



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION NO. 19 OF 2015
(As consolidated with Kisumu ELRC Cause No. 337 OF 2015)
(Before Hon. Lady Justice Maureen Onyango)

ALLOICE KING'ALA NGEREZA 1ST PETITIONER
LEONARD KEVIN NYAMASEGE2ND PETITIONER
ONDUKO GILBET ATUNGA 3RD PETITIONER
ENOCK NYAKUNDI OMWENGA 4TH PETITIONER

-Versus-

THE SPEAKER, NYAMIRA COUNTY ASSEMBLY 1ST RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA 2ND RESPONDENT
THE CLERK, NYAMIRA COUNTY ASSEMBLY 3RD RESPONDENT
THE NYAMIRA COUNTY ASSEMBLY
SERVICE BOARD4TH RESPONDENT

AND

CAUSE NO. 337 OF 2015
DUKE SIMEON ONYARI.....1ST CLAIMANT
SILVANUS NDEMO NYAMORA.....2ND CLAIMANT

-VERSUS

COUNTY ASSEMBLY SERVICE BOARD
NYAMIRA COUNTY.....RESPONDENT

JUDGEMENT

The Petition herein was filed by Alloice King'ala Ngereza, Leonard Kevin Nyamasege, Onduko Cilbert Atunga and Enock Nyakundi Omwenga, the 1st, 2nd, 3rd and 4th Petitioners respectively through the firm of Oguttu Mboya & Company Advocates on 19th August, 2015 seeking the following orders against the Speaker, Nyamira County Assembly (1st Respondent), County Assembly of Nyamira (2nd Respondent), The Clerk, Nyamira County Assembly (3rd Respondent) and the Nyamira County Assembly Service Board (4th Respondent):

a. Declaration be issued to the effect that the Petitioners are entitled to Protection under the Constitution.

b. Declaration that the actions and/or omissions of the Respondents herein, including the variation of the employment portfolio and terms of engagement of the Petitioners, constitutes and/or amounts to **unfair labour practices, mistreatment of the Petitioners and gross abuse of office.**

c. Declaration that the Letters of Appointment(s) dated the **1st day of July, 2015**, *albeit* signed by the 3rd Respondent on the **9th day of August 2015**, are illegal, *void* and contrary to the Due Process of the Law.

d. An Order of Judicial Review in the nature of *Certiorari* to issue to remove unto the Honourable Court and quash the purported new letters of Appointment (sic) dated **1st day of July 2015**, but signed and delivered on the **9th day of August 2015**, whose effects are to vary, alter and/or Review the Petitioners' terms of engagement.

e. Permanent Injunction, restraining the Respondents either by themselves, agents, servants and/or employees, from varying and/or altering the Petitioners' terms of employment and/or engagement, to the detriment of the Petitioners and without complying with the due process of the law.

f. Permanent injunction, restraining the Respondents and more particularly, the 2nd and 4th Respondent from recruiting, enlisting and/or appointing any other person(s), into the offices occupied by the Petitioners, in any manner, whatsoever and/or howsoever.

g. Costs of the Petition be borne by the Respondents jointly and/or severally.

h. The Honourable Court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.

Separately, on 16th September, 2015 Duke Simeon Onyari and Silvanus Ndemo Nyamora filed cause No. 337 of 2015 as 1st and 2nd Claimants respectively against the County Assembly Service Board Nyamira County through the firm of N. E. Mogusu & Associates seeking the following orders:-

a. A declaration that the terms of offer of appointment contained in the claimants' letters dated 19/11/2013 are the proper and conclusive terms of the employment contract regulating the employment relationship between the claimants respectively and the respondent.

b. A declaration that the claimants' do stand confirmed in the employment of the Respondent, effective from 01/12/2013, in terms of section 71 of the County Government Act, and are accordingly entitled to payment of pension from the said date of confirmation.

c. A declaration that the letters of confirmation of appointment dated 1st July, 2015 issued by the respondent to the claimants respectively, amount to a breach of the employment Act, the Constitution and internationally recognized labour practices; and the same are null and void.

d. A permanent injunction to issue to restrain the Respondent from unlawfully and arbitrarily reviewing the claimants' salaries downwards.

e. Damages for breach of contract and costs, plus interest on damages and costs at court's rates.

The firm of Okong'o Omogeni and Company Advocates appeared for the Respondents in both matters and filed responses in respect of both the petition and the claim.

