



**REPUBLIC OF KENYA**

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

**CAUSE NO.2106 OF 2014**

**FREDRICK ODHIAMBO NDEDE ..... CLAIMANT**

**VERSUS**

**MAKUENI COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**MAKUENI COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 24<sup>th</sup> November 2014 the claimant, Fredrick Odhiambo Ndede filed application through Notice of Motion and under the provisions of section 3, 12(1) (i) and (ii) of the industrial Court Act [Employment and Labour Relations Court Act] and Rule 16 (1) and (2) of the Court Rules and Article 41, 47 and 50 of the Constitution and seeking for orders that;

1. *Spent.*
2. *Pending the hearing and determination of this application interpartes, this Court do issue an order of temporary injunction against the Respondents against termination and/or dismissal of the Claimant from his employment without following the law and his terms and conditions of employment.*
3. *Pending the hearing and determination of this claim, this Court do issue an order of mandatory injunction against the Respondents against termination and/or dismissal of the Claimant from his employment without following the law and his terms and conditions of employment.*
4. *Pending the hearing and determination of this claim, this Court be pleased to issues Orders directing the Respondents to immediately pay the Claimant his salary from June 2013 to October 2014 and to continue to pay salary when due until this claim is heard and determined.*
5. *Costs of the suit be awarded to the claimant*

2. The application is supported by the annexed affidavit of the Claimant and on the grounds that the Claimant was deemed transferred to the 2<sup>nd</sup> Respondent by virtue of being an employee of the County Council of Makeni vide the County Government Act and after the general elections held on 4<sup>th</sup> March 2013. On the 25<sup>th</sup> February 2013 the Claimant received a letter informing him that he had been deployed to the position of interim County Secretary Makeni County Government where he worked diligently from March 2013 until May 2013 when the governor of the 2<sup>nd</sup> Respondent gave him a suspension letter on allegations that finances had been misused prior to the 2<sup>nd</sup> Respondent coming into being. The Claimant was not given an opportunity to defend himself and there was a violation of the collective bargaining agreement (CBA) between Association of Local Government Employers and Kenya Local Government Workers union clause 30(a). The actions of the Respondent are illegal as the Claimant is faced with great hardship due to the non-payment of his due salaries.

3. In his affidavit, the Claimant avers that he was employed by the Ministry of Local Government on permanent basis as Town/Clerk and worked in various stations until 2011 when he was posted to Makueni County Council. On 25<sup>th</sup> February 2013 the Transition authority issued him with a letter deploying him as an interim County secretary of 2<sup>nd</sup> respondent. On 15<sup>th</sup> May 2013 the 2<sup>nd</sup> Respondent issued him with a suspension letter to pave way for investigation over the Kshs.132 million received from the local Authority Trust Fund said to have been spent over projects other than the designated ones. He was not given a chance to explain the use of such funds. He protested the non-payment of his salary and on 10<sup>th</sup> June 2014 he was invited by 1<sup>st</sup> Respondent to answer to allegations of misappropriation of funds. He had also received a show cause letter with 9 allegations and did give a reply on 8<sup>th</sup> August 2014. Under the applicable regulations he was supposed to receive his quarter basic pay and full house allowance which has not been received since suspension. The Respondents have also violated the CBA applicable for the Claimant as under clause 30(a) which provide that a suspension should not be for over a period of 3 months. The Respondents acted illegally and subjecting a public officer to inhumane conditions and acting contrary to the provisions of section 236(b) of the Constitution and acting contrary to section 58 of the County Government Act where the 1<sup>st</sup> Respondent is the one supposed to act in the discipline of the Claimant and not the 2<sup>nd</sup> respondent.

4. In reply, the Respondent filed Replying Affidavit sworn by Rael Muthoka and dated 19<sup>th</sup> December 2014 and avers that as the acting County secretary of the Government of Makueni she has authority to reply herein. That the Claimant was seconded by the Transitional Authority to act as interim County secretary of the County Government of Makueni and to await the election of the Governor of Makueni who was to form his government. The Transitional Authority only seconded employees to the County Government and while the Claimant remained the County secretary, he was answerable to the Governor. The Claimant was suspected of committing fraud of Kshs.132 million and was suspended pending investigations.

5. The Claimant salary was to be drawn from the Ministry and his employment was never with the 1<sup>st</sup> Respondent and the applicable manual was not applicable to him. The CBA cited was not applicable to the Respondents as they were not parties to it. The 2<sup>nd</sup> Respondent has since appointed a County Secretary vide Gazette notice Number 6463 of 10<sup>th</sup> may 2013 and this has not been challenged and thus the prayers sought by the Claimant have been overtaken by events. The claim should have been lodged against the Public Service Commission or the Transitional Authority as all employees not absolved by the County Government were supposed to go back to the Transition Authority.

