

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KAKAMEGA**  
**PETITION NO. EO10 OF 2024**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL  
RIGHTS AND FREEDOMS**

**AND**

**THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE  
AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES  
41(1), 47(1), OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF INTERPRETATION OF ARTICLES 2, 3,  
10, 19, 20, 21, 22, 23, 24, 41, 47 & 48 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT CAP 226  
LAWS OF KENYA**

**BETWEEN**

**GILBERT NYONGESA WAFULA..... PETITIONER**

**VERSUS**

**BUKURA AGRICULTURAL COLLEGE.....RESPONDENT**

**PRINCIPAL/CEO**

**BUKURA AGRICULTURAL**

**COLLEGE.....INTERESTED PARTY**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**JUDGMENT**

**I. INTRODUCTION**

1. The petitioner through Kibet Adoli & Magina Advocates commenced the proceedings herein by way of a petition dated 29th November 2024 seeking for the following remedies –

- a) A DECLARATION that the actions by the respondent and the interested party to award the petitioner a three year contract starting 7<sup>th</sup> January 2023 crystalized the legitimate expectation on the part of the petitioner to complete his employment contract.*
- b) A DECLARATION that the upon awarding the petitioner a three-year contract of employment, and having prior knowledge of the age of the petitioner, the respondent and the interested party are estopped from terminating the said contract on account of age.*
- c) A DECLARATION that the letter dated 20<sup>th</sup> November 2024 terminating the petitioner’s employment contract on account of age is a violation of the petitioners right to legitimate expectation.*

- d) An order of certiorari to bring into this honorable court and quash the decision of the interested party contained in the letter dated 20<sup>th</sup> November 2023 terminating the petitioner's employment.***
- e) An order of mandamus directed to the respondent and the interested party to reinstate the petitioner as the Director Strategy and Corporate Services Grade BAC 2 pursuant to the petitioner's Employment Contract dated 7<sup>th</sup> January 2023.***
- f) In the alternative to €, the respondent to pay the petitioner for the remainder of the contract and the benefits that the petitioner was entitled to upon successful completion of his contract of employment dated 7<sup>th</sup> January 2023.***
- g) Costs of this petition.***
- h) Any other order that this court deems fit.***

2. The petition is supported with an affidavit sworn by the petitioner on even date with annexures thereto.
3. In response to the petition, the respondents through the Attorney General filed a replying affidavit sworn by Paul Njogu, the principal of the respondent and the interested party in the petition.
4. In response to the replying affidavit the petitioner filed a further affidavit sworn on 18th February 2024(sic!), it should read 2025.
5. By consent, the court directed that the petition be canvassed by way of written submissions. Mr. Magina for the petitioner filed submissions dated 12th May 2025 while Mr. Nyauma for the

respondent and the interested party filed submissions dated 10th June 2025.

## **II. THE PLEADINGS & EVIDENCE**

6. The petition sets out the constitutional provisions relied upon including **Articles 2, 3, 10, 19, 20, 21, 22, 23, 24, 41, 47, 48, & 165**. The petitioner briefly stated the application and relevance of each of the above Articles in the petition.
7. On the facts relied upon, it is stated that the respondent appointed the petitioner as secretary to the Board of Management thereof on 5th May 2021 with effect from 30th April 2021. The petitioner was also serving as the Director of strategy and corporate services with the respondent. The appointment was communicated to the petitioner vide a letter dated 5th May 2021.
8. It is stated that vide a letter dated 21st June 2022 the petitioner expressed interest to continue serving as the Director strategy and corporate services upon expiry of his contract. The Board of Management (BOM) in a meeting held on 18th November 2022 agreed to the renewal of the petitioner's contract for a further three years with effect from 7th January 2023. The petitioner was accordingly informed of the foregoing decision vide a letter dated 6th January 2023 and the petitioner thereafter executed a contract to serve on a three-year contract effective from 7th January 2023.
9. It is stated that the interested party unilaterally terminated the petitioner on the basis of his having attained the age of retirement

without involving the BOM notwithstanding that the respondent and the interested party were aware of his advanced age as at the time of renewing the contract as above stated. It is stated that the petitioner had legitimate expectation that his three-year contract was to run full course as the same had been voluntarily executed by both parties based on full disclosure.

