



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 271 OF 2014

PAMELA WANGUI KIAMA.....CLAIMANT

v

COUNTY PUBLIC SERVICE BOARD OF NYANDARUA.....1ST RESPONDENT

COUNTY SECRETARY OF NYANDARUA COUNTY.....2ND RESPONDENT

COUNTY GOVERNMENT OF NYANDARUA..... 3RD RESPONDENT

RULING

1. Pamela Wangui Kiama (Claimant) was appointed on an Interim basis as Chief of Staff in the office of the Governor, County Government of Nyandarua. The letter of appointment was dated 20 August 2013 and signed by the County Secretary of the County Government of Nyandarua (2nd Respondent). The Claimant accepted the appointment through a letter dated 26 August 2013.
2. Through a letter dated 30 August 2013 addressed to Director, Directorate of Personnel Management, the Claimant requested for secondment from the National Government to the County Government.
3. The Permanent Secretary, Ministry of Interior, meanwhile wrote to the Principal Administrative Secretary, Directorate of Public Service Management on 25 September 2013 requesting for approval of the Claimant's secondment.
4. The Deputy County Commissioner, Narok North under whom the Claimant was serving, on her part wrote to the Principal Secretary on 4 October 2013 seeking the release of the Claimant. This letter requesting the release was preceded by the Claimant handing over on 30 September 2013.
5. The Principal Administrative Secretary responded to the Permanent Secretary's letter through a letter dated 11 October 2013 asking him to provide him with a copy of the Claimant's appointment letter and letter requesting for secondment. The copy of the appointment letter was provided to the Principal Administrative Secretary through a letter dated 20 November 2013.
6. On the sidelines, the Principal Secretary, Ministry of Interior had been advised by the Deputy County Commissioner, Narok North to stop the Claimant's salary through a letter dated 24 October 2013.
7. On 20 June 2014, the Chairman to the 1st Respondent wrote to the Claimant, informing her of the decision to terminate her appointment as Interim Chief of Staff on the ground that she had not provided to

the 1st Respondent her resignation and secondment letters from the National Government. The letter indicated that the termination was pursuant to the 1st Respondent's powers as provided for in section 75 of the County Government Act.

8. The Claimant was dissatisfied with the termination and on 2 July 2014 she lodged a Statement of Claim against the Respondents stating the issues in dispute as

- i. *unfair and unprocedural termination of employment*
- ii. *Wrongful dismissal and unfair termination from employment*
- iii. *Discriminatory treatment in employment.*

9. Filed together with the Statement of Claim was a Motion under certificate of urgency seeking

2. *That pending the hearing and determination of the application inter partes, there be a stay of implementation of the decision of the 1st Respondent to terminate the services of the Claimant or recruitment of her replacement as the CHIEF of STAFF of the 3rd Respondent.*
3. *That a mandatory injunction do issue reinstating the Claimant to the position of CHIEF of STAFF of the 3rd Respondent AND in the alternative to the 3rd Respondent be compelled to make full payment of the Claimant's salary and allowances pending the hearing and determination of this cause.*

10. After hearing the motion *ex parte*, Ongaya J ordered that

2. *THAT pending the inter partes hearing of the application or further orders by the court, the respondents by themselves or their agents shall not initiate or continue the process of filling the position of chief of staff in the 3rd respondent governor's office.*
3. *THAT pending the inter partes hearing or further orders by the court, there shall be stay of implementation of the termination of appointment of the applicant as communicated in the letter Ref: NYA/CS/HR/1/2014 dated 20th June 2014 signed by DR. Eliud N. Mwaura the 1st respondents chairperson.*

11. The motion and orders were served and on 16 September 2014, the Respondents filed Grounds of Opposition. The motion was heard *inter partes* on 14 October 2014 and is the subject of this ruling.

Claimant's submissions

12. Mr. Chege for the Claimant submitted that the Respondents did not give the Claimant a hearing before terminating her services. Due process and rules of natural justice were not followed.

13. Mr. Chege further submitted that the Claimant was an employee of the Public Service Commission of Kenya and therefore the 1st Respondent could not terminate her services.

14. It was further urged that it was not shown that a secondment letter was a condition precedent to the continued service of the Claimant with the Respondent.

15. Further, it was submitted that sections 7(2) of the Transition to Devolved Government Act and section 76 of the County Government Act were material. The decision in Nakuru Cause No. 363 of 2013, *Joseph Theuri v Gitonga Kabugi & 3 others* was relied on.

