



Ngetich & 2 others v Kenya Water Institute & 4 others (Cause E365, E366 & E375 of 2021 (Consolidated)) [2024] KEELRC 108 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 108 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E365, E366 & E375 OF 2021 (CONSOLIDATED)**

**MA ONYANGO, J
JANUARY 26, 2024**

BETWEEN

**DAVID KIMUTAI NGETICH 1ST CLAIMANT
SAILAS OMOLLOH OLANG'O 2ND CLAIMANT
PAUL NGUKU MUTHAMA 3RD CLAIMANT**

AND

**KENYA WATER INSTITUTE 1ST RESPONDENT
DIRECTOR/CHIEF EXECUTIVE OFFICER KENYA WATER
INSTITUTE 2ND RESPONDENT
KENYA WATER INSTITUTE GOVERNING COUNCIL 3RD RESPONDENT
CABINET SECRETARY MINISTRY OF WATER, SANITATION AND
IRREGATION 4TH RESPONDENT
THE HON ATTORNEY GENERAL 5TH RESPONDENT**

JUDGMENT

1. The Judgment herein is in respect of 3 separate suits being Nairobi ELRC Cause No. E365 OF 2021, filed by David Kimutai Ngetich, whom for purposes of this judgment will be referred to as the 1st Claimant, Nairobi Cause No. E366 OF 2021 filed by Silas Omolloh Olango hereinafter referred to as the 2nd Claimant, and Nairobi Cause No. 375 of 2021 filed by Paul Nguku Muthama, the 3rd Claimant for purposes of this judgment.
2. All the suits are filed against the same Respondents. The subject matter of the suits is the same in all 3.
3. On 20th January, 2022, with concurrence of the counsel for all the parties, the court directed that the 3 suits be heard together. The suits were however not consolidated.



Cause No. 365 of 2021 David Kimutai Ngetich, 1st Claimant

4. The Claimant in this suit, David Kimutai Ngetich states in his Memorandum of Claim dated 14th April, 2021, that he was first appointed by the Public Service Commission on Permanent and Pensionable terms of service on 23rd July, 1996 as lecturer II (Hydrology). In 2010 his services were transferred to Kenya Water Institute, the 1st Respondent herein, where he was deployed as a Deputy Director Academic Affairs in acting capacity. He was confirmed to the position on 28th November, 2011. It is the 1st Claimant's averment that the terms of employment upon confirmation were that he would be engaged on 3-year renewable contracts until he attained the mandatory retirement age of 60 years.
5. It is the Claimant's case that his contract was either renewed or extended continuously until 8th February, 2021 when the 2nd Respondent on instructions of the 4th Respondent, purported to terminate his contract.
6. The Claimant avers that he appealed against the decision to terminate the contract but had not received any response at the time of moving this court.
7. The Claimant prays for the following orders:
 - a. The revoking of the Claimant's employment be declared unlawful,
 - b. The Claimant be reinstated to his employment forthwith,
 - c. Costs of this suit,
 - d. Interest on 3 above at court rates,
 - e. Any other or further relief that this Honourable court may deem just and fit to award to the "mein" the circumstances.

Cause No E.366 of 2021 Silas Omolloh Olang'o 2nd Claimant

8. Vide his Memorandum of Claim dated 14th April 2021 the Claimant in this cause Silas Omolloh Olang'o avers that he was employed by the 1st and 3rd Respondents as Dean of Students from 1st March, 2011 and served in various capacities until he was issued with a letter revoking his contract on 10th February, 2021.
9. It is his case that revocation of his contract was without authority. That he appealed against the revocation of his contract but was never addressed on his appeal.
10. The Claimant prays for the following reliefs:
 - a. The revoking of the Claimant's employment be declared unlawful,
 - b. The Claimant be reinstated to his employment forthwith,
 - c. Costs of this suit,
 - d. Interest on 3 above at court rates,
 - e. Any other or further relief that this Honourable court may deem just and fit to award to the "mein" the circumstances.



