



Njoroge v Thika Water and Sewerage Company Limited & 4 others (Cause 1338 of 2018) [2024] KEELRC 2353 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2353 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1338 OF 2018
BOM MANANI, J
SEPTEMBER 26, 2024**

BETWEEN

KENNETH MWANGI NJOROGE CLAIMANT

AND

THIKA WATER AND SEWERAGE COMPANY LIMITED 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF KIAMBU 2ND RESPONDENT

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

MINISTRY OF DEVOLUTION AND PLANNING 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

Introduction

1. This action challenges the 1st Respondent's decision to sever the employment relation it had with the Claimant. Whilst the Claimant contends that the decision was unlawful, the 1st Respondent avers that the contract of service between them came to a close through effluxion of time.
2. On their part, the 3rd to 5th Respondents deny that the Claimant was their employee when his contract of service was terminated in 2015. They contend that the Claimant was in the service of the 1st Respondent at the time. As such, they dispute that he has a valid claim against them.
3. The 2nd Respondent did not enter appearance or file a defense to the cause. This is notwithstanding service of summons to enter appearance on it.



Claimant's Case

4. The Claimant contends that he was first employed to serve in the defunct City Council of Nairobi as an Assistant Engineer II as from 1992. He avers that he served in this position until 18th October 2004 when the Town Clerk of the City Council deployed him to serve as Deputy Director, Environment in the same organization.
5. The Claimant avers that on 9th February 2007, the Permanent Secretary, Ministry of Local Government transferred his services to the Thika Municipal Council where he was to serve as General Manager, Water Department. He contends that the principal purpose for this transfer was for him to assist the Thika Municipal Council to set up and operationalize a water company as required under the [Water Act, 2002](#).
6. The Claimant contends that he discharged the aforesaid mandate resulting in the establishment of the 1st Respondent. He further contends that on 7th September 2009, the Thika Municipal Council entered into an agreement with 1st Respondent pursuant to which employees in the Council's water department were transferred to the 1st Respondent. He avers that clause three (3) of the agreement dictated that the affected staff would be transferred on the same terms and conditions as the ones they were serving under.
7. The Claimant avers that his services were subsequently transferred from the Thika Municipal Council to the 1st Respondent under the aforesaid agreement between the two agencies. He contends that he continued to serve the 1st Respondent as General Manager until October 2009 when he was appointed as the 1st Respondent's Managing Director.
8. The Claimant contends that on 21st February 2012, the 1st Respondent issued him with a draft employment agreement purporting to convert his permanent and pensionable term to a three (3) year fixed term with effect from 2nd October 2012. He contends that the decision to alter his term of service was unilateral and contrary to the reality that his position was permanent and pensionable.
9. The Claimant contends that he declined to execute the aforesaid agreement since it had disregarded the transfer of assets, staff and liabilities agreement that had been executed between the Thika Municipal Council and the 1st Respondent. He avers that he communicated this position to the 1st Respondent's management.
10. The Claimant contends that following his refusal to sign the impugned agreement, the 1st Respondent's management assured him that if his contract would not be renewed after the lapse of the three year term that he had been offered, he would be deployed to another government department. He contends that on the basis of this assurance, he continued to serve the 1st Respondent in the position of Managing Director.
11. The Claimant avers that sometime in the year 2015, he applied for study leave to enable him complete his studies at Jomo Kenyatta University of Agriculture and Technology. He contends that the request was granted by the 1st Respondent following which, he proceeded for his studies from November 2015 until November 2016.
12. The Claimant avers that during the currency of his study leave, the 1st Respondent unilaterally removed him from the position of Managing Director and deployed him to the position of Technical Manager. As a result, his salary was stepped down from Ksh. 585,000 to Ksh. 346,647 per month. At the same time, he learned that the 1st Respondent had engaged another individual to serve as its Managing Director.



13. The Claimant contends that he nevertheless served in the new position until November 2016 when he completed his study leave. He avers that when he sought to resume work at the end of his study leave, the 1st Respondent's management advised him not to. He contends that he was told to await communication on the issue.
14. The Claimant contends that shortly after this development, he was summoned for meetings by the 1st Respondent's management during which he was asked to tender his resignation from the organization. He contends that he rejected the request to resign. He avers that when he rejected the call to resign, the 1st Respondent stopped his salary and remittance of other employment and statutory obligations.
15. The Claimant contends that this development forced him to institute proceedings in court following which his salary was reinstated. As a result, the 1st Respondent continued to pay him Ksh. 214,422.81 per month pending resolution of the aforesaid court case. He contends that these payments continued until August 2017 when the court lifted the orders that it had issued in his favour.
16. The Claimant contends that since that time, the 1st Respondent has not paid him a salary. And neither has it permitted him to report back to work.
17. The Claimant contends that the 1st Respondent's actions are in contravention of his right to fair labour practices protected by both the Constitution and the Employment Act. As such, he prays for a declaration in that regard.
18. The Claimant contends that the decision by the 1st Respondent to withhold his salary and refuse to allow him to resume duty amounts to unlawful termination of his employment through constructive dismissal. He thus prays for an order that the Respondents: make good his salary underpayments; pay him damages for unfair termination of his contract of service; or reinstate or re-engage his services. He also prays for damages for violation of his employment rights.
19. Alternatively, the Claimant prays that the court finds that his contract of service was never terminated and that he remains an employee of the 1st Respondent. In addition to the foregoing, the Claimant has sought a plethora of other reliefs either as the main or alternative reliefs as more specifically set out in the Statement of Claim.

