



**Biwott v Eldoret Water and Sanitation Service & another (Cause E060 of 2024) [2024] KEELRC 2827 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2827 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**  
**CAUSE E060 OF 2024**  
**MA ONYANGO, J**  
**NOVEMBER 14, 2024**

**BETWEEN**

**PETER K BIWOTT ..... CLAIMANT**

**AND**

**ELDORET WATER AND SANITATION SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**DAVID SING'OEI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 31<sup>st</sup> July 2024 brought by the Claimant under the provisions of Articles 50, 41 and 47 of *the Constitution*, section 3 of the *National Youth Council Act* (sic), sections 12 and 20 of the Employment and Labour Court Act, Rules 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016. It seeks orders that:
  - i. Spent
  - ii. That pending the hearing and determination of the claim, the court be pleased to issue and hereby issues an order suspending the implementation of the 2<sup>nd</sup> Respondent's letter dated 17<sup>th</sup> July 2024 and which was addressed to the Claimant herein and referenced ELDOWAS/ADM/8/AE/VOL.XIX.
  - iii. This Honourable court be and is hereby pleased to issue Temporary Injunction orders staying the advertised recruitment exercise for the position of Managing Director of ELDOWAS as stated in the press advertisement on Daily Nation Newspaper on 19<sup>th</sup> July 2024 pending the hearing and full determination of the underlying suit herein.
  - iv. That upon order 3 being granted and pending the hearing and determination of the claim, an order of injunction do issue that the Applicant continues to hold the position of the Managing Director of the 1<sup>st</sup> Respondent (ELDORET WATER AND SANITATION SERVICE).



- v. That pending the hearing and determination of the claim, the court be pleased to grant an order of injunction prohibiting or restraining the Respondents, their servants, officials, representatives and or agents from advertising or having so advertised from acting thereupon, interviewing, recruiting, filling or otherwise in any manner replacing the Claimant in his position as the Managing Director of the ELDORET WATER AND SANITATION SERVICE.
  - vi. That pending the hearing and determination of the claim, the court issues interim order of injunction restraining the Respondent from appointing to the office of the Managing Director of the ELDORET WATER AND SANITATION SERVICE, any person to replace the Applicant, whether temporarily, permanently or in an acting position.
  - vii. The court be and is hereby pleased to issue a temporary injunction against the Respondents, their agents, servants and anybody claiming through them from harassing, intimidating, threatening, investigating, dismissing, interdicting, discussing, passing a decision and in any other way interfering with the Applicant's/Claimant's employment until hearing and determination of this application and suit.
  - viii. The costs of this application be awarded to the Applicant
  - ix. Any further order that this Honourable court may deem fit to grant
2. The grounds upon which the application is made as contained on the face of the application are that the Claimant is employed was the Managing Director of the 1<sup>st</sup> Respondent vide a Contract of Employment dated 3<sup>rd</sup> October 2021 for a period of three years with effect from 18<sup>th</sup> October 2021 to 17<sup>th</sup> October 2024; that on 16<sup>th</sup> April 2024 the Managing Director addressed a letter to the 2<sup>nd</sup> Respondent expressing his application for renewal of the contract pursuant to Clause 12 of the Contract of employment; that on 15<sup>th</sup> July 2024, the 2<sup>nd</sup> Respondent issued a notice to convene a special full board meeting of the Board of Directors to be held on 17<sup>th</sup> July 2024; that the Claimant was threatened and intimidated by an angry mob of employees of the 1<sup>st</sup> Respondent on 15<sup>th</sup> July 2024 after the board of directors meeting who heckled at him; that vide a letter dated 16<sup>th</sup> July 2024, the Claimant informed the 2<sup>nd</sup> Respondent that he was apprehensive that there would be more organised violence orchestrated against him during his evaluation thus requested the 1<sup>st</sup> Respondent to postpone the evaluation meeting to a later date which would guarantee him a fair chance to present his report and be heard without fear of threats, intimidation and violence; that the 1<sup>st</sup> Respondent was also informed that the Applicant's doctor advised him to take a bedrest from 15<sup>th</sup> July 2024 to 24<sup>th</sup> July, 2024; that the special meeting of the Board of Directors of the 1<sup>st</sup> Respondent held on 17<sup>th</sup> July 2024 where an angry mob of employees were gathered in tents and public address system set up awaiting the 2<sup>nd</sup> Respondent's announcement of the results of their meeting where it was resolved that the Applicant's application for renewal was declined and he was sent on terminal leave; that on 19<sup>th</sup> July 2024, the 2<sup>nd</sup> Respondent by an advertisement in leading local dailies invited applications from interested persons to fill the said vacancy of the Managing Director.
  3. The Claimant avers that if the recruitment process is allowed to go on, his prayer for reinstatement shall be rendered nugatory.
  4. It is also the Claimant's case that the proceedings of the 1<sup>st</sup> Respondent on 17<sup>th</sup> July 2024 were irregular and intended to unlawfully and irregularly dismiss the Claimant from employment with the 1<sup>st</sup> Respondent which decision, according to the Claimant, is unlawful under Article 50(2)(a) of *the Constitution*, which provides for fair hearing.