Respondents' submissions

16. For the Respondents, Mr. P.K. Kamau submitted that section 73(4) of the County Government Act authorised the 1st Respondent to either reject or accept secondment of officers from the National Government. Reference was also made to section 59 of the same Act.

17. Mr. Kamau also submitted that the appointment letter was clear it was on an interim basis/conditional pending regularization which was not done.

18. Further, it was urged that the Claimant was seeking mandatory injunctions which was not merited in the instant case and that granting prayer 3 of the motion would be tantamount to determining the main Cause at an interlocutory stage. No exceptional circumstances existed to grant mandatory orders at interlocutory stage. The case of *Kenya Breweries Ltd v Okeyo* (2002) 1 EA 101 was cited.

19. Mr. Kamau also submitted that because the Claimant was still on the pay roll and earning a salary, no irreparable harm would be occasioned to her, were the orders sought be disallowed

Evaluation

20. The principles for the grant of injunctive relief at an interlocutory stage were set in the case of *Giella v Cassman Brown & Co. Ltd.* (1973) EA 338. It was stated in that case that

the conditions for the grant of an interlocutory injunction are now, I think, well settled in E.A. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

21. These principles have been reiterated in many other decisions. However, the principles were not set within a contestation of employment law and therefore may be modified where necessary to enable a Court do justice to a party when necessary.

22. Section 49(4) (d) of the Employment Act, 2007 has given statutory underpinning to the common law principle that specific performance should not be ordered in contracts of service unless exceptional circumstances exist.

23. The caution against specific performance rings true especially in small organisations or one on one employment relationships where the protagonists would have to interact very closely on a daily basis. Where big organisations or institutions or employers are concerned, a more generous approach may be taken.

24. Further, where there are statutory processes involved and there are allegations of non compliance, the Courts ought to examine whether there has been compliance.

25. Section 59 of the County Government Act gives the 1st Respondent its functions and powers. These include creation and abolition of offices, appointments to offices in the County Public Service, disciplinary control and removal of officers while section 73 of the Act provides for secondment of officers from National Government to County Governments.

26. Under section 73(5) of the Act, a County Public Service Board should consider representations from officers on secondment or their heads of department before disallowing a secondment. The section provides that

The County Public Service Board making a decision on secondment shall not allow a secondment unless it has considered the representations by the concerned **authorised officer or head of the department.**

27. Considering the statutory framework narrated above and precedent cited and being cautious not arrive at determinations which may fetter the mind of the Court which will hear and determine the Cause herein on the merits, it is not clear to the Court at this stage who the authorised officer or head of department in respect of the Claimant is/was or whether the authorised officer was consulted by the 1st Respondent.

28. Further, it is not clear whether the Claimant should have been responsible for making available the secondment letter to the 1st Respondent. The evidence is that she made formal requests for the secondment letter.

29. Putting these factors into perspective, the Court is of the view that the Claimant has satisfied the first limb of the test in *Giella* and established a prima facie case.

30. The second test requires a Claimant to demonstrate that irreparable injury which may not be adequately compensated by an award of damages may be occasioned.

31. The Claimant's letter of appointment was clear that the appointment was initially on an interim basis. Further, in her letter to the Directorate of Personnel Management, the Claimant indicated that the position she was taking was contractual, although the length of the contract period was not disclosed. But it is public knowledge county governments have terms of five years before fresh elections are held.

32. Section 73(3) of the County Government Act also provides that seconded employees may return back to the National Government on lapse of the secondment to the County Government.

33. The relationship between the Claimant and the Respondents is purely one of employer and employee but which has some statutory underpinnings. It is not that of a statutory office holder such as a member of a county executive which may be subject to different legal principles, when threatened with impeachment.

34. In my view, considering the contractual nature of the appointment and possibility of returning to the National Government, the Claimant can be adequately compensated with damages were a finding to be made that the termination was unfair. This is therefore not a suitable case to grant the orders sought in the motion.

35. Being conscious of the caveat/common law principle of not granting specific performance in contracts of service which has now been given statutory underpinning, and in furtherance of the principal objective as set out in the Industrial Court Act, the Court directs that the main Cause be fixed for hearing on a priority basis on a date convenient to the parties and the Court.

Conclusion and Orders

36. On the basis of the foregoing, the Court declines to grant the orders sought in the motion dated 1st July 2014 and orders that the motion be dismissed.

37. Each party to bear own costs.

Delivered, dated and signed in open Court in Nakuru on this 24th day of October 2014.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Chege instructed by Gakuhi Chege & Co. Advocates

For Respondents

Mr. Kamau instructed by P.K. Kamau & Co. Advocates