



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO.92 OF 2014

JOSEPH KIPRONO KOECH.....CLAIMANT

-VERSUS-

THE COUNTY GOVERNMENT OF TURKANA.....1ST RESPONDENT

HONOURABLE JOSPHAT KOLI NANOK.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th October, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 08.04.2014 through Mongeri & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant is a legitimate employee of the respondents.
- b) A declaration that the respondents' institution barring the claimant from accessing his office was unlawful.
- c) A declaration that suspension of the claimant's services and employment was in contravention of the law.
- d) An order for reinstatement of the claimant to his capacity as interim chief finance officer forthwith.
- e) An order of permanent injunction barring the respondents jointly and severally from arbitrarily suspending the employment of the claimant.
- f) Damages including outstanding dues unpaid during suspension.
- g) Costs and interest of the suit.
- h) Any other relief that the honourable court may deem fit to grant.

The respondents filed the statement of response on 10.06.2014 through Rachier & Amollo Advocates. The respondents prayed that the memorandum of claim be struck out with costs to the respondents.

The claimant was employed in the public service in 1997 by the City of Nairobi as a City Askari. He rose through the ranks to a chief accountant and was appointed treasurer by the Public Service Commission

and deployed to the Municipal Council of Nakuru sometimes in 2009. He was transferred to the county Council of Nzoia and later in June 2012 to the Municipal Council of Lodwar as treasurer. The claimant reported at Lodwar on 5.07.2012 but according to the claimant's testimony he could not access office due to political interference. After ministerial intervention he reported at Lodwar on 1.10.2012 and served as treasurer till January 2013 when the town clerk retired voluntarily and the claimant was appointed the town clerk. The claimant at all material time was a PhD candidate at the Jomo Kenyatta University of Agriculture and Technology Nakuru Campus and holds an MBA in Finance, B.Com in Finance, CPA(K), CPS(K) and CSIA Part II and pursuing Part III.

During the constitutional transition the Transitional Authority advertised positions in the anticipated county governments. The claimant applied and was successful. He was seconded by the Public Service Commission through the Transitional Authority to the position of Interim Chief Finance Officer by the letter dated 25.02.2013 and deployed to Turkana County. The Transitional Authority designated the claimant as the receiver of revenue and the claimant was also appointed as the county accounting officer. The claimant testified that he performed his duties with due care and professionally.

On 19.07.2013 the claimant received a letter of the same date signed by the 2nd respondent suspending the claimant from the county government services. The letter stated as follows:

“SUSPENSION FROM THE COUNTY GOVERNMENT SERVICES

You may recall that I instituted a snapshot audit exercise to understand the financial operations of the county in the last 3 months and the preliminary feedback that I received has necessitated my office to take action to save the county from incurring unnecessary losses of public funds.

In addition, my office has received numerous feedback about you on areas that boarder insubordination and indiscipline in the course of duty. In some instances, procurement procedures have not been adhered with thus unnecessarily and unlawfully committing the County Government resources. This is unacceptable behaviour both in the code of conduct and practice.

It's against this backdrop that you are suspended from work with effect from 19th July, 2013. In the interim I have ordered a more comprehensive investigation that will provide information for the next course of action.

Once the investigations are complete, you will be given a chance to defend yourself against the findings as required by law. During this period you will be subjected to the terms and conditions governing suspension.

Do note that during the period of suspension, you will not be authorised to transact any business on behalf of Turkana County Government.

Sincerely,

Signed

H.E JOSPHAT KOLI NANOK

The Governor of Turkana County Government”

The claimant testified that prior to the suspension letter he had not been notified about any misconduct. The claimant handed over on 22.07.2013, the date he had received the letter, by writing to the 2nd respondent explaining that he was willing to provide information and assist in all investigations. The claimant received no further communication and he decided to write to the Transitional Authority to intervene. The Public Service Commission intervened by demanding that the respondents provide certain crucial documents but as far as the claimant was aware the respondents did not supply the documents to the Commission. The claimant was dissatisfied with the flow of things and he filed the suit.

