



**REPUBLIC OF KENYA**

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

**PETITION NO. 10 OF 2015**

**KENYA COUNTY GOVERNMENT WORKERS' UNION.....PETITIONER**

**VERSUS**

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

**NYERI COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 11<sup>th</sup> December, 2015)

**JUDGMENT**

The petitioner filed the petition on 24.06.2015 through Brian Otieno & Company Advocates. The petitioner alleged violation of Articles 10, 22, 28, 41(1) (2), 48, 232, and 236 of the Constitution. The petitioner invoked section 37 of the Employment Act, 2007 and section 61(3) of the County Government Act. The petitioner prayed for judgment, pursuant to Article 23 of the Constitution, against the respondents jointly and severally for orders:

- a. That the honourable court do make an order of injunction restraining the respondents either by themselves, employees, servants or agents from terminating the employment of the respondent or applicant's members as the termination is unlawful and irreparable harm will be caused to the members and interfere with their rights under the Constitution of Kenya, 2010 particularly the rights under Article 41(1) and (2) of the Constitution.
- b. That the respondents be restrained and prohibited from employing replacement labour or employees in the same positions to perform the same or similar work as the respondent or applicant's members.
- c. That an injunction do issue against the respondents against termination or dismissal of the respondent's members from their employment without following the law and their terms and conditions of employment.
- d. That the honourable court be pleased to vary the terms of service of the casual employees in the service of the respondent and in so doing declare the employees to be employed on terms and conditions of service consistent with the Employment Act.
- e. That the honourable court be pleased to declare that the respondents violated the respondent's or applicant's member's rights to fair labour practices namely reasonable working conditions including permanent terms and conditions of service as protected under Article 41 (1) of the Constitution and the provisions of the Employment Act, 2007.
- f. The respondents to pay costs of the petition.
- g. Any other and further orders as the court deems fit and appropriate.

The petition was supported by the affidavit of Roba Duba, the petitioner's National General Secretary

and the attached exhibits filed together with the petition.

The respondents opposed the petition by filing on 16.07.2015 the replying affidavit of Wambui Kimathi, the 1<sup>st</sup> respondent's county secretary. The respondents appointed M/S Wahome Gikonyo & Company Advocates to act for them in the matter.

The petitioner further filed on 31.07.2015 the supplementary affidavit of Roba S. Duba. The respondent filed the further affidavit of Wambui Kimathi on 08.10.2015.

As directed by the court, the parties filed written submissions on the petition.

The facts of the petitioner's case and which the respondents have not disputed in their affidavits are as follows:

- a. The respondents engaged 238 employees being members of the petitioner. The employees were engaged on diverse dates and assigned duties of a permanent nature which the employees have performed for a long time on permanent basis since their respective dates of initial engagement.
- b. Despite demands to place the employees on permanent terms and conditions of service, the respondent has failed to do so.
- c. Casual employee under the Employment Act, 2007 means a person the terms of whose engagement provide for payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.
- d. The employees in the case have been employed for longer periods than 24 hours at a time and some have served for over 15 years without a break.
- e. Further the employees were paid at the end of each month and not on a daily basis as is the case in casual employment.
- f. That the employees have worked for a period or a number of continuous working days in aggregate not less than one month and the employees have performed work which could not reasonably be expected to be completed within a period or a number of working days amounting in aggregate to the equivalent of three months or more as envisaged in section 37 (1) of the Employment Act, 2007 so that the employees' casual service became deemed terminable by 28 days notice under section 35(1) (c) of the Act and converted so that the terms and conditions of service as provided in the Act became applicable as provided in section 37(3) of the Act. Thus, the employees were entitled to permanent terms of service.
- g. The employees who were engaged as casuals were entitled that their terms and conditions of service convert to those under the Employment Act, 2007 and the casual engagement contravened Article 41(1) which entitled the employees to fair labour practices.
- h. Under section 61(3) of the County Government Act the 2<sup>nd</sup> respondent could abolish the offices held by the employees but subject to the due process of removing or retiring the employees including adherence to the principles of natural justice unless the affected public officer is deployed to another office.
- i. Under Article 28 of the Constitution, the employees have inherent dignity and the right to have that dignity respected and protected. Removing the employees from employment without good reason would be in contravention of that inherent human dignity especially in view of the values and principles of public service in Article 232 of the Constitution.
- j. Thus the petitioner is entitled as prayed because it would be in contravention of the cited rights for the employees' employment to be terminated on account of being casual employees and without due process.

