



**Ochieng v Kenya Accreditation Service (Employment and Labour Relations  
Petition E118 of 2024) [2024] KEELRC 13343 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13343 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E118 OF 2024  
AN MWAURE, J  
DECEMBER 3, 2024**

**BETWEEN**

**DAVID OUMA OCHIENG ..... PETITIONER**

**AND**

**KENYA ACCREDITATION SERVICE ..... RESPONDENT**

**RULING**

1. The Petitioner/Applicant filed a Notice of Motion dated 30<sup>th</sup> July 2024 under Certificate of Urgency seeking orders that:
  1. Spent
  2. Pending the hearing and determination of this Application interpartes, the Honourable Court be pleased to issue and hereby issues an order suspending the implementation of the letters dated 19<sup>th</sup> February 2024 and 2<sup>nd</sup> July 2024 by the Respondent herein
  3. Pending the hearing and determination of this Application Interpartes this court be pleased to issue an interim order prohibiting the Respondent from interfering with the Applicant's terms of service of employment as contained in the contract dated 6<sup>th</sup> July 2020.
  4. The costs of this application be provided for.

**Respondent's replying affidavit**

2. In opposition to the application dated 30<sup>th</sup> July 2024, the Respondent filed a replying affidavit dated 7<sup>th</sup> August 2024.
3. The Respondent, a State Corporation under the Ministry of Investments, Trade and Industry, established under the *Kenya Accreditation Service Act* (No. 17 of 2019), avers that its employees are governed by the *Public Service Commission Act* No.10 of 2017, the *Public Service (Values and Principles)*



Act No. 1A of 2015, the Employment Act, 2007 and Kenya Accreditation Service (KENAS) Human Resource Policy and Procedures Manual dated July 2019.

4. The Respondent avers that the retirement notice issued on 9<sup>th</sup> February 2024, and the subsequent direction for the Petitioner/Applicant to proceed on terminal leave followed due process as per relevant laws and their Human Resource Policy and Procedures Manual dated July 2019.
5. The Respondent avers that the Applicant misunderstood the terms of his contract dated 6<sup>th</sup> July 2020 together with Public Service Commission Act No.10 of 2017, the Public Service (Values and Principles) Act No. 1A of 2015, The Employment Act of 2007 and the Kenya Accreditation Service (KENAS) Human Resource Policy and Procedures Manual dated July 2019.
6. The Respondent avers that the Petitioner/Applicant's request for injunctive relief contravened the above-mentioned laws and did not satisfy the grounds for such relief.
7. The Respondent avers that the Petitioner/Applicant failed to demonstrate how he would suffer irreparable damage if the injunctive orders were not granted, and that any inconvenience to the Petitioner/Applicant could be compensated monetarily upon the conclusion of the main suit.
8. Furthermore, the Respondent avers that there could be potential operational and budgetary constraints if the court granted the orders sought.
9. The Respondent avers that the court should not issue orders that would cause unnecessary hardship or be in vain, as the Petitioner/Applicant is considered a retiree as he has attained the age of 60 years.
10. The Respondent avers that it denies any high-handed or oppressive handling of the matter and requested this Honourable court to dismiss the Notice of Motion Application dated 30<sup>th</sup> July 2024 with costs.

#### **Petitioner/Applicant's submissions**

11. The Petitioner/Applicant cited the case of *Giella V Cassman Brown* (1973) E.A 358 where the Court set out the principles for an order of injunction to be granted which includes:
  - i. The Applicant must establish that he has a prima facie case with a high chance of success;
  - ii. That the Applicant would suffer irreparable loss that cannot be compensated by an award of damages;
  - iii. If the court is in doubt, it will decide on a balance of convenience.
12. In *Moses C. Muhia Njoroge & 2 Others V Jane W. Lesaloi and Others* [2014] eKLR, the court while making a determination on the issue of a prima facie case with a probability of success cited the Court of Appeal decision in the case of *Mrao Ltd V First American Bank of Kenya and 2 Others* [2003] KLR 125 where the Court of Appeal held that:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
13. The Petitioner/Applicant submitted that his terms of service are not subject to any retirement rules or conditions because his terms were converted from permanent and pensionable to contract basis. According to Section 2.5.4 of the Respondent's Human Resource Policy and Procedure Manual



