



**Ngibuini v National Water Conservation and Pipeline Corporation & another  
(Cause 2299 of 2016) [2024] KEELRC 1581 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1581 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2299 OF 2016  
SC RUTTO, J  
JUNE 21, 2024**

**BETWEEN**

**EVANS JWC NGIBUINI ..... CLAIMANT**

**AND**

**NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION .... 1<sup>ST</sup>  
RESPONDENT**

**THE BOARD NATIONAL WATER CONSERVATION AND PIPELINE  
CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The instant suit was instituted through a Statement of Claim which was subsequently amended on 28<sup>th</sup> August 2020. The Claimant avers that he was employed on permanent and pensionable terms in the public service and posted to the office of the Controller and Auditor General. He was transferred to the Treasury in the office of the Auditor General in 1996 and on 30<sup>th</sup> May 2012, he transferred his services to the 1<sup>st</sup> Respondent in the position of Chief Internal Auditor on probationary terms.
2. On 12<sup>th</sup> August 2013, he was confirmed as the Chief Internal Auditor on permanent and pensionable terms of service. The Claimant further avers that on 6<sup>th</sup> November 2013, he was interviewed by the 2<sup>nd</sup> Respondent and subsequently appointed to the position of General Manager Finance. According to the Claimant, the 2<sup>nd</sup> Respondent duly converted his terms of service from contractual to permanent and pensionable on 6<sup>th</sup> November 2013, following a report and recommendation of the Human Resources and General Purposes Committee.
3. The Claimant further avers that on 10<sup>th</sup> March 2014, he was competitively appointed by the 2<sup>nd</sup> Respondent as the 1<sup>st</sup> Respondent's Acting Managing Director.



4. It is apparent from the record that the Claimant's upward trajectory was halted when he was directed to step aside in March 2015 pending investigations into allegations of corruption. Against this background, the Claimant seeks the following reliefs against the Respondents:
  - a. A declaration that the Claimant is in the Respondent's permanent and pensionable terms of service as the general manager, finance and or alternatively, the claimant be compensated for loss of prospective future earnings being the loss of a total of 105 months service until the attainment of the age of 60 years totaling the sum of Kshs 32,130,000/=;
  - b. An order compelling the Respondents to withdraw letter Ref: NWPC/HRA/SFIL/3214(64) dated 22<sup>nd</sup> September 2016;
  - c. Damages for the 2<sup>nd</sup> Respondent's refusal/ failure to forward the Claimant's name to the Cabinet Secretary for appointment as the 1<sup>st</sup> Respondent;
  - d. Payment of the sum of Kshs 731,500/= being salary unlawfully withheld;
  - e. Damages for financial losses, mental torture and other inconveniences suffered;
  - f. General damages for malicious prosecution;
  - g. Special damages (to be provided);
  - h. Interest on (a) (b) (c) (d) (e) (f) and (g) above at Court rates;
  - i. Costs of this claim;
  - j. Any other relief which this Honourable Court may deem just to grant.
5. Opposing the Claim, the Respondents aver that the Claimant has not been candid and forthright. According to the Respondents, the Claimant was employed on 30<sup>th</sup> May 2012 and in the year 2014, was appointed as the General Manager, Finance for a contractual period of three years starting from 2<sup>nd</sup> January 2014 and ending on 1<sup>st</sup> January 2017. That during the subsistence of the contract, the 1<sup>st</sup> Respondent appointed the Claimant as the Acting Managing Director when the said position became vacant. That in April 2015, less than a year upon being appointed, the Claimant failed to advise a Board Committee meeting on the procedures and protocols to be followed in deliberating matters that are of great importance in that he irregularly, arbitrarily and unlawfully without following the protocols and procedures changed and altered the terms of employment of the Respondent organization from temporary to permanent and pensionable. Accordingly, the Respondents have urged the Court to dismiss the Claimant's suit with costs.
6. The matter proceeded for hearing on 16<sup>th</sup> October 2023, during which both parties called oral evidence.

#### **Claimant's Case**

7. The Claimant testified as CW1 and to start with, he sought to rely on his Amended Memorandum of Claim, witness statements as well as the list and bundle of documents filed on his behalf to constitute his evidence in chief.
8. The Claimant stated that he performed his duties as the 1<sup>st</sup> Respondent's Acting Managing Director and Secretary to the 2<sup>nd</sup> Respondent diligently and later applied for the substantive position of Managing Director when the same was advertised.
9. Following competitive interviews of 9 candidates conducted by the 2<sup>nd</sup> Respondent on 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> January 2015, he emerged a distant first with a score of 77.83 in the order of merit.



