



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 182/2013

(Before Hon. Justice Hellen Wasilwa on 18th July, 2013)

TIMOTHY OMOLLO & 79 OTHERSCLAIMANTS

VERSUS

KAKAMEGA COUNTY GOVERNMENT & KAKAMEGA
COUNTY PUBLIC SERVICE BOARD RESPONDENTS

R U L I N G

The application before court is the one dated 1st July 2013. The application is filed under a certificate of urgency brought through a Notice of Motion dated the same day filed by the firm of Otieno, Yogo, Ojuro & Co. Advocate and brought under Section 3A, and 63(c) and (e) of the Civil Procedure Act Cap 21 Laws of Kenya and Order 40 Rules 2, 3, 4 and 8 and Order 51 Rules 1, 3 and 4 of the Civil Procedure Rules 2010 and any other applicable provision of law.

The applicant seeks order;

1. That this application be heard as a matter of urgency and *ex parte* in the first instance.
2. That pending the hearing and determination of this matter *inter partes* this court do issue a temporary injunction against the 1st and 2nd respondents against termination and/or dismissal of the claimants from their employment without following the law and their terms and condition of employment.
3. That pending the hearing and determination of this claim, a mandatory injunction do issue against the 1st and 2nd respondents against termination and/or dismissal of the claimants from their employment without following the law and their terms and condition of employment.
4. That a mandatory order do issue against the 1st and 2nd respondents for reinstatement of the claimants to their employment with full salary and benefits pending the hearing and determination of this claim *inter partes*.
5. That costs of this application be provided-

The application is supported by the affidavits of **Bonface Shivachi** and **Moses Muiruri** and further grounds as follows-

- a) The claimants were deemed transferred to the 1st respondent by virtue of being

employees of the Municipal Council of Kakamega by virtue of the Country Government Act after the general election held on 4.3.2013.

b) The claimants worked diligently for the months of March, April, May and June 2013 for the 1st respondent and were duly paid their wages for March and April 2013 but were not paid their wages for May 2013 and June 2013.

c) The claimants reported to their work station from 2.6.2013 but were informed by their supervisors that they had instructions not to assign them any duties as from June 2013.

d) The claimants sought direction from the Human Resource Manager of the 1st respondent who declined to grant the claimants audience.

e) That subsequently the 1st and 2nd respondents have removed the names of the claimants from the staff payroll and created a new staff payroll and issued new personal numbers to other staff members effectively purporting to terminate the employment of the claimants without pay and without following the due process of the law.

f) The claimants reported the actions of the 1st and 2nd respondent to the Kenya County Government Union Western Region Secretary who wrote a letter of 6.6.2013 demanding an explanation and a reminder on 18.6.2013 but the respondents have ignored and/or declined to respond.

g) The respondents' action violated Constitution of Kenya and Sections 59, 61, 72, 74, 75, and 76 of the County Government Act and Section 6 of the guidebook for Governors.

h) The claimants state that the respondents lack the legal or contractual authority or basis to act as they purport to do and ought to be prevented from such acts.

i) The claimants are facing extreme hardship and injustice by the actions of the respondents and unless the respondents are restrained, the claimants legal and Constitutional rights shall continue to be infringed upon.

j) The application is made in the interest of justice.

In the affidavits of the two deponents, the issues of the claimants employment starting with the Municipal Council of Kakamega have been brought out and a bundle of the claimants letters of appointment and payslips produced as BS – 1. They depone that after the general election of 4.3.2013, all personnel employed by the Local Authority were transferred to the new County Governments that came into operation after the said elections. However it appears in their case, the respondents treated them differently.

They annexed payroll sheets for January, March and April as annexures BS 3(a) (b) & (c) to show that their names were on the payroll but annexure BS – 4 a copy of the new Kakamega County staff list excludes them. The budget estimate BS – 5 also show that they had been catered for in the budget estimates for the full year 2013/2014. They have also annexed communication between their union and the respondents seeking clarification on the issues which have not been responded to.

