



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.33 OF 2019

(as consolidated with ELRC Cause No. 7 /2019, 34/ 35 /2019)

(Before D.K.N.Marete)

NELSON MURIITHI KINYUA.....CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI COUNTY GOVERNMENT.....2ND RESPONDENT

J U D G M E N T

This matter was originated by way of a Memorandum of Claim dated 20th December, 2017. The issue in dispute is therein cited as;

Unfair, wrongful and illegal termination of the Claimant's employment

The Respondent in the Respondents Response/Memorandum in Reply dated 31st January, 2018 denies the claim and prays that the same be dismissed with costs.

The Claimant's case is that on or about 30th December, 2013, he was appointed as Ward Administrator in the establishment of the Respondent on a four year contract.

His further case is that while in this position, he was posted to Karingani by County Secretary of the 1st Respondent vide an internal memo effective 12th February, 2014 with the appointment being converted to permanent and pensionable effective 10th November, 2016.

The Claimant's other case is that he was while in the course of duty, on or about 8th September 2017, his employment was terminated by the 2nd Respondent through its chairman –Stephen Mitugo. This was on the basis that all staff working in the Office of Governor have their services ending on the term of the sitting Governor in accordance with the pleasure doctrine.

The Claimant avers that he was not issued with a notice of termination nor was he subjected to a fair hearing before such termination. Again, he denies knowledge of the regulation(s) and philosophy belying the pleasure doctrine and deems the same unfair.

The Claimant further avers and posits that his letter of appointment was not for a fixed term of five (5) years as purported in the letter of termination which in outlook, essence and communication is unfair, wrongful and illegal.

He prays as follows;

- i) A declaration that the termination of the Claimant's employment was unfair.*
- ii) Immediate and unconditional reinstatement of the Claimant to his employment.*
- iii) Outstanding salaries and allowances are withheld by the 1st Respondent from August, 2017.*
- iv) One month's pay in lieu of notice.*
- v) Payment equivalent to two (2) months pay in lieu of unutilized leave, for two years.*
- vi) Costs of the suit and interest at court rates.*
- vii) Any other relief that the Honourable court may deem fit to grant.*

The Respondents denies the claim.

It is their case that the Claimant has no cause of action against them and further that the suit is an abuse of the process of this court.

The Respondents further case is that it entered into a contractual relationship through a letter of appointment dated 30th December, 2013 for a term of 4 years. This expired on 29th December, 2017.

The Respondents further case is that this suit is a fraud and filed to enforce an illegal variation of a contract entered into on 10th November 2016, *inter parties*. Therefore, the claimant has no claim whatsoever.

It is the Respondents case that sometimes before 10th November 2016, the Claimant fraudulently conspired with, one, Kenneth Kanga, the 2nd Respondent's secretary to issue him with a letter purporting to confirm him to the position of Ward Administrator. The said letter reads thus;

RE: CONFIRMATION

On behalf of the Tharaka Nithi Public Service Board (hereby referred to as TNCPSB), I am pleased to inform you that you have been confirmed into permanent and pensionable establishment as a Ward Administrator effective the date of your probation; 1st July, 2014.

The Respondents further case and averment is that the contents of the letter dated 10th November, 2016 is false and the Claimant at all material times knew that;

- a. he never held, following his employment as a Ward Administrator on 30th December, 2013, that position on probation or applied to the 2nd Respondent for confirmation to the said post;*
- b. the claimant was not interviewed by the County Public Service Board for the post of Ward Administrator;*
- c. the objects of the purported confirmation was purportedly to alter the terms of the contract entered into by him with the Respondents on 30th December, 2013, and to extend his service with the Respondents after his contract of employment had expired and also to increase his salary;*

d. he did not negotiate with the Respondent the purported terms of Ward Administrator.

The Respondent in totality denies the authenticity of the purported contract of employment relied on by the claimant. She avers that it is null and void for not being originated by the 2nd Respondent. It therefore amounts to an illegal contract or no contract at all. It is not enforceable.

On this they seek to rely on the authority of **Ridge vs Boldain & Others (1963) 2 ALL ER 66, Halsbury Laws of England** where it was held as follows;

“.....that public rights of an employee to fairness/ due process is dependent on his status as an office holder. The Respondents aver that the Claimant herein ceased to be an employee of the 1st Respondent after his contract of employment expired on 29th December, 2017. The Claimant, therefore, as pleaded above, was not an employee of the 1st Respondent and as such cannot claim that he was entitled to due process as his status ceased after the said general elections were held in August 2017.”