The respondent's main opposition to the petition is that the petition as filed is not maintainable as is an abuse of court process because it is *sub judice* Cause 31 of 2013 pending before this court between some of the respondent's employees and the two respondents and being, **Dickson Ngema Muriithi and Others –Versus- County Government of Nyeri and Another, Cause ELRC No.31 of 2013 at Nyeri.**

The 1<sup>st</sup> issue for determination is whether the petition is *sub judice* the said Cause 31 of 2013. The respondents invoked section 6 of the Civil Procedure Act thus, **“No court shall proceed with the trial of**

**any suit or proceeding on which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief sought.”** It was submitted for the respondents that under that section the elements for *sub judice* were:

- a. matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding;
- b. the previous suit is between the same parties or between parties under whom they or any of them claim, litigating under the same title; and
- c. such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

The respondents submitted that in Cause No. 31 of 2013 the claimants prayed for:

- a. A declaration that the claimants are permanent employees of the respondent.
- b. Respondent be ordered to issue appointment letters to the claimants.
- c. Claimants to be paid one month's salary in lieu of annual leave for each year worked.
- d. Terms of service for the claimants be improved.

The respondents submitted that the related prayers in the petition were (d) and (e) thus:

- d. That the honourable court be pleased to vary the terms of service of the casual employees in the service of the respondent and in so doing declare the employees to be employed on terms and conditions of service consistent with the Employment Act.
- e. That the honourable court be pleased to declare that the respondents violated the respondent's or applicant's member's rights to fair labour practices namely reasonable working conditions including permanent terms and conditions of service as protected under Article 41 (1) of the Constitution and the provisions of the Employment Act, 2007.

It was submitted that the prayers (d) and (e) were the same as the prayers in cause No. 31 of 2013 and the parties were the same as the union herein acting for the casual workers.

The respondents cited numerous authorities to support their case. One such case was **Standard Chartered Bank Limited –Versus- Jenipher Atieno Odok, HCCC No. 120 of 2003, 27.07.2005,** where the court (Warsame J) stated thus, **“(a) It is not within the rights of parties to engage in multiplicity of suits as the multiplicity of suits is meant to obstruct due process of law, and when a party shows design to abuse the powers of the court, such actions must be stopped to avoid unnecessary costs and waste of judicial time.”**

For the petitioner it was submitted that the petition was not *sub judice* the said Cause No. 31 of 2013 because of the following reasons:

- a. The party instituting the petition was entirely different from the parties that instituted Cause No. 31 of 2013.
- b. The present Petition raises constitutional issues on the rights of the petitioner's members but which was not the case in Cause No. 31 of 2013.
- c. The issue for absorption of casual workers is raised in both the petition and Cause No. 31 of 2013 but is raised with regard to different workers.

The court has considered the submissions. It is clear that Cause No.31 of 2013 was instituted by respondents' employees in their individual capacities while the current petition was instituted by the union as an autonomous legal person. It could be that some or all claimants in Cause No. 31 of 2013 are also members of the union but it is clear that they are not the only members of the union; the court finds that the union has filed the petition for members beyond the claimants in the earlier suit. It is clear that the petition is filed for 238 members being the respondent's employees whereas the earlier suit was filed by

or for 65 casual workers who served at the defunct Municipal Council of Karatina and who were currently serving in the respondent's employment. The court finds that even if the earlier suit were decided one way or the other, it would not serve to ameliorate multiplicity of suits but that entertaining the current petition would serve that purpose; since the employees not being litigants in the earlier suit but being the petitioner's members will not have to file similar suits if the petition determines their concerns. The reliefs in the petition are clearly wider in scope or different from the ones in the earlier suit. To answer the 1<sup>st</sup> issue for determination the court returns that the petition is not *sub judice* the said Cause 31 of 2013.

The 2<sup>nd</sup> issue for determination is whether the petitioner has established its case and is therefore entitled to the remedies as prayed for. The court finds that the matters of facts as pleaded by the petitioner have not been rebutted by the respondents. That being the case, the court finds that the law as pleaded and urged for the petitioner entitles the petitioner to the remedies as prayed for.