Cause No. E375 of 2021 Paul Nguku Muthama 3Rd Claimant

11. The Claimant Paul Nguku Muthama avers in his Memorandum of Claim dated 30th April, 2021 that he was at all times material to this suit an employee of the 1st Respondent having been employed in 2003 as a Senior Lecturer on permanent and pensionable terms of employment.
12. The Claimant avers that on 10th March 2011 he was promoted to the position of Deputy Director Research on fixed contract which was renewed two times ending on 9th March 2020. Thereafter the Contract was extended on two occasions from 10th March, 2020 to 9th September, 2020 and from 10th September, 2020 for 6 months from 3rd February to 2nd August, 2021.
13. The Claimant avers that on 10th February, 2021 the 2nd Respondent revoked the contract citing instructions for the 4th Respondent and without authority of the 3rd Respondent who is the appointing authority. His last salary was Ksh. 284,700 per month and he was serving in job Group KW2.
14. It is further the Claimant's averment that on 19th November 2011 the 3rd Respondent, the governing council of the 1st Respondent, met and resolved that employees in job Groups K2 and K3 would work until they attained retirement age of 60 years. That the resolution was communicated to the 4th Respondent on 10th January, 2011.
15. It is the Claimants contention that the revocation of his contract had no legal basis and was discriminatory.
16. The Claimant seeks the following reliefs:
 - a. The revoking of the Claimant's employment be declared unlawful,
 - b. The Claimant be reinstated to his employment forthwith,
 - c. Costs of this suit,
 - d. Interest on 3 above at court rates,
 - e. Any other or further relief that this Honourable court may deem just and fit to award to the "mein" the circumstances.
17. All the 3 claims were filed together with an application in which the Claimants sought similar orders as follows: -
 - a. That this application be certified as urgent and service dispensed with in the first instance owing to the urgency of the matter.
 - b. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to make a temporary order staying the intended recruitment of an employee to fill the position of Deputy director of academic affairs – job Group KW2, at the 1st Respondent offices and department; which is scheduled to commence on 5th May, 2021.
 - c. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to make a temporary order reinstating the Claimant's Contract of Employment extended by the 3rd respondent from 3rd February,2021 to 2nd August,2021, and stay the decision of the 2nd and 4th respondents dated 8th February,2021, which without any Authority, purported to have terminated the Claimant's Contract, Contrary to the terms of Service and the laws Governing the Claimant's appointment.



- d. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to make a temporary order staying the Revocation of the applicant/Claimant employment Contract as contained in the letter dated 8th February,2021 and instead, direct that the applicant/Claimant resume his official duties and earns his full salary without loss of any benefits.
 - e. That pending the hearing and determination of the main suit, this Honourable Court be pleased to make a temporary order staying the Revocation of the applicant/ Claimant employment Contract as contained in the letter dated 8th February,2021, and instead, direct that the applicant/Claimant resume his official duties and earns his full salary without loss of any benefits.
 - f. That upon hearing and determination of this Application inter-partes, this Honourable Court be pleased to make a temporary order staying the intended recruitment of an employee to fill the position of Deputy Director Of Academic Affairs - Job Group KW2 at the 1st respondent offices and department, which is scheduled to commence on 5th May ,2021.
 - g. That upon hearing and determination of this Application inter-partes, this Honourable Court be pleased to make a temporary order reinstating the Claimant's Contract of Employment extended by the 3rd respondent from 3rd February,2021 to 2nd August,2021, and stay the decision of the 2nd and 4th respondents dated 8th February,2021, which without any Authority, purported to have terminated the Claimant's Contract.
 - h. That the costs of this application be in the cause.
18. In opposition to each of the applications and claims, the Respondents filed Response to Memorandum of Claim dated 12th August 2021, a witness statement of James Mweni, the 1st Respondent's Human Resource Manager, dated 17th August, 2021, list of documents of even date and Replying Affidavit of James Mweni sworn on 26th October, 2021.
 19. It is the Respondent's case that Daniel Kimutai Ngetich was appointed by Public Service Commission and deployed to Kenya Water Institute, the 1st Respondent as a Lecturer from 23rd July, 1996. That he served on permanent and pensionable terms until 1st October, 2011 when he voluntarily transferred his services from the Ministry of State for Public Service to Kenya Water Institute as Deputy Director, Academic Affairs Scale KW2 and was engaged on fixed contract terms thereafter.
 20. The Respondents further state that Silas Omolloh Olang'o was appointed on a three-year contract by Kenya Water Institute as Dean of students in the Training Division from 1st March, 2011. That the contract was renewed severally on request by the Claimant until 28th February, 2017. That by letter dated 17th August 2016 the 3rd Respondent informed the Claimant that his contract would expire on 28th February, 2017 after which the position would be filled competitively. The Respondent later granted the Claimant a contract from 1st March 2019 to 28th February, 2020 as Registrar in the Academic affairs department scale KW3.
 21. It is the Respondents case that the contract was extended for 3 months from 29th February, to 1st May, 2020 and later renewed for 6 months from 2nd May, 2020 to 1st November, 2020.
 22. With respect to Paul Nguku Muthama, it is the Respondents' case that he was appointed by the Public Service Commission as a Senior Lecturer on 2nd July, 2003 and served the 1st Respondent on permanent and pensionable terms until 1st October, 2010 when he voluntarily transferred his services from the Ministry of State for Public Service to Kenya Water Institute and was engaged on fixed term