10. However, sometime in the month of February 2015 it was reported in the media-that Eng. Jacqueline Musyoki who was ranked a distant fifth with a score of 67.78 had despite the Inspector General of State Corporations' strong advice to the Cabinet Secretary, been appointed the Managing Director, NWCP.
11. On 18<sup>th</sup> February, 2015, a Judicial Review Case No. 53 of 2015 Republic-Vs-National Water Conservation & Pipeline Corporation & Another, Ex-Parte Oscar Juma Oyomba was filed in the High Court and the same sought the quashing of the Cabinet Secretary's decision. He was named as the 1<sup>st</sup> Interested Party in the matter.
12. Having been enjoined in the case in his personal capacity, he initially instructed his Advocates to seek his excusal from the proceedings. This was allowed by the Court. Later, following the filing of Replying Affidavits by the 2<sup>nd</sup> Respondent's Chairman, Dr. Julius Kones dated 3<sup>rd</sup> March 2015 and then Principal Secretary, Ministry of Environment, Water and Natural Resources, James Teko Lopoyotum dated 4<sup>th</sup> March 2015 which contained many lies and falsehoods, he, as a good and honest citizen, filed an Affidavit in order to put the record straight to enable the Court reach a fair and informed decision.
13. In the Affidavit he urged the Court to disregard the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Replying Affidavits for being wholly untruthful and solely intended to have Eng. Jacqueline Musyoki as the Managing Director of the 1<sup>st</sup> Respondent despite the fact that the Inspector General of State Corporations had strongly advised against it.
14. The contents of his Affidavit angered the 2<sup>nd</sup> Respondent's Chairman, who verbally warned him that since he had called him a "liar" he would "fire" him from the 1<sup>st</sup> Respondent and make sure that he was jobless and unable to transfer his services back to the Treasury where he had previously been employed.
15. The Claimant further averred that having emerged first in the "order of merit" his name was maliciously and/or fraudulently omitted from the names sent to the Cabinet Secretary and that the Cabinet Secretary failed, refused and/or neglected to comply with the Inspector General of State Corporation's advice.
16. It was his contention that having emerged first, he should have been appointed the 1<sup>st</sup> Respondent's Managing Director. In the circumstances, he has suffered great loss and damage.
17. The Claimant further averred that in late March 2015, while attending an official meeting in Dubai, he learnt that he had been adversely named in the so-called "List of Shame" by the President of the Republic of Kenya, H.E.Uhuru Kenyatta, during the "State of the Nation Address" in Parliament and ordered to "step aside" pending investigations into allegations of corruption.
18. Upon his return to Kenya, he duly "stepped aside" to await the said investigations.
19. On 18<sup>th</sup> November 2015, together with 11 others, they were charged with three counts alleging contravention of the provisions of the Public Procurement and Disposal, Act, 2005 and the Anti-Corruption and Economic Crimes, Act, 2003.
20. On 27<sup>th</sup> November 2015, pursuant to Section 62 of the *Anti-Corruption and Economic Crimes Act*, 2003, the 1<sup>st</sup> Respondent suspended him from duty and placed him on half pay awaiting the hearing and determination of the case.
21. According to the Claimant, he reliably learnt that the alleged corruption complaints against him to the Ethics and Anti-Corruption Commission were maliciously devised by Hon. Julius Kones, the 2<sup>nd</sup>