10. It is pleaded that the termination of the contract was illogical, unreasonable, inhumane, degrading, and against the legitimate expectation by the petitioner. It is further stated that the termination as communicated in a letter dated 20th November 2024 went against **Articles 41 and 47 of the Constitution**.
11. The foregoing averments were restated in the supporting affidavit by the petitioner and copies of all the documents mentioned above annexed thereto.
12. It is further deposed that the petitioner was entitled to a monthly salary of Kshs261,000/= during the entire period of the contract and gratuity at 13% of the basic salary upon completion of the contract.
13. It is deposed that the petitioner was issued and served with a letter of retirement dated 20th November 2024 on 27th November 2024. It is further deposed that the notice of retirement amounted to unlawful termination and the petitioner prays that the petition be allowed as pleaded and prayed.
14. In the joint replying affidavit for the respondents and the interested party, it is deposed that the petitioner was on a three-

year term contract as pleaded that was running from 11th November 2019. It is further deposed that the petitioner was also appointed the secretary to the BOM with effect from 30th April 2021.

15. It is deposed that as the secretary to the BOM the petitioner was responsible for advising the Board on sound and lawful management of the human resources.
16. It is deposed that the petitioner applied for the renewal of his contract as pleaded and the matter was deliberated by the Board in a meeting held on 18th November 2022 and the request was allowed and communicated to the petitioner through the interested party.
17. It is deposed that the renewal of the petitioner's contract was subject to the ***Employment Act*** and the respondent's human resource policy and procedure manual.
18. It is deposed that since the petitioner alleges that he was unilaterally terminated by the interested party without the knowledge of the respondent, he ought to have appealed the decision to the respondent as a first resort and thereafter, if not satisfied, appeal to the Public Service Commission (PSC).
19. It is deposed that the petitioner has not demonstrated and or proved that he was entitled to serve beyond his mandatory retirement age of 60. It is deposed that the petitioner did not possess rare knowledge, skills, or competencies that may have compelled the respondent to keep him in employment beyond the

mandatory age of retirement.

20. It is further deposed that in a meeting held on 7th November 2024 wherein the BOM was inducted, it was resolved and emphasized that the retirement age for all officers, unless otherwise exempted by the Commission, remained 60yrs. It is deposed that the petitioner was in attendance and did not object to that clarified position.
21. It is further deposed that the petitioner knew that he was to last in employment, whether on contract or otherwise, until he reached the mandatory age of retirement as stated above. It is deposed that the alleged legitimate expectation cannot override the law. The petitioner is accused of abusing the doctrine of exhaustion by failing to file his complaint with the respondent and thereafter appealing to the Commission.
22. It is deposed that the petitioner was lawfully retired upon attaining the mandatory retirement age of 60 and as such the petition herein discloses no cause of action and the same should be dismissed with costs.
23. In the further affidavit, the petitioner deposed that the issue of the retirement of the petitioner was not discussed during the BOM induction meeting held on 7th November 2024. It is deposed that at no time was his retirement or termination on retirement discussed by the BOM and he was not present wherein the decision of renewal of his three-year contract was rendered. He insists that he was not given a hearing prior to his termination on

the purported retirement.

### **III. SUBMISSIONS BY COUNSEL**

24. In the submissions dated 12th May 2025, counsel for the petitioner summarized the applicant's case as contained in the petition and in the two affidavits alluded to above. Counsel identified the issues for determination as – *Whether the petitioner upon extension of his three-year contract acquired legitimate expectation to remain in employment of the respondent until 7th January 2026 when the contract was to expire? And; What remedies are available to the petitioner?*
25. On the first issue, it is submitted that legitimate expectation is an administrative law remedy that is available in Kenya. Counsel cited ***Oindi Zaippeline & 39 Others V Karatina University & Another (2015) eKLR*** in support of that proposition, arguing that legitimate expectation is based on the principles of reasonableness, fairness, and holding public institutions and bodies to obey the law and keep promises.
26. It is further submitted that for legitimate expectation to crystallize, the expectation must be clear, unambiguous, and devoid of qualification. Such expectation has to be sensible and reasonable. Counsel cited ***De Smith and Jowell – Judicial Review of Administrative Action 5th Edition – Para. 8-055*** and several foreign decisions in buttressing the foregoing. It is further submitted that legitimate expectation must be founded on some

decision by a public body that was legally competent to make the decision challenged.