- contract terms. The contracts were renewed continually until the 3rd Respondent vide letter dated 18th August 2016 gave him 6 months' notice that upon expiry of his contract the position would be filled competitively.
23. The Claimant was thereafter given a 3-year contract from 10th March, 2017 to 9th March 2019 and a further contract from 10th March 2020 to 9th September, 2020. The contract was later renewed for 3 months from 10th September, 2020 to 9th December, 2020.
 24. It is the Respondents' case that the contracts of the Claimant were renewed continuously upon their request until 2018 when the 1st Respondent's Human Resource Policy Manual of 2018 was approved. The 1st Respondent thereafter informed the Claimants by letters issued in February, 2019 that it would not renew their contracts as the Manual provided that employees in KW1 and Directors in KW2 "shall be appointed on a contract not exceeding five (5) years renewable once subject to performance."
 25. Vide letters dated 7th January, 2021 issued to all the Claimants by the 2nd Respondent, they were required to hand over the 1st Respondent's property in their custody. Vide letters dated 1st February, 2021 the Claimants were offered extension of their contracts for 6 months from 3rd February, to 2nd August 2021 or until their positions were substantially filled, whichever came first. The said contracts were however revoked on 10th February, 2021. It is the revocation of the contracts that provoked the filing of the three claims herein by the Claimants.

Proceedings

26. Cause Nos. 365 and 366 first came before me under certificate of urgency on 5th May, 2021 while Cause No. 375 of 2021 came before me under certificate of urgency on 7th May, 2021.
27. In all the cases I certified the applications urgent. In the first two I directed that status quo be maintained pending inter parties hearing while in the 3rd case I granted orders staying the substantive filling of the position held by the Claimant being Deputy Director Research, Job Group KW2, pending inter parties hearing of the application.
28. When the parties appeared before the court on 5th July, 2021 they informed the court that they were in discussions with a view to settlement and prayed for a mention dated to record settlement.
29. On 27th September, 2021 the parties informed the court that they were unable to reach settlement. Ms. Mbilo for the Respondents requested that interim orders on the files be confirmed so that parties could move to dispose of the main suit. The suits were then fixed for hearing on 14th December, 2021. The suits was thereafter adjourned severally until 24th February, 2022 when Ms. Mbilo for the Respondents requested that the parties proceed by way of written submission. As the Claimants counsel had no objection, directions were taken for parties to file witness affidavits and written submissions.
30. Each of the Claimants filed submissions in their respective files. The Respondents also filed their submissions.

Analysis and Determination

31. Having considered the pleadings, evidence and submissions on record, the issues that arise for determination are the following:
 - i. Whether the revocation of the contracts of the Claimants was lawful.
 - ii. Whether the Claimants are entitled to the reliefs sought.