5. The application is opposed. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit Sworn on 4<sup>th</sup> September 2024 by the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent's Chairperson. He contends that it was a term of the employment contract that the Claimant shall be answerable to the Eldoret Water and Sanitation Company Board and further, that the Claimant/ Applicant's contract with the 1st Respondent was renewable by mutual consent of both parties and upon the Claimant meeting some conditions as set out on the very contract of employment. Among the conditions set out in the Contract of employment was the requirement for the Claimant to submit an application for extension of the contract to the Board six months before the expiry of his contract.
6. It is further deposed that since the Claimant was employed on 3<sup>rd</sup> October 2021 and his contract was to run until 3<sup>rd</sup> October 2024, he ought to have submitted his application for extension of his contract for consideration by the ELDOWAS Board by 3<sup>rd</sup> April 2024 but he inordinately delayed in submitting his application for renewal as he submitted the same on 24<sup>th</sup> June 2024, which was long after the deadline had lapsed without giving any reasons for such delay.
7. It is averred that the Claimant's employment contract provided that the renewal of the contract was to be by mutual consent and as such there was no guarantee from the beginning that the Claimant's contract would automatically be renewed upon its expiry.
8. According to the Respondents, the Board issued a notice to the Claimant on 5<sup>th</sup> July 2024 informing him of the special board meeting to be held on 10<sup>th</sup> July 2024 whose agenda was to consider his application for renewal/extension of contract subject to the Board's evaluation of the Claimant's performance and as such the Claimant was required to prepare and submit a self-evaluation report to the Board on 10<sup>th</sup> July 2024. Further, that the Claimant was granted more than three months from the date he applied for renewal of his contract to the date of the Board's evaluation meeting scheduled for 10<sup>th</sup> July 2024 to enable him prepare the reports and other necessary documents for the evaluation. It is therefore the Respondents' case that the Claimant cannot now feign ignorance of procedure when he has served as the Chief Executive Officer of the 1<sup>st</sup> Respondent for 3 years.
9. In denying the allegation made by the Claimant that he was not accorded reasonable time to prepare and submit the self-evaluation report, the Respondents have contended that upon the Claimant being issued with the notice to appear before the Board on 10<sup>th</sup> July 2024, the Claimant requested for an extension of time to prepare and submit the self-evaluation report and other sectoral reports which request was granted and the meeting was postponed to 15<sup>th</sup> July 2024 and later to 17<sup>th</sup> July 2024. It is therefore the Respondents' case that despite the 1<sup>st</sup> Respondent according the Claimant sufficient time to comply with the ELDOWAS Board's directives, the Claimant failed to submit the reports as directed and further refused to appear for the meeting held on 17<sup>th</sup> July 2024, which meeting was specifically to consider his application for renewal of his contract of employment.
10. In citing Article 10 of *the Constitution* of Kenya which provides for the national values and principles of governance, the Respondents aver that since the 1<sup>st</sup> Respondent is a state corporation, the actions, decisions and performance of its officers must be scrutinized under the lenses of Article 10 of *the Constitution* and the Claimant as the Managing Director was duty bound to account for his tenure by way of the self-evaluation reports as was required by the ELDOWAS Board which he failed to do.
11. Regarding the Claimant's claim that he was threatened and intimidated by an angry mob of employees on 15<sup>th</sup> July 2024, the Respondent denied that the incident happened and averred that the 1<sup>st</sup> Respondent's senior staff members were present on the material day and as such it was not possible for the 1st Respondent's employees to stage such threats, insults and intimidation against a chief officer such as the Claimant.