- (2019), officers at Grade KENAS 3, where he is currently employed, are on a five-year renewable contract based on performance, which is valid until 30<sup>th</sup> June 2025.
14. The Petitioner/Applicant submitted that the Respondent's notice of retirement is contrary to the terms of his valid and binding employment contract, making it illegal and void. Additionally, the Respondent violated section 80(2) of the *Public Service Commission Act*, which allows public officers who have reached the mandatory retirement age to serve on fixed-term contracts.
  15. The Petitioner/Applicant submitted that the Respondent was aware of the Applicant's age when issuing the fixed-term contract, thus making the contract terms binding on both parties.
  16. The Petitioner/Applicant submitted that the term "irreparable injury" refers to an injury that is substantial and cannot be adequately remedied or compensated by damages. It does not imply that the injury cannot possibly be repaired. Even if the Applicant has a right to recover damages, this does not prevent the court from granting an injunction if the Applicant's rights and the same cannot be adequately protected or vindicated through damages alone.
  17. The Petitioner/Applicant submitted that he stands to lose his job due to an illegal action by the Respondent, carried out in bad faith without following proper legal procedures or complying with the *Employment Act* and Constitution which he described this action as arbitrary and unlawful.
  18. The Petitioner/Applicant cited the case of *Muslims for Human Rights (Muhuri) and 2 others V Attorney General and 2 others Mombasa* Petition No. 7 of 2011 [2011] eKLR. Justice Ibrahim observed that Article 23(3)(c) of *the Constitution* grants the court the discretion to issue a Conservatory Order. This discretion must be exercised judiciously, considering all facts and circumstances, and not capriciously. The court must act with caution, care, reasonableness, flexibility, and fairness to enhance and enforce fundamental rights and freedoms for individuals and the public. To grant a Conservatory Order, the Applicant's claim must be prima facie arguable. An arguable case does not mean it is merely debatable but that it raises serious, fundamental, or substantial issues that deserve a reasonable and fair chance to be heard and articulated in a court of law.
  19. In *Olympics Sports House Limited V School Centre Limited* [2012] eKLR the court held damages are not an automatic remedy when deciding whether to grant an injunction. Damages cannot substitute for the loss caused by a clear breach of the law. The financial strength of a party is not always a reason to refuse an injunction. Additionally, a party cannot be forced to accept damages instead of their established right, which can be protected by an injunction order.
  20. The Petitioner/Applicant submitted that the court can intervene in response to the issuance of an unlawful retirement notice and failing to do so would permit the Respondent to act contrary to *the Constitution*, specifically Article 41, as well as section 80(2) of the *Employment Act*, section 2.5.4 of the *Public Service Commission Act*, and section 2.5.4 of the Respondent's Human Resource Policy and Procedure Manual (2019). The Petitioner/Applicant emphasized that such intervention by the court would not be considered an infringement on the employer's managerial prerogative.
  21. In *Muslims for Human Rights (Muhuri) and 2 others V Attorney General and 2 others*(supra) Justice Ibrahim observed it is reasonable to state that in certain Constitutional interlocutory applications seeking Conservatory Orders, the court may consider the balance of convenience between the Applicant/Claimant and the Respondent. This is especially true where national and/or public interest is involved.
  22. The Petitioner/Applicant submitted that he has demonstrated the existence of exceptional circumstances warranting the grant of orders as prayed citing the case of *Jane Achieng & another V University of Nairobi* [2015] eKLR the court stated that when adjudicating disputes between



employers and employees, the Employment and Labour Relations Court should respect the employer's decisions if they comply with the law and internal policies. However, if the employer's actions fail to meet legal and policy standards, the Court must intervene.

23. In Gregory Otieno Owouth V Mumia Sugar Co. Limited [2016] eKLR the court held that the Respondent cannot indefinitely suspend an employee contrary to its regulations. If the Respondent was not prepared to complete the process within the 21-day period, it should have conducted and concluded investigations before suspending the Claimant. Even though suspension is not a formal punishment, it leaves the employee uncertain about their fate, affecting their self-esteem and right to work. Disciplinary actions should be completed as quickly as possible to avoid becoming punitive.
24. The Petitioner/Applicant submitted that he is on contract whose terms cannot be re-converted to permanent and pensionable and thus should be allowed to serve his contract to its end. In Moses C. Muhia Njoroge & 2 Others V Jane W. Lesaloi and Others (supra), the court stated that granting of a mandatory injunction as an interlocutory relief is a very exceptional form of relief to grant but it can be granted (See Canadian Pacific Railway Vs Rand (1949) 2KB 239 at 249. In Locabail International Finance Ltd Vs Afro-Export (1988) ALL ER 901, where the Court held that the principle governing the grant of Mandatory Injunction are as follows: -

“A Mandatory Injunction can be granted on an Interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff mandatory Injunction will be granted on an interlocutory application”.

