



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT KISUMU**  
**CAUSE NO. 21/2014**

(Before Hon. Justice Hellen Wasilwa on 30<sup>th</sup> April, 2014)

1. SAMUEL OGONJI
2. OSCAR JUMA OJUOK
3. YAHYA OMAR
4. WYCLIFE CHITUI
5. HUMPREY OKOMBO
6. MARK OUMA
7. CHRISTOHER AYIEKO
8. HERINE OKETCH
9. JANE ANYANGO
10. LUCAS OBULA
11. JARED ODHIAMBO
12. PIUS ODHIAMBO
13. NICHOLAS OTUOMA
14. ALOYCE CHIENG
15. IRENE AKINYI
16. KENEDY OKONGO
17. ZACHARIA ZOMBO
18. AMBROSE ODHIAMBO

19. CAROLINE ODONGO
20. COLLINS OORO
21. CAROLINE SANGANY
22. GEORGE OOOYO
23. ANN OGINGYO
24. MESHACK OGWEDO
25. CHARLES OKEYO NYANANDI
26. FREDRICK ODHIAMBO
27. OUKO GEORGE OYOO
28. BENSON ODHIAMBO
29. ABSALOM OMONDI OTIENO
30. JACKTON KUNGU ONDIEK
31. DAVID OTIENO OGOLLA
32. JACOB NYAMITA AWINO ..... CLAIMANTS

**-VERSUS-**

KISUMU COUNTY GOVERNMENT.....1ST RESPONDENT

KISUMU COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

### **RULING**

The application before court is the one dated 10.2.2014. It was filed by the applicants herein under certificate of urgency. It is brought through a notice of motion dated the same day and brought under Rule 27(1) (c) of the Industrial Court (Procedure) Rules, 2010. Article 22(1), 47(1) of the Constitution of Kenya, Employment Act 2007 Sections 37 and 87(2) Labour Institution Act No. 12 of 2007 and all other enabling provisions of law. The applicants sought prayers:-

- 1. That this application be certified urgent and the same be heard *ex parte* in the first instance dispensed within the first instance.**
- 2. That this honorable court be pleased to grant temporary injunction restraining the respondent, their servants, agents, employees or any person duly authorized by them to act on their behalf from replacing, removing and or interfering with the claimants employment in any manner whatsoever until the application is heard and determined.**
- 3. That this honorable court be pleased to grant orders of temporary injunction restraining the respondent, their servants, agents, employees or any person duly authorized by them to act on their behalf from replacing, removing and or interfering with the claimant employment in any manner whatsoever until the suit is heard and determined.**

**4. That the honourable court be pleased to grant a mandatory injunction compelling the respondents to reinstate the applicants back to work unconditionally pending the hearing and determination of the reference.**

**5. That the cost of this application be provided for.**

Prayer 1 and 2 have since been overtaken by events and what remains are prayers 3, 4, and 5. The application is also grounded on the annexed affidavit of Oscar Juma Ojuok and on the grounds:-

**a. The respondent had failed to confirm the claimants as permanent and pensionable employees having worked for 3 months.**

**b. That the respondent has terminated the claimants contract for employment without warning and served each and every claimant text messages without according them fair hearing.**

**c. That despite numerous request and appeals to their former councils the respondent to confirm them as permanent employees they failed, refused and ignored or the fact the claimants had served them in their current capacities until the date of determination.**

**d. That the claimant had worked for their various councils for more than 10 years and 9 months before they were absorbed by the respondents.**

**e. The claimants have served untold suffering since their termination.**

There are 32 applicants in all but they granted authority to Oscar Juma Ojuok to execute pleadings, affidavits and other documents that may be necessary to execute in pursuit of the claim.

All the applicants annexed to this application their appointment letters. On different terms annexed as **App OJO-2**. Other annexures are payment sheets of different applicants (**App OJO-3**) renewal of casual employment, contracts - **App OJO-4**. Sheets of payments (**OJO-5**). Other, casual appointment renewals – **OJO-6** and termination of appointments – (**OJO-7**).

Basically, the applicants case is that they were lawful employees of various councils which are now under the auspices of Kisumu County Government namely; Kisumu County Council, Nyando County Council, Ahero Town Council and Muhoroni Town Council. The 32 applicants were paid salaries of at least Ksh 5,000/= depending on their respective County Council Remuneration Schedule. After the last general elections the former County Council staff were absorbed by the County Government of Kisumu and their contracts were renewed in February 2013 – as per **App OJO-4**. However from March to September 2013 the applicants worked without pay but were paid a paltry Ksh 5,000/= as per **App OJO-5**. Some of the applicants had however worked for their various councils for more than 10 years and 9 months respectively before being adsorbed by the County Government.