This matter was heard on 20th May, 2021 wherein the parties testified in reiteration of their respective cases.

The issues for determination therefore are;

1. Whether the impugned termination from employment by the letter dated 08.09.2017 was unfair and/or unlawful"
2. What remedies if any are available to the Claimant"
3. Who should shoulder the costs of the instant suit"

The 1st issue for determination is whether the impugned termination from employment by the letter dated 8th September, 2017 was unfair and/or unlawful. The Claimant in his written submission dated 15th July, 2021 faults his termination and deems it as unfair and unlawful.

It is his case and submission that the testimony of the respondent witness, R.W.1, lends guidance on this;

10. R.W.1 testified that the person who issued the Claimant with the appointment letter namely Kenneth Kanga who was the 2nd Respondents Secretary had been charged before Chuka Law Courts with criminal charges for issuing fraudulent appointment letters albeit the Claimant's letter of appointment was not proved to have been issued fraudulently as not proof of the criminal charges against the said Kenneth Kanga were produced in court in reference to the Claimant with the result that the Respondents did not prove that the said appointment letter was issued illegally as the employer is under a legal burden to prove the reason for terminating the employee's employment within the meaning of Section 43(1) of the Employment Act. The said section provides thus;

This is coupled with Section 43(1) which provides thus;

Proof of reason for termination

(1) “in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45”

It is his case that the Respondent did not discharge his evidential burden that the claimant's appointment was illegal and outside the scope of Section 43 (1) of the Employment Act, 2007. The element of fraud in the contract and contractual relationship was not demonstrated.

Again, the Claimant comes out thus;

12. Furthermore, in the termination letter dated 08.09.2017, the reason for terminating the Claimant's employment was stated thus;

"This decision has been reached based on the regulation that all staff serving in the office of the Governor have their services ending with the term of the sitting governor in accordance with pleasure doctrine."

This would mean that the claimant's services were terminated on the basis that the governor's term ended/ the pleasure doctrine which he submits is unlawful and a contravention of Section 41 (1) of the Employment Act, 2007.

The Respondents in their elaborate written submissions dated 14th June, 2021 reiterates a case of lawful termination of employment. In this they seek to rely on the authority of **Mapis Investments (K) Ltd v Kenya Railway Corporation, Court of Appeal at Nairobi, Civil Appeal No.14 of 2005** which forbids enforcement of illegal contracts when the illegality comes to the attention of the court;

d. The claim of Claimant offends the conscience of this Honourable Court as it is for enforcement of a purported contract fraudulently procured by him;

e. After the new Governor was elected, he undertook a review of the operations of the Respondent during the stewardship of the former Governor S.M. Ragwa and discovered that the Claimant was one of the former employees who had fraudulently obtained purported letters of appointment.

f. After the Respondent made the discovery referred to above, it informed him, on 8th September, 2017 that he was not one of its employees;

g. It sent to the Claimant the letter dated 8th September, 2017, terminating his services; it contends that by virtue of the rule in Macfoy v United Africa Company Ltd (1961) 2 All ER 1179, it was entitled to do so, the said rule which is stated at Page 1172, states the law as follows;

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

From the onset, the Respondent brings out and submits a case of the Claimant not having any cause of action against her for the default of his case for employment. It is based on a doubtless and disputed letter of employment. The Claimant was initially employed on contract but this expired slightly after the term of the subsisting governor.

The Claimant has not in any way controverted the Respondent's case and evidence on the illegitimacy of the alleged employment of the claimant. On a test of balance of probabilities and preponderance of evidence, the Respondent's case overwhelms that of the claimant. The claim fails for want of proof.

The Respondents case overwhelms that of the Claimant. This is because they have established a case for lawful termination of employment in evidence.

At the onset, the Respondents demonstrates a case of the employment of the claimant under the pleasure doctrine this is a situation where an employee serves on the whims and pleasure of a sitting governor. It is a political appointment which lapses with extinction /lapse of the office of the governor.

The Claimant's evidence of a contractual engagement with the respondent was demolished in evidence. The respondent out rightly demonstrated that this contract was a fraud and illegitimate. It has no place in law and therefore cannot be applied or implemented.

This being the case, the respondent case takes sway. I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

Overall, the claimant has failed to comply with Section 47 (5) of the Employment Act which provides as follows;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

He has failed to establish a case of unlawful termination of employment on a balance of probabilities or preponderance of evidence. I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the claim.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Warutere instructed by Warutere & Associates Advocates for the Claimant.
2. Mr.Munyori instructed by Kamau Kuria & Company Advocates for the Respondents.



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