



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAKURU**  
**CAUSE NO. 353 OF 2014**  
**BEATRICE ADHIAMBO ODERO.....CLAIMANT**  
**v**  
**SMALLHOLDER HORTICULTURE**  
**MARKETING PROGRAMME (SHoMAP).....RESPONDENT**

**JUDGMENT**

1. Beatrice Adhiambo Odero, (Claimant) was appointed by the Ministry of Agriculture as a messenger in the Smallholder Horticulture Marketing Programme (SHoMAP), (Respondent) through a letter dated 11 March 2008.
2. The letter of appointment provided that the appointment was performance based and would be renewable each year.
3. On 25 March 2014, the Respondent's Programme Manager wrote to the Claimant informing her that the programme completion date was 30 December 2013, and that her contract would expire on 30 June 2014.
4. On 9 May 2014, the Principal Secretary, Ministry of Agriculture wrote to the Respondent's Programme Manager to develop a comprehensive report and exit plan for staff bearing in mind that the programme would close on 30 December 2014. The letter also directed the Programme Manager to withdraw notifications sent to staff about the completion of the programme.
5. The Respondent did not withdraw the notification sent to the Claimant.
6. On 11 August 2014, the Claimant instituted legal proceedings against the Respondent. The gravamen of the cause of action is not clearly set out but it is apt to outline the paragraphs that appear to set out the facts constituting the cause of action
  7. *That a blatant disregard and in complete defiance to the directive by the Ministry of Agriculture, Livestock and Fisheries, the defendant neglected, failed and/or refused to withdraw the notification to the plaintiff but withdrew the notification issued to the other three officers who has been issued with notifications.*
  8. *The defendant treatment of the plaintiff was and is wrongful, unlawful and contrary to constitution of Kenya and amount to discrimination.*

9. *During the tenure of the plaintiff's employment with the defendant the defendant further discriminated the plaintiff by paying her a salary of Kshs 31,125/- per month instead of Kshs 35,700/- paid to other officers in the same rank.*

10. *The defendant therefore clearly neglected, failed and/or refused to accord the plaintiff the same treatment and term of employment as other employees in the same category.*

7. The Claimant testified. She stated she was issued with an appointment letter dated 11 March 2008 as a support staff at a monthly wage of Kshs 24,754/-. The contract was for one year but renewable and that she served for about 6 years.

8. According to the Claimant, her last contract was to end in June 2014 and that she received a notification dated 25 March 2014 on non renewal of the contract. Three other employees Christopher Nguku, Alex Miano and Gitonga M'Mbijjiwe also received notifications.

9. In the course of serving the notification period out, the Claimant stated that she received an urgent letter addressed to the Respondent from the Principal Secretary and she opened it because the Secretary was not present. The letter directed the Respondent to withdraw the notifications until development of a report and staff exit plan.

10. According to the Claimant, her notification of non renewal was not withdrawn while that of the 3 other employees were withdrawn. This was discriminatory.

11. In cross examination, the Claimant stated that the Respondent had the option not to renew her contract and that the programme was set to end in December 2014, but she was disengaged in May 2014 and that the other 3 employees were still serving.

12. The Respondent filed a Memorandum of Defence on 16 October 2014. It denied receipt of the letter from the Principal Secretary and of disregarding the directive by the Principal Secretary to withdraw the notifications or discriminating against the Claimant. The Respondent also pleaded that the Claimant was notified of non renewal of her contract and this was in accordance with the terms of the contract and no loss was suffered.

13. The Respondent further pleaded that the Cause was bad in law, incurably defective and contravened section 13A of the Government Proceedings Act.

14. The Respondent's Programme Manager, Peter Mbogo testified. He stated that the Claimant was employed on yearly renewable contracts as a support staff.

15. He further stated that the programme was initially to run for 7 years and completion was set for December 2013, with a closure date of June 2014. Because of uncompleted civil works, an extension of one year was granted at no cost i.e. no new funds were given and so all staff could not be retained. As a result, notices were given to 4 employees.

16. The witness stated that the 4 employees' contracts were not renewed and that none of the 3 persons mentioned by the Claimant were retained. Alex Miano, a driver was however retained due to nature of his duties, and that the Claimant worked until 30 June 2014.

17. The witness also stated that the non renewal of the Claimant's contract was not unfair and that the Claimant should not have opened the letter from the Principal Secretary.

18. During cross examination, the witness stated that the letter from the Principal Secretary was not binding on him and that Christopher Nguku and Gitonga M'Mbijjiwe left on expiry of their contracts in June 2014.