Whether the revocation of the contracts of the Claimants was lawful

32. The Claimants aver that the 1st and 3rd Respondents had a policy to the effect that staff in KW2 and KW3 would be appointed on three-year renewable contract until they attain retirement age of 60 years. They relied on a letter from the Director KEWI, the 2nd Respondent, who was also Secretary to the Governing Council, the 3rd Respondent, dated 10th January 2011 addressed to the Permanent Secretary Ministry of Water and Irrigation. The letter is reproduced below:

Kenya Water Institute

REF: KEWI/FIN/3/3A VOLIII(54)

Eng. David Stower, CBS, OGW

Permanent Secretary

Ministry of Water and Irrigation,

Maji House.

Dear Sir,

Ref: Resolutions of Kewi Governnig Cououncil

Following the Inauguration of the new Kenya Water Institute Governing Council on 10th October, 2010, the Governing Council embarked on addressing issues that had been pending for a long time when the same had not been consisted. Among the issues that were pending and required urgent attention of the Council were;

- i. Absorption of the KEWI Staff who were hitherto seconded form the Ministry of Water and Irrigation.
- ii. Level and duration of employment contracts
- iii. Recruitment of staff
- iv. Revision of the Governing Council allowance.

Pursuant to section 9 of the [Kenya Water Institute Act](#), 2001 the KEWI Governing Council during its 23rd meeting held on 19th November, 2010, deliberated under minute number MIN.GC/11/06A, on positions(s) to be hired on contract and those to be hired on Permanent and pensionable terms of service.

After the deliberations the Governing Council approved the following:

- i. KEWI should absorb the 54 members of staff hitherto on secondment from the Ministry of Water and Irrigation.
- iii. The Director may be appointed for a five year contract which is renewable once
- iv. staff on KW2 and KW3 scale may be appointed on three year renewable contract until they attain the mandatory retirement age of sixty years.

[Emphasis added]

33. For the Respondents it was submitted that the contracts signed by the Claimants provided that the Claimants would be subject to the provisions of the [Employment Act](#) 2007 and the Corporation's Staff Rules and Regulations as issued and/or amended from time to time. That Clause 3.4 of the Human



Resource Policy Manual of 2018 stated that “KW1 and Directors KW2 shall be appointed on a contract not exceeding five (5) years renewable once subject to performance.”

34. The Respondents relied on the decision in *John Njoroge Michuki v Kenya Shell Ltd* Civil Appeal No. 227 of 1999 where the court relied on the decision in *Wallis v Smith* (1882) 21 Ch, D 243 at page 266 where the court stated:

“As regards contracts between persons not under a disability or at arm’s length, the courts of law should maintain the performance of contracts according to the intention of the parties and should not overrule any clearly expressed intention on the basis that the judges know the business of the parties better than the parties themselves.”

35. The Respondents further relied on the decision in *Keith Wright vs Kentegra Biotechnology (EPZ) Ltd* [2021] eKLR where the court stated that:

“It is also commonplace that upon acceptance of an offer, a contract automatically becomes legally binding and can only be withdrawn or varied by consent or in accordance with the contract.”

36. It was the submission of the Respondents that the contracts had since lapsed and that the revocation was done as per contractual terms. They relied on the decision in *Keen Kleeners Limited v Kenya Plantation and Agricultural workers’ Union* (Civil Appeal 101 of 2019) [2021] KECA 352 (KLR) (17 December 2021) where it was stated by the Court of Appeal that “...the general position on the consequences of expiry of a fixed term contract, as can be gleaned from various decisions of this Court and that of the Employment and Labour Relations Court, is that once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period.

37. Reliance was also placed on the case of *Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & Another* [2012] eKLR, where Justice Rika defined the term a fixed term contract by stating as that: “A general principle that a fixed term contract will continue if not terminated would be a contradiction to the very definition of a fixed term. There is a definite start date and an end date. The contract would logically end automatically without more. Otherwise it would no longer be a fixed term contract.”

38. The Kenya Water Institute Human Resources Policy Manual of January 2010 which was applicable when the Claimants were appointed provided for contract employment as follows:

Appointment on contract terms shall be made where vacancies cannot be filled on pensionable terms or where terms of that particular office require that appointment should be on contract terms of services.

