



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NYERI

CAUSE NO. 3 OF 2022

**DR. AGNES WANJIRU NJERU
GATAMA.....CLAIMANT**

VERSUS

**THE ETHICS AND ANTI CORRUPTION
COMMISSION.....1ST RESPONDENT**

COUNTY ASSEMBLY OF KIRINYAGA.....2ND RESPONDENT

**AIDI JOHN KAMAU, CLERK OF COUNTY
ASSEMBLY OF KIRINYAGA.....3RD RESPONDENT**

AND

**SALARIES & REMUNERATION
COMMISSION.....INTERESTED PARTY**

J U D G M E N T

1. By a Memorandum of Claim dated 2nd August, 2022, the claimant sought the following reliefs against the respondents:

- a) *A declaration that the claimant has not breached any law or regulation in serving as a part-time external board member at*

the Kirinyaga County Assembly while being an employee of Jomo Kenyatta University of Agriculture & Technology (JKUAT).

- b) A declaration that the claimant remains entitled to her remuneration and benefits from the Kirinyaga County Assembly in line with the applicable Salaries & Remuneration Circular No.SRC/TS/CGOVT/3/61 Vol.IV (49) dated 8th December, 2017.*
- c) An order directed to the 2nd and 3rd respondent barring them from acting on the directive issued by the 1st respondent in its letter of 27th July, 2022 or any such similar directives concerning the remuneration and benefits due to the claimant.*
- d) An order of permanent injunction barring the 1st Respondent from interfering with the claimant's engagement at the 2nd Respondent, including payment of her lawful remuneration and gratuity benefits.*
- e) A declaration that any review of terms that would affect the external. Part time board members of County Assemblies such as the claimant, whether by the Interested Party commission or by any other Government agency cannot be applied retroactively.*
- f) Any further relief that this Honorable court may deem fit to grant in the circumstances in the interests of justice.*
- g) Costs of the suit.*

2. The respondents and the Interested party denied the claims by the claimant and prayed for the suit to be dismissed with costs. Further the 1st respondent prayed for the following reliefs although it did not file counter claim: -

- a) *A declaration that the claimant's employment and remuneration by both Jomo Kenyatta University of Agriculture and Technology and the Kirinyaga County Assembly Service Board are irregular and unlawful.*
- b) *A declaration that the claimant's payment of gratuity by the Kirinyaga County Assembly Board and pension by the Jomo Kenyatta University of Agriculture and Technology is unlawful and amounts to double compensation.*
- c) *A declaration that the claimant is not entitled to remuneration or benefits from Kirinyaga County Assembly Service Board.*
- d) *An order of refund of all remuneration and benefits received or accruing to the claimant from the Kirinyaga County Assembly Board.*
- e) *Costs of the suit.*
- f) *Interest on (d) and (e) above at court's rates.*
- g) *Any other order the Honourable court shall deem fit.*

Factual background

3. Section 12 of the County Government Act (CGA) establishes County Assembly Service Board in each of the 47 Counties. Subsection (3) provides that the Board shall consist of: -
 - a) The speaker of the County Assembly as the chairperson
 - b) A vice-chairperson elected by the Board from the members appointed under paragraph (c)
 - c) Two members of the County Assembly according to their proportion of members in the county assembly; and
 - d) One man and one woman appointed by the County Assembly from persons who are experienced in public affairs, but are not members of the County assembly.

4. The two members (external members) appointed under section 12 3) (d) of the Act are supposed to serve on part-time basis. The external members are supposed to:-
 - a) *Be citizens of Kenya.*
 - b) *Holders of a degree from a University recognized in Kenya.*
 - c) *Have at least ten years' experience in public affairs; and*
 - d) *Meet the requirements of leadership and integrity in Chapter six of the Constitution.*