- Respondent's Chairman and that his sole intention was to have him removed from his position as the 1<sup>st</sup> Respondent's Acting Managing Director and Secretary to the 2<sup>nd</sup> Respondent.
22. On 22<sup>nd</sup> September 2016, while still on statutory suspension, he received, via e-mail, a letter from the 1<sup>st</sup> Respondent, titled "END OF CONTRACTUAL TENURE AS THE GENERAL MANAGER, FINANCE". According to the 1<sup>st</sup> Respondent, his "contract" allegedly terminated on 1<sup>st</sup> January 2017.
  23. The Claimant averred that the contents of the aforementioned letter shocked him and he frantically attempted to contact Mr. Andrew Wanyonyi, the 1<sup>st</sup> Respondent's Acting Managing Director, with a view to withdrawing, reviewing and/or reversing the purported conversion of his terms of service. However, Mr. Wanyonyi failed and/or refused to respond to his countless telephone calls and text messages.
  24. He instructed his Advocates on record to inform the Respondents that the notice allegedly terminating his employment was unlawful since he was on permanent and pensionable terms of service.
  25. On 14<sup>th</sup> October 2016, the Respondents advertised his position of General Manager, Finance and sought applicants to fill the same.
  26. On 24<sup>th</sup> October 2016, his Advocates received a letter from the 1<sup>st</sup> Respondent stating that his contractual terms of service had been "erroneously" converted to permanent and pensionable vide letter dated 15<sup>th</sup> December 2014, and that the same had been converted "back to the original state ie. contractual terms with immediate effect from 1<sup>st</sup> April 2015". However, the 1<sup>st</sup> Respondent did not enclose a copy of the said letter dated 1<sup>st</sup> April 2015. The Claimant contended that he has never received the said letter.
  27. He is aware that conversion of the terms of service for the 1<sup>st</sup> Respondents' General Managers was duly and lawfully resolved and effected by the 2<sup>nd</sup> Respondent on 9<sup>th</sup> December 2014 following a report and recommendation of the 2<sup>nd</sup> Respondent's Human Resources and General Purposes Committee dated 21<sup>st</sup> August 2014 as well as a System Audit Report by the Kenya National Audit Office dated 4<sup>th</sup> September 2014.
  28. The Claimant contended that the Respondents' unlawful action deprived him of his prospective future earnings for a total of 105 months of service totaling the sum of Kshs 32,130,000.00.

### **Respondents' Case**

29. The Respondents called oral evidence through Mr. Joseph Ojiambo and Ms. Doris Mwangi who testified as RW1 and RW2 respectively. Mr. Ojiambo who was the first to go, identified himself as the Respondent's Manager, Human Resources and Administration. Similarly, he sought to rely on his witness statement, which he asked the Court to adopt as his evidence in chief. He further produced the list and bundle of documents filed on behalf of the Respondents as exhibits before Court.
30. It was his evidence that the Claimant was employed as a Chief Internal Auditor and later on as a General Manager, Finance on a contractual basis. It was RW1's contention that the Claimant was and has never been employed as an Acting General Manager.
31. RW1 further stated that attempts and or efforts to search, look, find, and or recover the Full Board meeting minutes that allegedly converted the terms of employment of the Claimant from contractual to permanent and pensionable terms on the 15<sup>th</sup> December 2015, as claimed, have proved futile and bore no fruit to date.



32. He further averred that the Claimant's claim that he was best suited and qualified to take up the post of the Managing Director of the 1<sup>st</sup> Respondent Corporation is a view that was dismissed by the Hon. Justice Korir in JR Case No. 53 of 2015.
33. According to RW1, the tribulations, misfortunes and or storms bedeviling the Claimant were orchestrated, authored and instigated by himself and the same cannot be blamed on the Chairman of the 2<sup>nd</sup> Respondent.
34. He has information which he holds as true to the best of his knowledge that the Claimant and other persons had been charged under the Economic Crimes Act 2003.
35. That the Claimant was implicated among others in committing economic crimes on three counts on charges of contravention of the provisions of the Public Procurement and Disposal Act 2003 and in accordance with the Economic Crimes Act 2003, was put on half salary.
36. RW1 further contended that through manipulation employed by the Claimant when he was in charge of the running and management of the affairs of the 1<sup>st</sup> Respondent, he improperly misled the Human Resource and General Purposes Committee of the Board to irregularly and erroneously make recommendations and purported it to be a valid resolution for implementation by the Full Board of Management of which to date he has never surrendered the alleged minutes.
37. The resolutions of the illegal Board meeting held on 15<sup>th</sup> December 2014 and on 9<sup>th</sup> February 2015 were nullified and or reversed following their illegality and full details of the nullification are within the knowledge of the Claimant as per the letter dated 1<sup>st</sup> April 2015 addressed to him.
38. The reversing of the erroneous resolution of the 2<sup>nd</sup> Respondent which was misled and without due regard to law, regulation and Government laid down procedure and policy, the Claimant's term of employment and those of other employees reverted to contractual and no benefits were made on account of his pensions accounts.
39. RW1 further averred that the Claimant continued to receive his normal and regular salary as per the terms of the contract. He never raised any objections from April 2015 until 2<sup>nd</sup> September 2016 when he reacted to the letter notifying him of the advertisement for recruitment of the General Manager, Finance.
40. In RW1's view, it is clear that the Claimant or his office at the time awarded himself the permanent and pensionable contract. That there was no Managing Director to offer the Claimant the alleged contract at the time.
41. That in the absence of the Claimant applying for the extension of time/contract, the 1<sup>st</sup> Respondent did not have any other option but to advertise for the position in accordance with the established policies.
42. In closing, RW1 termed the Claimant's claim for the sum of Kshs. 32, 130,000.00 and Kshs. 731,500.00 or any other sum as farfetched, baseless, wishful thinking, a creation of his mind, and uncalled for.
43. Ms. Doris Mwangi who testified as RW2, identified herself as the 1<sup>st</sup> Respondent's Principal Legal officer. Equally, she adopted her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before Court.
44. RW2 stated that her duties among other things include attending to all legal correspondences liaising with external Lawyers, liaising with the State Law Office among other legal tasks and briefs within the Corporation.



