

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC PETITION NO. E123 OF 2024

FELIX LUKWA LUSIRI.....
.....PETITIONER

VERSUS

NAIROBI CITY WATER & SEWERAGE CO.
LTD.....RESPONDENT

JUDGMENT

The facts deposed by the petitioner are that the petitioner was appointed to the position of Acting Environment and Compliance Manager of the Respondent on 6th May 2019 and has served in the said position for a period of about 5 years and 5 months.

That the Respondent extended the appointment of the Petitioner on various occasions and the Petitioner still holds the above position to date.

The Respondent advertised for the said position vide its internal advertisement dated 31st May 2024 and circular dated 2nd August 2024 seeking to fill the position of Environment and Compliance Manager despite having the Petitioner serve in the said role for 5 years and 5 months and as such is now the substantive holder of that position in accordance with the law.

That the Respondent shortlisted candidates for interviews for purposes of occupying and/or appointing a substantive holder of the office of the Petitioner. The said interviews were scheduled to commence on 8th August 2024.

Interim orders were issued to stop the intended interviews and maintain the status quo as of 14th August 2024.

Section 34(3) of the Public Service Commission (PSC) Act provides as follows: -

“34 Acting appointments

(3) An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.”

The Petitioner has worked in an Acting capacity beyond the limit of the law at all material time without filing this suit.

The Petitioner prays for the following reliefs: -

- a) An order be and is hereby issued quashing and or permanently staying any and further recruitment process by the Respondent to fill the position of Environment and Compliance Manager that is currently being held by the Petitioner.
- b) A declaration be and is hereby made that the Petitioner is qualified to assume office as the Environment and Compliance Manager at the Respondent Company.
- c) An order be and is hereby made compelling the Respondent to confirm the Petitioner in the position of Environment and Compliance Manager.

- d) This honorable court be pleased to issue an order of permanent injunction restraining the Respondent from advertising, interviewing, recruiting and/or appointing any individual to the position of Environment and Compliance Manager until the lapse of the term of the Petitioner legally.
- e) In the alternative to prayers (b), (c) and (d) above, an order does issue compelling the Respondent to shortlist the Petitioner for the interviews having met all the required qualifications for the appointment to the position of Environment and Compliance Manager at the Respondent company.
- f) General damages for violation of the Petitioner's constitutional rights
- g) Any other order as the court may deem fit
- h) Costs of this petition.

Replying Affidavit

The Respondent filed a replying affidavit of George Otieno Oketch, Industrial Relations Coordinator at Nairobi City Water Sewage Company Ltd.

The Respondent states that the Petitioner joined the Respondent as a junior officer on or about 21st July 2008 as Technical Water and Waste Water Officer. He was promoted to the position of Waste Water Coordinator.

On 2nd December 2015, the Petitioner's contract as the Waste Water Coordinator was renewed and extended for 5 years from 1st December

2015. The contract was further renewed on 2nd September 2020 and is scheduled to lapse on 28th November 2025.

The Respondent admits that the Petitioner was appointed as the Acting Environment and Compliance Manager of the Respondent from 6th May 2019, while he served in the substantive position of Waste Water Coordinator to date.

That his acting position was merely conferred to allow him to perform the duties of that office as Ms. Linet Njambi the substantive office holder had been appointed as the Acting Technical Director of the Respondent. That this was a temporary position awaiting filing the position in a competitive recruitment process once the position was declared vacant.

That the acting appointment does not amount to a promotion and confirming him to the said position will be contrary to the express provisions of the Public Service Commission Act which require filing of positions vide competitive process.

That the Managing Director subsequently extended the Petitioner's appointment as the Acting Environment and Compliance Manager for several times from 2019 to 2024 and which extension was explicit that the Petitioner would hold the position pending hiring of a substantive holder competitively.

That the position was advertised internally on 31st May 2024. That the Petitioner voluntarily submitted himself to the recruitment process and

applied to be hired to the substantive position under an application dated 12th June 2024.

That the Petitioner failed to be shortlisted as he did not attach copies of the EBK and Corporate IEK registration certificate as per the advertisement.

The Petitioner wrote to the Respondent on 5th August 2024, expressing dissatisfaction because he was not shortlisted. The Respondent issued a communication to the effect that the Petitioner was disqualified.

That the Petitioner could not be shortlisted without meeting the minimum qualification set out in the advertisement. That doing so would amount to discrimination against other qualified candidates who had applied for the position.

That the petition is in bad faith, lack merit and it be dismissed.