The claim was consolidated with the Petition as both the Claim and the Petition arise from the same circumstances.

On 9th November 2015 the parties agreed to proceed by way of written submissions. The parties thereafter filed and exchanged written submissions.

Background

For expediency in this judgement I will refer to the 1st and 2nd Claimants in Cause no. 337 of 2015 as the 5th and 6th Petitioners respectively.

The Petitioners are all employees of the County Assembly of Nyamira having been employed in various capacities as follows:-

The 1st Petitioner Alloys King'ala Ngereza was employed as Principal Administrative Officer by letter dated 19th November 2013 at a Salary of Kshs.4,487.4 to 6,013.5 per month with house allowance of K.pound .2000 and allowances of K.pound.700.

The 2nd Petitioner Leonard Kevin Nyamasege was employed by letter dated 19th November, 2013 as Principal Finance Budget Officer at a basic salary of Kshs.89,748 per month with house allowance of Kshs.40,000 per month and other allowances of Kshs.14000 per month.

The 3rd Petitioner Onduko Gilbert Atunga was employed by letter dated 19th November, 2013 as Clerical Officer II at a salary of Kshs.35,910 per month with a house allowance of Kshs.20,000 and other allowances of Shs.6,000 per month.

The 4th Petitioner Enock Nyakundi Omwenga was employed by letter dated 19th November, 2013 to the position of Principal Human Resource Officer at a salary of Kshs.89,748 per month with house allowance of Kshs.40,000 and other allowances of Kshs.14,000 per month.

The 5th Petitioner Duke Simeon Onyari was appointed to the position of Deputy Clerk by letter dated 19th November, 2013. His Salary was Kshs.109,089 per month with a house allowance of Kshs.40,000 and other allowances of Kshs.16,000.

The 6th Petitioner Silvanus Ndemo Nyamora was employed by letter dated 19th November 2013 as Hansard Reporter at a monthly salary of Kshs.77,527 with a house allowance of Kshs.40,000 and other allowances of Kshs.12,000 per month.

All the petitioners were to serve on probation for 6 months before confirmation. Other terms were as stated in their letters.

By letters dated 1st July, 2015 from the County Assembly Service Board all the Petitioners were confirmed into employment on the following terms which were inferior to the terms upon which they were employed:-

1st Petitioner:

Basic Salary	65,290
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House Allowance	24,000
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Commuter Allowance	8,000
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2nd Petitioner

Basic Salary	65,290
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House Allowance	24,000
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Commuter Allowance	8,000
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3rd Petitioner

Basic Salary	32,580
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House Allowance	10,000
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Commuter Allowance	5,000
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4th Petitioner

Basic Salary	65,290
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House Allowance	24,000
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Commuter Allowance	8,000
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5th Petitioner

Basic Salary	50,590
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House Allowance	24,000
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Commuter Allowance	8,000
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6th Petitioner

Basic Salary	65,290
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House Allowance	24,000
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Commuter Allowance	8,000
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The Petitioners aver that the letters of confirmation constitute new letters of appointment with a variation, alteration and review of the terms of employment, are irregular, illegal and unconstitutional. The Petitioners further aver that the actions of the Respondents amount to and constitute a violation and/or infringement of their Fundamental Rights and Liberties by subjecting them to treatment that is inhuman and dehumanising, discrimination, condemnation without an opportunity to respond or react to the adverse actions, denying and depriving the petitioners the right to a fair hearing. The Petitioners aver that the actions of the Respondents violate the provisions of Article 10(2) b & (c), 27(1), 28, 41(1) and 47(1) & (2) and 50(1) of the constitution 2010.

The Respondents opposed the petition through the Replying Affidavit of JOASH NYAMOKO the Speaker, Nyamira County Assembly who is also the 1st Respondent herein. He depones that none of the Respondents has the power or mandate to set terms and other emoluments of County Assembly Staff,

that by dint of section 12 as read with section 59(1)(j) of the County Government Act (No.17 of 2012) the 4th Respondent in consultation with the County Public Service Board only recommends to the Salaries and Remuneration Commission (SRC) the proposed remuneration, pensions and gratuities of County Public Service employees, that it is SRC which has the mandate to advise both National and County Governments on remuneration and benefits of Public Officers.