45. She is aware that the Claimant worked for the Corporation as an Internal Auditor and a General Manager Finance on contract until the time he left the Corporation.
46. She does not agree with the Claimant's pleadings that during his tenure, he acted with diligence and prudence as the Internal Auditor, General Manager Finance and Acting Managing Director and that he was best suited to be the subsequent Managing Director. She averred that that notion was dismissed by the Court in JR Case No. 53 of 2015.
47. That further, the Claimant was implicated among others in committing economic crimes and his name was among those read in Parliament and subsequently charged in a court of law and put on half salary.
48. RW2 further averred that the Claimant through acts of manipulation, scheming and maneuvers when he was in charge of the management and running of the affairs of the 1<sup>st</sup> Respondent, illegally and unlawfully misled the sub-committee on Human Resource and General Purposes to irregularly and erroneously make a recommendation and purported it to be true.
49. That contrary to the Claimant's claim, the 2<sup>nd</sup> Respondent's full board reversed and nullified the illegal board resolution.
50. RW2 further contended that reversing the erroneous resolution of the 2<sup>nd</sup> Respondent which was misled un-procedurally and without due regard to law, regulation, rules and laid down Government procedures and policy guidelines, the Claimant's terms of employment and those of other employees reverted to contractual and no benefits were made on account of his pension account thereafter in a meeting duly convened by the Claimant himself who was at the very material time the Secretary to the Board which resolved to amend, rectify and annul the erroneous, irregular and erroneous resolution(s) and which information.

### **Submissions**

51. The Claimant submitted that he was not treated fairly by the Respondents. In this regard, he argued that he was never accorded an opportunity to be heard either before the adverse decision was allegedly made by the 2<sup>nd</sup> Respondent on 6<sup>th</sup> February 2015 or when the decision to issue him with a three month notice on 20<sup>th</sup> September 2016.
52. According to the Claimant, these administrative decisions without doubt violated his right to fair administrative action as guaranteed by Articles 41 and 47 of *the Constitution* of Kenya, as well as Section 4 of the *Fair Administrative Action Act*.
53. The Claimant further submitted that the Respondents did not comply with Section 10(5) of the *Employment Act* in that they never consulted him when making the alleged change to the contract of employment dated 15<sup>th</sup> December 2014 and neither did they notify him in writing within the stipulated period vide section 13(1) and (3) (a) of the *Employment Act*. In support of this position, the Claimant placed reliance on the case of James Ang'awa Atanda & 10 others vs Judicial Service Commission (2017) eKLR.
54. The Claimant further submitted that the deliberate failure and/or refusal by the 2<sup>nd</sup> Respondent to forward his name to the appointing authority was, to say the least, inhumane, demeaning and degrading treatment.
55. On the other hand, the Respondents submitted that the allegations of malicious prosecution are not based on any evidence presented in this Court at any stage. In the Respondents' view, the same are based on mere conjecture, speculation and innuendos.