5. On 16th September 2017, the 2nd respondent advertised for the two positions of the external members of the Board and the claimant applied. She was then issued with an appointment letter dated 14th December, 2017 after a competitive recruitment. Since her appointment was on part time basis, she was not entitled to any salary or retainer but sitting allowances for meetings held and attended, accommodation allowances, airtime and transport allowance.
6. By circular No.SRC/TS/CGOVT/3/6/Vol.IV (49) dated 8th December 2017, the interested party notified all the County Assemblies and their Clerks that it had reviewed the remuneration terms of the part-time Board members by introducing a monthly retainer of Kshs.145,000.00 among other terms. Subsequently, by a letter dated 9th January, 2018, the 2nd respondent informed the claimant of the new and enhanced package as declared by the interested party. The letter reiterated that she remained a part time member of the Board.
7. By a letter dated 18th July 2022, the 1st respondent notified the 3rd respondent that it was conducting investigations into alleged corrupt and unethical conduct by the claimant and sought copies of all the relevant documents. By another letter dated 27th July

2022, the 1st respondent stated that the claimant had contravened Article 77(i) of the Constitution and Section 27 of the Leadership and Integrity Act. Further the 1st respondent directed the 3rd respondent to stop any further remuneration to the claimant including salary, allowances and gratuity upon expiry of her term.

8. It is the claimant's case that she was condemned unheard contrary to the rules of natural justice through abuse of office. It is further claimant's case that she was not a state officer but a public officer with every right to serve as part-time Board member. She maintained that the terms of her appointment were formulated by the interested party in exercise of its lawful mandate.
9. The 1st respondent is established by the Ethics and Anti-corruption Act and by section 11(1) (k) it has the power to undertake investigations to establish the extent of liability for loss or damage to public property, to institute civil proceedings against any person for the recovery/restitution of such property or for freezing or confiscation of proceeds of corruption or related to corruption or payment of compensation or other punitive and disciplinary measures. Further, under section 45 of the Anti-corruption and Economics crimes 2003, it is tasked with protection of public

property and revenue including money of a public body, or under the control or consigned or due to a public body.

10. On 14th July 2022, the 1st respondent allegedly received a complaint about the claimant's employment and remuneration by two public institutions and commenced investigations in accordance with its mandate. The preliminary investigations established that the claimant was indeed employed by both Jomo Kenyatta University of Agriculture and Technology (JKUAT) as a lecturer and also a member of 1st respondent's Board. Further, it established from the interested party that, the members of the County Board were paid a monthly retainer and other allowances and benefits including gratuity as set out by the circular dated 8th December 2017. Also, the interested party advised that a public officer serving on permanent and pensionable terms are not eligible to payment of two or more similar benefits/allowances, offered by different public entities for the same period.
11. The Public Service Commission (PSC) was also asked for advice and it clarified that section 26 of the Leadership and Integrity Act prohibits a public officer on full time basis from participating in any other gainful employment. It further advised that the interested party's circular dated 8th December, 2017 was averse to the

provisions of Section 26 of the Leadership and Integrity Act for making gratuity payable to any part time members of the County Board. Further the PSC advised that payment of gratuity to a public officer who is currently serving on full time basis amounts to double compensation of terminal benefits.

12. The 1st respondent's case is that Article 77(1) of the Constitution (Chapter six) prohibits state officer on full time basis from participating in any other gainful employment. Further, that section 52(1) of the Leadership and Integrity Act provides that the provisions of Chapter six of the Constitution applies to all public officers as if they were state officers.
13. It is the 1st respondent's case that the claimant is a public officer within the meaning of Article 260 of the Constitution, who is sustained by remuneration and benefits from the public exchequer. In the County Board, she is also holding a public office and similarly receiving remunerations and benefits from the public exchequer. Receiving gratuity from the County Assembly and Pension from the University for the same period amount to double remuneration from public funds, hence loss of public funds. Allowing the claimant to hold the two public offices at the same

time and receive double pay amount to conflict of interest and unnecessary pressure to the tax payers.

