



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nang'ole v Nairobi City Water & Sewerage Company (Petition  
E138 of 2022) [2023] KEELRC 359 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 359 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E138 OF 2022  
JK GAKERI, J  
FEBRUARY 15, 2023**

**BETWEEN**

**MARTIN NANG'OLE ..... PETITIONER**

**AND**

**NAIROBI CITY WATER & SEWERAGE COMPANY ..... RESPONDENT**

**RULING**

1. Before the court for determination a Notice of Motion dated 29<sup>th</sup> July, 2022 by the Petitioner/Applicant filed under Certificate of Urgency.
2. The Applicant seeks Orders That;
  1. Spent
  2. Spent
  3. The Honourable Court be pleased to issue an order in favour of the Applicant restraining the Respondent from enforcing its unilateral and unfair decision contained in Internal Memo Ref: NCWSC/HRD/VOL.1/953/MNT/vn and dated 8<sup>th</sup> June, 2022 varying the Applicant's terms of engagement to his detriment pending the hearing and determination of this Petition.
  4. The costs of this Application be provided for.
3. The Application is expressed under Articles 41 and 47 of *the Constitution* and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and enabling provisions of law, is based on the grounds set out on its face and the Affidavit of the Petitioner dated 29<sup>th</sup> July, 2022.



4. The affiant states that he responded to a newspaper advertisement dated 22<sup>nd</sup> February, 2012 which stated that the position he applied for was for a 3 year term and renewal based on performance and as a consequence left permanent and pensionable employment at Ketepa following an interview.
5. That he was offered and accepted the position of Director ICT for a period of 3 years as per the revised Human Resource Manual, 2009 and reported on 20<sup>th</sup> August, 2012 and served a probationary period of 6 months.
6. The affiant further states that he was taken through the Human Resource Manual and policies of the company.
7. That on 13<sup>th</sup> February, 2013, he was offered employment under a 5-year renewable contract based on performance and applied for renewal on 11<sup>th</sup> May 2017, was appraised and recommended renewal.
8. The affiant states that on 23<sup>rd</sup> June, 2017, he was summoned to the Respondent's Managing Director's Office who communicated the renewal and gave the affiant the renewal letter which indicated that it would be his final term to which the affiant objected in writing but got no feedback.
9. It is the affiant's case that the Human Resource Manual, 2019 had no term limit.
10. That by an email dated 8<sup>th</sup> June, 2020, the Director Human Resource Administration (DHRA) informed the Applicant that Board of Directors had at its meeting on 5<sup>th</sup> December, 2020 reviewed the terms of engagement for the Managing Director and Functional Directors to 5 year contracts and for a period not exceeding two terms.
11. That the effective date of the new terms of employment was 8<sup>th</sup> June, 2020 and would thus serve up to 8<sup>th</sup> June, 2030.
12. That Managers, Co-ordinators and Officers would be employed on 5 year contracts renewable on the basis of performance.
13. The Petitioner avers that introduction of new term limits was unlawful, punitive and unfair to Directors.
14. The affiant together with his colleagues had raised the issue of discrimination with the Managing Director on 29<sup>th</sup> November, 2021 which he denied.
15. That his extraneous allowance was withheld for 28 months while others were paid despite board approval.
16. The affiant states that on 5<sup>th</sup> May, 2022, he received a 3 month notice of expiry of his contract of employment and directed to proceed on leave and the last working day was 20<sup>th</sup> August, 2022.
17. The affiant states that his contract was yet to expire for renewal and had lost hope of such renewal.
18. That owing to the Respondent's conduct, he has suffered anxiety, unrest, stress, mental torture apprehension and instability.
19. That unless the internal memo dated 8<sup>th</sup> June, 2020 was stayed, suspended and/or stopped, he would suffer prejudice and irreparable loss.
20. The affiant prays that the Respondent be compelled to renew the Applicant's contract for 5 years according to the letter dated 8<sup>th</sup> June, 2020.



21. The affiant avers that his appraisals have been exceptionally impressive and rated good by the Managing Director.
22. Finally, the affiant prays for the reliefs sought.