Contract appointment shall be approved for staff in KWI-KW4 positions to meet the needs of specific objectives of the Institute and shall not exceed a period of three (3) years and renewable if need be.

For every year worked or at the expiry of the contract period, an employee will be entitled to service gratuity, which shall be calculated at the rate of 31 % (or the prevailing rate) of the employee's basic salary over the contract period.

39. The power to make appointments is provided for at paragraph 2.2 of the Manual as follows:

The power to appoint persons to hold or act in any office in the Institute is vested in the Governing Council.



The Council will interview candidates short-listed for posts in salary scales KS1 to KW4. The advisory and Selection Committee will interview candidates short-listed for posts in salary scales KW5 to KW12 and make recommendations to the Director who approves the appointment and advises the Governing Council accordingly.

40. The Kenya Water Institute Career Guidelines of May 2018 provide for contracts at paragraph 3.4 as follows:
1. Appointment on contract terms shall be made where vacancies cannot be filled on pensionable terms or where terms of that particular office require that appointment should be on contract terms of services.
 2. KWI and Directors KW2 shall be appointed on a contract not exceeding five (5) years renewable once subject to performance.
 3. An employee serving on contract terms for a continuous period of not less than one year shall be eligible for payment of service gratuity, which shall be calculated at the rate of 31% (or the prevailing Government rate) of the employee's basic salary over the contract period. Where an employee does not complete the contract period, he/she shall be paid service gratuity on a pro-rata basis.
 4. All employees serving on contract terms who may wish to have their contract renewed shall apply to the Council through the Director in writing not more than six months to, and not less than three months before the expiry date of the contract.
 5. Termination of contract appointment shall require either party to submit a written notice of one month or payment of one month's salary in lieu of notice.
41. From the contracts of the Claimants, the Human Resource Policy Manual and the Career Guidelines referred to above it is clear that the Claimants were employed on renewable fixed term contracts which were renewed and/or extended severally. They were therefore bound by the terms of the contracts which they voluntarily signed and under whose terms they worked. Needless to state, the Respondents were also bound by the said contracts.
42. The last contracts issued to the Claimants were extended on 1st February 2021 and stated:
- “I am pleased to inform you that Kenya Water Institute Governing Council during their meeting of 29th January 2021 offered you an extension of your contract for a period of six (6) months from 3rd February 2021 to 2nd August 2021 or until your position is substantively filled, whichever comes first.”
43. By letters dated 10th February 2021 the 1st Respondent wrote to the Claimants revoking the contracts. The letter of revocation for the 1st Claimant, which is similar to the letters of the same date issued to the 2nd and 3rd Claimants reads:
- Ref KEW1/20070095 VOL 11(24)
- David K Ngetich
- BOX 43
- Kipkarren River
- Re: Revocation Of Contract



This is to bring to your attention that your application for renewal of your employment contract was considered and though approved by the Governing Council on 29th January, 2021, has been revoked through the Cabinet Secretary Ministry of Water, Sanitation and Irrigation directive communicated to management in a meeting held on 8th February, 2021.

This office therefore informs you that you are not eligible for another term (contract), in line with KEW Human Resource Instruments. You are therefore required to vacate the office and handover all KEWI assets and liabilities. In this process please write a detailed handing over report (KEW-Assets/liabilities, in hard/soft copy, policy documents, curriculum reports, examination records, computer hardware/software etc, and fill in clearance certificate. The Ministry of Water, Sanitation and Irrigation, KEWI-Governing Council and management take this opportunity to thank you for the service you have rendered for KEWI over the years.

Yours faithfully,

Signed

Prof. Patrick O. Hayombe, PhD.