27. It is thus submitted that while **Section 80(2) of the Public Service Commission Act** provides for retirement of public servants at the age of 60, there is a proviso that some employees in the public sector may be retained beyond the retirement age due to their possessing rare skill, knowledge, or competencies if the same are required, but also such employees may be engaged on contract if their service is not impaired by age.
28. It is submitted that the renewal of the petitioner's contract was discussed by the BOM in a meeting held on 18th November 2022 and it was resolved that the same be extended for another three years to run until 7th January 2026 based on the contract freely and voluntarily executed by the parties and dated 7th January 2023.
29. It is submitted that in the circumstances the petitioner had a legitimate expectation that he was to offer his services as agreed by and between the parties as above.
30. On reliefs, it is submitted that the petitioner approached the court under **Articles 22, 23, & 24 of the Constitution** based on the violation of his rights by the respondent and the interested party.
31. Citing **Kenya Power & Lighting Company Limited (2017) eKLR** the court is urged to relief the petitioner as pleaded and prayed in the petition.
32. Counsel for the respondent and the interested party submitted that

since the petitioner was a public officer/servant, he was always aware that his mandatory age of retirement was 60yrs as provided for under the **Public Service Commission Act** and the respondent's HR Manual and policies. It is submitted that the petitioner was well aware of the foregoing as he chaired the human resources management committee of the respondent.

33. It is further submitted that the renewal of the petitioner's contract did not allow him and the respondent did not undertake to retain him beyond his retirement age of 60yrs as provided for by the law. It is submitted that the respondent is a public corporation governed by **Bukura Agricultural College Act** and subject to all other laws of the Republic including the **Constitution, the Employment Act, the Public Service Commission Act**, et al.
34. It is submitted that the contract did not create or give legitimate expectation to the petitioner that he was to work beyond the mandatory age retirement as such an expectation is outrightly unlawful.
35. Counsel identified the following two issues for determination – *Whether the petitioner was validly retired; And, Whether the petitioner's rights were violated.*
36. On the first issue, it is submitted that the petitioner was validly and lawfully issued with a notice of retirement dated 20th November 2024 in accord with **Section 80 of the Public Service Commission Act** and **Regulation 70 of the Public Service Commission Regulations**. It is submitted that it is not in dispute

that the petitioner attained the mandatory age of retirement of 60 in November 2024 and he was not exempt from the mandatory retirement as provided for in the above law.

37. Citing *Inter Public Universities Councils Consultative Forum & Others V Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers & Others (2021) eKLR* it is submitted that legitimate expectation cannot be founded on an illegality. It is further submitted that in *Okumu V Nairobi City Water & Sewerage Company Ltd (2018) eKLR* it was held that a contract cannot extend retirement age beyond the legally provided limit. It is submitted that a contract that purports to contravene the law is unenforceable, null, and void ab initio.
38. It is further submitted that the petitioner was not terminated but lawfully retired upon his attainment of the mandatory retirement age of 60. Counsel relied on *Nathan Mukewa V Alupe University College (2022) eKLR* in support of this argument.
39. On the second issue, it is submitted that in view of the foregoing the petitioner had no right to any legitimate expectation as he was not exempt from the afore-cited provisions of the law. It is submitted that any expectation by the petitioner to serve beyond the mandatory age of retirement was clearly unfounded, unreasonable, and unlawful. Counsel supported this argument by citing the Supreme Court in *Communications Commission of Kenya & 5 Others V Royal Media Services Limited & 5 Others (2014) eKLR*. It is submitted that the petitioner was always aware

that he was to retire at 60 and there was no exemption granted to him at any point. It is submitted that if the petitioner ever held such expectation the same was baseless, unreasonable, and unlawful. Counsel cited *Akinyi & 4 Others V Kenya Medical Research Institute (KEMRI) & Another (2023) eKLR* in support of that position.

40. It is further submitted that the respondent had no legal capacity to extend the petitioner's contract beyond his 60th birthday and any express or implied term of the renewed contract to that effect was outrightly unlawful. It is reiterated that no legitimate expectation arose from such unlawful term in the contract, if any or at all.

41. It is further submitted that the petitioner was not ignorant of the foregoing law governing his retirement and, while ignorance of the law is not a defence, the petitioner was a senior officer with the respondent and chair of the human resources management committee who ought and indeed fully appreciated the law, policies, and guidelines on retirement age as captured in the foregoing paragraphs.

42. The court is urged to dismiss the petition with costs.

#### **IV. ISSUES FOR DETERMINATION**

43. Upon due consideration of the petition, the affidavit in support thereof, the affidavit in opposition, the annexures to all the affidavits, and the written submissions by counsel for both parties, the court finds that the following issues commend

themselves for determination –

*a) Was the petitioner terminated or lawfully retired?*

*b) Was there created legitimate expectation to the petitioner in the renewed contract?*

*c) Is the petitioner entitled to the reliefs sought?*

*d) What are the appropriate orders for the court to make based on the findings on the foregoing issues and on costs?*