1st Respondent's Case

20. In its Statement of Defense, the 1st Respondent contends that it was incorporated in October 2009 as a private company. However, in the witness statement by its witness which was adopted as its evidence in chief, it contends that it was incorporated on 8th July 2009.
21. The 1st Respondent admits existence of the transfer of assets, staff and liabilities agreement which the Claimant has alluded to. The 1st Respondent contends that the aforesaid agreement was executed by the Claimant on its behalf on 7th September 2009 in his capacity as its Managing Director.
22. The 1st Respondent contends that the transfer of assets, staff and liabilities agreement was subject to its Memorandum of Association and Articles of Association (MA and AA). According to the 1st Respondent, the MA and AA provide for the manner of appointment of Managing Director and the Claimant was aware of this when he assumed office. Therefore, he was aware of his job status.
23. The 1st Respondent denies that it unilaterally altered the Claimant's contractual term from permanent and pensionable to fixed term. It contends that the terms and conditions of service under which the Claimant was appointed as its Managing Director were negotiated with him before he personally prepared and executed the contract.



24. The 1st Respondent further contends that the Claimant negotiated renewal of the fixed term contract and was granted a further term which ran from 21st February 2012 to October 2015. It contends that the contract was not renewed after it lapsed in October 2015.
25. The 1st Respondent denies that: the Claimant applied for study leave as he contends at paragraph 25 of his original Statement of Claim; that it approved the study leave for him; that the Claimant proceeded on approved study leave between 1st November 2015 and 1st November 2016; and that whilst on study leave, the Claimant was deployed to the position of Technical Manager. It is the 1st Respondent's case that the aforesaid assertions by the Claimant are misleading since he ceased being its employee from October 2015 when his contract lapsed.
26. The 1st Respondent contends that the decision to pay the Claimant salary whilst he was on purported study leave was illegally sanctioned by him without the approval of its Board. As such, he should reimburse it the money he was unlawfully paid.
27. The 1st Respondent contends that once the Claimant's contract lapsed in October 2015, he cleared with it and was paid his terminal dues. The 1st Respondent further contends that when the Claimant's contract expired in October 2015, it advertised the position of Managing Director and hired a new individual to fill it. It asserts that the Claimant did not apply for the position when it was advertised after the lapse of his term.
28. The 1st Respondent denies that it deployed the Claimant to serve as its Technical Manager after his term as Managing Director lapsed. Further, it denies the Claimant's assertion that it underpaid him during the period he purportedly served as its Technical Manager.
29. The 1st Respondent denies the Claimant's assertion that when he attempted to resume duty after his study leave in November 2016, its management asked him not to. It also disputes the Claimant's contention that its management asked him to resign from the organization.
30. According to the 1st Respondent, the Claimant's contract lapsed in October 2015 and was not renewed. The 1st Respondent denies that it subsequently appointed him to the position of Technical Manager. As such, the 1st Respondent contends that it is not conceivable that the two engaged in discussions regarding the Claimant's employment in 2016.
31. The 1st Respondent admits that there was indeed a proposal by its Finance and Administration Committee in April 2015 to appoint the Claimant to the position of Technical Manager. However, it contends that this proposal was not actualized since it did not get the endorsement of its Board of Directors.
32. The 1st Respondent admits that it was ordered by the court to pay the Claimant salary for the period between November 2016 and August 2017. However, it denies that there was an existing employment relation between the two during the period covered by the payments. The 1st Respondent contends that it eventually managed to have the impugned court order discharged thus stopping further payments.
33. The 1st Respondent contends that the Claimant willingly entered into a fixed term contract of service with it. As such, when the contract came to a close in October 2015, the parties were mutually released from their obligations under it after the Claimant was paid his exit gratuity.
34. The 1st Respondent prays that the instant suit be dismissed with costs to it. It further prays that the Claimant be compelled to reimburse the payments which were made to him between November 2016 and August 2017.