Mr. Nyamoko deposes that the only reason why the remuneration of the Petitioners (could be revised as alleged) is for purposes of rationalisation and realignment of the job scale cadre in the entire county to ensure that the qualifications and competencies of staff tally with their remuneration and to ensure equity across all county governments. Mr. Nyamoko deposes that at the time of advertisement of positions among those that the Petitioners applied for, the Respondents had come up with proposed schedule of monthly remuneration on account of which letters of appointment were issued to the Petitioners on six months probation subsequent to which they would be confirmed and that the Petitioners salaries and remuneration could not be finally determined prior to due consultation with SRC.

Mr. Nyamoko further contends that the 1st, 2nd, 3rd and 4th Petitioners are currently on suspension pending disciplinary action. He submitted and that all of the Petitioners are not qualified to hold the positions which they are holding and that they were either irregularly or unprocedurally recruited on superior job scales which ordinarily belonged to persons with more experience and or better qualifications and that their appointments were made on political grounds.

The Respondent contend that the 1st Petitioner's position was never advertised, he never applied for the position, did not attend interview and does not qualify for the position of Principal Administrative Officer, that the 1st petitioner's father Hon. Alfayo Ngerenza Mabera who is a member of the 2nd Respondent and Chairperson of the Trade, Tourism and Investment Committee influenced his appointment. Mr. Nyamoko submitted that this is the reason why the 1st Petitioner's letter of appointment is handwritten. He further submitted that the salary earned by the 1st Petitioner is not what was stated in his letter of appointment being between Kshs.4,487.4 to Kshs.6,013.5 with a house allowance of Kshs.2,000 and other allowances of Kshs.700 yet his payslip shows his salary to be Kshs.94,235.

For the 2nd Petitioner the Respondents contend that he was appointed to the position of Principal Finance Officer barely six months after graduating from University yet the position required a person with at least three years' relevant experience. That inspite of this the 2nd Petitioner was started off at job group "Q", the third highest scale in the County Assembly reserved for officers with more than 10 years experience.

For the 3rd Petitioner, the Respondents aver that he was recruited as a Clerical Officer II while still a student at the University of Kabianga, that the recruitment was based on his transcripts and he was elevated from the position of intern/volunteer with no qualification or experience.

With reference to the 4th Petitioner the Respondents aver that he was recruited as Principal Human Resource Officer on the basis that he holds a Masters degree in Human Resource Management from the University of Nairobi which the Respondents have since discovered was a forgery, that this is sufficient grounds for summary dismissal of the 4th Petitioner and disciplinary proceedings have since been instituted against him. The Respondents further aver that the 4th Petitioner did not have the relevant experience of five (5) years as stated in the advertisement for the job as he was previously a teacher with no relevant experience. It was further the Respondents' position that the 4th Petitioner is currently under interdiction having been charged in Nyamira Anti-corruption Court on 29th May, 2015 over allegations of irregular procurement of medical insurance at an inflated price through single sourcing.

The Respondents further aver that the actions taken in reducing the salaries and allowances of the Petitioners was a result of rationalisation on the advise of SRC to facilitate proper and efficient utilisation of public resources. They also aver that the 1st to 4th Petitioners are guilty of non-disclosure of material facts, having failed to disclose to the court that they were on either suspension or interdiction at the time of filing suit.

The 5th and 6th Petitioners did not file separate submissions but relied on the submissions filed on behalf of the 1st to 4th Petitioners. The Respondents did not file an affidavit or make any submissions in respect of the two.

Determination

I have considered the pleadings and written submissions of the parties. In the written submissions of the Petitioners, the following issues which I have adopted have been extracted for determination:-

- (a) Whether the Employment of the Petitioners was regular, lawful and legitimate?
- (b) Whether the Petitioners' appointments were confirmed and/or stood confirmed upon lapse of 6 months?
- (c) Whether the variation and/or alteration of the Petitioners' terms of employment amounted to violation of Fundamental and Constitutional Rights?
- (d) Whether the actions of the Respondents amounted to unfair Labour Practices?
- (e) Whether the Petitioners are entitled to the reliefs sought.

On the first issue, whether the recruitment of the Petitioner's was valid, regular and legitimate, it has been rightly pointed out that the 4th Respondent is mandated to create offices and appoint employees to such offices to enable the County Assembly function. The Respondents have also rightly, submitted that the remuneration of such employees were subject to approval by SRC as established under Article 230 of the Constitution.