### **Respondent's submissions**

25. The Petitioner/Applicant submitted that the application does not meet the requirements to obtain injunctive relief as set in the case of Giella V Cassman Brown (supra).
26. The Petitioner/Applicant submitted that the KENAS Human Resource Policy and Procedure Manual 2019 provides that the Petitioner/Applicant is subject to mandatory retirement age, especially in reading clauses 2.5.5 and 13.7.1 of the manual states that officers on contract terms are subject to mandatory retirement age of public servants.
27. In Mrao V First American Bank of Kenya Limited & 2 others [2003] eKLR the court stated that:

“it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”
28. The Respondent submitted that the application failed to demonstrate any infringement of any right whether contractual or constitutional, and does not present an arguable case.
29. The Respondent submitted that the Petitioner/Applicant has not proven that it acted high-handedly or breached any rights. Furthermore, the Petitioner/Applicant has not demonstrated that he would suffer irreparable harm that cannot be compensated by damages if he succeeds in the main suit should the court dismiss the application.
30. The Respondent submitted that if the Petitioner/Applicant is successful in the main suit, the loss suffered can be adequately remedied through monetary compensation.



31. The Respondent further submitted allowing the Petitioner/Applicant to continue working beyond the mandatory retirement age would disrupt the Respondent's operations, create uncertainty in human resource management, and strain their budget.

### **Analysis and determination**

32. The main issue for determination herein is whether the application is merited.
33. For this Honourable Court to grant injunctive orders, it has to consider the three principles as set out in *Giella V Cassman Brown* (supra).
34. Upon the perusal of the application, the Petitioner/Applicant is seeking the orders preventing the implementation of the letters dated 19<sup>th</sup> February 2024 and 2<sup>nd</sup> July 2024. The Petitioner/Applicant is also seeking interim orders prohibiting the Respondent from interfering with his terms of service of employment contained in the contract dated 6<sup>th</sup> July 2020.
35. In *Nguruman Limited V Jan Bonde Nielsen, Herman Philipus Steyn Also Known as Hermannus Phillipus Steyn & Hedda Steyn* [2014] KECA 606 (KLR) the Court of Appeal stated as follows:
- “We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The standard of proof of that prima facie case is on a balance of or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed”
36. In the instant case the Petitioner was employed on permanent and pensionable terms effective from 27<sup>th</sup> July 2017. The appointment was confirmed on 23<sup>rd</sup> July 2018.
37. The respondent then offered the petitioner a further fixed contract which converted the terms from permanent and pensionable to fixed contract of five (5) years from 6<sup>th</sup> July 2020. He was not to be on pension but on gratuity and his term was to run until 31<sup>st</sup> June 2025 subject to renewal.
38. At the time he was placed on a fixed contract the Respondent obviously had his records and must have known the Petitioner's retirement age. Yet he offered him a fixed term contract beyond his retirement age. It would be unfair to then in the middle of that fixed term terminate him on the guise that he had reached the age of retirement.
39. The respondent is relying on their Human Resource Policy Manual which provide the retirement age at 60 years. And yet Section 80(2) of the *Public Service Commission Act* also provide that an employee who has reached the retirement age can still be offered extra term on contractual basis depending on the special skills resident on such an employee.
40. It is settled jurisprudence that a fixed term contract only terminates not by notice but by effluxion of time.

In the case of *Anne Wangari Maina -vs- Kirinyaga Water Sanitation Cause No. 851 Of 2023* the court found that a claimant voluntarily extinguished a permanent and pensionable contract between her and the Respondent when she entered into a fixed term contract of service dated 2<sup>nd</sup> August 2018.



This is the same scenario that took place in this case but now the employment transitioned to fixed term contract.

41. In the case of Transnet T/a Transnet Freight Rail Versus National Union Of Metalworks Of South Africa Obo Manku & Another (2020) 30 LAC 1:11:47 the court held –

“The case reviewed above serves as a warning to employers to ensure that there is always a justifiable reason to enter into a fixed term agreement before concluding this form of a contract and that during employment relationship, employers act in an appropriate manner so that they do not create any unreasonable expectation of permanent employment or renewals.

42. In this case the Respondent granted a fixed term contract to the Petitioner and there was no reference to retirement. The contract was therefore expected to terminate by effluxion of time.

There is therefore no justifiable reason to terminate the Petitioner due to attaining his retirement age before the expiry of the fixed term contract.

43. The court has considered the pleadings and the submissions and precedents and is persuaded the Petitioner has established a prima facie case to justify granting of the prayers as per the Petitioner’s Notice of motion application dated 30<sup>th</sup> July 2024.

The prayers sought are therefore granted and the court order each party to meet their respective costs of the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

