



**REPUBLIC OF KENYA**

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

**CAUSE NO. 76 OF 2015**

**ABDIKADIR SULEIMAN.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF ISIOLO.....1<sup>ST</sup> RESPONDENT**

**GOVERNOR, COUNTY OF ISIOLO.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 2<sup>nd</sup> December, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 08.05.2015 through Mbogo & Muriuki Advocates. The claimant prayed for judgment against the respondent for:

- a) An order of reinstatement into the claimant's position of employment as the Chief of Staff and to remain in service of the respondents, and to perform the attached duties in accordance with the relevant provisions of the Constitution and other laws, unless he otherwise ceases to lawfully hold office in the said position.
- b) A declaration that the act of the 2<sup>nd</sup> respondent in relieving or removing the claimant of his duties is a breach of his constitutional right under Article 27, 28, 41, and 50 of Constitution of Kenya and that the same is null and void for all intents and purposes.
- c) General damages for unlawful dismissal.
- d) Kshs.5,198,000.00 being dues payable to the claimant as tabulated at paragraph 11 above being accrued payment upto the time of termination of the contract of service.
- e) Costs and interests.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed the memorandum of response on 03.06.2015 through Kithi & Company Advocates. The respondent prayed that the claim be dismissed with costs. The claimant filed the reply to the response on 20.08.2015.

It is not disputed between the parties that by a letter of appointment dated 10.01.2014 the 1<sup>st</sup> respondent employed the claimant in the position of the Chief of Staff on the following terms:

- a) The contract of employment would commence from 7<sup>th</sup> January 2014 and would stand

terminated at the end of the service of the 2<sup>nd</sup> respondent.

b) Appointment was in Job Group “S”.

c) The salary scale was Kshs.120,270 to Kshs.232, 860.00 per month.

d) House allowance was Kshs.60,000.00 per month.

e) Commuter allowance of Kshs.16,000.00 per month.

Prior to the employment the claimant’s case was that he had resigned from his previous employment in the position of Personal Banking Manager with the Kenya Commercial Bank. The claimant’s testimony was that on 04.05.2015 the 2<sup>nd</sup> respondent suddenly convened a meeting at which officers working in the 2<sup>nd</sup> respondent’s office were summoned to attend. The officers that were summoned included the claimant, the Political Advisor one Salat, and the Personal Assistant one Guyo Adhi. The claimant’s further testimony was that at that meeting, the 2<sup>nd</sup> respondent dismissed the officers, including the claimant, verbally – and the claimant left the office having been fired verbally. The 2<sup>nd</sup> respondent then issued a press statement announcing that some of his officers had been sacked. The claimant’s case was that he was one of the officers mentioned in the press statement. Prior to the termination, the claimant testified that he had not received a prior notice or warning.

The claimant testified that immediately after he was fired, the respondent appointed one Mohamed Boru Ali to replace the claimant in the position of Chief of Staff. The claimant’s evidence was that he knew about his replacement because by the circular letter dated 27.05.2015 about Madaraka Day Celebrations, 2015, the said Mohamed Boru Ali signed as the Chief of Staff.

The claimant testified that the show-cause notice dated 20.05.2015 was delivered to the claimant on 27.05.2015 long after his verbal termination on 04.05.2015. The claimant further testified that he received on 27.05.2015 the letter dated 04.05.2015 asking him to go on a compulsory leave effective 04.05.2015 and pending investigations on several matters which had been brought to the attention of the 2<sup>nd</sup> respondent. The claimant’s further case was that by 27.05.2015 he had already filed the present suit on 08.05.2015 questioning the respondents’ unfair dismissal conveyed verbally by the 2<sup>nd</sup> respondent on 04.05.2016. Accordingly, the claimant’s case was that the two letters to show-cause and on compulsory leave (received on 27.05.2015) were the 2<sup>nd</sup> respondent’s belated and pretended moves to deal with the unfair verbal termination.

The respondent did not call a witness at the hearing. The respondents’ case as pleaded is that after the claimant’s alleged verbal termination on 04.05.2015 (but which the respondents deny and say the claimant was put on a compulsory leave) the claimant continued to earn as per the terms of service in his letter of appointment. Thus, the respondents’ case is that the claimant is not entitled to claim unfair termination. However, the court observes that the only evidence on record on the point of continued payments and as testified by the claimant was that the claimant was last paid at the end of June 2015.

The respondents’ further case is that by the letter on compulsory leave dated 04.05.2015, the claimant was placed on leave pending investigations and subsequently by the show-cause letter dated 20.05.2015 the claimant was subjected to a disciplinary process on account of underperformance and incompetence. The respondents urged that the claimant filed the present suit to preempt the disciplinary proceedings. Further, the respondents’ case is that as per the claimant’s letter of appointment dated 10.01.2014, the claimant was subjected to all regulations for officers of Isiolo County Public Service which are in force or as may be promulgated from time to time.