6. Ms Muthoka also aver that the suit herein has been overtaken in time and thus statute barred. There was no authority to deal with officers formerly deployed by the Transitional Authority. The application should therefore be dismissed with costs.

### **Submissions**

7. In submission the Claimant stated that the Claimant was employed by the Ministry of Local Government and later deployed by the Transitional authority as interim County secretary Makueni on 25<sup>th</sup> February 2013. He was suspended by the 2<sup>nd</sup> Respondent on 15<sup>th</sup> May 2013. Article 236(b) of the Constitution provides that a public officer such as the Claimant should not be dismissed or be disciplined without due process of the law. Section 58 of the County Government Act make provision for the appointment of County Public Service Board to take over functions offices in the County public service and as such also can discipline such officers.

8. The Claimant also submitted that at the time he was suspended, the County Government Service Board had not been constituted, he was serving on an interim basis awaiting the recruitment of the County Secretary by the 1<sup>st</sup> respondent. As held in **Timothy Omollo & 78 Others versus Kakamega County Government 7 Another, Cause No.182 of 2013**, the staff previously working under the Local Government became the staff of the County Government upon the election of the County elections. Such staff are for purposes of deployment, discipline or engagement regulated under the Public Service

Commission unless the County Government permanently engages them. In this case the 2<sup>nd</sup> Respondent did not have the mandate to suspend or discipline the claimant. By keeping the Claimant on suspension without pay for over 24 months is unlawful and inhumane. The application should be allowed as prayed.

9. The Respondents on their part submitted that the application by the Claimant is not properly before this Court as the interim orders sought are not part of the main claim as under the provisions of Rule 16 (3) of the Court Rules. The interim orders sought are final in their nature and not capable of being granted noting that prayer two (20 stopping the termination of the Claimant has been overtaken by events.

10. The Respondents also submit that the Claimant was not their employee as of 4<sup>th</sup> March 2013 so as to warrant the orders sought. The Claimant was not qualified to hold the office of the County secretary by virtue of section 44(2) of the County Government Act. Having been deployed as interim County secretary by the Transitional Authority, the Claimant was never recruited and confirmed for the position as this required a competitive process. Section 138(5) of the County Government Act provides that the officers previously under the local Governments that were not absorbed by the County Government public service were to be released to the national government. In this case the Respondents opted not to absorb the claimant. During the transitional period, such officers on deployment were to be paid by the national government.

11. The Respondents also submitted that the 2<sup>nd</sup> Respondent was correct in suspending the Claimant following misappropriation of funds that the Claimant failed to account for and thus the suspension. Any complaints that the Claimant had should have been by appeal to the Public Service Commission which he has failed to do.

12. The Claimant has thus failed to establish a prima facie case to warrant the orders sought; he has not met the threshold for the grant of a mandatory injunction; and the application is thus not merited and should be dismissed with costs.

### **Determination**

13. The Claimant was the Clerk of Makueni County Council until 25<sup>th</sup> February 2013 when the Transitional Authority deployed him as interim County secretary of Makueni County. His terms of service were to remain as his current appointment in the Public Service. His salary was to be paid by the parent ministry as well as an allowance of Kshs.75, 000.00 for extraneous responsibilities. This was therefore a deployment.

14. From the averments and responses of the Respondents, the 2<sup>nd</sup> Respondent has since constituted its Government without the appointment or confirmation of the Claimant in the deployed capacity. Such officers appointed were gazetted vide Notice No. 6463 of 10<sup>th</sup> May 2013. However, while the Claimant was serving in his deployed capacity, the 2<sup>nd</sup> Respondent suspended him on 15<sup>th</sup> May 2013 pending investigations on how a sum of about Kshs.132 million received from LATF in March 2013 was spent without the involvement of the office of the Governor [the 2<sup>nd</sup> respondent]. That similar spending was traced to a sum of kshs.145 Million received in October 2012. The letter of suspension further advised the Claimant that where he was found not culpable upon investigation, he would be reinstated to his position.

15. Thus the cause of action leading to the suit herein stems from this letter of suspension dated 15<sup>th</sup> may 2013. On 24<sup>th</sup> November 2014 the Claimant moved the Court seeking orders stopping his dismissal or termination without due process and that pending the hearing of the suit, his salaries from June 2013 to October 2014 be paid and such payment be made until the final determination of the suit. I take it then, since May 2013, the Claimant has remained on suspension and since October 2013 he has not been paid his salary and neither has he been terminated from his position as he is seeking to secure his employment. the submissions by the Respondent that the suit is filed out of time has no basis, noting that this is an employment matter based on the orders sought and the relationship that exists between the parties, that of an employer and employee. The suspension was on 15<sup>th</sup> May 2013, the suspension has not been lifted and

while the same was ongoing, the Respondents stopped the salaries of the claimant. Under the provisions of section 90 of the Employment Act, such are ongoing issues that parties can challenge before this court.

