



REPUBLIC OF KENYA



**KENYA LAW**  
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**Irungu v Kenya Pipeline Company Limited (Cause E950 of 2022)  
[2024] KEELRC 537 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 537 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E950 OF 2022  
BOM MANANI, J  
MARCH 7, 2024**

**BETWEEN**

**DR. SAMSON MACHARIA IRUNGU ..... CLAIMANT**

**AND**

**KENYA PIPELINE COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. In this action, the Claimant challenges the Respondent's decision to revise his term of office as its Managing Director from five (5) to three (3) years. He contends that the decision was irregular and violated his legitimate expectation that he will hold office for five (5) years.
2. On the other hand, the Respondent contends that the Claimant's contract was erroneously extended to five (5) years. When the error was discovered, the extension was rescinded and the contract reverted to its initial tenure of three (3) years. The contract thereafter terminated through effluxion of time.

**Claimant's Case**

3. The Claimant states that the Respondent initially hired him in the position of Managing Director for a period of three (3) years with effect from 2<sup>nd</sup> December 2019. He contends that on 8<sup>th</sup> August 2021, the Respondent extended this term to five (5) years. He further contends that the Respondent informed him that he would hold office until 1<sup>st</sup> January 2025. It is the Claimant's case that the Respondent's aforesaid letter aroused in him legitimate expectation that he will serve as its (the Respondent's) Managing Director until 1<sup>st</sup> January 2025.
4. The Claimant avers that on 8<sup>th</sup> October 2022, he received a letter from the State Corporations Advisory Committee (the SCAC) indicating that there was an error in its letter of 30<sup>th</sup> June 2021 on the basis



- of which the Respondent had extended his tenure in office. He contends that the alleged error was allegedly discovered more than one (1) year after his contract had been extended.
5. Following this development, the Claimant states that the Respondent convened a Special Board Meeting for its Directors on 7<sup>th</sup> December 2022 at which a unilateral decision was taken to rescind the extension to his contract. He contends that this resolution was irregular as it interfered with his contract of service.
  6. The Claimant contends that the impugned decision was communicated to him vide the Respondent's letter of 9<sup>th</sup> December 2022. According to the Claimant, the import of the letter was to constructively terminate his contract.
  7. The Claimant contends that he wrote to the Respondent on 23<sup>rd</sup> December 2022 to seek clarification regarding the aforesaid resolution. However, the Respondent ignored his letter. Instead and by the letter dated 13<sup>th</sup> January 2023, it (the Respondent) informed him that his contract had lapsed by effluxion of time.
  8. The Claimant contends that the Respondent's actions constitute bad corporate behaviour and unfair labour practice. He contends that the Respondent was driven by improper motive in making the impugned decision.
  9. According to the Claimant, the Respondent's action was a travesty of the Constitution, the Employment Act and its Human Resource Manual. As a consequence, he prays for the various reliefs that are set out in the alternate in the amended Memorandum of Claim.

### **Respondent's Case**

10. On its part, the Respondent admits that it indeed hired the Claimant to serve as its Managing Director on a three (3) year contract. However, the tenure was later inadvertently extended to five (5) years before the extension was cancelled.
11. According to the Respondent, the Claimant's tenure was extended due to an error in communication by the SCAC. That the SCAC wrote to it (the Respondent) inadvertently suggesting that the Claimant's contract was to run for five (5) years.
12. The Respondent contends that the SCAC's letter erroneously referred to the Claimant's contract as falling under clause 2.5.3 of the its (Respondent's) HR Manual which provides for office tenure for five (5) years yet the Claimant's contract fell under clause 2.5.2 which provides for tenure of three (3) years. As a result, the Respondent's Board erroneously extended the Claimant's tenure to five (5) years.
13. The Respondent contends that this error was later discovered by the SCAC in October 2022 more than one (1) year after it (the SCAC) had sanctioned the impugned revision to the Claimant's contract. As a result, it (the Respondent) convened a special general meeting at which the error was corrected by reverting the contract's tenure to three (3) years.
14. The Respondent contends that the law empowers the SCAC to advise it on human resource issues. As such, it could not have ignored the SCAC's directives in respect of the impugned extension.
15. The Respondent contends that the Claimant was given an opportunity to apply for renewal of the contract but failed to do so. As a result, the contract lapsed by effluxion of time where-after the position was advertised and filled by the current Managing Director who now holds office on a four (4) year renewable contract.



## Issues for Determination

16. After analyzing the pleadings and evidence on record, I am of the considered view that the following are the broad issues that require resolution:-
  - a. Whether, by law, the Respondent's human resource instruments require approval by the State Corporations Advisory Committee.
  - b. Whether the Claimant legitimately expected that his contract would run for the extended term of five (5) years.
  - c. Whether the Respondent regularly rescinded the five (5) year extension to the Claimant's contract.
  - d. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.
17. I do not propose to consider the above issues either separately or sequentially. However, as I pen off, I will have commented on all of them.