14. The 1st respondent maintained that preliminary investigations have revealed that the claimant has breached provisions of the constitution and statutes, hence it is only fair that the claimant be barred from engaging in other gainful employments to avoid the recovery process after investigations are complete. It maintained that it is immaterial that the claimant was engaged on part time basis since section 45 (1) (a) and (b) of the Anti-Corruption and Economic Crimes Act, 2003 provides that any payment done contrary to law give rise to an offence.
15. The 2nd and 3rd respondents admitted that the claimant was competitively recruited as a part time Board member vide the letter dated 14th December, 2017. They further admitted that the claimant was entitled to the following remuneration allowances:-
 - a) Sitting allowance of Kshs.8,000.00 per sitting up to a minimum of 8 meetings per month
 - b) Accommodation allowance of Kshs.10,000.00 per day for a maximum of 8 sittings per month.
 - c) Transport allowance of Kshs.25,000.00 per month.
 - d) Air time worth Kshs.5000.00 per month.

e) Travelling and subsistence allowance.

16. They further admitted that by a circular dated 8th December 2017, the interested party notified them that the remuneration of Board members serving on part time basis had been revised and set as follows:-

a) Monthly retainer package Kshs.145,000.00

b) Gratuity at the rate of 31% of annual retainer remunerative package for term served

c) The remuneration and benefits was effective 1st July 2017.

17. the 2nd respondent eventually notified the claimant of the revised remunerative compensation on 9th January 2018. Thereafter the 1st respondent requested certain information from them. The 1st respondent also informed the 3rd respondent that it had been established that the claimant is an employee of JKUAT, and therefore a public officer but also engaged by the County Board contrary to Article 77(1) of the Constitution and section 26 of the Leadership and Integrity Act.

18. The letter further informed the 2nd and 3rd respondents that the claimant could not be paid gratuity and pension for the same period as they are both terminal benefits. They were further informed that payment of remuneration to the claimant was

irregular and unlawful. In view of the foregoing, they prayed for the suit to be dismissed with costs.

19. The interested party admitted being aware that the two external members of the County Board serve on part time basis. It further admitted that it issued circular No.SRC/TS/CGOVT/3/61 VOL.IV (49) dated 8th December 2017. However, it averred that it did not envisage that public officer would be eligible for appointment as members of the County Boards.
20. The interested party further admitted that the 1st respondent wrote to it a letter requesting for clarification on eligibility of a public officers in full time employment, for appointment in County Boards and payment of monthly retainer and gratuity. It also sought clarification on whether the circular dated 8th December, 2017 applied to public officers.

Claimants' submission

21. The claimant framed seven issues for determination: -

- a) *Whether throughout the employment period at the CASB, the respondents and Interested Party were aware that the claimant is a senior lecturer at JKUAT.*

- b) *Whether the claimant was granted the right to be heard by the 1st respondent before adverse Administrative Action of stopping her remuneration was made.*
- c) *Whether working as a University Lecturer and CASB is tantamount to an officer serving in two engagements as defined under the Leadership and Integrity Act, 2012.*
- d) *Whether the claimant's employment at the CASB renders her a public officer or state officer.*
- e) *Whether the claimant is entitled to pension and gratuity for serving at the CASB, which she justly received on the Interested Party's own motion, after reversing its decision to hold the benefits.*
- f) *Whether there is a lawful basis for further conduct of criminal investigations against the claimant by the 1st respondent pertaining the matter herein.*
- g) *Whether the claimant is entitled to the reliefs sought in the Statement of Claim.*

22. On the 1st issue, it was submitted that the County Board was fully aware that the claimant was a senior lecturer at the JKUAT during all the period she was a Board member at the County. Her appointment to the Board was due to her expertise in policy,

education and allied matters as a senior lecturer at the University. Consequently, it was submitted that the alleged misconduct is without basis because the respondents recruited her fully aware her employment background at the University.