The respondents' witness was Moses Erus Ekai (RW) a member of the Turkana County Public Service Board. He became a member of the Board on 14.8.2013. It was his testimony that upon appointment the Board underwent induction and thereafter embarked on urgent assignments such as vetting of serving officers and recruitment of staff for the young county government. It was his testimony that the Board came to know about the claimant's case sometimes in January 2014 during the process of vetting of the serving staff and also received the copy of the claimant's letter dated 12.12.2013. The board wrote to the county government's secretary the letter dated 17.01.2014 to find out if the case had been resolved. RW testified that the county government's secretary has informed the Board that some investigations about the claimant's case were on-going. Later the Board was notified that the case was in court and if the claimant had not filed the suit in April 2014, RW testified that the Board would have already finalised the case by the time of hearing of the case in July 2014. RW confirmed that the Board had recruited a substantive chief finance officer called Koskei Josiah and appointed in May or June 2014. RW also confirmed that the claimant's earlier office of town clerk no longer existed in the respondents' staff establishment. RW also testified that the Board would be willing to absorb the claimant as an accountant in current county establishment or other position commensurate with the claimant's qualifications. RW confirmed that the county secretary had not given the Board the necessary information about the claimant's case to enable the Board to finalise the case. RW confirmed that the transitional policy was to absorb into the county public service the staff that served in the local authorities and the claimant was properly an employee of the Board. RW also testified that he did not know any details of misconduct against the claimant.

The court has considered the pleadings, the evidence and the submissions and makes findings on the issues in dispute as follows.

The **1st issue** for determination is whether the 2nd respondent was vested with the authority to suspend the claimant. The court has carefully considered the letter dated 25.02.2013 exhibit KJK2 by which the claimant was deployed to the Transition Authority with effect from 12.02.2013 as an interim finance officer and further deployed to Turkana County. The letter stated that during the deployment the claimant's terms and conditions of service would be as per his prevailing appointment in the public service. The claimant would continue drawing his salary from his parent ministry or department or the National Assembly under which he was serving prior to the deployment in the interim capacity.

The material before the court shows that at all material times, the claimant was deployed in the interim capacity and continued to serve under the terms of appointment in the public service as stipulated by the Public Service Commission. In that interim and transitional service, the court finds that the claimant was subject to disciplinary procedures as were in place and imposed by the Commission. The 2nd respondent has not established any authority he invoked within the Commission's disciplinary provisions that entitled him to suspend the claimant in the manner he pretended to proceed. Accordingly, the court finds that the 2nd respondent was not vested with the power or authority to suspend the claimant.

The **2nd issue** for determination is whether the claimant's suspension was lawful. The court has already found that the 2nd claimant has not established any basis of the authority he pretended to exercise in suspending the claimant. The court finds that there was no inherent power vested in the 2nd respondent to suspend the claimant in the manner the 2nd respondent acted in the case. The court finds that the suspension was a nullity *ab initio*.

The **3rd issue** for determination is whether the respondents could advertise and appoint a person to the office of the Chief Finance Officer while the claimant held the office of Interim Chief Finance Officer. It is not disputed that at all material time the claimant has never vacated the office of the Interim Chief Finance Officer. It is also not disputed that the duties attached to the office of the Interim Chief Finance Officer are the same duties vested in the office of the Chief Finance Officer. Accordingly, in the opinion of the court, officers holding the two offices could not be in place concurrently. In the opinion of the court, the two offices could not coexist and the office holders could not be in place concurrently because the county government could not have two separate offices in its establishment with respect to duties essentially performed by one office holder under the prevailing financial management of the county

government. In the opinion of the court, the legitimate action on the part of the respondents was to appoint an acting Interim Chief Finance Officer until such time the claimant's suspension was resolved one way or the other. RW testified that the 1st respondent had a transitional obligation to absorb the serving officers who had transited into the service of the 1st respondent from the former local authorities. The claimant was one such officer and the court finds that prior to the making of the respondents' decision that the claimant would not be absorbed into the service in the substantive position of the Chief Finance Officer, the authority to otherwise fill the office did not accrue. The court finds that the respondents could not substantively fill the office of Chief Finance Officer while the claimant continued to hold the office of the Interim Chief Finance Officer and while the office of the Interim Chief Finance Officer still existed in the county government's establishment.

