



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

PETITION NO. 1 OF 2015

(Formerly Petition No. 12 of 2015 at Nairobi)

GRACE N. MAKORI..... 1ST PETITIONER

ISAAC NGOTHO MAINA.....2ND PETITIONER

AND

175 OTHER PETITIONERS

-VERSUS-

MURANG'A COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

**PUBLIC SERVICE COMMISSION OF KENYA.....2ND
RESPONDENT**

MINISTRY OF HEALTH.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th May, 2015)

JUDGMENT

The petitioners filed the petition on 26.01.2015 through Juma, Awiti & Associates. The petitioners prayed for judgment against the respondents for:

1. An order compelling the 1st respondent to reinstate, without loss of benefits, all the ESP health workers on permanent and pensionable basis.
2. An order to stop the 1st respondent from recruiting to replace the petitioners until the matter is heard and determined.
3. An order to stop victimization of the petitioners or their representatives.
4. Costs of the petition.

The petitioners filed on 12.03.2015 the further supporting affidavit of Grace N. Makori.

The 1st respondent opposed the petition and filed on 23.02.2015 the replying affidavit of Richard Kamami, the 1st respondent's secretary, through Mbugua Ng'ang'a & Company Advocates. The 1st respondent filed on 02.04.2015 the further replying affidavit of Richard Kamami.

The learned litigation counsel Makori Okello for the Hon. Attorney General appeared for the 2nd and 3rd respondents. He filed his replying affidavit on 24.04.2015 whose effect was that the 2nd and 3rd respondents supported the petition.

Written submissions were filed for all the parties.

The petitioners are 177 health workers employed by the government of Kenya on diverse dates in 2011 under the Economic Stimulus Programme (ESP). The petitioners serve in diverse cadres in the government health services. Each of the petitioner's employment was based on provisions of a standard letter of offer of employment by the 3rd respondent whose salient provisions were as follows:

- a. The appointment was approved by the Public Service Commission, the 2nd respondent.
- b. The appointment was on three year contractual terms of service.
- c. During the term, the petitioner would be subject to all regulations applicable to civil servants then in force or which could be promulgated from time to time.
- d. The appointment was subject to certificate of medical fitness to serve.
- e. The appointment was subject to a consolidated salary attached to the grade and stated in the letter.
- f. The petitioner was to signify acceptance by signing enclosed prescribed forms and submitting them to the designated District Medical Officer of Health and to report to the Officer by designated date for relevant deployment.

The petitioners' case was that the persons employed under the ESP in 2010 were absorbed in the public service on permanent and pensionable basis as promised to all persons who were employed under the ESP. The petitioners' further case was that their 3 years' contract lapsed sometimes in 2014 and after the coming into effect of the Constitution of Kenya 2010 under which the health services were devolved to the newly established county government. The transitional constitutional and statutory provisions had the effect that the petitioners continued in employment under the 1st respondent.

The petitioners' further case was that their respective 3 year contracts lapsed in May 2014 and instead of being absorbed into the permanent and pensionable service, the 1st respondent opted to extend the contractual service by 6 months pending review of their respective contracts. Upon the 1st respondent's directive, the petitioners submitted the relevant academic and professional certificates to facilitate issuance of letters of permanent appointment not later than 16.12.2014. Instead of receiving the letters of permanent employment, the petitioners were informed by the 1st respondent that their ESP contracts had been extended by a further 7 months under the ESP prevailing terms of service. The reason given for the extension was that the petitioners' remuneration as regular employees had not been budgeted for until 1.07.2015.

In the circumstances, the petitioners were dissatisfied, went on a go-slow, reported a dispute to the county labour officer, the 1st respondent refused to attend conciliation proceedings, and subsequently the petitioners filed the petition in a situation whereby the 1st respondent had initiated steps to replace the petitioners with newly recruited staff. The court made interim orders by whose operation the petitioners remained in the 1st respondent's service pending the hearing and determination of the petition.

It is not disputed that the 3rd respondent requested the 1st respondent to absorb the petitioners into regular permanent and pensionable service. The 1st respondent objected to such absorption because in its considered view, the petitioners had not been appointed by the 2nd respondent and therefore could not be deemed seconded to the county government under the provisions of section 138 of the County Governments Act, 2012. The 1st respondent therefore demanded that the 3rd respondent seeks proper appointment by the 2nd respondent and the Treasury was to avail the funds set aside for the ESP staff to enable the 1st respondent to absorb the petitioners as requested by the 3rd respondent. Thus, for the 1st respondent it was urged that the absorption should be possible and ordered only if the 2nd respondent regularised the appointments and the national government provided the necessary funds. The 1st

respondent's further grounds of opposition to the petition were as follows:

- a. The national government cannot direct the 1st respondent or the county government to absorb the petitioners because the 1st respondent is independent in the performance of its duties and the county government is autonomous.
- b. By accepting extension of the term contracts for 6 months, the petitioners were thereby stopped from unilaterally urging for permanent and pensionable service.
- c. By declining to accept extension of term contracts, the petitioners should be deemed to have left employment.