56. The Respondents further argued that it is clear beyond any peradventure that the claim for malicious prosecution is incompetent, defective, misplaced, bad in law, and outside the ambit of the jurisdiction of this Court.
57. The Respondents stated in further submission that the Claimant was duly issued with the three months notice of termination as per his contract through the letter dated 22<sup>nd</sup> September 2016, which period was to run from 1<sup>st</sup> October 2016. According to the Respondents, the Claimant's contract consequently ended on 1<sup>st</sup> January 2017.
58. Placing reliance on the determinations in *Protus Wanjala Mutike vs Angalo African Properties t/a Jambo Mutara Lodge Laikipia* (2021) eKLR and *Galgalo Jarso Jillo vs Agricultural Finance Corporation* (2021) eKLR, the Respondents further posited that the Claimant has not demonstrated that he was unfairly or unlawfully terminated from his employment.

### **Analysis and Determination**

59. Flowing from the pleadings, the evidence on record as well as the rival submissions, the following issues stand out for determination:
  - a. Whether the Claimant was unfairly and unlawfully terminated from employment; and
  - b. Whether the Claimant is entitled to the reliefs sought.

### **Unfair and unlawful termination?**

60. To answer this question, it is imperative to revisit the record and determine the nature of the Claimant's contract of service at the time he exited the 1<sup>st</sup> Respondent's employment.
61. It is the Claimant's case that on 9<sup>th</sup> December 2014, following a report of the 2<sup>nd</sup> Respondent's Human Resources and General Purposes Committee dated 21<sup>st</sup> August 2014 as well as a system audit by the Kenya National Audit Office, the 2<sup>nd</sup> Respondent resolved to convert the terms of service of its General Managers from contractual to permanent and pensionable. This included his contract of service given that at the time, he was serving substantively as the General Manager Finance. It is on this account that the claimant has termed the termination of his contract of service through the letter dated 22<sup>nd</sup> September 2016, unfair and unlawful.
62. The Respondents have disputed the Claimant's position and contended that he (the Claimant) misadvised the Human Resources and General Purposes Committee to mislead the Board to change the terms of employment of the senior managers from contractual to permanent and pensionable. According to the Respondents, this culminated in the illegal resolution of the 1<sup>st</sup> Respondent's Board on 15<sup>th</sup> December 2014.
63. The Respondents have termed the said resolution illegal on account that first, there was no Agenda circulated prior to the meeting of the Human Resources and General Purposes Committee detailing the seriousness and consequential business that was intended to be transacted. Second, there was no disclosure of conflict of interest in the said meeting on the part of the Claimant who was substantively the General Manager, Finance and who stood to personally benefit from the change of terms of employment. Third, the decision was not informed by any policy of the Respondent or that of the Government of Kenya.
64. According to the Respondents, the Board subsequently nullified the resolution of 15<sup>th</sup> December 2014 on 9<sup>th</sup> February 2015.