23. It was further submitted that no conflict of interest or irregularities or concerns whatsoever were raised by the respondents or interested party during her service at the County Board as a part-time Board member. Her dual roles were known and accepted by all the relevant stakeholders and she discharged her duties diligently as a Board member while still serving as a lecturer at the university.
24. It submitted that there was nothing wrong with a public officer holding two or more positions. Reliance was placed on the case of **Felix Kiprono Matagei v Attorney General & 3 others (2016) eKLR** where the court held that holding two public offices does not violate the constitution provided that the statute permits it and the roles are clearly defined.
25. As regards the second question, it was submitted that the claimant was condemned unheard contrary to Article 47 of the Constitution and as such the adverse action taken against her was arbitrary and unfair. Reliance was placed on the case of **Kenya Human Rights**

Commission v Non-Government Organizations Coordination

Board (2016) eKLR where it was held that where a person's interests and rights are likely to be adversely affected by an administrative action, he is entitled to be heard and the action taken against him.

26. As regards the issue of breach of section 26 of the Leadership and Integrity Act, it was submitted that the claimant is **not** a state officer but a public officer. Consequently, it was submitted that section 26 of the Act does not apply to the claimant. Further reliance was placed on **the Felix Kiprono Matagei case, supra** where the court distinguished a public officer from a state officer.
27. It was further submitted that the Constitution does not stop the gainful employment of any person. Citing the case of **Bhutt v Haroon Bhutt (2014) eKLR** it was submitted that Article 77(1) of the Constitution does not address gainful employment as an area of contravening the Constitution just as is the case in the Leadership and Integrity Act.
28. It was submitted that in the **Felix Kiprono Matagei case, supra** that the party objecting to engagement of a state officer must demonstrate that the employment inherently is incompatible with

the responsibility of the state officer and that it will result in conflict of interest.

29. It was argued that the claimant's service to the university and the County Board did not amount to two employments since the position of Board member was on part-time basis and not full-time employment. In that respect it was submitted that the claimant did not contravene the prohibition of full-time employment. Further the terms of her part-time engagement were authorized and justified by the interested party's circular dated 8th December, 2017.
30. As regards the question of payment of gratuity, it was submitted that the claimant served her contract term and rendered her service, and as such she is entitled to gratuity from the County Board. It was argued that, the withholding of her benefits is unjustified and discriminatory. Further that there is no evidence either from the interested party or the PSC tendered to demonstrate that a Public officer cannot serve at the County Board on part-time basis as an external member.
31. As regard the question whether there is any basis for further investigations by the 1st respondent. It was submitted that there was no such basis since the claimant's engagement as part-time

Board member did not contravene the law. It submitted that the claimant was engaged and remunerated in accordance with the County Government Act and the circular by interested party.

32. On the basis of the submissions above, the court was urged to grant claimant the reliefs sought.

1st Respondent's submissions

33. The 1st respondent framed the following issues for determination:

- i. *Whether the Employment of the claimant as an external member of the Kirinyaga County Assembly Service Board while being an employee of the Jomo Kenyatta University of Science and Technology (JKUAT) was irregular, unlawful and unconstitutional;*
- ii. *whether the caution by the 1st respondent to the 2nd and 3rd respondents was capricious;*
- iii. *whether the claimant is entitled to payment of gratuity and other benefits from the 2nd respondent;*
- iv. *whether the claimant is entitled to the orders sought herein.*

34. On the 1st issue, it was submitted that the claimant was at all material times to this suit a public officer because staff of JKUAT are public officers within the meaning of Article 260 of the Constitution, Leadership and Integrity Act. It was further submitted that the

claimant's engagement by the County Board while still a full-time public officer at JKUAT was irregular because Article 77 (1) of the Constitution prohibit full-time state officer from participating in any other gainful employment.

