



**Gichira v Teachers Service Commission & another (Judicial Review Miscellaneous Application E007 of 2024) [2024] KEELRC 1799 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1799 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E007 OF 2024**

**AN MWAURE, J**

**JULY 10, 2024**

**BETWEEN**

**CHARLES MACHARIA GICHIRA ..... APPLICANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF EXECUTIVE OFFICER, TEACHERS SERVICE COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. The Applicant filed Chamber Summons dated 3<sup>rd</sup> February 2024 seeking the following orders that: -
  1. spent
  2. this Honourable Court be pleased to grant leave to the Applicant to file a motion on Judicial Review for:
    - a. An Order of *Certiorari* to quash and nullify the 1<sup>st</sup> Respondent's decision dated 19<sup>th</sup> September 2023 which was administered without due procedure and in clear violation of the 1<sup>st</sup> Respondent's HR Manual.
    - b. An Order of Prohibition restraining the 1<sup>st</sup> Respondent from conducting interviews and/or recruiting for the position of Director-Information Communication and Technology.
    - c. The grant of leave do operate as a stay of the recruitment of the position of Director-Information Communication and Technology by the 1<sup>st</sup> Respondent and enforcement and implementation of the 1<sup>st</sup> Respondent's decision made on 19<sup>th</sup> September 2023.



3. costs of this application be provided for.

### **Applicant's Case**

2. The Applicant avers that he served as the 1<sup>st</sup> Respondent's Director-Information Communication and Technology for a period of 5 years from 17/09/2018 to 16/09/2023. It was an express term that the contract will be renewable for one more time or up to the date he attained 60 years whichever came first.
3. The Applicant avers pursuant to this, he complied with the requirement to apply for renewal between 6 and 4 months prior to expiry of the contract.
4. The Applicant avers that the Respondent's HR Manual under Part XI, section 135, the commission is mandated to issue a one-month notice to an officer before expiry of the contract.
5. It is the Applicant's case that the Respondent failed to issue him with the one month's notice before expiry of the contract dated 17/09/2018 as prescribed in the HR manual.
6. The Applicant lodged his application not more than 6 months and not less than 4 months before the date the contract expired.
7. Therefore, the Respondent's decision on 19/09/2023 was illegal as it was issued after the expiry of the Applicant's contract due for expiry on 16/09/2023.
8. It is the Applicant's case that he will suffer substantial irreparable loss if the 1<sup>st</sup> Respondent's decision is not quashed and the implementation prohibited for the reason that the 1<sup>st</sup> Respondent has advertised a vacancy for the position.

### **Respondents' Case**

9. In reply to the Application, the Respondents filed a replying affidavit dated 19<sup>th</sup> March 2024.
10. The Respondents aver that employment contract was a fixed term contract with no renewal clause as it stipulates under clause 1(a) of the contract that the contract was for 5 years beginning 17/09/2018 or until the Applicant attains the age of 60 years whichever comes first.
11. The Respondents aver that Section 3 of the Schedule of the Agreement stipulates that at no more than 6 months and not less than 4 months before the Applicant's service lapses, the Applicant shall give notice to the 1<sup>st</sup> Respondent on whether he desires to remain in its employment, for the 1<sup>st</sup> Respondent to decide whether it will offer him further employment as mutually agreed by the parties.
12. The Respondents aver that the Applicant was aware his employment would lapse on 16/09/2023 and is not entitled to a month notice as pleaded being his engagement was by fixed term contract.
13. The Respondents aver that the contract does not refer to any renewal of contract but re-engagement on a new term which is tantamount to re-employment of the officer desirous to continue working for the 1st Respondent.
14. The Respondents aver that the 1<sup>st</sup> Respondent has no mandatory obligation to renew the Applicant's contract.
15. The Respondents aver that it has a contractual basis for its lawful disengagement with the Applicant which cannot be termed as unfair termination.