## Analysis

18. Section 26 of the *State Corporations Act*, establishes the SCAC. Although section 27 of the Act purports to empower the agency to handle matters pertaining to terms and conditions of service for persons working for State Corporations, this power constitutionally vests in the Public Service Commission by virtue of article 234 of *the Constitution* of Kenya 2010. As such and to the extent that section 27 of the *State Corporations Act* is in conflict with article 234 of *the Constitution* in this respect, the provisions of *the Constitution* prevail with the consequence that the SCAC has no mandate to formulate human resource instruments for public officers.
19. This point has been made in a number of judicial decisions. In *Consumers Federation of Kenya (COFEK) suing through its officials namely Stephen Mutoro, Ephraim Kanake and Henry Ochieng v National Social Security Fund Board of Trustees & another; Cabinet Secretary, Ministry of Labour and Social Protection (Interested Party)* [2022] eKLR (The Cofek case), the court observed that although the power to originate human resource instruments for State Corporations lies with the Boards of the Corporations, the instruments require the approval of the Public Service Commission for implementation. The SCAC has no role in this respect.
20. In *Manyara Muchui Anthony v Communications Authority of Kenya & 3 others* [2022] eKLR, the court observed on the same matter as follows:-

“The entity given constitutional authority to employ, issue terms and conditions of service, review, audit and advice with regard to public service is the 3<sup>rd</sup> respondent (Public Service Commission). Employees in the service of the 1<sup>st</sup> respondent Authority (Communications Authority of Kenya) are subject to the constitutional mandate of the 3<sup>rd</sup> respondent.”
21. The Respondent in the instant case asserts that it altered the tenure of the Claimant from three (3) to five (5) years based on the erroneous advice by the SCAC. When this error was discovered, it (the Respondent) sought to rectify it by reverting the Claimant's tenure to the initial three (3) years. However, as indicated earlier, the SCAC had no mandate to delve into human resource matters pertaining to the Respondent, least of all purporting to formulate the Respondent's human resource instruments.



22. As is clear from the Cofek case, the power to originate human resource instruments for State Corporations including the Respondent vests in the Boards of these agencies. However, these instruments require approval of the Public Service Commission for their implementation since the constitutional mandate of managing the public service vests in the commission.
23. Having regard to the foregoing, I find that the Respondent had the mandate to propose revision of the Claimant's contract from three (3) years to five (5) years as it did through its Board Session on 18<sup>th</sup> August 2021. Such action was lawful and fell within the powers of the Respondent subject only to concurrence by the Public Service Commission.
24. The SCAC had no role in the process. As such and in my view, the Respondent could not recall its communication to the Claimant regarding variation to his tenure of office based on the purported advice of the SCAC.
25. The Respondent having communicated to the Claimant the revision to his tenure of office from three (3) to five (5) years, the latter legitimately expected to hold office for the new term of five (5) years unless the constitutional organ with the mandate to approve the arrangement (the Public Service Commission) declined to approve it. The Respondent does not suggest that the Public Service Commission declined to sanction the variation aforesaid.
26. In *Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others* [2005] 1 KLR 28, the court said this of legitimate expectation:-

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases, the expectation ought not to be summarily disappointed.”
27. Quoting the South African case of *South African Veterinary Council v. Szymanski* 2003 (4) S.A. 42 (SCA), the court in *Onyancha & another (Suing on behalf of the proposed, Kenya Medical Doctors' Union) v Registrar of Trade Union (ROTU) & another (Petition E017 of 2023)* [2024] KEELRC 8 (KLR) (23 January 2024) (Ruling) identified some of the conditions for application of the principle of legitimate expectation to be the following:-
  - a. There must be a promise or representation by a decision maker, either express or by past practice, to confer a benefit to the promisee;
  - b. The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification;
  - c. The expectation must be reasonable;
  - d. The representation must have been induced by the decision-maker;
  - e. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.
28. In the instant case, there is evidence that the Respondent offered to alter and indeed altered the Claimant's contract to expand his tenure from three (3) to five (5) years. The offer was unambiguous. As indicated earlier, it was within the Respondent's powers to make this alteration subject only to the concurrence of the Public Service Commission.