65. In support of his case, the Claimant exhibited a copy of a report from the Kenya National Audit Office dated 4<sup>th</sup> September 2014 in which it was observed that there was high turnover in the 1<sup>st</sup> Respondent's management structure. It was further observed that since the introduction of contract terms in 2006, no head of department had their contract renewed for a second term. Consequently, the report recommended enhancement of the managers' terms of service to ensure security and establish a succession plan in the corporation to improve on stability and continuity.
66. The Claimant further exhibited a copy of the minutes of the meeting held by the Human Resources and General Purposes Committee on 21<sup>st</sup> August 2014, in which it was recommended that the terms and conditions of service of General Managers be converted from contract to permanent and pensionable terms.
67. The Claimant further exhibited a copy of minutes of a meeting held on 12<sup>th</sup> September 2014, by the Board in which it was recommended that the recommendation of the Human Resources and General Purposes Committee be presented to the full Board for further consideration and financial decision.
68. In further support of his case, the Claimant exhibited an Extract of Resolutions of the 2<sup>nd</sup> Full Board's meeting held on 9<sup>th</sup> December 2014. It is notable that under Agenda No. 5 titled "Report from the Committees of the Board", it is recorded as follows under (I):
- "That the issue of converting the terms and conditions of service of General Managers as recommended in Human Resources and General Purposes Committee is adopted and prorated gratuity for period served on contract be paid."
69. Worthy to note is that the Chairman of the 2<sup>nd</sup> Respondent signed on the Extract of the said Resolutions on 15<sup>th</sup> December 2014.
70. The record further bears that through a letter dated 15<sup>th</sup> December 2014, the Claimant was notified of the conversion of his terms of service from contract to permanent and pensionable. The letter is couched as follows:
- "Following the resolution of the full Board meeting held on 9<sup>th</sup> December 2014, you are hereby advised that your terms and conditions of services as the General Manager Finance have been converted to permanent and pensionable terms...."
71. The letter was authored by one Musiega Assava on behalf of the Managing Director. The Claimant accepted the terms of the appointment by appending his signature. Subsequently, he was paid prorated gratuity in the sum of Kshs. 453,530.00 upon conversion.
72. On the part of the Respondents, they exhibited a copy of the Board's Resolution of 6<sup>th</sup> February 2015 in which the earlier resolutions of 9<sup>th</sup> December 2014, 19<sup>th</sup> December 2014 and 7<sup>th</sup> to 9<sup>th</sup> January 2015 were expunged and replaced with the resolution that the translation of the terms and conditions for General Managers to permanent and pensionable would be reconsidered if and when a policy is tabled and adopted by the Board.
73. Consequently, in a letter dated 1<sup>st</sup> April 2015, the Respondent's Acting Managing Director notified the Claimant of the Board's resolution and the reconversion of his terms of service from permanent and pensionable to contract terms.
74. Therefore, after the lapse of three years from 20<sup>th</sup> December 2013, when he was initially appointed as the General Manager Finance, the Claimant was notified that his contract of service would lapse on 1<sup>st</sup> January 2017. With that, the Claimant was exited from service.



75. It is not in doubt that the Claimant's terms of service were so fundamental as they had an overall effect on his contract of employment. Specifically, a change in his terms of service had a significant bearing on his tenure of service hence such a change ought to have been done in line with the provisions of Section 10(5) of the *Employment Act* which provides as follows:

“(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

76. It is unequivocal that the conversion of the Claimant's terms of service from permanent and pensionable to contractual, was detrimental to him as it had the effect of reducing his length of service. It was therefore imperative for the 1<sup>st</sup> Respondent to prove that the Claimant's consent was obtained prior to such a change. Without evidence it can only be presumed that there was no consent from the Claimant's end, to alter his terms of service from permanent and pensionable to contractual.

77. Indeed, it is notable that during the initial conversion of the Claimant's terms of service from contractual to permanent and pensionable, his consent was obtained as he signed the letter dated 15<sup>th</sup> December 2014 and acknowledged acceptance of the same.

78. In the event the 2<sup>nd</sup> Respondent Board had now come to the realization that conversion of the terms of service of the General Managers from contractual to permanent and pensionable was erroneous, the proper thing to do was to once again obtain the Claimant's consent to convert his terms of service back from permanent and pensionable to contractual.

79. In light of the foregoing, I cannot help but conclude that the change of the Claimant's terms of service from permanent and pensionable to contractual, without his express consent can be deemed to be a unilateral act from the Respondents' end. As such, this was in contravention of the provisions of Section 10(5) of the *Employment Act* and hence was of no effect since any variation on the Claimant's terms of service had to be with his consent.

80. Ultimately, it is this Court's finding that termination of the Claimant's contract of employment on the basis that his contractual tenure had lapsed, amounted to unlawful termination of his employment contract.

81. As I pen off on this issue, it is worth mentioning that the Respondents cannot be heard to say that the Claimant misled and misadvised the Committee of the 2<sup>nd</sup> Respondent Board into converting the terms of service of the General Managers from contractual to permanent and pensionable. I say so because the Board of Directors is composed of men and women of sound mind. Therefore, one wonders how they could all be misled and misadvised into endorsing an erroneous decision. Further, in the event the Human Resources and General Purposes Committee was misled and misadvised as the Respondents aver, why did the full board adopt the said Resolution?

82. Indeed, the record bears that in the end, it is the same Board that resolved to rescind the earlier resolution converting the terms of service of the General Managers from contract to permanent and pensionable. This therefore means that they were fully aware of the effect of that Resolution.