It has been submitted that pursuant to that mandate, the Respondents created positions and placed advertisements in the Daily Nation following which the Respondents received applications which they vetted, called candidates for interview and subsequently issued letters of appointment to the selected candidates. The letters issued to the Petitioners set out the positions and remuneration for the positions. The letters stated that the appointments were on 6 months probation following which the candidates will be confirmed. The probationary appointments were stated to be subject to termination on grounds of performance below expectation or for misconduct.

The Petitioners reported for work and have been in employment since 19th November, 2013. The contention by the Respondents that the Petitioners were recruited irregularly and/or unprocedurally is self defeating as it is the Respondents who recruited the Petitioners and the employments have not been impugned by the said Respondents on grounds that they are irregular and/or unprocedural. As at the time of filing suit the appointment were still valid. Indeed the Respondents confirmed the validity of those appointments by issuing the impugned letters of confirmation dated 1st July, 2015 to each of the Petitioners

In this respect I agree with the decision of the court of Appeal in Kisumu Civil Appeal No. 51 of 2014 between *Speaker of the County Assembly - Kisii County & 2 others v James Omamba Nyarge* when the court observed as follows:-

The 1st appellant did not challenge the authenticity of those letters. He did not deny signing them either. He only discredited them because, in his view, Section 13 of the County Government Act and the cited Articles of the Constitution were not complied with in the appointment of the respondent. But why did it take him more than eight (8) months to discover that the appointment of the Respondent contravened the said provisions of the County Government Act and the Constitution? The answer, in our view, is not difficult to find.

I find that the employment of the Petitioners by the 4th Respondent was regular, lawful and legitimate in so far as at the time of filing this petition the appointments had not been challenged or withdrawn by the

Respondents or any other authority.

The second issue is whether the Respondents had power to set remuneration of employees without taking into account the advice of SRC. The obvious answer is that they did not. It would be unconstitutional to do so. In the recent decision of the Court of Appeal in *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others [2015] eKLR* the court considered the role of SRC and held as follows:-

"Pursuant to Article 230 (4)(b), it is a Constitutional mandatory procedure for TSC to seek SRC advice on matters relating to remuneration and benefits of teachers. The binding nature of the advice given by SRC is a matter involving interpretation of the following provisions of law: Article 230(4)(b) and (5)(a) Article 237(2) (b) and Article 259(11) of the Constitution and Sections 37(3) of the TSC Act and Section 11 of the SRC Act.

*The binding nature of SRC advice is a constitutional matter dependent on the governance structure established by the Constitution whose essence is separation of powers and sharing of functions among different organs of government and the independent Commissions. The Supreme Court in the matter of **Interim Independent Electoral Commission Constitutional Application [2011] EKLR**, at paragraph 54 observed that "the totality of governance powers is shared out among different organs. These organs play mutually counter veiling roles. In this set up it is to be recognised that none of the several government organs functions in splendid isolation."*

The Respondents in this case appointed the Petitioners and set their terms as recommended in the SRC circular dated 29th July, 2013 that all the parties hereto have relied on. The circular is addressed to All Speakers of County Assemblies Kenya. The 1st Petitioner was employed as Principal Administrative Officer at a salary of K.pounds 4487.4 to K.pounds 6013.5 with house allowance of K.pounds 200 and commuter/other allowances of K. pounds 700. This is consistent with the scale for Principal Officers in the circular from SRC which provides for a salary of Shs.89,748, house allowance of Shs.40,000/= and other allowances in sun of Shs.14,000/=(Kenya pounds (K.pounds) is equal to (Kshs. 20)

The 2nd Petitioner who was employed as Principal Finance, Budget Officer and the 4th Petitioner employed as Principal Human Resource Officer were given similar terms. The 3rd, 5th and 6th Petitioners were also placed under the approved terms of the SRC circular commensurate with the grades into which they were appointed.

It has been submitted for the Respondents that the 4th Respondent had not fully taken into account the advice of the SRC. This is not evident from either the circular from SRC or the letters of appointment. The argument that the review of the remuneration of the Petitioners was for purposes of effecting the rationalisation and realignment of the job scale cadres in the entire county to ensure competencies of staff tallies with their remuneration is not supported by any evidence. If there was a staff/or remuneration rationalisation, there was nothing to prevent the Respondents from submitting such evidence. No report or minutes have been produced nor any correspondence advising employees of such rationalisation. There is no evidence of any staff rationalisation.