3rd to 5th Respondents' Case

35. The 3rd to 5th Respondents are all represented by the Attorney General. As such, they filed a joint Statement of Defense and called one witness in support of their case.
36. The three Respondents confirm that the Claimant was indeed employed in 1992 by the 3rd Respondent's predecessor as an Assistant Engineer II. They also confirm that the Claimant was deployed to work at the City Council of Nairobi. They confirm that he was confirmed as a permanent and pensionable employee in 1996.
37. The three Respondents confirm that the Claimant was thereafter transferred to the Thika Municipal Council on 9th February 2007 in the position of General Manager. According to these Respondents, this assignment by the Claimant was to enable him set up and operationalize the 1st Respondent.
38. The three Respondents contend that following the promulgation of *the Constitution* of Kenya 2010, some services, including provision of water and sanitation, were devolved from the national government to the devolved units. As such, it became necessary to transfer staff in the affected areas to the devolved units.
39. The three Respondents contend that since the Claimant was performing a devolved function, he was initially seconded to the County Government of Kiambu which is affiliated with the 1st Respondent. Thereafter, his services were transferred to the said County Government with effect from 1st July 2016.
40. The three Respondents contend that the complaints raised by the Claimant regarding unfair labour practices occurred whilst he was in the service of the 1st Respondent, an affiliate of the County Government of Kiambu. Therefore, the suit against them is misplaced and should be dismissed with costs to them.

Issues for Determination

41. After evaluating the pleadings, evidence and submissions by the parties, I am of the view that the following are the matters that fall for determination:-
 - a. Who was the Claimant's employer?
 - b. What was the nature of the Claimant's employment at the time that the 1st Respondent claims that his contract terminated through effluxion of time?
 - c. Whether the Claimant has a cause of action against the 3rd to 5th Respondents.
 - d. Whether the Claimant's contract of service lapsed through effluxion of time or was unfairly terminated.
 - e. Whether the Claimant is entitled to the reliefs that he seeks.
 - f. Whether the 1st Respondent is entitled to recover the amounts that it paid to the Claimant during the time he purportedly served as its Technical Manager and whilst he was on his study leave.

Analysis

42. I do not propose to address these issues in any systematic way. However, by the time I conclude this decision, I will have spoken to all of them.



43. From the evidence on record, it is apparent that the Claimant was first employed as an Assistant Engineer in the City Council of Nairobi as from 1992. This fact is confirmed by both the Claimant and the witness for the 3rd to 5th Respondents.
44. According to the witness for the 3rd to 5th Respondents, the Claimant was hired by the predecessor of the 3rd Respondent, a national government agency and assigned to work at the defunct City Council of Nairobi, a local authority in the service of the national government. As such, it is apparent that the Claimant was in the employment of the national government attached to the Ministry of Local Government.
45. The evidence on record demonstrates that on 9th February 2007, the Claimant was transferred from the City Council of Nairobi to the Thika Municipal Council. This fact is confirmed by a letter of even date which was produced in evidence by the Claimant. It is also confirmed by the witness who testified on behalf of the 3rd to 5th Respondents.
46. It is evident from the evidence of both the Claimant and the witness for the 3rd to 5th Respondents that on his transfer to the Thika Municipal Council, the Claimant was elevated to the position of General Manager, Water Department. His principal role at the Council was to assist in the setting up and operationalization of the 1st Respondent.
47. The evidence on record further demonstrates that the 1st Respondent was incorporated on 8th July 2009. This fact is confirmed by the 1st Respondent's witness at paragraph four (4) of his witness statement which was adopted on oath.
48. The record further demonstrates that after the 1st Respondent was incorporated, it entered into an agreement with the Thika Municipal Council dated 7th September 2009 for the transfer of customer contracts, operational assets, staff and operational liabilities. Clause three (3) of the agreement deals with the transfer of staff from the Thika Municipal Council to the 1st Respondent. It provides as follows:-
 - a. All the particulars of transferred staff including their remuneration, age, gender, file number, leave accrued but not taken, position, grade, recognized seniority and staff who are on leave of absence and its nature, are set out in Appendix 2 to this contract.
 - b. The transferee shall ensure that the transferred staff:-
 - i. Retain the same rights including pay and obligations as arose from their employment relationship with the transferor; and
 - ii. Retain their seniority.
 - c. The transferee shall assume in respect of the transferred staff all rights and obligations imposed by the applicable law provided that all pension obligations and other such benefits as well as arrears of statutory deductions, if any, that are outstanding as at the effected date (sic).
 - d. The transferee shall enter into employment contracts with the transferred staff which shall reflect terms and conditions which are similar to those enjoyed by the transferred staff in their previous relationship with the transferor provided always that such agreement shall not contain terms detrimental to the transferred staff. Emphasis added by underlining.
49. Appendix 2 to the agreement contains a list of members of staff of the Thika Municipal Council who were to be transferred to the 1st Respondent. The list includes the Claimant.