The guidebook for governors dealing with issues of staff of former Municipal Council employees is also annexed as proof that such staff ought to be taken over by the Country Governments. The claimants aver that they cannot be terminated without following the laid down regulation and laws of the National Public Service.

The respondents were duly served with this application as ordered by court on 3.7.2013. The application was heard *ex parte* in the 1st instance and interim orders of stay against the respondents action granted. The application was scheduled to be heard *inter partes* on 9.7.2013. It is on this day that the respondents filed their notice of appointment of advocates filed by the firm of Wachakana and Company

Advocates. No other pleadings had been filed. On this day the claimants advocates raised an objection to have the respondents being heard having failed to implement the court order granted on 2.7.2013. This court agreed with the claimants and declined to give audience to the respondents who were coming to court with dirty hands.

I heard the applicant claimants who reiterated their submissions based on the law and supported by the annexures on the file.

Upon hearing the claimant applicants the issues for determination are:-

1. What is the position of the claimant applicants in relation to the respondents.
2. Whether the applicants are entitled to remedies they have sought.

On 1st issue, I wish to refer to the bundle of annexures BS-2 which shows the claimants were employees of the defunct Municipal Council of Kakamega. By virtue of the letters of appointment of the claimants, they were employees of Local Authorities in Kenya and one letter addressed to Mwingi Gibson Machairi (Annex BS -2) stated;

“Your employment shall be governed by the terms and condition of service of officers of Local Authorities in Kenya, the Public Service Commission (Local Authority Officers) Regulation, 2007, the Employment Act and any other relevant written laws and Regulations”.

By virtue of these letters, the claimants were public officers working under Local Authorities Art 236(b) of the Constitution states:-

“ A public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law”

That protection accorded to these officers under the Constitution should therefore be adhered to even if they have to be removed from office.

The County Government Act Section 58 provides for the appointment of the County Public Service Board which in essence takes over the functions of establishing and abolishing offices in the County Public Service. It is this board that can appoint persons to hold or act in offices of the County Public Service and also exercise disciplinary control over, and remove, persons holding or acting in those offices.

The County Service Board under S. 61(3) of the County Government Act shall have powers to abolish offices however;

“Any decision by the County Public Service Board to abolish an office in the County Public Service shall be subject to the due process of removing or retiring the affected public officer including adherence to the principles of natural justice unless the affected public officer has been re-deployed to another office.

It is imperative to point out that the Country is still in a transition period on issues of devolution having just emerged from the general elections. Guidelines for implementing the transition therefore ought to be developed. Under the Transition to Devolved Act this transition is to be phased out within three years. Rules have been made by the Transition Authority to this effect. Rule 6.6 of the guidelines for governors states that;-

“Local Authorities were abolished when the Local Government Act was repealed, on the announcement of the final results of the County election. The function of Local Authorities are function of the County Governments. Staff of Local Authorities, who are public servants appointed by or under delegation from the PSC automatically become County Government staff”.

Rule 6.14 states as follows in answer to a question as to whether the Governor can terminate staff of Local Authorities:-

“No. While on secondment staff of Local Authorities are employees of the PSC and can only be terminated by the PSC. Any termination by the PSC would be in accordance with the laid down laws and regulations for National Public Service.

Once the staff are permanently recruited by the County they will be managed by the CPS B in accordance with County Public Service regulations”.

That being the legal position the relationship between the claimants and respondents cannot be terminated without due process. They remain employees of the County Government and they can only be separated after following due process.

Having said this I find the application by the claimants has merit and I order that:-

1. Pending the hearing and determination of this claim, a mandatory injunction do issue against the 1st and 2nd respondents against terminating or dismissing the claimants from their employment without following the law and their terms and condition of employment.
2. The respondents are ordered to immediately pay the claimants their salaries for May and June, 2013 and to continue to pay salary when due until this case is heard and determined.
3. The respondents are ordered to pay costs of this application.

HELLEN WASILWA

JUDGE

18/07/2013

Appearances:-

Yogo for claimants present

Wachakana for respondents present

CC. Sammy Wamache.