



**Wario v Youth Enterprise Development Fund Board (Cause 2406 of 2016)
[2024] KEELRC 2560 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2560 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2406 OF 2016
BOM MANANI, J
OCTOBER 24, 2024**

BETWEEN

UMURO WARIO CLAIMANT

AND

YOUTH ENTERPRISE DEVELOPMENT FUND BOARD RESPONDENT

JUDGMENT

Background

1. The Claimant has instituted the instant action to challenge the Respondent's decision not to renew his contract of service. According to him, the Respondent had acceded to his application to renew the contract. However, it later purported to reject the application. He contends that the Respondent's actions trampled upon his legitimate expectation that the contract would be renewed.
2. On the other hand, the Respondent contends that the Claimant's application for renewal of his contract was legitimately declined. As such, the contract lapsed on account of effluxion of time.

Claimant's Case

3. The Claimant avers that he was engaged by the Ministry for Youth Affairs and Sports to serve in the position of the Respondent's Chief Executive Officer as from 13th December 2007. He avers that the appointment was for a fixed term of three years.
4. The Claimant avers that the letter of appointment entitled him to apply for renewal of the contract. However, he was required to lodge such application in writing at least six months before the existing contract lapsed.
5. The Claimant contends that in line with the foresaid procedure, he applied for renewal of the contract through his letter to the Ministry for Youth Affairs and Sports dated 10th June 2010. He contends that the letter was copied to the Respondent's Board of Directors.



6. The Claimant avers that the Respondent wrote to him on 19th November 2010 purporting to decline his request. He contends that the Respondent had no mandate to reject his request since it was not his appointing authority. According to him, the power to decline his request vested in the Ministry for Youth Affairs and Sports.
7. Despite contesting the Respondent's powers to renew his contract, the Claimant contends that the Respondent considered and approved his request to renew the contract during its 28th Board Meeting that was held on 20th August 2010. As such, he contests the Respondent's contention that the issue concerning renewal of the contract was considered during its 29th Board Meeting that was held on 3rd November 2010.
8. Consequently, he contends that the Respondent's letter of 19th November 2010 purporting to communicate its alleged resolution of 3rd November 2010 to reject his aforesaid request is fictitious and was meant to justify a nonexistent decision. He further contends that the Respondent's manipulative actions violated his legitimate expectation that his contract was going to be renewed.
9. The Claimant contends that on 23rd November 2010, the Head of Public Service wrote to the Respondent sensitizing it on the procedure for reappointment of Chief Executive Officers for State Corporations. However, the Respondent allegedly ignored the advice.
10. The Claimant asserts that during the Respondent's 28th Board Meeting held on 20th August 2010, it approved his request for annual leave. The leave was to run until 27th December 2010.
11. The Claimant further contends that the Secretary to the State Corporations Advisory Committee (the SCAC) wrote to the Respondent on 27th December 2010 regarding his (the Claimant's) accrued leave. However, the Respondent ignored the advice. As such, his leave benefits remain unsettled to date.
12. The Claimant avers that the aforesaid advisory by the SCAC related to his accrued annual leave. He contests the Respondent's contention that it (the advisory) was in relation to his terminal leave. In his view, since the Respondent had granted his request for renewal of his contract during its 28th Board Meeting, the issue of terminal leave could not have been considered by the SCAC. As such, the agency can only have been addressing his annual leave.
13. The Claimant further accuses the Respondent of having attempted to unfairly surcharge him for Ksh. 1,429,900.00 which had been paid as salary to employees who had been reinstated into employment. However, he contends that the decision was reversed by the Inspector General (Corporations) after he (the Claimant) was cleared of any wrongdoing.
14. The Claimant also accuses the Respondent of having published defamatory information against him touching on matters in respect of which he had been cleared by the Ethics and Anti-corruption Commission. He contends that this was meant to tarnish his reputation and standing in society.
15. Consequently, he prays for various reliefs as more specifically set out in the amended Statement of Claim to wit the following: damages for denial of legitimate expectation to renew his contract; damages for wrongful termination of his contract of employment; six months' salary and house allowance in lieu of notice to terminate his contract of service; accrued leave and leave allowance; damages for late payment of gratuity; costs; and interest.



