



Mkombola v Directline Assurance Company Limited (Cause E052 of 2023) [2024] KEELRC 2077 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2077 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E052 OF 2023
NZIOKI WA MAKAU, J
JULY 30, 2024**

BETWEEN

HABEL MWAGHA MKOMBOLA CLAIMANT

AND

DIRECTLINE ASSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. In the Statement of Claim dated 26th January 2023, the Claimant prays for judgment against the Respondent for:
 - a. A declaration that the Claimant had a legitimate and reasonable expectation that his Contract would be renewed on permanent and pensionable terms.
 - b. A declaration that the Respondent's failure to renew the Claimant's three-year employment on permanent and pensionable terms as per previous communication constituted an unfair labour practice and an unfair and unlawful termination of the Claimant's employment.
 - c. Compensation of 12 months' salary inclusive of benefits for unlawful, illegal, discriminatory, malicious and unfair non-renewal of contract to permanent and pensionable terms/or breach of the Claimant's legitimate expectation – Kshs 300,000/- x 12 = Kshs 3,600,000/-.
 - d. General damages for unfair labour practices, harassment and unfair treatment.
 - e. Costs of this suit and interest thereon from the date of filing until payment in full.
 - f. Any other Order the Court may deem fit.
2. The Claimant averred that he worked for the Respondent as an Information Technology (IT) Manager on a three-year contract running from 8th April 2019 to 7th April 2022, during which period no complaint was ever raised against him. He contended that the Respondent's Board had resolved that



for any renewal of contract after a successful three-year service, a staff would be entitled to an Open Contract. That consequently, the Chief Executive Officer (CEO) that took over the Respondent Company sometimes in 2021 communicated the said information to the staff in a Town-hall meeting and followed it up with a Memo.

3. The Claimant's case is that upon lapse of this three-year contract, he continued working for the Respondent and on or about 5th May 2022, he was summoned to the Human Resource Office and informed that the Respondent's CEO had decided to extend his contract by six (6) months. He argued that he was supposed to be given an Open Contract, not limited to any number of years, and/or permanent and pensionable terms as per the Board's Resolution communicated to them on 18th February 2022. The Claimant averred that when he enquired the reasons that informed his contract extension for six months, he was referred to the CEO and thus expressed interest in discussing the issue with the CEO before signing the said Contract. He noted that when he finally got audience with the CEO, he was not given any reason for the contract extension and was informed that they wanted to put him back on probation for six (6) months yet he had already worked for the Company for three (3) years without any complaint. That on the contrary, the CEO had particularly mentioned that the Claimant's technical work was very good and the Claimant then asked for more time to consult before signing the contract extension.
4. It was the Claimant's averment that on 11th May 2022, the HR Manager called him and demanded that he hands over to his deputy and apply for annual leave and that when he asked to be given the said instructions in writing, the HR Manager insisted that the same were "verbal orders". That on the same day at about 5.00pm, the Investigations Manager visited his office and informed him that the CEO had asked him to eject the Claimant from office unless he signs the six-months Contract. That consequently, he could not access his office the next day as all his rights had been revoked and he also did not have time to hand over. The Claimant contended that the aforementioned actions amounted to harassment and that the Respondent had breached its own policy and his legitimate expectation of the renewal of his contract to permanent and pensionable terms.
5. The Claimant further averred that the Contract between him and the Respondent had an Arbitration Clause in case of disagreements, but which clause he argued is vague as to the appointing authority and for which the Chartered Institute of Arbitrators – Kenya Branch advised them to agree or otherwise approach Court for assistance. That he consequently filed HCCOMM/E497/2022 and after the Court similarly noted that the said Arbitration Clause was vague, he filed the claim herein.
6. In response, the Respondent filed its Defence dated 24th March 2023, averring that the suit is fraudulent and has been filed to enable the Claimant illegally extend a fixed term contract that has expired. It further argued that the suit is bad in law for being based on the Claimant's own wrong within the meaning of the rule in *Nabro Properties Ltd v Sky Structures & another* [2002] 2 KLR 299. It contended that the suit is based on the Claimant's misapprehensions on the employer's managerial prerogative and on the limited instances when the said managerial prerogative can be interfered with by this Court.
7. It was the Respondent's stance that the Claimant's three-year Contract having expired on 7th April 2022, there is no employer-employee relationship between him and the Respondent. It averred that on 17th May 2022, it informed the Claimant that under clause 2A of the said fixed term Contract dated 8th April 2019, he was obliged to apply for renewal of extension of the contract at least 60 days before expiry of the said contract. That however, the Claimant failed to make the application and therefore the Respondent was within its rights to act as it did thereafter. The Respondent stated that following the Claimant's decision not to extend his contract, it offered him a Certificate of Service and computed his final dues. It thus denied that the Claimant is entitled to the reliefs sought in his Claim and prays that the suit be dismissed with costs.