Further Affidavit

The Petitioner filed supplementary affidavit asserting his case as set out in the petition, supporting affidavit and the attached documents. The Petitioner denied that he was not qualified to hold the substantive position as he had served in an Acting capacity for more than five years and 5 months. The Petitioner joined issues with the Respondent and put the Respondent to strict proof thereof. The Petitioner states that the Respondent has violated Articles 27 and 41 of the Constitution in that holding him in acting capacity for a period of 5 years and 5 months is contrary to section 34(3) of the PSC Act, 2017, amounts to unfair labour

practice and denies the Petitioner equality before the law and equal protection and equal benefit of the law.

The Petitioner stated that he had EBK and IEK registration certificates and had attached them to the application. The said certificates were produced before court. The Claimant deposed that the action by the Respondent was in bad faith and mischievous.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with the evidence adduced by the parties in their depositions. The issues for determination are:

- (i) Whether the Petitioner had legitimate expectation to be appointed to the substantive position and if this was compromised by the Petitioner submitting himself as a candidate in the recruitment process.
- (ii) Whether the respondent has violated the rights of the petitioner and
- (iii) Whether the petitioner is entitled to the reliefs sought

The burden of proof that there was legitimate expectation that the Petitioner would be confirmed to the substantive position of Environment and Compliance Manager rests with the Petitioner. This was stated by Rika J. in the case of ***Kirigo versus Othaya Mukurwei-ini Water Services Limited (Cause E016 of 2024) [2025] KEELRC 451 (KCK) (20 February 2025)*** in which the Judge cited with approval the decision of the Court of Appeal in *Transparency International of Kenya versus Omondi (2023) KECA 174 (KLR)* as follows: -

***“The employee must demonstrate some rational and objective reason, for her expectation. The representations underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewal extends service beyond the period provided for in the fixed term contract and promise of renewal are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation.*”**

I agree with the foregoing view that there are instances when the employee’s legitimate expectation is roused by the employer’s undertaking in the contract itself and other forces highlighted in the above decision.”

The above decision related to a fixed term contract, whereas this case is about confirmation to a substantive position upon being kept on acting capacity for more than 5 years.

It is the court’s finding that, whereas the Petitioner may have had expectation to be confirmed to the position beyond the lawful six (6) months period, he ought to have demonstrated that legitimate expectation by writing to the Respondent, when the Acting position became illegal by dint of section 34 of the PSC Act and if no action was taken to assert his legitimate expectation by escalating the matter within the internal grievance handling and dispute resolution mechanisms available. The Petitioner

waited for over 5 years without taking any demonstrated action to assert the said legitimate expectation. There is no evidence that the respondent recommended the petitioner for appointment to the substantive position or promised the petitioner in writing or otherwise that he would be appointed substantively to the position he held on Acting basis.

The Petitioner's position is weakened by the fact that he submitted himself to a competitive recruitment process to appoint a substantive holder of the position, without any protestation. The Petitioner was not shortlisted for, alleged failure to furnish mandatory professional certificates demanded by the employer a fact contested by the petitioner.

The Petitioner has demonstrated that he had the required professional qualification to be appointed as a substantive holder of the position he had hitherto Acted in for a long time but whether or not he had attached the certificates cannot be established from his pleadings before court. The Petitioner was however serving in his substantive position on a fixed term contract which was due to expire on 8th November 2025 and has not demonstrated that the Respondent was bound to extend his employment upon expiry of the contract.

The Respondent no doubt, disregarded section 34 of the Public Service Act by keeping the Petitioner in Acting position for a period of over six (6) months.

The Petitioner has not stated that he was not paid or was under paid during that Acting period. The Petitioner has therefore not proved any prejudice

suffered by him while he held the position of Environment and Compliance Manager in an Acting capacity.

The Petitioner has in sum failed to prove that he had a legitimate expectation to be appointed to the said position having voluntarily subjected himself to a competitive recruitment process which he had not objected to in the first place and from which all the candidates had expectation to be considered to fill the advertised position.

Accordingly, the Petitioner has failed to prove that his rights protected under Articles 27(1) and 41(1) of the Constitution were violated by the Respondent, especially because he held a fixed term contract which was due to expire on 28th November 2025.

The petition lacks merit and is dismissed.

Dated at Nairobi this **27th Day of November 2025.**



Mathews Nduma

JUDGE

Appearance:

Ms. Wangusi for Petitioner

Ms. Muthee for Respondent

Mr. Kemboi – Court Assistant