16. It is the Respondents' case that the employment contract stipulates that the 1<sup>st</sup> Respondent was at liberty to end the engagement when the contractual term lapsed and it had no legal obligation to renew the contract.
17. The Respondents aver that the Applicant's employment was not terminated but the fixed term contract lapsed. He was entitled to gratuity which was paid in full.
18. The Respondents aver that the application is flawed as it seeks leave of the court to initiate a motion of judicial review for an order of reinstatement which is not available to him.
19. It is the Respondents' case that should leave be granted the same is overtaken by events as the status quo is that the contract expired by lapse of time and all his benefits paid.
20. The Respondents aver that the 1<sup>st</sup> Respondent is at an advanced stage of filing the vacant position and any delay will cause it a hefty financial burden and expose it to litigation arising from an interrupted recruitment process.

### **Applicant's Submissions**

21. The Applicant relied on the case of *Republic v Retirement Benefits Appeals Tribunal & another Ex-Parte Edwin Ngesa Nyamoro & 16 others* [2013] eKLR and Article 47 of [the Constitution](#).
22. The Applicant submitted that the 1<sup>st</sup> Respondent was obliged to offer a one month's notice regardless of whether it had an intention of renewing the contract or not. This is based on Clause 135 (1) of the Human Resource Policies & Procedures Manual for Secretariat Staff, the 1<sup>st</sup> Respondent shall issue a one month's notice to an officer before the expiry of the contract.
23. It is the Applicant's submission that despite the Respondents' knowledge of the provisions of Clause 135 (1) of the HR Manual, the 1<sup>st</sup> Respondent served him a notice in writing dated 19/09/2023 on 20/09/2023; which was illegal and unprocedural in contravention of the 1<sup>st</sup> Respondent's Human Resource Manual.
24. It is the Applicant's submission that the purpose of judicial review is to ensure that an individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.
25. The Applicant submitted that there was procedural impropriety as the 1<sup>st</sup> Respondent being the decision-maker overlooked or failed to properly observe statutory procedural requirements and common law rules of natural justice and fairness.
26. The 1<sup>st</sup> Respondent as an administrative body failed to observe procedural rules expressly laid down in its Human Resource Policies & Procedures Manual for Secretariat Staff by which its jurisdiction is conferred is a form of procedural impropriety.
27. The Applicant submitted that the Respondents decisions were irrational as the 1<sup>st</sup> Respondent failed to issue a one-month notice before the end of the requisite contractual period ending on 16/09/2023 and the Respondents have already published a vacancy for the post of Director- Information Communication Technology.
28. It is the Applicant's submission that the standard of reasonableness must be the standard indicated by the true construction of the Human Resource Policies & Procedures Manual for Secretariat Staff. No reasonable decision maker could arrive at the impugned decision made by the 1st Respondent, and,



that, the decision falls outside the possible justifiable outcomes a decision maker properly directing his mind to the law and facts can reasonably arrive.

### Respondents' Submissions

29. The Respondents submitted that application does not raise a point of law or fact, sufficient to call for an answer from the Court. It relied on the case of *Transparency International - Kenya v Omondi* (Civil Appeal 81 of 2018) [2023] eKLR where it held that it is trite law that a fixed-term contract of employment is a lawful mode of employment with a start and end date and that a claim of unfair termination cannot arise from such a fixed term contract upon its expiry. The Applicant admits that it was a fixed term contract for a duration of 5 years, but still claims unfair termination and entitlement to one-month salary in lieu of notice.
30. It is the Respondents' submission that the Applicant cannot plead legitimate expectations emanating from a fixed-term contract with no automatic renewal clause. He knew from the very onset when his contract was going to lapse, and he ought to have sufficiently prepared for it.
31. The Respondents submitted that reinstatement is impractical and untenable because of the lapse of time, the 1st Respondent having paid the Applicant his gratuity in full, and the almost complete process of recruitment of a new Director – ICT by the 1<sup>st</sup> Respondent therefore makes the prayer for reinstatement impractical.
32. It is the Respondents' submission that it is established that a claim of unfair termination cannot arise from a fixed term contract upon its expiry. This renders the Applicant's case inarguable as it is mounted against a jurisprudential pronouncement and therefore, incurably feeble.