Respondent's Case

16. The Respondent does not admit the claim. It avers that the Claimant was employed as its Chief Executive Officer on a three year contract as from 31st December 2007. It contends that this contract came to a close on 12th December 2010.
17. The Respondent admits that the Claimant applied for renewal of the contract through his letter of 10th June 2010. However, the letter was not addressed to it but to the Minister for Youth Affairs and copied to the Chairman of its Board of Directors.
18. The Respondent contends that upon receiving a copy of the Claimant's letter, it evaluated his request during its 29th Board Meeting that was held on 3rd November 2010 and resolved not to renew the contract. As such, it wrote to him on 19th November 2010 informing him of its decision.
19. The Respondent contends that renewal of the Claimant's contract was not meant to have been automatic. It contends that its Board had the discretion to either accept or decline the request and make the appropriate recommendation to the appointing authority.
20. The Respondent further contends that the Ministry for Youth Affairs and Sports was represented during its (the Respondent's) 29th Board Meeting on 3rd November 2010 when the decision not to renew the Claimant's contract was arrived at. As such, it (the Ministry) tacitly acceded to the decision.
21. The Respondent contends that a decision having been made not to renew the Claimant's contract, the said contract came to a close through effluxion of time at the end of December 2010. As such, the contract was not unlawfully terminated.
22. The Respondent denies that it was motivated by malicious intent not to renew the Claimant's contract. As such, it contests his plea for the various reliefs set out earlier in this judgment.
23. The Respondent contends that the Claimant admitted through correspondence to it that he had forfeited his accrued annual leave following his protracted suspension from employment. As such, he is not entitled to seek this benefit.
24. The Respondent further contends that the Claimant was paid his gratuity. As such, he is not entitled to make a claim in relation to this benefit.

Issues for Determination

25. After evaluating the pleadings and evidence on record, I am of the view that the following are the matters that fall for determination in the cause:-
 - a. Whether the Claimant's request to renew his contract was granted by the Respondent.
 - b. Whether the Respondent's failure to renew the contract between the parties violated the Claimant's legitimate expectation to have the contract renewed.
 - c. Whether the Respondent was in fact and law the appointing authority of the Claimant.
 - d. Whether the Claimant is entitled to the reliefs that he seeks through these proceedings.
 - e. Whether the contract between the parties was unlawfully terminated by the Respondent or expired by effluxion of time.



Analysis

26. I do not propose to address the aforesaid issues in any specific way. As a matter of fact, a majority of them will be considered jointly.
27. The Respondent is a State Corporation established under the [State Corporations Act](#), CAP 446 Laws of Kenya. It was set up through the Youth Enterprise Development Fund Order vide [Legal Notice No. 63 of 2007](#). By virtue of regulation five (5) of the aforesaid Order, the Respondent was granted corporate personality in accordance with section 3 of the [State Corporations Act](#).
28. Under section 5 (3) of the Act, State Corporations have the power to hire their employees including their Chief Executive Officers. However, such appointment can only be considered valid if it is done in accordance with the terms and conditions of service approved by the Cabinet Secretary for the Ministry under which a State Corporation falls. The law requires that the terms and conditions aforesaid must have been developed by the parent Ministry in consultation with the SCAC.
29. However, with the promulgation of [the Constitution](#) 2010, the power to appoint personnel to public office now vests in the Public Service Commission (see article 234 of [the Constitution](#)). As such, it is doubtful that the procedure prescribed under section 5(3) of the [State Corporations Act](#) still holds sway. It would appear that under the new constitutional order if a State Corporation has to appoint its Chief Executive Officer, it will only do so as a delegate of the Public Service Commission.
30. From the evidence on record, the Claimant applied for re-appointment as the Respondent's Chief Executive Officer on 10th June 2010. This was approximately two months before [the Constitution](#) 2010 was promulgated on 27th August 2010. However, the application was considered and declined on 3rd November 2010 after the new Constitution had come into force. As such, it (the application) was considered at a time when the country was undergoing transition from the old to the new constitutional order.
31. Section 7 of the Sixth Schedule to [the Constitution](#) permits the continued use of laws that predate [the Constitution](#). However, such laws ought to be applied subject to alterations and adjustments that permit their congruence with [the Constitution](#).
32. Undoubtedly, the Claimant's application for reappointment as the Respondent's Chief Executive Officer was anchored on his contract and section 5 (3) the [State Corporations Act](#). The application having been tendered and processed during the transition period, the court is required to determine which institutional framework was relevant to the process.
33. It is noteworthy that section 5(3) of the [State Corporations Act](#) requires that the terms and conditions of service for employees of State Corporations should have received the concurrence of SCAC. However and as noted earlier, under the new Constitution, the power to establish and abolish office in public service; appoint personnel to such office; and develop human resource instruments in the public realm now vests in the Public Service Commission. As such, the Claimant's application for reappointment as the Respondent's Chief Executive Officer required the concurrence of the Ministry for Youth Affairs and the Public Service Commission.
34. In effect, the court finds that whilst the Respondent had a role in the reappointment of the Claimant as its Chief Executive Officer, it was not the sole appointing authority. Under the old constitutional order, the process required the involvement of the Respondent, the Ministry for Youth Affairs and Sports and the SCAC. However, under the new constitutional order, the process required the involvement of the Ministry for Youth Affairs and Sports and the Public Service Commission.