Director/CEO

44. It is the position of the Claimants that the revocation was an unfair termination of their contracts as they were neither given valid reasons nor were they subjected to due process as provided in sections 41 and 43 of the [Employment Act](#). They rely on the following decisions:
Civil Appeal No. 118 of 2017, National Bank of Kenya v Samuel Nguru Mutonya, eKLR, Coram R.N. Nambuye, P.O. Kiage, S Ole Kantai, Civil Appeal No. 31 of 2015, Kenfreight (EA) Limited v Benson K. Nguti [2016] eKLR, Magunga General Stores v Pepco Distributors Limited [1987]2 KAR 89, Mary Chemweno Kiptui v Kenya Pipeline Company, Civil Appeal No. 178 of 2002, Court of Appeal at Nairobi Kiai Mbaki & 2 Others v Gichuhi Macharia & Another [2005] eKLR,
45. It is further the submission of the Claimants that the 4th and 5th Respondents on whose authority their contracts were revoked had no authority to dictate the terms of their employment as only the 3rd Respondent had capacity to terminate their contracts as provided in the Career Guidelines.
46. The Respondents although stating that the contracts were revoked lawfully do not refer to the legal instruments or authority used to revoke the contracts. They have not explained why the 4th Respondent directed the 3rd Respondent to revoke the contracts which were approved by the 3rd Respondent, their employer, as stated in the letter extending the contracts.
47. The Respondents having renewed and/or extended the contracts of the Claimants continuously from the date of their first appointment and having allowed all the contracts to run their full course, the Claimants had legitimate expectation that their last contracts would lapse in accordance with the terms thereof.
48. In the applications they filed in court, the Claimants stated that the Respondents intended to carry out recruitments on 5th May 2021. This averment was not rebutted or even denied by the Respondents.
49. The renewal of the contracts of the Claimants having been for 6 months terminable either upon expiry or upon substantive recruitment of holders of the position, whichever was earlier, the Respondents were in breach of the said contracts by revoking them before the occurrence of the events upon which the termination was predicated. Further, the contracts provided for the mode of termination which the Respondents did not comply with. There was no provision for revocation in the contracts. As was stated by the Court of Appeal in *Keen Kleeners Limited v Kenya Plantation and Agricultural workers'*



Union (supra) relied upon by the Respondents above, “...the general position on the consequences of expiry of a fixed term contract, as can be gleaned from various decisions of this Court and that of the Employment and Labour Relations Court, is that once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period.

50. I therefore find that the revocation of the contracts of the Claimants was unfair and in breach of the terms of their contracts. The revocations were also in breach of the Employment Act which the contracts were subject to as pointed out by the Respondents.
51. Further, the reasons given for revocation are also not valid as the 4th Respondent on whose instructions the contracts were allegedly revoked had no authority to recruit or terminate the contracts of the Claimants, such authority having been vested in the 3rd Respondent by both the terms and conditions of employment of the Claimants and the relevant Act under which the 1st Respondent is established. I accordingly find and declare the revocation of the contracts of the Claimants unlawful and unfair.

Remedies

52. The Claimants prayed for reinstatement which is obviously not possible as the term of the said contracts have since lapsed. Further, the Employment and Labour Relations Act only provide for reinstatement within 3 years from date of termination which has since lapsed.
53. The Claimants prayed for payment of salary for five (5) years as an alternative to reinstatement. Section 49 of the Employment Act permits the court to award compensation where reinstatement is not possible. The Claimants have however not explained or justified their prayer for 5 years compensation.
54. It is my view that because reinstatement is not possible the Claimants are entitled to compensation. Refer to Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR. Considering all the circumstances of the instant case, and especially the length of service of the Claimants, the fact that their contracts had been renewed and/or extended severally even after they had been notified that the same would not be renewed or extended, the conduct of the Respondents and, recognizing that the Claimants had legitimate expectation to work until their contracts lapsed, it is my view that compensation equivalent to 6 months gross monthly salary is reasonable for the Claimants. I accordingly award them the same.
55. In view of the fact that none of the parties supplied the court with copies of pay slips to enable the court tabulate the compensation, the parties are directed to each tabulate and exchange the computation of the compensation. Should there be disagreement either party may approach the court to do the computation.
56. The Respondents shall in addition to the compensation pay each of the Claimants one month’s salary in lieu of notice and any gratuity that is outstanding as well as any other terminal benefits that they are entitled to under to their terms of service.
57. The 1st Respondent shall bear the costs of the Claimants.
58. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 26TH DAY OF JANUARY 2024

MAUREEN ONYANGO

JUDGE