The **1<sup>st</sup> issue** for determination is whether the claimant was verbally dismissed by the 2<sup>nd</sup> respondent on 04.05.2015. First, the claimant’s testimony and account of his verbal dismissal by the 2<sup>nd</sup> respondent on 04.05.2015 has not been rebutted by way of opposing or other evidence. Second, there is no doubt that on 27.05.2015 one Mohamed Boru Ali wrote the circular letter about the Madaraka Day Celebrations, 2015

and signed as the Chief of Staff. Accordingly the court returns that the claimant was dismissed verbally on 04.05.2015, a vacancy thereby accrued, and was filled by one Mohamed Boru Ali as per the credible material on record.

The **2<sup>nd</sup> issue** for determination is whether the claimant's verbal dismissal on 04.05.2015 was in contravention of Articles 27, 28, 41, and 50 of the Constitution of Kenya and therefore null and void for all intents and purposes. The submissions filed for the claimant do not mention any of the stated provisions of the Constitution. Thus the court returns that as invoked, the contravention of the cited constitutional provisions has not been established and that the present case was typically a case based on breach of the contract of employment and the constitutional provisions were unnecessarily invoked and remotely so.

The **3<sup>rd</sup> issue** for determination is whether the claimant's dismissal was unfair. It is not in dispute that the claimant's service was subject to all regulations for officers of Isiolo County Public Service which are in force or as may be promulgated from time to time. The parties did not refer to any of such regulations as may have been promulgated. In view of that express term of service, the court finds that the claimant was a public officer subject to the law governing officers in the county public service. Under section 59(1) of the County Governments Act, 2012, the County Public Service Board is conferred, on behalf of the county government, the function and power to exercise disciplinary control over, and to remove persons holding or acting in county public service office. Under section 76(1) of the Act, in exercising disciplinary powers, the County Public Service Board must observe principles of natural justice. Under section 76(2) of the Act, no public officer may be punished in a manner contrary to any provisions of the Constitution or any Act of Parliament.

The court has considered the enumerated provisions of the Act. First, the court finds that the 2<sup>nd</sup> respondent usurped the functions and powers of the Isiolo County Public Service Board in purporting to verbally dismiss the claimant on 04.05.2015 and further, in so doing, the 2<sup>nd</sup> respondent acted without relevant authority – as the board was clearly vested with the relevant authority to act in exercise of the powers of disciplinary control over the claimant. Second and in absence of established regulations, the court finds that the verbal termination was without a valid reason as envisaged under section 43 of the Employment Act, 2007 and without a notice and a hearing as provided in section 41 of the Employment Act, 2007. Thus, the court returns that the claimant's dismissal was unlawful and unfair.

The **4<sup>th</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court has considered the pleadings, the evidence and the submissions on record and makes findings as follows.

**First**, the claimant prayed for an order of reinstatement into the claimant's position of employment as the Chief of Staff and to remain in service of the respondents, and to perform the attached duties in accordance with the relevant provisions of the Constitution and other laws, unless he otherwise ceases to lawfully hold office in the said position. The claimant has testified that the position has since been filled by one Mohamed Boru Ali. The claimant has also testified that he has since moved on and he works as the Advisor to the Governor, County of Tana River. In such circumstances, the court finds that orders of reinstatement will not advance the interests of justice in the present case because it would unnecessarily unsettle the accrued and vested parties' new employment relationships. The prayer will therefore be declined.

**Second**, the claimant prayed for a declaration that the act of the 2<sup>nd</sup> respondent in relieving or removing the claimant of his duties is a breach of his constitutional right under Article 27, 28, 41, and 50 of Constitution of Kenya and that the same is null and void for all intents and purposes. As already found, the contravention of the cited constitutional provisions was not established and that the present case was typically a case based on breach of the contract of employment and the constitutional provisions were unnecessarily invoked and remotely so. The prayer will therefore be declined.

**Third**, the claimant prayed for general damages for unlawful dismissal. The court has found that the dismissal was unfair and unlawful. The claimant did not contribute to his termination. He desired to serve

the full contractual term ending about August 2017. The claimant tried to mitigate his circumstances and got an alternative job in August 2016, more than 12 months from the date of his dismissal on 04.05.2015. It would appear that the claimant was last paid in June 2016. Thus, under section 49(1) (c) of the Employment Act, 2007 and taking into account the cited circumstances and factors impacting the case, the court considers that 10 months' gross pay at Kshs.226, 018.00 making **Kshs.2, 260,180.00** will meet the ends of justice. The claimant is entitled accordingly but less the due income tax.

**Fourth**, the claimant prayed for Kshs.5, 198,000.00 being dues payable to the claimant as tabulated at paragraph 11 above being accrued payment up to the time of termination of the contract of service. The court considers that the claimant has since got alternative employment and has mitigated his circumstances. Further, the court considers that the award of compensation sufficiently serves justice in the case. The prayer for Kshs.5,198,000.00 is therefore declined.

As the claimant has substantially succeeded in his claim, the respondents will pay costs of the suit.

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

- a) The respondents to pay the claimant **Kshs.2,260,180.00** by 15.02.2017 failing interest at court rates to be payable thereon until full payment.
- b) The respondents to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 2<sup>nd</sup> December, 2016**.

**BYRAM ONGAYA**

**JUDGE**