8. Claimant's Submissions

The Claimant submitted that he had legitimate expectation that his employment contract would be renewed as communicated by the Respondent's CEO. On the issue of legitimate expectation, the Claimant cited the cases of *Jane Kiongo & 15 others v Laikipia University & 6 others* [2019] eKLR, *John Nduba v Africa Medical and Research Foundation (AMREF Health Africa)* [2020] eKLR and *Republic v Communications Authority of Kenya Ex parte Airtel Networks Kenya Limited* [2017] eKLR. The Claimant noted that he had verbally communicated to the HR staff and was then issued with UN Sacco Letter (Exhibit 5), in which the HR Manager requested the UN Sacco to assist the Claimant as his contract was to be converted to permanent and pensionable. He posited that the Respondent did not refute and/or rebut his testimony that the HR Manager verbally confirmed to him that there would be no problem in the renewal of his contract because only those under Performance Improvement Program (PIP) or any other disciplinary action would be challenged.

9. It was the Claimant's submission that he had proved on a balance of probability that the Respondent was obligated to convert his contract to permanent and pensionable but he was instead ejected from his office in an act that was unfair labour practice and unfair termination of his employment. He asserted that the Respondent failed to call witnesses or produce documents to rebut the particulars of harassment as pleaded and submitted that the said claim thus remained unchallenged. As regards the prayers sought, the Claimant relied on the case of *John Nduba v Africa Medical and Research Foundation (AMREF Health Africa)* [2020] eKLR in which the Court declared that the respondent's failure to renew the claimant's employment for a period of 2 years constituted an unfair and unlawful termination of his employment and went on to award the claimant 12 months' gross salary as compensation.

10. Respondent's Submissions

The Respondent submitted that as stated by the Court of Appeal in *Transparency International - Kenya v Omondi* (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR) (17 February 2023) (Judgment), an employer in a case of fixed term contract has no obligation to justify the non-renewal of a fixed term contract of employment. The Court of Appeal further held that the doctrine of legitimate expectation does not arise in the renewal of a fixed term contract and its non-renewal cannot constitute unfair termination of employment or dismissal. The Respondent in the instant case argued that since it is trite law that parties are bound by their contract and the Claimant did not comply with the terms set out in clause 2A(b) on his application for an extension of contract, he cannot blame anyone for his non-compliance. It further submitted that this Court should reject the Claimant's invitation to amend and re-write the Contract to include other terms not envisaged by the parties herein. In this regard, the Respondent relied on the decision of the Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR that a Court of law cannot re-write a contract between parties and that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

11. The Respondent further submitted that it is the practice of this Court not to interfere with the exercise of managerial prerogative of the employer per *Alfred Nyungu Kimungi v Bomas of Kenya* [2013] eKLR and *Rebecca Anne Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR. It was the Respondent's submission that the Claimant is not entitled to any damages on account of expiry of his employment contract and that the Court ought to dismiss his Claim with costs. That



as regards general damages in employment contracts, the Court in the case of Godfrey Allan Tolo v Tobias O. Otieno & another [2022] eKLR held as follows:

“The claim for general damages for breach of legitimate expectation and breach of contract, punitive damage, damage for pain and suffering and compensation for violation of the claimant’s rights must fail, because the claimant admitted that a separation agreement was entered into between him and the employer that settled his expected dues. The dues have already been partly paid and the balance secured by a deposit court.”

The Respondent thus urged the dismissal of the Claim with costs.

12. The Claimant was dismissed after he declined to sign a renewal contract under duress. He sought time to review the contract with a lawyer and when his request was denied he was bundled out of the Respondent’s premises. The Respondent had no proper defence since the Claimant had been on long term contracts and then suddenly he was placed on a short term contract which he queried. Despite seeking time to review the contract, the Claimant was denied the opportunity and escorted out of the premises by the Respondent’s security. He was dismissed without being afforded the safeguards under the law. He seeks a slew of reliefs since he had a legitimate expectation of the renewal of the contract to favourable terms as had been done for fellow employees who had served for long periods like him. In the claim, the Claimant sought payment of 12 months compensation but having regard to the ability of the Claimant to obtain alternative employ in the vibrant field of ICT, a compensation of 3 months would suffice. In the final analysis I enter judgment for the Claimant for:-
- a. A declaration that the Claimant had a legitimate and reasonable expectation that his contract would be renewed on permanent and pensionable terms.
 - b. One month’s notice – Kshs 300,000/-
 - c. Compensation for 3 months – Kshs 900,000/-
 - d. Costs of the suit.
 - e. Interest at court rates on the sums in (b) and (c) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