While making that finding the court upholds its opinion in **Peter Wambugu Kariuki & 16 Others – Versus- Kenya Agricultural Research Institute [2013]eKLR** thus,

**“What is this right to fair labour practices?”**

**First, it is the opinion of the court that the bundle of elements of “fair labour practices” is elaborated in Article 41(2), (3), (4) and (5) of the Constitution. Under Article 41(2) every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Under Article 41(3) every employer has the right to form and join an employers’ organization; and to participate in the activities and programmes of an employers’ organization. Under Article 41(4), every trade union and every employers’ organization has the right to determine its own administration, programmes and activities; to organize; and to form and join a federation. Under Article 41(5) every trade union, employers’ organization and employer has the right to engage in collective bargaining. These constitutional provisions constitute the foundational contents of the right to fair labour practices.**

**Secondly, it is the opinion of the court that the right to “fair labour practices” encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work.”**

And further,

**“A casual employee is defined under section 2 of the Employment Act, 2007 to mean a person the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time. The court has considered the material on record and finds that the petitioners were not casual workers because they were engaged for a longer period than twenty four hours at a time. They served for many days without any break in their service. Each of the petitioners served for more than three continuous months and the respondent was required to reduce their contract of service in writing as provided for in section 9 (1) of the Act.”**

And further,

**“The court considers that the foregoing standards that govern employment in the public service essentially discourage and abolish casual employment in the public service. Casual workers do not qualify as public officers within the tests set in the standards for employment of public officers. For instance, by nature of casual service within the meaning assigned in the Employment Act, 2007, casual workers do not and cannot enjoy the constitutional protection of public officers from victimization or discrimination for performing their duties and entitlement to due process in event**

**of termination as provided for in Article 236 of the Constitution and section 41 of the Act. Further, recruitment and selection process in engagement of casuals opens itself to failure to meet the constitutional and statutory tests of participation, competition, merit, inclusivity, representation, integrity, competence and suitability. In delivery, casual workers are unlikely, and are invariably unable, to comply with the relevant public service codes of conduct, ethics and integrity which are at the core of good public service delivery. Casual employment in the public sector easily falls prey to likely corrupt practices as manifested in cleptocracy in remuneration processes; favoritism or nepotism or bribery or cronyism in appointment processes; unprofessional service delivery through intellectual dishonesty to preserve the employment; and exclusion of competent and suitable persons from otherwise permanent employment. The pretended casual worker is dejected and demotivated as it happened in this case because the legal protections are undermined in the casual employment relationship. Thus, in event of temporary duties, it is the opinion of the court that employers in public service would rather invoke public procurement laws and engage private sector service providers to avoid contravention of the constitutional and statutory provisions on public employment and whose framework does not only discourage but in effect abolishes casual employment in the public service.”**

The opinions fully apply to the current petition, the court finds that the petitioner’s case squarely fits in the opinions and the petitioner is entitled to the prayers as made in the petition.

In conclusion, judgment is hereby entered for the petitioner against the respondents, jointly and severally, for:

- a. The order restraining the respondents either by themselves, employees, servants or agents from terminating the employment of the petitioner’s members herein purportedly as casual employees as the termination would be unlawful and irreparable harm will be caused to the members and interfere with their rights under the Constitution of Kenya, 2010 particularly the rights under Article 41(1) and (2) of the Constitution.
- b. The order restraining and prohibiting the respondents from employing replacement labour or employees in the same positions to perform the same or similar work as the petitioner’s members herein.
- c. The order stopping the respondents from terminating or dismissing the petitioner’s members from the respondent’s employment without following the law and their terms and conditions of employment.
- d. The conversion of the terms of service of the petitioner’s members herein purportedly being casual employees in the service of the respondents to respondent’s employees on terms and conditions of service consistent with the Employment Act, 2007.
- e. The declaration that the respondents violated the petitioner’s member’s rights herein to fair labour practices namely reasonable working conditions including minimum terms and conditions of service as protected under Article 41 (1) of the Constitution and the provisions of the Employment Act, 2007.
- f. The respondents to pay the petitioner’s costs of the petition.

**Signed, dated and delivered in court at Nyeri this Friday, 11<sup>th</sup> December, 2015.**

**BYRAM ONGAYA**

**JUDGE**