



**Isiavale & 22 others v Nairobi City County Governement & 2 others (Employment and Labour Relations Petition E185 of 2023) [2024] KEELRC 1072 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1072 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E185 OF 2023**

**MN NDUMA, J**

**MAY 9, 2024**

**BETWEEN**

**GADDAFFI ISIAVALE ..... 1<sup>ST</sup> PETITIONER**

**DIANA AKINYI ODHIAMBO & 21 OTHERS ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NAIROBI CITY COUNTY GOVERNEMENT ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

- 1 The respondents filed a notice of preliminary objection dated 24/10/2023 objecting to the jurisdiction of the court to hear and determine this matter.
- 2 A careful consideration of the petition indicates that the cause of action arose from a letter by the 3<sup>rd</sup> respondent dated 31/8/2021 titled “Review of Employees on Contract Terms and Entry Level.” The aim of the said letter as pleaded was to have employees appointed from May 2019 to have their terms of service translated to permanent and pensionable terms. An appraisal process of health workers and clerical officers was conducted for that purpose and the officers had legitimate expectation that their terms of service would be converted to permanent and pensionable terms.
- 3 However, on 26/2/2023 and 8/8/2023 the 1<sup>st</sup> respondent advertised for the training of clerical officers and health workers externally instead of absorbing the health workers and clerical officers in employment.
- 4 That the 1<sup>st</sup> and 2<sup>nd</sup> respondents then proceeded to issue termination letters to the clerical officers and replaced their positions with new appointees.



- 5 That the conduct by the respondents amount to unfair labour practice in violation of Article 41 of *the Constitution*. That these were Nairobi Metropolitan Services Staff and had legitimate expectation to be absorbed into the permanent and pensionable county service.
- 6 The petitioners pray for the following reliefs:-
- a. A declaration that the petitioner's right to fair labour practices as enshrined under Article 41 of *the Constitution* of Kenya 2010, have been contravened and infringed upon by the respondents.
  - b. An order compelling the respondents to review the contractual terms of employment of all the aggrieved NMS staff to permanent and pensionable terms.
  - c. An order compelling the respondents to reinstate to work the petitioners' who were NMS staff and whose contracts were terminated instead of being converted to permanent and pensionable terms.
  - d. A declaration that the petitioners' whose contracts were terminated are entitled to the payment of damages and compensation to be assessed by the court for violation and contravention of their rights to fair labour practices as provided under Article 41 of *the Constitution* of Kenya, 2010.
  - e. A permanent injunction restraining the respondents by themselves, their employees or agents from harassing, discriminating and/or victimizing the petitioners' and the NMS staff in general with respect to the matters leading to or after the dispute in the present case.
  - f. Costs of the petition
  - g. Any other relief that this honourable court may deem just to grant.
- 7 At the outset the court has discerned this dispute to be one between employees and their employer. That the subject of the dispute being conversion of the grievants from contract service to permanent and pensionable employees is a dispute related to employment and labour. The preliminary objection lack merit and since this is a matter best resolved by this court.

### **Replying affidavit**

- 8 The respondents filed a replying affidavit dated 29/11/2023 sworn to by Mr. Nyamwaya Nyagara the Acting Chief Executive Officer of the 2<sup>nd</sup> respondent. The deponent states that to the extent the petitioners were employed by the defunct Nairobi Metropolitan Services (NMS), there is no employer-employee relationship between the petitioners and the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
- 9 The court has already found that the subject of the dispute is related to employment and labour and dismissed the preliminary objection.
- 10 On the merits the respondents depose that the petitioners' contracts of service were for a fixed term which lapsed by effluxion of time in March 2023 and so the petitioners' lack any cause of action.
- 11 That the petition violated the doctrine of exhaustion of internal remedies since the framework for the handover of the transferred functions from the National Government to the Nairobi City County Government provides at clause 3.5 that any matters that require resolution concerning the staff and personnel referred to in Article 3.3 shall be resolved by the Public Service Commission (PSC) and the County Public Service Board (CPSB).
- 12 That the petitioners' have not tabled any evidence that they attempted to resolve the dispute internally.



- 13 That the suit has been overtaken by events since letters of appointment have been issued to new appointees who have replaced the petitioners' and have resumed their duties.
- 14 That the petitioners' have not proved any threat to and or violation of their right to fair labour practices. That the petition be dismissed with costs.
- 15 The 3<sup>rd</sup> respondent filed replying affidavit dated 9/11/2023 sworn to by one Simon K. Rotich the secretary/Chief Executive Officer of PSC.
- 16 The deponent states that the petitioners were engaged on local agreement terms in the defunct Nairobi Metropolitan Service during the remaining tenure of the deed of transfer with effect from the date each one of them assumed duty.
- 17 That the deed dated 25/2/2020 transferred some of the functions of the Nairobi City County Government to the National Government. That the deed became effective from date of execution and remained in force for an initial renewable period of 24 months from date of execution.
- 18 That the petitioners' were recruited by PSC upon request by the defunct Nairobi Metropolitan Services (NMS) as health workers and clerical officers.
- 19 That the petitioners' were aware at all material times that their contracts would terminate upon the end of the tenure of NMS.
- 20 That this position was affirmed by the Court of Appeal in Civil Appeal No. 81 of 2018: Transparency International Kenya Versus Tereje Carlo Omondi where the court addressed itself to the issues of legitimate expectation thus:

“Having noted that the respondent was in employment under a fixed term contract and that the contract came to an end at the appointed time, we are of the view that any relief sought by the respondent on basis of her assertion that her employment was unfairly terminated was automatically not available to her.”