50. The recital to the appendix indicates that the number of employees of the Thika Municipal Council in its water department, including the Claimant, at the time of the transfer stood at 104. All these individuals were given the option of either remaining with the Thika Municipal Council or transiting to the 1st Respondent on the same terms and conditions with effect from 7th September 2009, the effective date.
51. There is no evidence that the Claimant entered into a written contract of employment with the 1st Respondent either on or after the effective date. However, there is evidence that he transited to the 1st Respondent and assumed the position of Managing Director.
52. As a matter of fact, the Claimant signed the transfer of assets, staff and liabilities agreement in this capacity. It is therefore evident that with effect from 7th September 2009, the Claimant ceased to be an employee of the national government and transited to be an employee of the 1st Respondent in the position of Managing Director.
53. The dispute between the 1st Respondent and the Claimant appears to centre on the ramifications of the aforesaid transition on the latter's contract of service. According to the 1st Respondent, the Claimant's services were transferred to it subject to its MA and AA. The 1st Respondent contends that the MA and AA empower its Board of Directors to appoint its (the 1st Respondent's) Managing Director. As such, the Claimant was hired by the said Board as Managing Director on a three (3) year contract with effect from 7th September 2009.
54. The 1st Respondent contends that the Board negotiated with the Claimant his terms and conditions of engagement. That the Claimant acceded to these terms and conditions and in fact prepared and executed a contract in that regard. As such, he transited to the 1st Respondent on a fixed as opposed to indefinite term contract.
55. On his part, the Claimant concedes that there was an employment contract between him and the 1st Respondent after he transited to the latter from the Thika Municipal Council. However, he denies that the contract was reduced into writing.
56. According to the Claimant, when the 1st Respondent tried to have him settle for a fixed term contract, he rejected the idea as it was contrary to the transfer of assets, staff and liabilities agreement between the 1st Respondent and the Thika Municipal Council. The Claimant avers that whilst the transfer of assets, staff and liabilities agreement provided that the transferred staff would retain their accrued rights including the right to retain permanent and pensionable positions for employees who were serving as such, the 1st Respondent attempted to manipulate this requirement by pushing him to accept to serve as a fixed and not indefinite term employee.
57. Clause 69 of the 1st Respondent's MA and AA provides as follows:-
- “ The Board of Directors shall appoint a Managing Director through a reputable consultancy firm or through other means the Board deems fit to manage the Company for remuneration by way of salary and allowances subject to such terms as may be agreed upon and likewise may revoke any such appointment in accordance with the terms and conditions of the appointment.”
58. This provision empowers the 1st Respondent's Board of Directors to appoint a Managing Director for the 1st Respondent. However, it does not limit the Board's powers to making such appointment for a term of three (3) years.



59. Indeed, the Board has absolute discretion to appoint and determine the term of service for the 1st Respondent's Managing Director. Thus, read together with clause three (3) of the transfer of assets, staff and liabilities agreement dated 7th September 2009, it is apparent that the 1st Respondent's Board had the power to permit the Claimant to transit to the 1st Respondent on the indefinite term that he was serving whilst at the Thika Municipal Council.
60. The 1st Respondent argues that appendix 2 to the transfer of assets, staff and liabilities agreement shows that the position of General Manager at the Thika Municipal Council was vacant as at 7th September 2009 since the Claimant had already been engaged by it as its Managing Director. As such, the Claimant could not have transited from the Thika Municipal Council to it (the 1st Respondent) under this arrangement.
61. The 1st Respondent further contends that in any event, the position of General Manager which the Claimant occupied whilst at Thika Municipal Council did not exist in its (the 1st Respondent's) staff establishment. It contends that only the position of Managing Director existed in its staff establishment. Therefore, the Claimant cannot purport to have transited from the position of General Manager at the Thika Municipal Council to Managing Director at the 1st Respondent since the two are different.
62. I do not agree with these contentions. This is for two the reasons that I set out here below.
63. First, the list of members of staff that were to be transferred in appendix 2 of the transfer of assets, staff and liabilities agreement bears the name of the Claimant as one of the 104 individuals who were to be transferred. This can only be understood to mean that the Claimant's services were transferred from the Thika Municipal Council to the 1st Respondent under this arrangement.
64. Second, at the point of transfer, the Claimant's position of General Manager in the water department of Thika Municipal Council was the most senior. It is not disputed that the position of Managing Director in the 1st Respondent staff establishment was the most senior.
65. Clause 3 (1) (b) of the transfer of assets, staff and liabilities agreement only underscored the need for the transferred members of staff to retain their seniority. They were not required to retain the same positions which they had held whilst at the Thika Municipal Council. Rather, they were to retain equivalent positions in ranking in the new organization.
66. As such, I hold the position that the Claimant transited from the position of General Manager which he held at the Thika Municipal Council to the position of Managing Director at the 1st Respondent establishment under this arrangement. Although the two positions were not the same in name, they were similar in seniority in the two organizations.
67. The transfer of assets, staff and liabilities agreement obligated the parties to it to allow the transferred staff to retain the same rights which they had enjoyed whilst in the service of the Thika Municipal Council. All the parties to this action do not dispute the fact that the Claimant held the position of General Manager at the Thika Municipal Council on an indefinite term contract. Thus and by virtue of clause three (3) of the transfer of assets, staff and liabilities agreement, he was entitled to retain his permanent and pensionable position once he transited to the 1st Respondent.
68. The 1st Respondent has argued that the Claimant transited on a fixed term contract. Yet, it has not provided proof that the Claimant entered into a contract with it converting his term from indefinite to fixed term when he transited on 7th September 2009.