The 4th issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The claimant prayed for a declaration that the claimant is a legitimate employee of the respondents. There is no dispute between the parties that the claimant is legitimately employed in the service of the respondents as the Interim Chief Finance Officer. Thus the court finds that the claimant is entitled to the declaration as prayed.
- b) The claimant prayed for a declaration that the respondents' institution barring the claimant from accessing his office was unlawful. The court has found that the suspension was a nullity *ab initio*. Thus the court finds that the claimant is entitled to the prayer.
- c) The claimant prayed for a declaration that the suspension of the claimant's services and employment was in contravention of the law. The court has found as much and the claimant is entitled to the declaration.
- d) The claimant prayed for an order for reinstatement of the claimant to his capacity as interim chief finance officer forthwith. The court has found that the claimant was never removed from the position as interim Chief Finance Officer and the court finds that he is entitled to continue in that service unless lawfully terminated from such service.
- e) The claimant prayed for an order of permanent injunction barring the respondents jointly and severally from arbitrarily suspending the employment of the claimant. The claimant is a public officer. Under Article 236, the claimant is entitled not to be victimised or discriminated against for having performed the functions of office in accordance with the constitution or other law; or is entitled not to be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. Taking that constitutional provision into account, the court finds that the claimant is entitled to the order of permanent injunction as prayed for.
- f) The claimant prayed for damages including outstanding dues unpaid during suspension. The court has found that the suspension was a nullity. The claimant was unfairly kept out of work and income following the null suspension. The court upholds its opinion in **Grace Gacheru Muriithi – Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus, **“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is**

found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."

The court further upholds the opinion in Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited [2013]eKLR, where this court stated thus, **"The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged."** Accordingly, in the present case the court finds that the claimant is entitled to all withheld salary and allowances with due annual increments including the Kshs. 60,000.00 per month for extra responsibilities all paid from the date of the suspension.

g) The claimant prayed for any other relief that the honourable court may deem fit to grant. The court has found that the appointment of a person to hold the office of chief finance officer while the claimant was holding the office of interim chief finance officer was irregular and null and a declaration shall issue accordingly.

In conclusion, judgment is entered for the claimant against the respondents for:

1. The declaration that the claimant is legitimately employed in the service of the respondents as the Interim Chief Finance Officer.
2. The declaration that the respondents' barring of the claimant from accessing the office was unlawful.
3. The declaration that the suspension of the claimant's services and employment was in contravention of the law.
4. The declaration that the claimant was never removed from the position as interim Chief Finance Officer and the claimant is entitled to continue in that service unless lawfully terminated from such service.
5. The order of permanent injunction barring the respondents jointly and severally from arbitrarily suspending the employment of the claimant.
6. The order that the claimant is entitled to all withheld salary and allowances with due annual increments including the Kshs. 60,000.00 per month for extra responsibilities all paid from the date of the suspension to date; and the claimant to compute the due sum of money, file and serve upon the respondent within 7 days from the date of judgment for recording the quantum on a convenient mention date.
7. The respondents to pay the money in order 6 above by 1.12.2014 failing interest at court rates to be paid thereon from the date of the judgment till full payment.
8. The declaration that the appointment of a person to hold the office of chief finance officer

while the claimant was holding the office of interim finance officer was irregular and null.

9. The respondents to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 17th October, 2014**.

BYRAM ONGAYA

JUDGE