29. The Respondent does not contend that the concurrence of the Public Service Commission to expand the Managing Director's tenure beyond the three (3) years set in its Human Resource Manual of 2019 (HR Manual) was not granted. As a matter of fact, although clause 2.5.2 of the 2019 HR Manual produced in evidence provided for a 3 year term for the Managing Director, it is noteworthy that the Managing Director whom the Respondent appointed to take over from the Claimant in April 2023 was granted a four (4) year contract, a clear indication that the three (3) year tenure provided in the 2019 Manual had been revised upwards.
30. The SCAC's commentary which the Respondent purported to invoke to terminate the Claimant's extended contract was of no legal effect. Therefore, the Claimant validly expected that his contract was to run for the extended term of five (5) years.
31. Quoting the decision in *R vs. Devon County Council ex parte P Baker* [1955] 1 All ER, the court in *Republic v Communications Authority of Kenya v Ex Parte Airtel Networks Kenya Limited* [2017] eKLR said that where a party has aroused in another a valid expectation that some benefit would be conferred on him, such promise or expectation should not be arbitrarily withdrawn without the promisee being accorded a chance to comment on it. The court observed as follows:-
- “...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”
32. The Respondent contends that extension of the Claimant's term was in error. As a result, it (the Respondent) convened a special general meeting on 9<sup>th</sup> December 2022 at which a decision was taken to recall the impugned extension.
33. However, there is no evidence that the Claimant was given an opportunity to comment on the proposed withdrawal of the extended term before the decision to cancel it was made. The Claimant's letter to the Respondent dated 23<sup>rd</sup> December 2022 calling for guidance on the matter fortifies the fact that he was not consulted before the decision to withdraw his five (5) year tenure was made. As the Claimant asserts, his aforesaid letter did not elicit a response from the Respondent. Instead, the Respondent's Board went ahead to declare his (the Claimant's) position as lost and recommend the appointment of an acting Managing Director through its letters of 13<sup>th</sup> January 2023 and 16<sup>th</sup> January 2023.
34. In the court's view, the failure by the Respondent to engage the Claimant regarding the recall of the extended term (whether it had been granted regularly or irregularly) smirks of unfair labour practice. The action violated the Claimant's legitimate expectation that he will remain in office for the extended duration of five (5) years. If the Respondent, for whatever reasons, thought that the extension had been erroneously procured, it ought to have engaged the Claimant on the matter before the decision to recall the extension was made.
35. Indeed, the foregoing is what I understand sections 9 and 10 of the [Employment Act](#) to demand of the employer. The sections requires the employer to reduce a contract of service whose tenure exceeds three (3) months into writing. The write up must contain a statement of certain particulars of the contract which may be addressed in instalments. These include the tenure of the contract. By virtue of section 10 (5) of the Act, if the employer wishes to make changes to the particulars aforesaid, he must do so in consultation with the affected employee.



36. To the extent that the Respondent's actions infringed on the obligation to ensure fair labour practice, it (the Respondent) violated its obligation to respect and uphold the right to fair labour practice under article 41 (1) of *the Constitution*. To the extent that the Respondent failed to consult the Claimant regarding rescission of the five (5) year tenure, it violated the duty to consult the Claimant on changes to his contract as required under section 10(5) of the *Employment Act*. I therefore agree with the Claimant that the Respondent's actions were a travesty of both *the Constitution* and the *Employment Act*. It is so declared.
37. The Claimant has prayed for a declaration that he is entitled to remain in office for the balance of his tenure up to 1<sup>st</sup> January 2025. He has further prayed for an order of injunction to restrain the Respondent from terminating his contract or declaring a vacancy for his position.
38. However, there is evidence that when the Claimant failed to comply with the Respondent's directions through its letter dated 9<sup>th</sup> December 2022 to tender an application for renewal of his contract, the latter went ahead to advertise the position and appoint a new Managing Director. As such, the primary reliefs sought in the claim cannot issue.
39. The Claimant has lodged an alternative prayer for compensation for the balance of his term of five years. However, it is noteworthy that his contract of 9<sup>th</sup> December 2019 had a termination clause. Thus, even assuming that it was validly extended for five (5) years, this was not a guarantee that he would have served for the entire of the period. The contract was amenable to terminate for any other lawful reason.
40. Having regard to the foregoing, the plea by the Claimant that he be compensated for the balance of the five (5) years is untenable. Consequently, I award him compensation that is equivalent to his gross salary for three (3) months, that is to say Ksh. 1,081,309.00 x 3 = Ksh. 3,243,972.00. In making this assessment, I have considered the duration of service of the Claimant to the Respondent.
41. This award is subject to the applicable statutory deductions.
42. I award the Claimant interest on the sum awarded at court rates from the date of this judgment.
43. I award the Claimant costs of the case.

### **Summary of the Award**

44. After evaluating the evidence on record, the court makes the following findings and orders:-
  - a. The Respondent's decision to unilaterally rescind the extension to the Claimant's contract constituted a breach of the Claimant's right to fair labour practice and a violation of the Claimant's legitimate expectation that, all matters remaining constant, he was to serve as the Respondent's Managing Director for five years.
  - b. The court declines to grant the Claimant the primary reliefs as set out in the Statement of Claim.
  - c. The court awards the Claimant compensation that is equivalent to his gross salary for three (3) months, that is to say Ksh. 3,243,972.00, as redress for the breaches in paragraph 44(a) above.
  - d. The award is subject to the applicable statutory deductions.
  - e. The court awards the Claimant interest on the sum awarded at court rates from the date of this decision.
  - f. The court awards the Claimant costs of the case.



**DATED, SIGNED AND DELIVERED ON THE 7<sup>TH</sup> DAY OF MARCH, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> 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**