69. The Claimant's position is that although he had an employment contract with the 1st Respondent, it was not reduced into writing owing to the disagreement between them regarding his term of service. Despite this disagreement, the Claimant contends that he continued to serve the 1st Respondent because he understood that he had transited to it (the 1st Respondent) on permanent and pensionable terms in terms of clause three (3) of the transfer of assets, staff and liabilities agreement. He avers that this explains why he remained steadfast in his rejection of the 1st Respondent's invitations to execute a fixed term contract.
70. If indeed the Claimant and 1st Respondent had a written fixed term contract as contended by the latter, evidence of this ought to have been tendered during the trial. As the record shows, this was not done.
71. Sections 10 (6) and 74 of the [Employment Act](#) obligate employers to keep records of employment in respect of their employees. Therefore, the legal obligation to keep and produce in evidence employment records for the Claimant lay with the 1st Respondent.
72. The 1st Respondent's witness tried to explain away this obligation by stating that the Claimant had custody of the contract when he was serving as its Managing Director. And that the agreement could not be traced after he left.
73. This explanation cannot fly. The law requires that if a document required to be produced in evidence is in the possession of the adversary, the party seeking to rely on it should issue to the adversary a notice to produce the document (see sections 66 to 69 of the [Evidence Act](#)). This requirement can only be disregarded if the exceptions that are set out under section 69 of the [Evidence Act](#) are shown to exist.
74. There is no indication that the 1st Respondent undertook the aforesaid process. As such, its explanation that the first fixed term contract between them was taken by the Claimant is a mere excuse to evade its statutory obligations in respect of the disputed records.
75. From the foregoing analysis, it is clear to me that the Claimant was entitled to and indeed transited to the 1st Respondent on permanent and pensionable terms which he had enjoyed whilst in the service of the Thika Municipal Council as had been dictated by clause three (3) of the transfer of assets, staff and liabilities agreement between the 1st Respondent and the Thika Municipal Council. The fact that the Claimant had been engaged by the predecessor of the 3rd Respondent on permanent and pensionable terms is acknowledged by the witness for the 3rd to 5th Respondents.
76. The evidence on record establishes that although the Claimant was initially an employee of the national government, he transited to serve the 1st Respondent which is in the service of a devolved unit as from 7th September 2019. On this transition, he ceased being an employee of the national government.
77. The grievances which the Claimant raises all arose after he had transited to the 1st Respondent. As such, they (the grievances) do not relate to the period he was in the service on the national government. Consequently, I find that the Claimant has no cause of action against the 3rd to 5th Respondents.
78. The evidence on record confirms that before the Claimant transited to the 1st Respondent, he had served the national government for longer than three months in aggregate. As such and in terms of section 9 of the [Employment Act](#), his contract qualified to be evidenced in writing.
79. The Claimant has produced the letter dated 1st April 2004 by which he was appointed by the national government to the position of Chief Assistant Engineer. This is evidence that his engagement was evidenced in writing as required by the law.



80. Under section 10(5) of the *Employment Act*, if an employer proposes to alter any of the particulars of a written contract of service, including the form and duration of the contract, he is obligated to do so in consultation with the affected employee. Further, the employer must evidence any such changes in writing.
81. At the time that the Claimant transited to the 1st Respondent, he was serving as a permanent and pensionable employee with a written contract. As such, if the 1st Respondent intended to alter this term to fixed term, it ought to have done so in consultation with the Claimant. Further, it ought to have reduced whatever agreement the two reached into writing.
82. There is no evidence that this was done. As such, the purported change to the Claimant's term from indefinite to fixed term not only offended the express agreement between the 1st Respondent and the Thika Municipal Council in the transfer of assets, staff and liabilities agreement but also the *Employment Act*. Therefore, the change was invalid and unlawful with the consequence that the Claimant's contract with the 1st Respondent retained its permanent and pensionable status.
83. The 1st Respondent asserts that after the first contract with the Claimant lapsed, the two entered into a fresh arrangement by which the contract was renewed for a period of three (3) years from 21st February 2012 to October 2015. The 1st Respondent contends that this latter contract ran its full term and expired through effluxion of time at the close of October 2015.
84. The 1st Respondent contends that the contract was not renewed thereafter. It further denies that it hired the Claimant in a different position. As such, it contends that the employment relation between the two ended at the close of October 2015.
85. I have looked at the instrument which the 1st Respondent relies on to advance the above argument. It is apparent that the Claimant did not execute it. As such, it does not constitute a written contract of service between the two.
86. Therefore, the draft contract dated 21st February 2012 did not alter the subsisting indefinite employment relation between the Claimant and the 1st Respondent. The parties continued to work on the basis of the indefinite terms which the Claimant transited with from the Thika Municipal Council.
87. The evidence on record shows that on 15th April 2015, the 1st Respondent's Finance and Administration Committee approved the Claimant's request to proceed on study leave for one year. It also authorized payment of his salary at 80% per month for the duration of his study leave.
88. The 1st Respondent has contended that the resolution by the Finance and Administration Committee required approval of its full Board. However, it has not pointed to the regulation in its MA and AA that anchors such requirement.
89. Article 74 of the 1st Respondent's MA and AA which the 1st Respondent's counsel quotes in his submissions to cushion his contention that the 1st Respondent's full Board ought to have sanctioned the Claimant's request for study leave and payment of 80% of his salary whilst on such leave does not vest this mandate in the Board. It only mandates the Board to determine the 1st Respondent's "staffing levels and approve appointment and dismissal of staff terms and conditions of service". In the premises, I hold that the resolution by the 1st Respondent's Finance and Administration Committee in its meeting of 15th April 2015 on the two issues constituted the 1st Respondent's resolution on the matters.