12. It is therefore the Respondents' position that the Board resolved that the Claimant's contract of employment would not be renewed based on his performance during his tenure as the Managing Director of Eldoret Water and Sanitation Company which decision was also informed by strong reasons that rendered renewal of his contract untenable. This according to the Respondents, was communicated to the Claimant vide a letter dated 17<sup>th</sup> July 2017, with the reasons why the Claimant's contract would not be renewed.
13. The Respondents aver that the 1<sup>st</sup> Respondent and the Board of Directors fully complied with the provisions of the Claimant's employment contract, the Mwongozo guidelines for public servants and the Corporate Guidelines for the Water Services Sector.
14. The Respondents have also contended that the prayers sought in the instant application are untenable as they seek to essentially create a vacuum in the administration of the 1<sup>st</sup> Respondent which would inevitably hamper service delivery to the people of Uasin Gishu County and other service areas. It is therefore the Respondent's case that it is in the public interest that the process of advertisement and recruitment of a new Managing Director for the 1<sup>st</sup> Respondent continues.
15. The application was canvassed through written submissions. The Claimant filed two sets of submissions, one dated 25<sup>th</sup> September 2024 and supplementary submissions dated 15<sup>th</sup> October 2024. The Respondents' submissions are dated 7<sup>th</sup> October 2024.
16. In his submissions, the Claimant avers that he was not accorded an adequate opportunity to prepare his self evaluation, present arguments and evidence and to challenge or respond to the opposing evidence. The Claimant avers that he was not aware that there were charges of disciplinary nature against him and that all he knew was that he was to be appraised in his performance for the years 2021/2022, 2022/2023 and 2023/2024 based on his yearly performance contracting. According to the Claimant, the letter dated 17<sup>th</sup> July 2024 indicated that the Board considered various issues unrelated to an appraisal and found him guilty of all of them.
17. In submitting that the Respondents breached the constitution and the statutory provisions, the Claimant avers that he was not accorded a fair hearing as required by Article 41, 47 and 50 of the Constitution and also, that Clause 1.4 of the Mwongozo Code of Governance for State Corporations enjoins the 2<sup>nd</sup> Respondent to give proper guidance to the corporate body, to monitor the performance of the CEO and lead in the evaluation of their performance. That in the instant case, no material was placed before the board which could lead it to evaluate the Claimant as at 17<sup>th</sup> July 2024.
18. On this basis, the Claimant submitted that he is entitled to the injunctive orders he is seeking.
19. In the supplementary affidavit, the Claimant referred the court to the Gazette Notice dated 30<sup>th</sup> August 2024 which was the appointment of the 1<sup>st</sup> Respondent's Board of Directors. According to the Claimant, the decision made by the Board on 17<sup>th</sup> July 2024 is unlawful and not binding on the Claimant since they were appointed on 31<sup>st</sup> July 2024. It is submitted that the said persons had no jurisdiction to entertain an application by the Claimant for renewal of the contract on 17<sup>th</sup> July 2023.
20. On their part, the Respondents' in their submissions reiterated the averments made in the Replying Affidavit dated 4<sup>th</sup> September 2024. The Respondents submit that the Claimant has not established a prima facie case against the Respondents nor does the balance of convenience tilt in his favor.
21. It is further submitted that the instant application has been overtaken by events as the Claimant proceeded on his terminal leave on 17<sup>th</sup> July 2024 and the 1<sup>st</sup> Respondent initiated the process of recruiting a new managing director to take the Claimant's place immediately after his contract expires.