### **Reliefs?**

83. As the Court has found that termination of the Claimant's contract of service on the basis that his contractual tenure had lapsed, amounted to unlawful termination of his employment contract, he is awarded compensatory damages equivalent to six (6) months of his last salary. This award takes into



account the length of the employment relationship and the remainder of the period the Claimant would have served had the Respondents not effected termination of his contract of service in the manner it did. In the same vein, the Claimant's claim for loss of future prospective earnings until attainment of the retirement age is declined.

84. In holding as such, I am fortified by the determination of the Court of Appeal in the case of D K Njagi Marete vs Teachers Service Commission [2020] eKLR, where it was held as follows: -

“On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word „permanent employment.” underlined for the emphasis

85. The Court further declines to award damages for Respondents' failure to forward the Claimant's name to the Cabinet Secretary for appointment as the 1<sup>st</sup> Respondent's Managing Director. Here is why.
86. The record bears that following the appointment of Eng. Jackline Musyoki as the 1<sup>st</sup> Respondent's Managing Director, one Oscar Juma Oyomba instituted judicial review proceedings being JR Case No. 53 of 2015. In his Judgment delivered on 19<sup>th</sup> May 2015, the Court (Hon. Justice Korir, as he then was) held that various factors have to be taken into account by a Board before the top three candidates are selected. The Court further noted that there was no disclosed breach of the guidelines by the Respondents. The Court proceeded to state that when it comes to management of the state corporations, the buck stops with the Boards. In this regard, the Court further reckoned that a decision overturning the decisions of the Respondents would amount to taking over their duties.
87. In view of the above findings, the Court dismissed the JR application. Indeed, there is no evidence, let alone an indication that the said decision has been appealed. As such, the matter regarding the appointment of the 1<sup>st</sup> Respondent's Managing Director was settled. This Court cannot therefore reopen the same issue for consideration again. Consequently, any relief sought with regard to the issue cannot be sustained.
88. The claim for payment of withheld salary from 1<sup>st</sup> April 2015 to 21<sup>st</sup> November 2015 is similarly declined as it is evident that the Claimant was suspended from duty pending hearing and determination of the criminal case that had been instituted against him pursuant to Section 62 (1) of the Anti-Corruption and Economic Crimes Act. As such he was to earn half salary during the pendency of the criminal trial.



89. In this regard, Section 62 (1) of the *Anti-Corruption and Economic Crimes Act* (ACECA), which is relevant herein, provides as follows: -

“ A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:

Provided that the case shall be determined within twenty-four months.”

90. Therefore, the Court returns that the Claimant’s half salary was rightly withheld during the said period.

91. The Claimant has further sought damages for malicious prosecution. As stated herein, the Claimant was charged with economic crimes in the Anti-Corruption Court. According to the Claimant, his prosecution was malicious. The elements that must be proved in a claim of malicious prosecution were stipulated as follows in the case of *George Masinde Murunga vs Attorney General* [1979] eKLR:-

“ As to malicious prosecution the plaintiff must prove four things:

- (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this);
- (2) that the prosecution terminated in the plaintiffs’ favour (there is also no dispute as to this);
- (3) that the prosecution was instituted without reasonable and probable cause; and
- (4) that it was actuated by malice.”

92. In a nutshell, the Claimant must prove that: -

- a. there was a prosecution by the respondent;
- b. the proceedings complained of were terminated in his favour;
- c. the prosecution was instituted without reasonable and probable cause that it was actuated by malice; and
- d. the prosecution was instituted or carried on maliciously.

93. It is this court’s finding that the above elements have not been proved in this case. Indeed, there is no evidence that the Respondent or any of its Board members instigated the prosecution of the Claimant in any way. Accordingly, this relief collapses.

94. The claim for special damages is similarly declined as the same was not specifically pleaded and proved to the required standard. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as the circumstances permit.

95. On this score, my thinking accords with the determination by the Court of Appeal in *Capital Fish Limited vs Kenya Power and Lighting Company Limited* (2016) eKLR:

“ The appellant apart from listing the alleged loss and damage, it did not ...lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to



award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.”

### **Orders**

96. The upshot of the foregoing is that Judgment is entered in favour of the Claimant for the sum of Kshs 1,836,000.00 being compensatory damages equivalent to six (6) months of his last salary. Interest shall apply on the said award at Court rates from the date of Judgment until payment in full.
97. The Respondents shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE 2024.**

.....

**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Mr. Kamunya

For the Respondents Mr. Muriuki

Court Assistant Millicent Kibet

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