*90. Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof. [Emphasis added].*

16. Where there are alleged acts of continuing injury or damage or the cause of action is within 3 years since it arose, such matters where they relate to employment and labour relations can validly be filed before this court. I therefore find the claim, application and orders sought are within the requisite time and not overtaken in terms of time within which the Claimant should have filed the same.

17. The Claimant was an employee of the Local Government and deployed to the County Council of Makueni as Clerk. On 25<sup>th</sup> February 2013, the Transitional Authority deployed the Claimant as interim County secretary of Makueni County. His terms of service were to remain constant as an officer in the public service. In this regard therefore, where the Claimant remained in his position on interim basis or under deployment to the County Government of Makueni, his position as a public officer did not stop. As a public officer he remained protected by article 236 of the constitution, the Employment Act and where applicable the County Government Act. Under article 236(b);

*236. A public officer shall not be—*

*(a) ...*

*(b) Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.*

18. The Claimant as a public officer, even where he was deployed on an interim basis, he enjoyed the constitutional protection against any adverse action against him without due process of the law. The claimant's rights as an employee and public officer are also guaranteed under the Employment Act. It is also settled law that all employees who served under various legislations at the Local Government level or public entities and were deployed to the County upon County Government elections, such employees by virtue of section 58 of the County Government Act were taken over by the County Government Board and hence the close linkages with the Public service Commission in matters of discipline under section 77 of the County Government Act. The functions of the 1<sup>st</sup> Respondent in this case therefore become separate and distinct from those of the 2<sup>nd</sup> Respondent as any disciplinary actions against the Claimant as a public officer should adhere to the law as under section 61 of the County Government Act. Such constitutional protections do not go contrary to the principles set out in the case of **Giella versus Cassman Brown [1969] EA** as submitted by the Respondents. To the contrary and I agree with the submissions of the Claimant in the case of **Timothy Omollo & Others versus Kakamega County Government & Another**, when the Claimant was deployed or seconded to the County Government of Makueni, he remained a public officer and the employee of the County Government entitled to due process of the law. Such due process requires that the rules and regulations of public officers be adhered to and reference be made to the Public Service Commission.

19. Without going into the merits of the main suit, the allegations leading to the suspension of the Claimant go back to 2012 and 2013 before the Respondents came into being. To therefore act and discipline the Claimant without giving him a chance to a defence is contrary to the protections outlined under article 236 which require due process of the law. For the 2<sup>nd</sup> Respondent to act *suo motto* on matters the 1<sup>st</sup> Respondent has not investigated and found the Claimant culpable is to deny the Claimant the protections under section 77 of the County Government Act. To retain the Claimant under suspension and without pay and his allowances for periods more than 3 months and without any hearing is inhumane, degrading and contrary to article 28 of the Constitution that dictate that all persons should be treated with

dignity. I find such dignity of the person is fundamental to the interim orders sought seeking to have the salaries and allowances due to the Claimant paid pending the hearing of the suit. To make such a provision in the circumstances of this case and pending the suspension is not to act contrary to the rules of the Court. This is to ensure the Claimant as an employee has his dignity restored by having his salary paid. Such salary should not be stopped to await the Respondents get back to him as advised in their letter dated 15<sup>th</sup> May 2013 noting that;

*... Needless to add if after investigations you are found to be without blame you will be immediately re-instated to your position.*

It has been over 2 years since. I find no evidence by the Respondent indicating that their investigations with regard to the Claimant have been undertaken or concluded. To leave the Claimant thus in abeyance without payment of his due salary and without due cause is to subject him to degrading treatment. Pending such investigations and hearing of the main suit the Claimant should receive his due salary. The orders sought with regard to an injunction stopping any termination or dismissal are best addressed in a full hearing.

**In conclusion therefore, in the interim and pending the hearing of the suit, prayers one (1) and two (2) shall not issue until the final hearing and I direct as follows;**

- a. Pending the hearing and determination of the claim herein the Claimant shall be paid all salaries due and unpaid from june 2013 to date and such salaries shall continue to be paid unconditionally until the final determination of the suit herein; and**
- b. Costs awarded to the claimant.**

Delivered in open Court at Nairobi this 8<sup>th</sup> day of October the year 2015.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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