90. The Claimant contends that when he sought to resume duty after his study leave, he was prevented from doing so by the 1st Respondent's management. He contends that since then, the 1st Respondent has kept him away from work without salary.
91. He further contends that the 1st Respondent irregularly advertised and filled his position with a new Managing Director whilst he was away on study leave. He further avers that the 1st Respondent declined to permit him to resume duty as its Technical Manager, a position he says was assigned to him after he was replaced as Managing Director.
92. On its part, the 1st Respondent contends that the Claimant could not have resumed duty as he claims since his contract expired in October 2015. As such, his contention that he was prevented from resuming duty is misplaced.
93. The 1st Respondent denies that it appointed the Claimant to the position of Technical Manager after his contract of Managing Director had lapsed. It contends that the proposal by its Finance and Administration Committee to appoint the Claimant as its Technical Manager did not receive the approval of its full Board in terms of article 74 of its MA and AA. As such, the Claimant illegally appointed himself into that position in a bid to unlawfully continue drawing a salary.
94. As indicated earlier in this decision, the 1st Respondent's decision to alter the Claimant's position of Managing Director from indefinite to fixed term was irregular. Therefore, the purported appointment of a new Managing Director to replace him on the ground that his contract had expired through effluxion of time was not only unlawful but also constituted an unfair labour practice.
95. As such, the 1st Respondent unlawfully terminated the Claimant's employment when it appointed his replacement without lawfully discharging him from employment. Consequently, the court finds that the Claimant's contract of service as the 1st Respondent's Managing Director was unlawfully terminated.
96. Although the 1st Respondent denies that it appointed the Claimant to the position of Technical Manager, there is evidence that there was a proposal by its Finance and Administration Committee to move him to this position after a decision was taken to terminate his contract as Managing Director. This is clear from the minutes of the Committee's meeting of 15th April 2015.
97. There is evidence that the Claimant was subsequently moved to the position of Technical Manager. This is evident from the pay slips which the 1st Respondent issued to the Claimant for the period between January 2016 and October 2016 after his contract as Managing Director had been terminated. The slips described the Claimant's position as that of Technical Manager.
98. The 1st Respondent has disputed the fact that it appointed the Claimant to the aforesaid position. It relies on the fact that its full Board did not ratify the proposal by its Finance and Administration Committee in respect of the appointment to contest its validity.
99. It is true that there is no evidence to suggest that the 1st Respondent's full Board expressly approved the proposal by the Finance and Administration Committee to move the Claimant to the position of Technical Manager. However, there is evidence that the 1st Respondent moved the Claimant to this position and paid him a salary for the position between January 2016 and October 2016.
100. Although the 1st Respondent argues in its submissions that the Claimant unlawfully appointed himself to the position of Technical Manager, it did not tender evidence during the trial to support this assertion. There was no evidence tendered to demonstrate that the Claimant either prepared and executed documents to install himself in the position or gave verbal instructions to the 1st Respondent's



staff to install him in the position as suggested by the 1st Respondent. As such, I reject the contention by the 1st Respondent that the Claimant unlawfully installed himself into the position in order to continue drawing a salary after his contract as Managing Director expired.