35. It was further submitted that section 6 of the Leadership and Integrity Act provides that the provisions of Chapter six of the Constitution shall form part of its general code while section 52 provides that provisions of Chapter six of the Constitution and part II of the Act shall apply to public officers as if they were state officers.
36. It was submitted that the 1st respondent has demonstrated by evidence that the claimant is employed by JKUAT on permanent and pensionable terms and therefore she is a full-time public officer. Accordingly, it was argued that by dint of Article 77 of the Constitution the claimant was not allowed to participate in any other gainful employment. The definition of gainful employment under section 26 of the Leadership and Integrity Act was adopted to fortify the 1st respondent's submissions.
37. It was further submitted that the claimant's job at the County Board was incompatible with her full-time job in the University and therefore it constituted a prohibited gainful employment. It was

submitted that the claimant being a full-time employee of the University, from 8am to 5pm every week, she had no time to serve the County Board without compromising her duties at the University. Consequently, the court was urged to find that the claimant's engagement by the County Board was a nullity in law, and forming no basis for reliefs sought. For emphasis the decision of Lord Denning in **Macfoy v United Africa Co.Ltd (1961) 3ALL E.R 1169** was cited.

38. It was further submitted in this case that caution by the 1st respondent to the 2nd and 3rd respondents that the engagement of the claimant as member of the Board and payment or remuneration and gratuity was irregular was not capricious. It was argued that preliminary investigations and documents supplied by the PSC and the interested party confirmed that it was irregular for a public officer to earn both pension and gratuity. Further the caution was done in accordance with the 1st respondent's mandate as donated by section 11 (1) (g) of the Ethics and Anti-Corruption Act. Finally, it was submitted that the caution did not yield much since the claimant was paid all the money following court order issued on 5th August, 2022.

Interested Party's submissions

39. The interested party did not frame any issues for determination. Consequently, its submissions generally echoed its pleadings and affidavit.

Analysis and Determination

40. Having considered the pleadings, evidence and submissions. There is no dispute that the claimant was a full-time senior lecturer employed by JKUAT. It is also a fact that she was competitively recruited to serve as a member of the County Assembly Board on part-time basis for 5 years. It is also a fact that her term of service were governed by circulars made by the Interested party in exercise of its constitutional as well as statutory mandate.

41. The issues for determination revolve around the eligibility of the claimant as full-time public officer to serve as a part-time County Board member, and the legality of payment to her of the benefits set out by the interested party in its circular published on 8th December 2017. In my view the main issues that fall for determination are:-

- a) *Whether the claimant was eligible for appointment as part time member of the County Assembly Board.*

b) *Whether the claimant was eligible for payment of the remuneration, allowances and gratuity set out by the said circular.*

c) *Whether the claimant is entitled to the reliefs sought.*

Eligibility for Appointment

42. The 1st respondent contended that the claimant was not eligible for the appointment because he was already a full-time public officer employed by JKUAT. On the other hand, the claimant maintained that she was not a state officer who are barred from engaging in other gainful employment by the Constitution and section 26 of the Leadership and Integrity Act. She contended that she was eligible for appointment as a County Board member which was on part time basis.

43. Article 77(1) of the Constitution states that:-

“A full-time state officer shall not participate in any gainful employment.”

44. Section 52 of the Leadership and Integrity Act provides that:-

“Pursuant to Article 80(c) of the Constitution, the provisions of Chapter six of the Constitution and part II of this Act, except section 18, shall apply to all public officers as if they were state officers.”

45. Article 77 above is part of chapter six of the Constitution and it applies to all public officers by dint of section 52 above. Therefore, the prohibition to participate in other gainful employment applies to all full public officers including the claimant. She was not eligible to participate in any other gainful employment.

46. Section 26(1) of the Leadership and Integrity Act defines gainful employment as:-

“Work that a person can pursue and perform for money or other form of compensation or remuneration which results in the impairment of judgment of the state officer in execution of the functions of the state office or results in conflict of interest in terms of section 16.”

47. The above definition fits in this case because there was payment of money to the claimant for services rendered. The claimant whether paid in terms of remunerative allowance or retainer, in my view she was being compensated for services rendered. It is immaterial that such payment is pegged on the number of sittings in month or whether it is in the form of a monthly retainer. It is another pay for the same period already covered by the University salary. Worse still the double pay emanated from the public exchequer.