35. There is no evidence to suggest that the Public Service Commission and the Ministry for Youth Affairs approved the Claimant's application for renewal of his contract. Without this approval, the application was doomed to fail. Absent concurrence by the parent Ministry and the Public Service Commission that his contract should be renewed, there is no basis upon which the Claimant could have entertained legitimate expectation that the contract would be renewed.
36. The evidence on record shows that the Claimant lodged the application for renewal of his contract on 10th June 2010. The minutes produced by the Respondent suggest that its Board sat on 3rd November 2010 to consider the application when the same was not granted.
37. However, the Claimant contests the Respondent's contention that it considered the application on 3rd November 2010. He contends that the Respondent considered and approved the application during its 28th Board Meeting which was held on 20th August 2010. To support this contention, the Claimant called a former Director of the Respondent who tendered oral evidence to the effect that the application was approved on 20th August 2010.
38. Despite the aforesaid oral testimony, there was no documentary evidence to back the assertion that the Respondent approved the Claimant's application on 20th August 2010. The Claimant did not produce minutes for the meeting that was allegedly held on 20th August 2010 to approve his request. And neither did he produce any correspondence between him and the Respondent to corroborate his contention.
39. The law recognizes that critical documentary evidence which a litigant requires to establish his case may sometimes be in the possession of his adversary in litigation. However, this does not absolve such litigant of the obligation to take steps to avail such evidence to court.
40. Under section 68 of the *Evidence Act*, one is entitled to prove the contents of a document by tendering secondary evidence of the document if, inter alia, the document is shown to be in the custody of his adversary. Secondary evidence of a document includes an oral account of the contents of the document (see section 67 of the Act). However, before the court can permit this mode of proof of a document, the party seeking to adduce such evidence must have issued a notice to produce to the adversary requiring him to produce and show the court the document in question (see section 69 of the Act).
41. It is understandable that the Claimant and his witness may not have had access to the minutes of the Respondent's meeting of 20th August 2010. In the circumstances, they were entitled to tender secondary evidence (including an oral account) on the content of the minutes but only after the Claimant had issued the Respondent with a notice to produce the minutes.
42. There is no evidence to suggest that the Claimant issued a notice to produce the said minutes. As such, he was not entitled to give an oral account of their content. In the premises, the court rejects the oral evidence by the Claimant and his witness on the proceedings at the Respondent's meeting of 20th August 2010, if at all it took place.
43. The evidence on record shows that the Respondent's decision declining the Claimant's request for renewal of his contract was communicated to the latter on 19th November 2010. The letter was copied to the Ministry for Youth Affairs and Sports and other agencies.
44. It is noteworthy that the parent Ministry did not raise objections to the Respondent's decision. As a matter of fact, a representative of the Ministry, one G.K Somba – Kivalya is indicated to have been present at the meeting when the decision was made. As such, it is apparent that the Ministry for Youth Affairs and Sports was in tacit agreement with the decision.



45. The Claimant has contested the authenticity of the Respondent's minutes for the meeting of 3rd November 2010. He, together with his witness, contends that the said minutes are a forgery. However, he did not present cogent evidence to anchor their assertion.
46. On the contrary, the Respondent produced an attendance sheet for the impugned meeting which suggests that the Claimant's witness was in attendance notwithstanding his oral evidence to the contrary. As such, I unable to come to the conclusion that the meeting never happened and that the minutes produced by the Respondent as evidence of meeting are not genuine.
47. The Claimant's witness confirmed during cross examination that his directorship with the Respondent was terminated in a manner that he perceived as unfair and unlawful. Although he (the witness) contended that he had no bitterness against the Respondent following this development, the court cannot rule out the fact that his evidence may have been clouded by what he perceives as his unfair treatment by the Respondent's parent Ministry.
48. Consequently and based on the evidence on record I arrive at the conclusion that deliberations on the Claimant's request were held during the Respondent's Board Meeting on 3rd November 2010. Further, I arrive at the conclusion that the Claimant's request was declined as stated by the Respondent.
49. What was the consequence of the refusal to accede to the Claimant's request? In my view, the failure by the Respondent to recommend the Claimant for reappointment meant that the parties did not enter into a new contract. As such, the employment relation between them lapsed lawfully when Claimant's earlier contract expired by effluxion of time.
50. There is no evidence to suggest that the Respondent made representations to the Claimant which aroused his expectation that his contract would be renewed once it lapsed. The Respondent (and those whose concurrence was required to renew the contract) were entitled to accept or reject the Claimant's application. Whichever decision they made in relation to the application was within their power and therefore lawful.
51. The Claimant and his witness have suggested in evidence that the contract was supposed to have been automatically renewed. However, there is nothing on record to support this contention.
52. According to the renewal clause in the contract, the Claimant was required to apply for the renewal to happen. The fact that an application was required means that the Respondent and the other appointing authorities were entitled to either approve or reject it. As was observed in *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR, to suggest that an employee serving under a fixed term contract is entitled to have the contract automatically renewed is to undermine the very purpose of a fixed term contract of service.