### Analysis and Determination

33. The main issue for determination is whether Applicant has met the requirements for granting judicial review orders.
34. The High Court in *Multiline Services Limited v Nairobi City County Government* (Judicial Review Application E025 of 2023) [2023] KEHC 23794 (KLR) (Judicial Review) (19 October 2023) (Ruling) held: -

“It is a requirement of the law under Order 53 Rule 1 of the *Civil Procedure Rules* 2010, that an Applicant must seek leave to institute judicial review proceedings.”
35. Leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. This reason for leave was discussed in the case of *Republic v County Council of Kwale & another ex parte Kondo & 57 others*, Mombasa HCMCA No. 384 of 1996.
36. The Learned Judge, in *Republic v County Council of Kwale & another Ex Parte Kondo & 57 others* (*supra*), further held that leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant; the test being whether there is a case fit for further investigation at a full inter parties



hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion, but as always it has to be exercised judiciously.

37. From the foregoing, in an Application for leave, such as the instant one, this court ought not to delve deeply into the arguments of the parties; but should make cursory perusal of the evidence before it [court] and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.

Also, in *Republic v National Transport & Safety Authority & 10 others* [2014] eKLR, the court held that:

“in judicial review, the threshold for obtaining leave to commence is low and obtaining leave is not in itself evidence of a strong case. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he has an arguable case.”

38. Additionally, the requisite requirement for grant for leave were set out by Mativo J. in *Republic v Kenya Revenue Authority Commissioner Ex Parte Keycorp Reals Advisory Limited* [2019] eKLR where he cited with approval the decision in *Meixner & another v A.G* [2005] KLR 189. At the leave stage the Applicant must show that: -

- i. Sufficient interest in the matter otherwise known as locus standi.
- ii. He/she is affected in some way by the decision being challenged.
- iii. He/she has an arguable case and that the case has a reasonable chance of success.
- iv. The application must be concerned with a public law matter that is the action must be based on some rule of public law.
- v. The decision complained of must have been taken by public body, that is a body established by statute or otherwise exercising a public function.”

39. Similarly, in *Ex Parte Keycorp Reals Advisory Limited (supra)* it was stated:

“At the leave stage, the Applicant has the burden of demonstrating that the decision is illegal, unfair and irrational. The Applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the Judge believes that the Applicant has raised an arguable issue that can only be resolved by a full hearing of the judicial review application. If the Court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.”

40. The employment contract between the petitioner and the respondent dated 17<sup>th</sup> September 2018 read as follows on terms of engagement:

”the engagement of the officer is for a period of 5 years of service beginning from the 17<sup>th</sup> day of September 2018 or until you attain 60 years of age whichever comes first.” The petitioner by his letter dated 24<sup>th</sup> April 2023 requested for renewal of his contract for a further five years

41. The respondent declined the request for renewal by their letter dated 19<sup>th</sup> September 2023 and apparently that is the time he was informed his contract would not be renewed. The respondent's manual provide that a month before the expiry of a contract the employee should be given a notice of one month informing him that his contract would not be renewed (section 135 of the respondents HR manual.)



42. The respondent failed to give the petitioner the notice. That was a failure on the part of the respondent.
43. That lapse however would not justify granting of a judicial review to stop the respondent from conducting interviews or recruiting for the position.
44. The court is satisfied the petitioner's contract expired by effluxion of time and he already knew that he had a 5 years contract from 17<sup>th</sup> September 2018 to 17<sup>th</sup> September 2023. Failure to give notice for a fixed contract would not justify granting of judicial review prohibiting the recruitment of the former position of the petitioner. The court is always declaring that it cannot rewrite a contract between the parties. The terms of their contract binds them and it is not the role of the court to rewrite it for them but can only enforce it. The court finds there are no valid grounds to grant judicial review orders prayed in the chamber summons dated 3<sup>rd</sup> February 2024 and the same are dismissed.
45. The petitioner is to be paid for one month salary to at least cushion him for the failure of the 1<sup>st</sup> respondent to give him notice as provided in their Human Resource Manual. The same should be Kshs 240,533/- according to his contract and interest at court rates from date of judgment till full payment.
46. The respective parties will meet the costs of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10<sup>TH</sup> DAY OF JULY, 2024.**

**ANNA NGIBUINI MWAURE**

**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, this 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 Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