It is therefore submitted that the injunctive orders sought cannot issue against a process that has already been finalized.

### **Determination**

22. I have considered the application and the response thereto. I have further considered the submissions on record. The issue for determination is whether the Claimant is entitled to the orders he is seeking in his application.
23. From an analysis of the prayers sought by the Claimant, the orders sought are conservatory in nature as they intend to stop the Respondents from recruiting a new managing director.
24. The conditions for consideration in applications for injunctions were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the Court expressed itself in the following terms:

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
25. As to what amounts to a prima facie case, in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123, the Court of Appeal held as follows:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
26. The first question for determination is whether the Claimant has demonstrated a prima facie case. As pointed out herein above the Claimant seeks conservatory orders restraining the Respondents from filling the position of Managing Director. His argument is that his employment contract provides for renewal of contract and that he wrote to the 2<sup>nd</sup> Respondent vide a letter dated 16<sup>th</sup> April 2024 expressing his interest to have his contract extended.
27. According to the Claimant, his request was declined without him being accorded a fair hearing.
28. Clause 12 of Claimant’s employment contract provided as follows:
  12. Renewal
    - 12.1 After expiry of the contract, renewal shall be by mutual
    - 12.2 Six months’ notice prior to expiry time be issued by either party.
29. Vide a letter dated 16<sup>th</sup> April 2024 referenced “Application for Renewal of Employment Contract for final second term”, the Claimant wrote to the Chairman of the 1<sup>st</sup> Respondent’s Board of Directors seeking for extension of his contract where upon receipt, the Respondent’s chairman, on the 5<sup>th</sup> July 2024 in a letter referenced “Notice to convene special board meeting” notified the Claimant to convene a special meeting on 10<sup>th</sup> July 2024 with agenda 3 being “To receive and consider an application by the Managing Director for renewal of his contract” and to prepare and submit self-evaluation report to



the Board. It is this meeting that was postponed to 17<sup>th</sup> July 2024 at which a resolution was made not to renew the Claimant's contract.

30. The general rule is that a fixed term contract carries no expectation for renewal. The Claimant's employment contract dated 4<sup>th</sup> October 2021 which set out the terms and conditions of service provided for a definite duration.
31. This court in the case of *Stephen M. Kitheka v Kevita International Limited* [2018] eKLR observed:

“It is my finding that the claimant having worked for only one term of a three months' contract did not have any legitimate expectation for renewal, and as admitted by him, did not ask for renewal.”
32. Similarly, in the case of *Trocaire v Catherine Wambui Karuno* (2018) eKLR the Court held that upon the lapse of a fixed term contract an employer is under no obligation to justify termination on other grounds beyond the lapse of the fixed term contract.
33. Having found that the Claimant's contract of employment lapsed by effluxion of time, the Claimant cannot be heard to say that he has a prima facie case on the renewal of the contract.
34. On irreparable harm, the Claimant's contract has expired. An order of the court cannot extend his contract. He cannot therefore argue that he would suffer irreparable loss. Secondly, should the court find that the Respondents acted wrongly, the Claimant can be assuaged by compensation or award of damages which he has prayed for in the Claim.
35. On the last principle of balance of convenience, it is my view that the same tilts in favour of the 1<sup>st</sup> Respondent which stands to suffer more by having a vacuum in the office of the managing director should the orders sought by the Claimant be granted.
36. For these reasons, the application dated 31<sup>st</sup> July, 2024 is without merit and is dismissed. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024**

**MAUREEN ONYANGO**

**JUDGE**