Determination

53. Having regard to the foregoing, I arrive at the conclusion that the Claimant's contract of service lapsed through effluxion of time.
54. I find that the Respondent did not unlawfully terminate the contract.
55. I further find that the Claimant had no reasonable grounds to harbour legitimate expectation that the expiring contract would be renewed once it lapsed.
56. Consequently, I decline to grant the Claimant: damages for alleged denial of legitimate expectation to renew his contract; damages for alleged wrongful and illegal termination of contract; and six months' salary and house allowance in lieu of notice.



57. The Claimant has prayed for accrued leave and leave allowance. However, the amended Statement of Claim does not set out cogent particulars in respect of the claim. For instance, there is no indication in the pleading regarding when the leave accrued and how many days are the subject of the claim. Paucity of these details is replicated in the Claimant's witness statement dated 26th November 2012.
58. During cross examination, the Claimant sought to clarify that the leave claim was in respect of the days he had written to the Respondent confirming that they had been forfeited by him. However, he contended that because the Respondent did not act on his letter, he had revived the claim.
59. The Respondent produced in evidence a letter by the Claimant dated 28th September 2010. In the letter, the Claimant confirmed to the Respondent's chairman that as at 20th August 2010, he was entitled to 30 leave days. He went further to state that the Respondent's Board had approved the leave days during its meeting of 20th August 2010. The Respondent also produced leave application forms by the Claimant, one of which bore 10th September 2010 as the date on which the Claimant's request for 30 days leave was sanctioned.
60. In the same letter, the Claimant confirmed to the Respondent that he was not eligible to claim leave for the period between 13th December 2008 and 1st December 2009 since he had been away on suspension. He further clarified that he had forfeited the leave for the period between 13th December 2007 and 13th December 2008 since the Respondent's Board did not approve carrying forward of the leave days for that period. As such, he clarified that he was only entitled to 30 leave days which accrued in 2010.
61. By his own hand, the Claimant abandoned the claim for leave for the years 2007-2008 and 2008-2009. It is therefore surprising that he would now turn around to claim that which he had assured the Respondent that he had forfeited. The court cannot award that which had hitherto been abandoned.
62. But even if I had not rejected the claim for the above reason, I would still have rejected it for want of particulars and proof. As indicated earlier, the Claim was not adequately pleaded or proved. As such, it would still have collapsed on that ground.
63. The Claimant has lodged claim for damages for late payment of his gratuity. He does not deny that his gratuity was paid after he completed his term. As a matter of fact, he confirmed during oral testimony that his gratuity was paid. His complaint is that the gratuity was paid two years after his contract had terminated. As such, he should be compensated for the delayed payment.
64. Clause 14 of the contract between the parties provided for payment of gratuity to the Claimant once he successfully served the term of the contract. However, there was no provision for a penalty for late payment of the benefit. Having regard to this, I see no basis for the Claimant's plea for damages for the late payment of the benefit. As such, the request is declined.
65. Consequently, the entire of the Claimant's suit against the Respondent fails.
66. I award the Respondent costs of the case.

Summary of the Award

67. The Claimant's contract of service lapsed through effluxion of time.
68. The Respondent did not unlawfully terminate the Claimant's contract of service.
69. The Claimant did not have reasonable grounds to legitimately expect that his expiring contract would be renewed.
70. The Claimant is not entitled to the reliefs that he seeks through this action.



71. As such, the Claimant's case against the Respondent is dismissed.

72. The Respondent is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 24TH DAY OF OCTOBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th 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

