



**Mwancha v Anti-Counterfeit Authority (Employment and Labour Relations  
Petition E180 of 2022) [2024] KEELRC 1000 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1000 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E180 OF 2022  
MN NDUMA, MN NDUMA & MN NDUMA, JJ**

**APRIL 11, 2024**

**BETWEEN**

**KEZZIAH MWANCHA ..... PETITIONER**

**AND**

**ANTI-COUNTERFEIT AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The petition was animated by the decision by the respondent to renew the contract for the position of Director Enforcement which it had advertised on 31/1/2022 as being for a one-year fixed term contract with no option for extension or renewal whatsoever in the advert.
2. Upon enquiry, the respondent proffered the reason for the one-year fixed term nonrenewable contract to be because of a merger with the Kenya Industrial Property Institute and the Kenya Copyright Board.
3. The petitioner was aggrieved by the intended action by the respondent to renew the said contract which contradicts the explanation hitherto given by the respondent hence the suit seeking the following reliefs: -
  - a. A declaration that the respondent is bound to employ the Director Enforcement for a one-year fixed term non-renewable based on the advert dated 31<sup>st</sup> January 2022.
  - b. A declaration that any purported renewal or extension of the one-year fixed term contract beyond and above the one year as advertised is unconstitutional for violating Articles 10, 27 and 232 of the Constitution.
  - c. A prerogative order of prohibition preventing the respondent from considering or purporting to renew or extend the appointment of the Director Enforcement beyond the one-year fixed term contract as advertised on 31<sup>st</sup> January 2022.
  - d. Costs of the petition



## **Violation of the Constitution.**

4. The petitioner relies on alleged violation of Article 27 and 232 of the Constitution arguing that all Kenyans are equal before the law and have the right to equal protection and benefit of the law. That all Kenyans have the right to equal opportunity in treatment in all spheres and that the respondent (ACA) had violated these rights in unlawfully intending to extend or renew the one-year fixed contract of the Director Enforcement contrary to the communication made to the public in the advertisement for the job.
5. That the respondent is a state corporation bound by values and principles of public service under Article 232(2)(b) of the Constitution which values and principles the respondent had violated by considering and contemplating renewal of the contract of the Director of Enforcement.
6. The petition is opposed on the basis that the petitioner has not disclosed any threat to and or any violation of the Constitution of Kenya 2010 by the respondent. That the petition therefore lacks any sound legal and factual basis and ought to be summarily dismissed.
7. The respondent filed replying affidavit of Dr. Robi Mbugua Njoroge the Executive Director of the respondent sworn to on 10/11/2021.
8. He deposes that the Respondent received an approval from the Head of Public Service through the Cabinet Secretary, Ministry of Industrialization, Trade and Enterprise Development to recruit nine (9) prioritized positions on a one-year contract pending the completion of the merger process. This is after the Authority made the recruitment approval request to the Head of Public Service on 8<sup>th</sup> June 2021. The said positions have helpfully been listed under paragraph 8 of the response.
9. That the positions were advertised in widely circulated daily newspapers and ACA website in compliance with the Authority's and public service recruitment policies and procedures on 1<sup>st</sup> February 2022. Members of the public were given up to 14<sup>th</sup> February 2022 to have submitted their applications.
10. That the Ag. Director appointed an opening committee which carried the exercise of opening, recording and sorting of all applications received at the close of the advertisement period. The Director Enforcement position attracted a total of twenty (20) applications.
11. It is stated that the Board constituted an ad hoc committee consisting of three members of the Board to handle the shortlisting of the applicants who met the required qualifications for the advertised positions falling under the Board purview. This Committee met on 12<sup>th</sup> April 2022 and on 18<sup>th</sup> March 2022 and carried out the shortlisting exercise. Five applicants including Yusuf Ahmed Osman were shortlisted.
12. The shortlisted candidates were notified of the shortlisting and invited for interviews on 12<sup>th</sup> April 2022 at the ACA headquarters. The interviews were conducted by members of the Board as required by the Authority's recruitment policy. Vetting letters and background check letters were sent to the relevant persons and institutions to ascertain all the candidates' compliance with chapter six of the Constitution.
13. It is deposed that during the interview, Mr Yusuf Ahmed Osman emerged top for the position of Director Enforcement (ACA) and therefore he was given an offer of an acceptance letter on a one-year contract pending completion of merger process on the 25<sup>th</sup> May 2022.