Moreover, letters of confirmation of employment are not the proper channel for communication of such rationalisation. The purpose of a letter of confirmation can only be to confirm employment on terms that have already been stated in either the letter or contract of appointment. A letter of confirmation cannot confirm that which does not exist.

On the validity of the confirmation letters issued to the Petitioners, they have submitted that their probationary appointments lapsed after 6 months. Relying on Section 42 of the Employment Act, the Petitioner Submit that their probationary employments not having been extended as provided therein, the purported confirmation letters dated 1st July, 2015 (and not 6th August, 2015 as submitted by the Petitioners) are invalid as the Respondents had no mandate and/or authority to purport to issue letters purporting to confirm the Petitioners into offices other than those to which they were duly appointed.

It is not contested that the letters of appointment were on probationary terms that were to last for 6 months. Section 42 of the Employment Act provides as follows:-

1) *The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.*

(2) *A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.*

(3) *No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).*

(4) *A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.*

Section 42(3) is explicit and couched in mandatory terms. It prohibits an employer from placing an employee on probationary terms for a period longer than twelve (12) months. Section 26 of the Employment Act provides that no employer shall place an employee on terms that are less favourable than the minimum terms set in the Act or regulated by any regulations.

I agree with the Petitioners that their employment on terms and conditions of service contained in their letters of appointment were confirmed by operation of Law vide Section 26 of the Employment Act and the only action the Respondent could take in respect thereto was to formalise the same by letter of confirmation for record purposes.

There is however another element in the confirmation letters of the Petitioners, that is, whether an employer can confirm an employee's employment on terms different from those upon which they were recruited.

Section 10(1) of the Employment Act provides that :-

"A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment."

"Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing."

A confirmation of appointment is not an opportunity to give new terms. If there are changes in the terms of appointment they must conform with the law. If the terms are less favourable than the original contract the employee must accept the new terms. Failure to do so would constitute a fundamental breach of the contract. Like any other contract, a variation of terms of an employment contract cannot be done unilaterally or arbitrarily by one of the parties to the contract.

In the present case the letters of confirmation are indeed fresh letters of offer as they are for different terms and in different capacities that are in fact less favourable than those which the Petitioners were originally employed. Confirmation after probation can only be to a position and on terms already set in the letter of appointment or on better terms.

For the foregoing reasons I find that the letters of confirmation issued to the Petitioners are invalid for reasons that the terms of employment of the Petitioners had already been confirmed by operation of Section 42 of the Employment Act as read with section 26(2) on terms of their letters of appointment.

Was the variation of the Petitioner's terms a violation of their constitutional rights and an unfair labour practice?

Every employee adjusts their lifestyles to conform to their circumstances including their income. The Petitioner's are not an exception. The letters of appointment to the Petitioners promised that they would be on permanent and pensionable terms and would be confirmed on the terms set out therein, unless they either failed to perform to expectation or were found guilty of gross misconduct. They therefore had a legitimate expectation that if they kept their part of the bargain the Respondents would also keep their part.

The Petitioner's were therefore entitled to be consulted before any changes detrimental to them were made to their employment contracts. The failure to do so amounts to unfair labour practice and is therefore unconstitutional.

The Respondents have submitted that the Petitioner's came to court with unclean hands and are not entitled to any of the remedies they seek. The Respondents submit that the Petitioners having been irregularly and unprocedurally recruited on higher job scales than they are entitled to or qualified for, and being guilty of material non-disclosure, are not entitled to equitable orders of an equitable court of law. The Respondents rely on the decision in the case of Daniel Kamau Mugambi v Housing Finance Company of Kenya Ltd [2006] eKLR quoted with approval by the Court of Appeal in Francis J.K. Ichatha v Housing Finance company of Kenya Civil Appeal No. 108 of 2005 as follows;

"A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the Plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity."

I have already determined elsewhere in this judgment that the appointment letters of the Petitioners are valid in so far as they have not been challenged or withdrawn by the Respondents. The Respondents cannot be heard to claim irregularity of appointment letters which they have indeed purported to confirm.

Having found that the letters of confirmation are invalid, I declare that the terms of engagement of the Petitioners are those contained in their original letters of appointment. The letters of confirmation dated 1st July 2015 varying the terms of employment of Petitioners are hereby brought into this court and are quashed.

The Respondents will pay costs of the Claimants.

Dated, Signed and delivered this 17th day of December, 2015

MAUREEN ONYANGO

JUDGE