101. Although there was no evidence that the 1st Respondent's full Board expressly sanctioned the proposal by the Finance and Administration Committee to move the Claimant to the position of Technical Manager, there is evidence that the Board impliedly ratified this proposal. Evidence of this ratification is seen in the fact that the Claimant's job title as the 1st Respondent's Technical Manager were entered into its (the 1st Respondent's) payroll and the 1st Respondent paid him a salary for this position from January 2016 to October 2016. There was no evidence tabled before court to demonstrate that the Claimant entered the particulars for the position into the 1st Respondent's payroll as suggested in the 1st Respondent's submissions.
102. It is noteworthy that the pay slips for January 2016 to October 2016 were all issued by the 1st Respondent to the Claimant before the court order in *Petition No. 147 of 2016* issued. Thus, it cannot be contended that the 1st Respondent made the payments evidenced by the pay slips to the Claimant pursuant to the aforesaid court order. Quite evidently, the 1st Respondent voluntarily made the payments to the Claimant in the purported belief that it had legitimately appointed him to the new position of Technical Manager.
103. The aforesaid slips are proof of the fact that the 1st Respondent stepped down the Claimant's position from that of Managing Director to Technical Manager. In my view, this transition amounted to a demotion of the Claimant to a lesser position suggesting that he was a victim of constructive dismissal from employment.
104. The 1st Respondent contends that the Claimant was in attendance at the meeting at which a resolution was made to replace him as its Managing Director. As such, he cannot contend that the impugned decision was unilateral.
105. It is true that the Claimant may have been in attendance at the meeting aforesaid. However, his presence at the meeting could not have affected the resolution to advertise his position even if he was of a contrary minority view. This is because resolutions of a corporate body are validated by a majority vote of the attendees at a meeting of the corporate entity.
106. The record shows that the 1st Respondent's Finance and Administration Committee meeting of 15th April 2015 at which the decision to advertise the Claimant's position was made had four (4) members in attendance. The record further shows that the Claimant's position was discussed and a resolution made to advertise it. Therefore, even if the Claimant was of a contrary minority view, this would not have affected the said resolution.
107. The 1st Respondent contends that the Claimant accepted the fixed term nature of the contract between them. It contends that this is the reason why he accepted to be paid gratuity at the close of the relation thereby bringing the relation to closure. The 1st Respondent relies on the decision of *Bamburi Cement Ltd v Farid Aboud Mohammed [2016] eKLR* to contend that gratuity is only payable on exit from employment.
108. On the other hand, the Claimant contends that the gratuity that was paid to him was not to signify closure of their employment relation. Rather, it was in recognition of his performance. As such, it cannot be relied on to anchor the contention that his employment terminated in October 2015.



109. According to Black’s Law Dictionary, the term “gratuity” bears the same meaning as the term “bounty”. And the term bounty, inter alia, denotes the following:-
- “A premium or benefit offered or given especially by a government to induce someone to take action or perform a service... Also termed as gratuity; bonus.”
110. On the other hand, the term bonus, inter alia, denotes the following:-
- “A premium paid in addition to what is due or expected especially a payment by way of division of a business’s profits, given over and above the normal compensation. In the employment context, workers’ bonuses are not a gift or gratuity; they are paid for services or on consideration in addition to or in excess of the compensation that would ordinarily be given....”
111. Clearly and from the foregoing, gratuity does not necessarily denote end of contract payment. And I do not understand the court in *Bamburi Cement Ltd v Farid Aboud Mohammed* [2016] eKLR to have been making such a proposition. Gratuity could also be payment to induce one to perform a service better.
112. Despite the 1st Respondent contending that it paid the Claimant gratuity to signify closure of the fixed term contract between them, it did not provide evidence to support its contention that the gratuity that was paid under their contract was for the purpose it suggests. As such, I am unable to come to the conclusion that the Claimant was paid “gratuity” to signify closure of a fixed term contract as opposed to appreciating his past performance in the year.
113. The final issue for consideration relates to the reliefs which the Claimant seeks. In addressing this issue, I will be guided by section 49 of the [Employment Act](#) as read with section 12 (3) of the [Employment and Labour Relations Court Act](#).
114. Both provisions provide a wide range of reliefs to parties to an employment relation. In particular section 12 (3) of the [Employment and Labour Relations Court Act](#) permits the court to award damages in any circumstances contemplated under the Act or any written law.
115. Although the two pieces of legislation provide a plethora of remedies, the court is not obligated to grant all or indeed any of them. It is important to bear this in mind when dealing with the question of the reliefs to grant in order to avoid the temptation to make multiple awards which may amount to double compensation to an aggrieved party.
116. At paragraph 54 of the amended Statement of Claim, the Claimant contends that the 1st Respondent’s actions of withholding his salary and failing to allow him to resume work after his study leave amounted to constructive termination of the employment relation between them and as well unfair labour practice. Having regard to the evidence on record and the court’s earlier findings, I am in agreement with the Claimant’s contention in this respect.
117. Refusal by the employer to remunerate an employee, or refusal to allocate the employee work or demotion in rank of an employee are all acts that amount to repudiation of the contract of service by the employer. Such conduct by the employer results in the constructive termination of the affected employee’s contract of service. As such, the employee is entitled to consider himself as constructively dismissed from employment (*Moses Wanyama Omondi v Agility Logistics Limited* [2019] eKLR).
118. Accordingly, I hereby issue a declaratory order that the 1st Respondent’s acts in relation to its contract of service with the Claimant amounted to constructive termination of the latter’s employment.