In October 2013, the County Government decided to renew their contracts for three months on the basis of the same Ksh 5,000/= salary per month regardless of individual designation. The applicants further state that on or about 6th January 2014, they were served with termination letters and text messages even without being accorded fair hearing.

The termination letters are marked as **OJO-7**. It is the applicants contention however that they are permanent employees of the respondents by operation of the law and hence are entitled to privileges and rights of those on permanent and pensionable employees having worked for the respondents for more than 3 months.

The applicants further contend that the respondents are in the brink of recruiting new employees in their former positions in blatant disregard to their rights. It is for this reason that the applicants seek orders of

injunction to bar the respondents from replacing or recruiting new employees into the applicants former position pending the hearing and determination of this suit.

The respondents apposed this application. They filed their response to the statement of claim on 20.3.2014 through the firm of Rodi Orege and Co. Advocates. They also filed their replying affidavit sworn by Daniel Otuoma, the HR Manager of the respondents herein. It is the respondents contention that the applicants were engaged by the respondents as a transition measure subject to renewal for a period of three months. They denied that the applicants were inherited as assets and liabilities of the defunct council under the Kisumu County. They also aver that the applicants temporary employment was terminated pursuant to the various letters of engagement in compliance with the terms and condition therein. The respondents deny that the applicants even assumed permanent and pensionable status and that the applicants have not been interviewed not employed by the Kisumu Public Service Board and no one else has been employed in their place pursuant to the audit of the existing permanent employees of the various defunct councils under the County Government of Kisumu. They asked court not to allow the application as the respondents will suffer irreparable harm if the orders are granted.

After hearing the parties herein, the issues for determination are:-

- 1. What is the nature of engagement between the applicants and the respondents.**
- 2. Whether the orders sought by the applicants can be granted in view of the engagement above.**

The applicants contend that they had worked for respondents various councils for a period of 10 years and 9 months respectively. Various letters – *App OJO-2* were annexed as proof that certain applicants were appointed as casual employees of the County Council of Kisumu and Town Council of Ahero. The letter to Nicholas Otuoma for instance states that he was appointed as cess collector with effect from 1st April 2012. The appointment was for a period of 3 months. However vide another letter dated 3.1.2013, this appointment was renewed again for 1 month with effect from 1.2.2013. What happens between April 2012 to February 2013 is not clear but there are other renewals of the same Nicholas Otuoma dated 30.9.2012 for another period of 3 months in the same capacity. This scenario translates to other applicants such as Humphrey Okombo, Collins Odhiambo and Absalom Omondi Otieno amongst others. With such a scenario, it is apparent that the applicants worked for over 3 months in their former Councils' offices. Under Section 37(1) of the Employment Act 2007.

**Notwithstanding any provisions of this Act, where a casual employee—**

**(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or**

**(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.**

The contract of service where wages are paid monthly is deemed to be a term contract. I can therefore conclude that the contract the applicants had though stated as being casual are not in any case casual but term a contract as provided under, the provisions of Section 35 of the Employment Act shall apply.

Given that the terms of engagement between applicants and respondents was term, are the applicants entitled to remedies they have sought? I have discussed such a scenario in the case of *Timothy Omollo & 79 Others =VS= Kakamega County Government and Kakamega County Public Service Board (2013) Eklr.*

The applicants in the above case were terminated by the respondents and the court found that they could not be terminated without due process.

In this case, however, it appears that the applicants have already been terminated unlike in the case of **Kakamega County Government**. And following the rule in **Giella VS Cassman Brown [1973]** EA 358, for this court to grant an order of injunction, it must be established that there is a *prima facie* case with a probability of success.

I do find that such a *prima facie* case is established. However, given the mischief has already been done I make an order restraining the respondents, their servants, agents, employee or any person duly authorized by them to act on their behalf from replacing the applicants in their former position of assignment until this case is heard and determined. The *status quo* will be maintained in the meantime.

The respondents will pay costs of this case.

**HELLEN WASILWA**

**JUDGE**

**30/4/2014**

**Appearances:-**

Mwamu for claimants present

Rodi for respondents present

CC. Wamache