## **Determination.**

14. The court has considered the deposition and written submissions by the parties and the issues for determination are: -
  - a. Whether the petition discloses any cause of action.
  - b. Whether the petitioner is entitled to the reliefs sought.
15. The petitioner relies on the principle of legitimate expectation to argue that the respondent having declared the one-year fixed contract granted to the office holder of Director Enforcement, the respondent was bound by that promise to the public and was thus estopped from taking any steps to extend the contract for a further term.
16. The petitioner relies on Smith & Maxwell 6<sup>th</sup> Edition where Desmith, Woolf and Jowell in “Judicial Review of Administrative Action “ states:-

“ A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. It is a basic principle that legitimate expectation is at the core of the constitutional principle of the rule of law which requires predictability and certainty in government’s dealing with the public.”
17. In Kevin Kimiti and others -vs- Kenya School of Law and 2 others [2015] eKLR, Odunga J. as he then was stated: -

“In my view there is a legitimate expectation that public authority should comply with the constitution and the law. In our law, it is expected that public authority will adhere to the constitutional values and principles including those enumerated in Article 10..... Where legitimate expectation is found to apply, if a public authority is to depart from it, it must be demonstrated that there exists good reason for that departure.”
18. The petitioner has not attached any correspondence by the petitioner or any other member of the public to the respondent, enquiring whether the respondent intends to extend or renew the contract of Director of Enforcement and if that is the case, the reasons for the intended action.
19. From the deposition before court, the petitioner relies on conjecture and supposition that the respondent intends to take the impugned action.
20. The petitioner does not disclose in what manner any lawful expectation of a named member of public collective has been threatened as violated by the alleged intended action.
21. Furthermore, the petitioner does not begin to demonstrate how equal rights before the law of any other named person or member of the public has been threatened or violated by the impugned intended action.
22. In Misc. application No. 461 of 2016, HCC at Milimani, JR Division, Mativo J. citing authorities stated;

“Judicial oversight is necessary to ensure that decisions are taken in a manner which is lawful, reasonable, rational and procedurally fair. What matters is to establish whether the decision was taken in a manner which is lawful, rational and procedurally fair.”



23. The power of the court to review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved.
24. As was stated in John Weckinn T/A Githekwe Grace Land and Wandumbi Bar and 50 others -vs- the County Government of Nyeri and another, the court emphasized three category of public law wrongs which are commonly addressed in cases of this nature. These include: -
- a. Whether the authority understands and has followed the law. If not, the decision is illegal.
  - b. Whether the authority has acted fairly. This means the authority must follow any expressed procedure by legislation to reach a decision and must not be in breach of rules of natural justice. If this is not done, the decision is unfair.
  - c. Whether the decision is irrational or disproportional. The courts must intervene and quash a decision if they consider it to be demonstrably unreasonable as to constitute irrationality or perversity on the part of the decision maker.
25. The bench mark was laid way back in 1948 by Lord Green in Associated Provincial Picture Houses Ltd -vs- Wednesbury Corporation that: -
- If a decision on a competent matter is so unreasonable that no reasonable authority could even have come to it, then the courts can interfere, but to prove a case of that kind would require something overwhelming.”
26. The petitioner in this case does not address any tangible action already taken or demonstrably about to be taken which comes within the three wrongs discussed above. It has to be shown clearly whose rights are threatened or violated by the intended renewal of a contract of a lawful holder of office. The law applicable to that renewal that would be violated by the respondent has to be spelt out clearly for the illegality, unfairness, irrationality and disproportionality to be clear to a naked eye or neutral mind. Short of that, the suit lacks merit and borders on abuse of the court process.
27. In conclusion, for the above reasons, the petition lacks merit and is dismissed with no order as to costs.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**

**MATHEWS NDERI NDUMA**

**JUDGE**

**Appearance:**

Mr. Macharia for petitioner

Mr. Odukenya for respondent

Mr. Kemboi, Court Assistant