The 1st respondent in the submissions admitted that the petitioners were dependable employees in the county government's health services, the work they performed was permanent and in the event of absence of the petitioners the county government would not have alternative employees to perform the duties performed by the petitioner. It was further submitted that even with the petitioners at work, the county government was constraint in terms of staff to deliver effective and efficient health services. Thus, other than for the financial limitations, the petitioners would be entitled to permanent and pensionable terms of service.

The 2nd respondent by the letter dated 5.05.2015 being exhibit MO2 on the replying affidavit of Makori Okello confirmed as follows:

1. Some of the persons employed under ESP in earlier batches had been absorbed into permanent and pensionable service.
2. Those employed under ESP in later batches were to be absorbed by the respective county governments into permanent and pensionable service upon lapsing of their 3 years' contract and some counties had already absorbed such staff into the permanent and pensionable service.
3. An inter-agency committee meeting held on 12.02.2015 bringing together the Council of Governors, the 3rd respondent, the 2nd respondent, the Transition Authority, National Treasury and the Directorate of Public Service Management had resolved that all the ESP employees be absorbed.

Further, by the letter dated 17.02.2015 being part of exhibit MO3 on the replying affidavit of Makori Okello, the 2nd respondent confirmed that at the meeting held on 17.02.2015, the Council of Governors undertook to implement various resolutions including issuing of circulars to 16 county governments that had not absorbed ESP personnel to do so.

The **1st issue** for determination is whether the petitioners are entitled to be retained in the employment of the 1st respondent on permanent basis or should remain on contractual basis.

Section 138 (1) of the County Governments Act, 2012 provides that any public officer appointed by the 2nd respondent in exercise of its constitutional powers and functions before the coming into effect of the Act and was serving in the county on the date of constitution of the county government shall be deemed to be in the service of that county government on secondment from the national government with their terms of service at that date.

The 1st sub-issue is whether the petitioners were appointed by the 2nd respondent. The 1st respondent's case is that the 2nd respondent did not appoint the petitioners. The court has perused the undisputed sample letter of offer of appointment. The letter is express that the 2nd respondent approved the appointment of the petitioners and the court finds as much. Thus, the said section 138 of the Act applied to the petitioners.

The 2nd sub-issue is whether the terms of service for the respondents included absorption into permanent and pensionable service. As submitted for the 3rd and 2nd respondents, the best placed parties to confirm the terms of the contract and the intention of the parties are the parties at the formation of the contract of

employment being the petitioners, the 2nd respondent and the 3rd respondent. The evidence on record is clear that the petitioners, the 2nd respondent and the 3rd respondent are not in dispute that the petitioners would be absorbed into regular permanent and pensionable terms of service upon the lapsing of the 3 years' contractual term. The court finds as much.

In making that finding the court has considered that even in cases of casual employment, under section 37 (1) of the Employment Act, 2007, the casual employment converts to permanent regular employment under the Act if the casual employee has worked for a period or a number of continuous working days whose aggregate is not less than one month; or the casual employee performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to equivalent of three months or more. The court finds that the petitioners' claim for regular permanent and pensionable service is within that general statutory principle of regular permanent service because the petitioners have served for more than 3 years without a break and all parties agree that the work to be performed is of a permanent nature.

It is not in dispute that the 2nd and 3rd respondents as well as some county governments have already absorbed into permanent and pensionable service some persons employed under the same terms and circumstances as the petitioners. Accordingly, the court finds that it would be unfair labour practice and in contravention of Article 41 of the Constitution for the 1st respondent or any other county government to treat employees like the petitioners or those in petitioners' circumstances differently by denying them the permanent and pensionable terms of service. Further the court holds that it would be discriminatory to treat the petitioners differently and deny them the permanent and pensionable terms as that would contravene their right under Article 27(2) of the Constitution to equality and the full and equal enjoyment of all rights and freedoms and in particular the right to equally enjoy the right to fair labour practices that entail freedom from discriminatory terms of employment.

The court has considered the 1st respondent's submission that it cannot be directed by the 2nd and 3rd respondents in the performance of its functions.

