlawful or illegal as the law of general application envisages contracts of a limited duration.

34. It is up to an employer and employee to agree on the nature of contract and in the circumstances presented here, the order sought is not appropriate save a declaration that the Claimant was (is) not a casual employee or worker but on term contract by dint of section 37 of the Employment Act, 2007.

**(ii) Kshs 553,938 being unpaid salary arrears and house allowance.**

35. The prescribed minimum wages are not static and are amended from time to time, usually effective from the beginning of May of each year. The rates also differ from area to area.

36. Just as a sample, the prescribed minimum wage for a day watchman in 2012 (legal Notice No. 71 of 2012) for all other areas (excluding Nairobi, Mombasa, Kisumu, all municipalities, Mavoko, Limuru and Ruiru town councils) was Kshs 4,577/- exclusive of house allowance.

37. For this period, the Claimant did not disclose how much he was earning to enable the Court make a

determination as to whether there was underpayment (Claimant was merely content with stating that before the wage was fixed at Kshs 7,000/- he was earning Kshs 4,000/-). Even the date of increment was not revealed.

38. According to Legal Notice No. 197 of 2013, the prescribed minimum wage for a day watchman was Kshs 5,218/- and if 15% house allowance was factored, the total remuneration would be Kshs 6,000/-.

39. The Claimant did not disclose the wages during the currency of this Legal Notice.

40. As for the year 2014, the Claimant produced muster rolls for September 2014 indicating monthly wage of Kshs 7,370/-.

41. The Claimant did not place before the Court any Regulation of Wages Order for this year and my own research has shown there was none.

42. The effect being that the wages set out in the 2013 Order (gross of Kshs 6,000/-) were applicable, and therefore the Claimant was being paid above the prescribed minimum wage.

43. All in all, the Court notes that the Claimant did not lay sufficient evidential foundation for this head of relief and it is declined.

### **Conclusion and Orders**

44. The upshot of the foregoing is that the Cause herein is dismissed with no order as to costs.

45. This judgment to apply in the Causes referred to in paragraph 2 above.

**Delivered, dated and signed in Nakuru on this 9<sup>th</sup> day of December 2016.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant            Mr. Musembi instructed by Musembi & Co. Advocates

For Respondents        Mr. Kanyi instructed by Kanyi Ngure & Co. Advocates

Court Assistants        Nixon/Daisy