- 21 The NMS, National Government, and County Government developed a framework for the handover of the transferred functions from the National Government to the Nairobi City County Government. The petitioners rely on this framework for their case. The framework was executed on 30/9/2023 and under clause 3.3 the framework provided that:

“Staff and personnel who have been performing the transferred functions under NMS shall be deployed as follows:-

- a. Staff and personnel who had been seconded to the Nairobi Metropolitan Services from either level of Government shall be redeployed to their respective levels of government.
- b. Staff and personnel who were employed by the Nairobi Metropolitan Services during the subsistence of the deed shall be absorbed into Nairobi City County Government's staff establishment subject to existing vacancies and based on Nairobi City County needs.
- c. For those who will not be absorbed in line with (b) above, the Public Service Commission shall handle their deployment to government ministries and/or agencies based on their terms of employment
  - ii. At paragraph 3.6 of the framework, it is provided that:



For the avoidance of doubt, staff and personnel who were employed by the Nairobi Metropolitan Services to discharge supportive roles in relation to the transferred functions shall be retained and remunerated by the Nairobi Metropolitan Service in accordance with their contracts or service.”

- 23 The 3<sup>rd</sup> respondent deposes that the petitioners cannot rely on the aforesaid framework since their contracts were tied to the remainder of the tenure of the deed of transfer between NMS, the National Government and Nairobi City Council to direct the 3<sup>rd</sup> respondent to absorb them to the staff-establishment of its service on permanent and pensionable terms as the framework did not provide for the same. That the petition lack merit and it be dismissed.

### **Rejoinder**

- 24 The petitioners reiterate that the 1<sup>st</sup> and 2<sup>nd</sup> respondents continued to employ the petitioners at the expiry of NMS deed of transfer which ended in March 2023.
- 25 The respondents admit that there was continued engagement which was not premised on a fixed term contract. The respondents purported to terminate the contract of the petitioners by letters dated 2<sup>nd</sup> June 2023 by giving them 30 days’ notice.
- 26 The petitioners state that the respondents having taken over the petitioners from the NMS and having given them expectation of being taken over on permanent and pensionable terms had provided the petitioners legitimate expectation that they would continue serving the respondents.
- 27 That the change of mind by the respondents violated the petitioner’s right to fair labour practices.
- 28 That the petition has merit and it be granted.

### **Determination**

- 29 The parties filed written submissions which the court has carefully considered together with the deposition by the parties. The issues for determination are:-
1. Whether the petitioners have proved violation of Article 41 of *the Constitution* of Kenya 2010.
  2. Whether the petitioners are entitled to the reliefs sought
- 30 The rights and obligations between the petitioners and the respondents must flow from the letter of appointment issued to the petitioners at the time of their appointment. The letters of appointment were for a two year fixed term period and were issued by the Director General of NMS to the petitioners. The letters did not provide for renewal or transfer of services beyond the fixed term.
- 31 The petitioners admit that their contracts of employment were not between themselves and the respondents. It is clear that the petitioners were employees of Nairobi Metropolitan Services which is not a party to this suit.
- 32 The burden of proving that the respondents were under a legal obligation to take over the petitioners from NMS upon expiry of the deed of transfer lies on the petitioners on a balance of probability. It is also incumbent on the petitioners to prove that the respondents have violated their right to fair labour practices.
- 33 There is no evidence adduced by the petitioners to demonstrate any such violation of their right under Article 41 of *the constitution* by the respondents.



- 34 To the contrary, the petitioners belly their case based on the principle of legitimate expectation. The petitioners were not employees under the purview of the Public Service Commission.
- 35 The provisions of section 74 of the Public Service Commission were not applicable to them. The Public Service Commission had only been tasked to recruit the petitioners on behalf of NMS under the deed for transfer of services in the City of Nairobi.
- 36 It is not in dispute that all the petitioners were employed on fixed term contract of two years between the period 22<sup>nd</sup> March 2021 to 21<sup>st</sup> March 2023, and following the decision of the Court of Appeal in Civil Appeal No. 81 of 2018, Transparency International Kenya (Supra), the court finds that these contracts expired by effluxion of time and the petitioners have failed to demonstrate that they had a right for renewal of the said contracts by the respondents.
- 37 The petitioners have also failed to establish that they had legitimate expectation to have the respondents absorb them into service upon the expiry of these contracts and ceasing of existence of NMS.
- 38 Accordingly, the petition lack merit and is dismissed with no order as to costs.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2024**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearance:

Mr. Amanyia for petitioners

Mr. Maalim for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Ms. Wangechi for 3<sup>rd</sup> respondent

Mr. Kemboi, Court Assistant