- Further I declare that the 1st Respondent's acts amounted to violation of the Claimant's right to fair labour practice contrary to article 41 of *the Constitution* (Miyawa & 7 others v Judicial Service Commission (Petition *29 of 2016*) [2017] KEELRC 1735 (KLR) (24 February 2017) (Judgment)).
119. The Claimant's contract of service should not have been terminated in the manner that it was. It was unfair for the 1st Respondent to have considered the contract between them as having lapsed through effluxion of time notwithstanding that the Claimant was serving on indefinite terms.
 120. The record shows that the Claimant was demoted from the position of Managing Director to a lesser position of Technical Manager after his contract purportedly expired. This action impliedly terminated the Claimant's contract through constructive dismissal.
 121. In their submissions, the 1st Respondent's lawyers have argued that the court should not entertain the Claimant's contention that he was a victim of constructive dismissal because this matter was not pleaded. However and as has been pointed out earlier in this decision, the Claimant did plead constructive termination of his contract at paragraph 54 of the amended Statement of Claim. As such, the 1st Respondent's objection in this respect is misguided.
 122. Having regard to the foregoing, I award the Claimant compensation for the unfair termination of his employment that is equivalent to his salary as the 1st Respondent's Managing Director for six (6) months. According to the pay slip appearing at page 50 of the 1st Respondent's trial bundle which was produced in evidence, the Claimant's salary as Managing Director was Ksh. 585,000.00. As such, I award him Ksh. 585,000.00 x 6 = Ksh. 3,510,000.00 under this head. This award is subject to the applicable statutory deductions.
 123. As indicted earlier, the 1st Respondent's actions against the Claimant violated the latter's right to fair labour practice as protected under article 41 of *the Constitution*. In the premises, I award the Claimant general damages for violation of this employment right in the sum of Ksh. 1,000,000.00.
 124. I award the Claimant interest on the amounts awarded at court rates from the date of this decision.
 125. The Claimant is awarded costs of the case.
 126. The 1st Respondent has prayed for refund of the money that was paid to the Claimant whilst he held the position of Technical Manager and whilst he was on study leave. However, it did not file a Counter Claim to anchor this claim. The claim only features in the relief section of the Statement of Defense. As such, it is doubtful that the court is entitled to grant the orders sought on the basis of the Statement of Defense as framed. In the premises, I decline to consider the request.
 127. However, even if the request had been properly pleaded, it would still have failed for the reason that the court has already found that the Claimant's request for study leave and payment of salary whilst on the study leave was approved by the 1st Respondent's Finance and Administration Committee. As indicated earlier, there is no clause in the 1st Respondent's MA and AA which required these two requests to be approved by the 1st Respondent's full Board. As such, the payments to the Claimant during his study leave were legitimate. They are thus not refundable to the 1st Respondent.
 128. Since the Claimant had no cause of action against the 3rd, 4th and 5th Respondents his case against them fails. As such, the Claimant is condemned to pay costs of the case to these three Respondents.

Summary of the Findings and Determination

129. After evaluating the evidence on record, I make the following findings and orders:-



- a. The Claimant's employment with the 3rd Respondent terminated when he transited to the employment of the 1st Respondent on 7th September 2009. Therefore, the Claimant has no cause of action against the 3rd to 5th Respondents.
- b. The contract of service between the Claimant and 1st Respondent was for an indefinite and not fixed term.
- c. It is declared that the 1st Respondent unlawfully terminated the aforesaid contract of service through constructive termination of the Claimant's employment.
- d. It is further declared that the 1st Respondent violated the Claimant's right to fair labour practice in contravention of article 41 of the Constitution.
- e. I award the Claimant Ksh. 3,510,000.00 as compensation for unfair termination of his contract of service.
- f. This amount is subject to the applicable statutory deductions.
- g. I award the Claimant general damages in the sum of Ksh. 1,000,000.00 for violation of his right to fair labour practices.
- h. I award the Claimant interest on the amounts awarded at court rates from the date of this decision.
- i. The Claimant is awarded costs of the case.
- j. I decline the 1st Respondent's prayer that the Claimant be compelled to reimburse the amount that was paid to him whilst holding the position of Technical Manager and whilst he was on study leave.
- k. Since the Claimant had no cause of action against the 3rd, 4th and 5th Respondents his case against them fails.
- l. As such, the Claimant is condemned to pay costs of the case to the 3rd, 4th and 5th Respondents.

DATED, SIGNED AND DELIVERED ON THE 26TH DAY OF SEPTEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

..... for the 1st Respondent

..... for the 3rd to 5th Respondents

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

B. O. M MANANI