## **Issues for determination**

19. From the pleadings, evidence and submissions, the Court has identified the questions for determination as, *whether the directive by the Principal Secretary was binding on the Respondent, whether the Claimant was discriminated against and appropriate relief.*

### **Whether directive by Principal Secretary was binding upon the Respondent**

20. The Respondent's evidence that the programme was to be completed by December 2013 and closing date was June 2014 was not challenged. The evidence that an extension of one year was sought and granted was also not controverted.

21. The Principal Secretary, Ministry of Agriculture, Livestock and Fisheries through a letter dated 9 May 2014 wrote to the Respondent. The letter as may be material stated

*As you are aware, there are critical activities that need to be completed before the programme closes on 30 December 2014. It is therefore imperative that a comprehensive report on the status of implementation and an exit plan for staff be developed and approved to ensure smooth and successful completion of the programme.*

*You are therefore required to develop the plan in liaison with the Director Crops and submit the same to my office by 20<sup>th</sup> May 2014. In the meantime, the notification issued to the four officers should be withdrawn until this matter is concluded.*

22. The parties did not place direct material before Court to enable it understand or establish the correct and proper relationship between the Respondent and the Ministry of Agriculture, Livestock and Fisheries.

23. But all the letters produced in Court were on the letterheads of the Ministry. These include the appointment letter of the Claimant and the notification dated 25 March 2014 to the Claimant. The letter by the Principal Secretary was in response to a letter by the Respondent.

24. From these secondary materials, the Court finds that the programme was a public project under the Ministry of Agriculture. It is public knowledge that Principal Secretaries are the Accounting Officers of their respective state departments, and therefore the Court finds that the directive by the Principal Secretary was binding upon the Respondent.

25. The Respondent should not have disengaged the services of the Claimant until development of a staff exit strategy.

### **Whether the Claimant was discriminated against**

26. There was a clear directive that the notifications of non renewal of contracts be withdrawn. The Claimant asserted that 3 other staff members whom she named were allowed to continue working.

27. The Respondent on the other hand contended that the employees save for a driver were sent off (contracts were not renewed) and were no longer working with it.

28. It is the word of one party as against the other. I am unable to find that the 3 other colleagues of the Claimant had the notifications withdrawn or had their contracts renewed on the basis of the material placed before me.

29. The Claimant further contended in the pleadings that she was discriminated on the basis of pay. However, the Claimant did not provide any evidence to support discrimination on the basis of pay. She did not prove how much the *comparators* were being paid.

30. Equally, there was no evidence provided by the Claimant that the other 3 employees were doing similar work or their duties required similar skills or qualifications. No basis was laid of any genuine occupational qualification or requirement.

## **Appropriate relief**

### ***Declarations***

31. The Claimant sought 2 declarations. One to the effect that the *defendant's treatment of her was wrongful and contrary to the constitution* and that *she was entitled to treatment and terms of employment as other employees*.

32. Relief should be appropriate and effective. Granting of any declarations sought herein in the circumstances presented here would not be appropriate or effective.

### ***Pay and emoluments***

33. The Claimant further sought an order directing the Respondent to pay her total emoluments as paid to other officers in her category. The Claimant did not adduce any evidence as to these emoluments paid to other officers in her category.

34. Any award under this head would be in vacuo.

### ***Wages up to December 2014.***

35. In lieu of the prayer for total emoluments paid to other officers and having found that the Respondent was bound by the directive of the Principal Secretary, the Court would award the Claimant wages from July 2014 to December 2014 when the programme was to close assessed in the sum of Kshs 186,750/-, based on the pleaded but uncontroverted salary.

### ***Reinstatement***

36. The Claimant's case was not pleaded as one of unfair termination or wrongful dismissal. Reinstatement is an appropriate and effective relief where there is a finding of unfair termination or wrongful dismissal.

37. In any case, specific performance can only be ordered in exceptional circumstances and no such circumstances were demonstrated here. This relief is declined.

### ***Costs***

38. Claimant was directed to file and serve submissions before 11 December 2014. The directive was not complied with (Respondent though filed submissions on 18 December 2014). The Court therefore orders each party to bear own costs

**Delivered, dated and signed in open Court in Nakuru on this 6<sup>th</sup> day of February 2015.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant            Mr. Cheche instructed by Olaly Cheche & Co. Advocates

For Respondent        Mr. Mbaka, Litigation Counsel, office of the Hon. Attorney General