48. As regards conflicts of interest, I agree with the 1st respondent that the claimant's duties as full-time public officer at the university is compromised by the duties towards the Board. She is engaged by the University on full-time basis from Monday to Friday and therefore any time taken to serve the Board several kilometers away, would negatively affect her service to the university.

49. Matters are worsened by the fact that the two jobs are unrelated in any way. I seek support from the case of **Nicholas Rono v County Secretary Government of Bomet & 3 others (2020) eKLR** where the court dismissed the employee's case by holding that:-

“The two functions of Municipal manager and member of County Assembly Board are not reinforcing. Each is an independent office with different functionalities and constituted under different legal regimes.”

50. In view of the express provision of the Constitution, Leadership and Integrity Act, and the **Nicholas Rono case** above, I am satisfied that the claimant was not eligible for appointment to the part-time position of county Assembly service Board. Whereas appointment of public officers to the said boards brings in expertise in areas of policy, governance and professionalism, I am afraid that there are potential risks of conflict of interest and

compromise of performance of duties in the full-time public office. There will also be double payment from the public coffers to the same officer, which seems to be the main motivation for public officers taking such appointments.

Eligibility to payment

51. The interested party's circular dated 8th December 2017 was intended to remunerate part-time Board members who were lawfully recruited to serve. The benefits included a monthly retainer plus facilitation allowances and of course gratuity at the rate of 31% of the annual retainer. Such benefits fit well to a person who is not in full time service as a public officer.
52. Having made a finding of fact that the claimant's appointment to the County Board was prohibited by Article 77 (1) of the Constitution read with section 52 of the Leadership and Integrity Act, it follows naturally that she was not eligible for payment of the remuneration and benefits under the circular dated 8th December, 2017.
53. I must however state that the claimant should not bear the blame for receiving the remuneration and allowances under the contract between her and the County Board. She applied for the job and she was competitively recruited by the County Assembly, while fully aware that she was a public officer. The Board then continued

to pay her all the retainer, and allowances for five (5) years and thereafter paid her gratuity. This case can be distinguished from the **Nicholas Rono case**, *supra*, because in the said case the public officer concealed his status to the County Board during the recruitment process but in this case the claimant was allegedly recruited for her expertise in policy, education and status as senior lecturer in the university.

Reliefs sought

54. The claimant seeks declaration that she did not breach any law or regulation in serving as part-time external board member. However, in view of the finding above that she was not eligible to the said appointment, I find that she is not entitled to the declaration sought above. For the same reasons, I find that she is not entitled to declaration that she remains entitled to remuneration and benefits from the County Assembly in line with circular No.SRC/TS/CGOVT/3/61 Vol.IV (49) dated 8th December, 2017.
55. The prayer for permanent injunction to bar the 1st respondent from interfering with claimant's engagement and issuing directions to the 2nd and 3rd respondents concerning her remuneration and gratuity cannot issue because that would amount to restraining the

1st respondent from exercising its investigatory role under the constitution and the Leadership and Integrity Act. It has not been shown that the 1st respondent is acting outside the law in issuing the impugned directives.

Conclusion

56. I have found that the claimant was not eligible for appointment as part-time member of Kirinyaga County Assembly Service Board since she was a full-time Public officer serving as senior lecturer at JKUAT. I have further found that for same reason she was not eligible for payment of the remuneration and benefits in the circular No.SRC/TS/CGOVT/3/61 Vol.IV (49) dated 8th December, 2017. Finally, I have found that she is not entitled to the reliefs sought in the memorandum of claim dated 2nd August, 2022. Consequently, I dismiss the suit with no costs since, as I have observed, she was not to blame alone for her appointment as part-time member of Kirinyaga County Assembly Service Board.


Dated, signed and delivered at Nyeri this 20th day of December 2023.


ONESMUS N MAKAU

JUDGE

ORDER

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

A handwritten signature in black ink, appearing to read 'Onesmus N. Makau', written in a cursive style.

ONESMUS N. MAKAU

JUDGE