First the court observes that the duty to absorb the petitioners into permanent service on the part of the 1st respondent is clearly founded upon the provisions of section 15(2) of the 6th schedule to the Constitution on the transitional and consequential provisions. Under that section the national government is obligated by legislation to facilitate the devolution of power, assist county governments in building their capacity to govern effectively and to provide the services for which they are responsible; and to support county governments. In the opinion of the court, that transitional provision is partly amplified and given operation through section 138 of the County Governments Act, 2012 so that the 1st respondent is obligated to operate within that transitional constitutional and statutory framework to achieve effective and efficient delivery of the county health services. In the opinion of the court, emplacement of the petitioners on regular permanent and pensionable service meets the constitutional requirement that the 2nd and 3rd respondents should support the county government to achieve devolution.

Second, an appeal from decisions of the 1st respondent would go to the 2nd respondent under the provisions of Article 234(2) (i) of the Constitution and as provided for in section 77 of the County Governments Act, 2007. Thus, in the opinion of the court, the 1st respondent would properly be bound by the 2nd respondent's decision in a dispute taken to the 2nd respondent on appeal. In the instant case the petitioners moved the court to arrest what they considered prejudicial decisions by the 1st respondent and in circumstances whereby the 2nd respondent has already communicated the applicable policy, in the opinion of the court, it would be in vain for the 2nd respondent to run away from that policy.

Third, the 2nd respondent has demonstrated that the original intention was to absorb the petitioners upon lapsing of the 3 years' contractual term and the applicable resolution that the petitioners be absorbed into regular permanent and pensionable service was made in consultation with the Council of Governors. The Council is established under section 19 of the Intergovernmental Relations Act, 2012 and some of its

functions under section 20 of the Act include providing a forum for consultations amongst county governments; considering matters of common interest to county governments; consideration of matters referred to the Council by a member of the public; and consideration of reports from other intergovernmental forums on matters affecting national and county interests or relating to the performance of counties. Under subsection 20(2) of the Act, the Council is empowered to establish other intergovernmental forums including inter-city and municipal forums and in subsection 20(3) the Council may establish sectoral working groups or committees for the better carrying out of its functions.

The court holds that in discharging its functions the 1st respondent cannot claim and further a province of independence and autonomy in a manner that would undermine or disregard the true and proper function of other statutory and constitutional bodies such as the Council of Governors and the 2nd respondent appropriately established to achieve the proper goals of the devolved system of government. The court considers that the Council and the 2nd respondent were within their respective constitutional or statutory authority to consider and arrive at resolutions on the destiny of the ESP staff serving in the county governments across the country including their absorption into the regular permanent and pensionable service. In the opinion of the court, such was a common interest for the good performance of the county governments that fell within the Council's functions and the resolutions are binding upon the 1st respondent.

Thus to answer the 1st issue for determination the court returns that the petitioners are each entitled to be retained in the employment of the 1st respondent on regular permanent and pensionable basis with effect from the date of lapsing of their initial 3 years' contractual term of service.

The **2nd issue** for determination is whether the petitioners should, on a balance of convenience, be so retained in employment on the permanent and pensionable basis. The court has found that the petitioners are so entitled and therefore it would not be useful to investigate the issue of balance of convenience. Nevertheless, it was urged for the 1st respondent that the National Treasury had to provide for the necessary funds to meet the resultant financial implications of absorbing the petitioners. The court finds that throughout the proceedings it was never shown that the petitioners were paid out of funds other than the funds provided by the tax payers and budgeted for in the regular government budgets. Accordingly, the court finds that the 1st respondent is enjoined to budget for the resultant financial implications but in view of the extra financial implications that may come about and in view of the government budgetary cycle the court considers that the 1st respondent should be allowed to comply by 1.08.2015.

The **3rd and final issue** for determination is whether the petitioners are entitled to the remedies as prayed for. The court finds that the petitioners are entitled in terms of the findings already made in this judgment.

In conclusion, judgment is made for the petitioners against the 1st respondent and for:

1. The declaration that the petitioners are each entitled to be retained in the employment of the 1st respondent on regular permanent and pensionable basis with effect from the date of lapsing of their respective initial 3 years' contractual term of service.
2. The 1st respondent to provide for and to meet the resultant financial implications of order 1 by 1.08.2015 in view of the government budgetary cycle and in default interest at court rates to run from 1.08.2015 till full payment of the extra monthly payments that may be due to each of the petitioners till full payment.
3. The secretary and each member of the 1st respondent shall be responsible for implementation of orders 1 and 2 above.
4. The 1st respondent is stopped by itself or by its employees or agents from victimization of the petitioners or the petitioners' representatives with respect to the matters leading to or after the dispute in the present case.
5. The 1st respondent to pay the petitioners' costs of the suit.
6. The 2nd and 3rd respondents to bear own costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 8th May, 2015.**

BYRAM ONGAYA

JUDGE