



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT GARISSA**

**PETITION NO. 1 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND**

**FUNDAMENTAL FREEDOMS IN ARTICLES 1, 2, 3(1), 10, 19, 20,21, 22,**

**27, 28, 41, 43, 47 AND 174 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT (NO. 7 OF 2007),**

**THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

***BETWEEN***

**OSMAN ABDULLAHI SHEIKH.....CLAIMANT**

***VERSUS***

**COUNTY GOVERNMENT OF GARISSA.....RESPONDENT**

**JUDGMENT**

This petition was instituted on 14<sup>th</sup> February 2019 but was later amended on 8<sup>th</sup> October 2019. The following reliefs were sought–

- a. A declaration that the Respondent withholding the Claimant’s salary since September 2017 to date is unfair, unlawful and wrongful.*
- b. Reinstatement to the payroll without loss of benefits of seniority.*
- c. Salary in arrears from September 2017 to date of Kshs.1,165,274.05.*

*d. Damages for loss of income/earnings (gross wage x 12) amounting to Kshs.1,902,420.00.*

*e. Alternatively:*

*i. Damages equivalent to salary for the remaining part of the contract of employment up to November 2019 totalling to Kshs.31,462,425.00.*

*ii. Salary in arrears from September 2017 to date of Kshs.1,165,274.05.*

*iii. Severance pay.*

*iv. Respondent to issue a certificate of service to the Claimant stating that he left the organization honourably and without blemish*

*f. Costs of the suit.*

*g. Interest until payment in full.*

The Respondent did not enter appearance or file any response despite service of summons, the petition, amended claim, mention and hearing notices as well as the application to have the matter deemed undefended. As such, on 6<sup>th</sup> November 2019, this Court directed that this matter proceeds as an undefended claim.

The Claimant avers that he was appointed as an ICT Manager on 10<sup>th</sup> February 2014 and performed his duties diligently without any disciplinary action being taken against him. That in September 2017, his name was expunged from the payroll, his salary withdrawn and other personnel recruited in his department who usurped his duties and responsibilities thus rendering him redundant.

It is averred that the Garissa County Public Service Board admitted to his erroneous removal from the payroll and was of the view that he ought to be reinstated immediately as his services were still required at the department of county affairs. However, he was never reinstated to the payroll or paid his withheld salary.

The Claimant avers that the Respondent's failure to pay his salary has occasioned a default on his loan facility resulting to his blacklisting by the Credit Reference Bureau. It is his position that the withholding of his salary was malicious, unlawful, unfair and wrongful.

During trial, the Claimant adopted his witness statement of 8<sup>th</sup> October 2019 as his evidence. In his statement, he stated that despite being expunged from the payroll, he was still required to appear in certain fora. For instance, on 21<sup>st</sup> and 22<sup>nd</sup> February 2018, he participated in a forum for the preparation of the National Addressing System. On 3<sup>rd</sup> and 4<sup>th</sup> April 2018, he also attended a seminar on Water Management as a service platform.

In his submissions filed on 19<sup>th</sup> February 2020, the Claimant submits that his expulsion from the payroll amounts to constructive dismissal, there being no explanation offered by the Respondent for such action and in light of the Respondent's refusal to reinstate him.

It is his submissions that the termination of his employment was unlawful for failing to comply with the provisions of section 45 (1) and (2) of the Employment Act. He relies on the cases of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, **Nicholus Muasya Kyula v FarmChem Limited [2012] LLR 235 (ICK)** and **Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR** to fortify his position.

### **Analysis and Determination**

I have carefully considered the petition which was amended to a claim, the evidence adduced by the Claimant as well as his

submissions and I have noted that the Claimant has sued the County Government of Garissa as the Respondent. However, after examining the documents produced by the Claimant, it emerges that the vacancy for his position was advertised by the County Public Service Board of the County Government of Garissa. It is the County Public Service Board that issued him with an appointment letter and executed the Employment Contract.

Section 57 of the County Governments Act establishes the County Public Service Board in each county “*which shall be a body corporate with perpetual succession and a seal and capable of suing and being sued in its corporate name*”.

Under section 59 (b) and (c) of the Act, the functions of this Board are enumerated as appointing persons to hold or act in offices of the county public service and to confirm appointments and to exercise disciplinary control over, and remove, persons holding or acting in those offices.

It therefore follows that the Claimant was in the employment of the Garissa County Public Service Board. Further, in his witness statement the Claimant avers that he was recruited to the position of ICT manager by the Garissa County Public Service Board. Additionally, from the facts outlined in his claim and witness statement, it is clear that his cause of action lies against the Garissa County Public Service Board and not the Respondent as the actions complained of relate to the latter.

It is therefore my finding that the Claimant has sued the wrong party in these proceedings. This is a case of misjoinder of a party.

For these reasons the claim fails and is accordingly dismissed with no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF JULY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**



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