#### **V. TERMINATION OR RETIREMENT?**

44. The evidence on record is that the petitioner was issued with a notice of retirement dated 20th November 2024 that effectively extinguished his renewed three-year contract was to expire sometimes in January 2026. It is not in dispute that in a letter dated 6th January 2023 the respondent through the interested party informed the petitioner that it had been resolved in a meeting held on 18th November 2022 that his contract was renewed for a further three years commencing from 7th January 2023. Effectively, therefore, the renewed contract was to expire in January 2026.
45. The court has gone through the contract executed by the parties on 7th January 2023 and noted that the same did not mention anything about the retirement of the petitioner in case he attained the mandatory age of retirement within the period of the contract. Likewise, the contract did not mention or state that the contract had been renewed owing to any special skill, knowledge, or

competencies held and or possessed by the petitioner that were necessary in the operations of the respondent. Likewise, the contract did not state or provide that the petitioner was exempt from the law on the mandatory retirement upon his attaining the age of 60yrs.

46. Vide a letter or notice dated 20th November 2024 the respondent through the interested party informed the petitioner that he was to proceed on retirement with effect from the 22nd November 2024 upon attaining the age of 60, the mandatory retirement age. For avoidance of doubt the said letter stated as follows – (Janet – see this letter and reproduce the same in bold italics).
47. Clearly and evidently, the petitioner was not terminated but rather he was retired upon his attaining the mandatory age of retirement. The above letter/notice cited the law relied upon in the issuance thereof.
48. In view of the foregoing, the court finds and holds that the petitioner was not terminated as envisaged under **Sections 41 and 45 of the Employment Act** but rather he was retired upon attaining the mandatory retirement age of 60.
49. **Section 80 of the Public Service Commission Act** provides as follows –
- (1) Where a public officer has attained the mandatory retirement age as may be prescribed in regulations –**
- a) the public officer shall retire from the service with effect from the date of attaining the mandatory retirement age;**

*and*

*b) the commission or other appointing authority shall not extend the service of such retired public officer beyond the mandatory retirement age.*

*(2) Despite subsection (1)(b), the Commission or other appointing authority may engage the public officer for service after the retirement upon such terms of contract as may be agreed if –*

*a) the public officer possesses rare knowledge, skills and competencies for the time being required in the service;*

*b) the retired officer is willing to be engaged on contract; and*

*c) the retired public officer's performance shall not in any way be impaired by age.*

*50. Regulation 70 of the Public Service Commission Regulations provides as follows –*

*(1) Subject to the constitution, section 80 of the Act, any other relevant written law or a specific government policy, the mandatory retirement age in the public service shall be –*

*a) Sixty years;*

*b) Sixty-five years for persons with disability; and*

*c) Such age as may be determined by the Commission for lecturers and research scientists serving in public universities, research institutions or equivalent institutions as determined by Commission in consultation with such universities, research institution or equivalent institutions.*

51. The above provisions of the law are clear, unambiguous, and without obscurity. A contract that runs against the law is not only unlawful and illegal but also null and void ab initio. If it was the intention of the parties to extend the stay of the petitioner at work beyond the mandatory retirement age of 60, without any exemption as provided for in the proviso in the above the law, the contract was null and void to that extent.
52. The parties should only have renewed the contract such that the petitioner was only to serve for the period before he attained the mandatory age of retirement.
53. Legitimate expectation cannot and should not be based or founded on an illegality. The alleged expectation by the petitioner that he was to serve beyond the mandatory age of retirement of 60, without an exemption as provided for in the law, was only wishful thinking and not founded or based on any law – see ***Communications Commission of Kenya & 5 Others V Royal Media Services Limited & 5 Others (supra)***.
54. Further, and contrary to the allegation by the petitioner, the notice of retirement, though authored and signed by the interested party, was sanctioned by the respondent and that has not been denied by the respondent.
55. It is the finding and holding of the court that the contract that purported to extend the employment of the petitioner beyond the mandatory age of 60 was unlawful, null, and void to that extent.
56. For all the foregoing reasons it is the finding and holding of the

court that the petitioner was lawfully retired based on the applicable law.

- 57. Consequently, the court cannot order for his reinstatement as that shall amount to the court enforcing an illegality. Likewise, the court cannot order that the petitioner be paid for the remainder of the contract as that shall again amount to the court enforcing an illegality.
- 58. Since the petitioner is not seeking for any dues that were due and payable to him before attainment of the mandatory age of retirement, and no such dues were proved, the court has no basis for ordering any compensation to the petitioner.
- 59. The court has this far said enough in demonstrating that the entire petition has no merits and the same is for dismissal and the same is hereby dismissed.

**X.ORDERS**

- 60. Flowing from all the foregoing, the petition is dismissed with no order on costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
KAKAMEGA THIS 4TH DAY OF DECEMBER, 2025.**

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**HON. DAVID NDERITU  
JUDGE.**