### **Respondent's case**

23. In the Replying Affidavit, Monica Tuli, deposes that the Petitioner was employed by the Respondent as Director, Information Communication Technology on 20<sup>th</sup> August, 2012 for a three year renewable contract and on 13<sup>th</sup> February, 2013, he signed a contract for a period of 5 years effective 1<sup>st</sup> July, 2012.
24. Clause 12 of the agreement provided that the same was renewable for a further period of 5 years as provided by the Respondent's Human Resource Policies and Procedures Manual reviewed and approved by the Board on 18<sup>th</sup> December, 2012 which was a departure from the previous formulation.
25. That the Petitioner sought renewal of contract in May 2017 and the board approved the same on 20<sup>th</sup> June, 2017 and the decision was communicated to the Petitioner and the renewal letter was clear that the renewal was for a final term of 5 years as per the Human Resource Manual approved by the Board in December 2012.
26. The affiant states that the review of the Human Resource Policies and Procedures was done by the Board of Management comprising the Managing Director, Engineer Philip Gichuki, Functional Directors, Finance J. Randu, Human Resource and Admin, Ms. Rosemary Kijana, Commercial, Engineer Stephen Mbugua Chege, ICT, Martin Nangole (Petitioner), Internal Audit Risk & Compliance Griffine Sangole, Head of Legal Services & Company Secretary Ms, Ivy Nyarango and Ag. Technical Director, Engineer Nahashon Muguna.
27. That a collective letter to the Managing Director (MD) dated 19<sup>th</sup> November, 2021 by four directors including the Petitioner raised issues of discriminatory treatment by the Respondent.
28. The affiant deposes that the four directors had full knowledge of the contents of the Human Resource Policies and Procedures having participated in its review and had transitioned from the 3 year to 5 year term contracts as set out in their contracts of employment which they did not object to and the Respondent had notified them that the renewal in 2017 would be a final term and none of them raised the issue until November 2021.
29. That the issue of term limits was not unique to the Respondent in the Public Service particularly those reporting to the Chief Executive Officer, such as Water Services Regulatory Board (WASREB), KETRACO and Geothermal Development Company Ltd.
30. That the Respondent responded to the collective letter to the individual directors.
31. The affiant further states that on 15<sup>th</sup> March 2022, the Respondent received similar but separate letters from the four directors including the Petitioner from Guserwa & Co. Advocates including a statement that before 2012 directors were serving on Permanent and Pensionable terms of employment which was not factual as all management staff were under 3 year contracts then and later 5 years on renewable terms.
32. That arising from a ruling in Petition E161 of 2021, the Public Service Commission (PSC) sent out Circular Ref PSC/LEG/009/21/544(27) dated 10<sup>th</sup> February, 2022 to all Chairpersons of State Corporations, CEO's, Vice-Chancellors of Public Universities and Principals of Constituent Colleges advising them to continue applying the Human Resource Instruments as approved by the Boards and halt those being reviewed until the issue was addressed in a wholistic manner.



33. That the Respondent had complied fully with its Human Resource instruments as advised by the Public Service Commission.

### **Applicant's submissions**

34. The Applicant's counsel identified two issues for determination;

- i. Whether the Petitioner/Applicant has a prima facie case with probability of success.
- ii. Whether the Applicant will suffer irreparable loss.

35. On the first issue, it was submitted that since the orders sought were injunctive, the threshold prescribed in *Giella V Cassman Brown & Co. Ltd* (1973) EA 358 had to be met namely, a prima facie case with a probability of success, irreparable injury or harm incapable of remedy by way of damages and in case of doubt, the court should be guided by balance of convenience.

36. It was urged that prima facie case meant that the material before the court should enable the court properly directing itself to find that a right has been violated and the court had power to suspend the memo dated 8<sup>th</sup> June, 2020 as it had jurisdiction to do so.

37. It was further submitted that the Applicant's contract in 2012 subjected renewal to performance and his performance from July 2018 to June 2021 was exemplary.

38. That the 5 year term employment agreement dated 13<sup>th</sup> February, 2013 has a similar renewal clause.

39. The court was urged to find that the employment contracts executed by the Applicant were renewable based on performance exclusively.

40. Counsel urged that introduction of a two-term limit in 2020 was a negative adjustment of the Applicant's terms of employment contrary to the rules of natural justice.

41. That the Applicant's non-involvement in policy making contravened Article 232 (1) (d) of *the Constitution* of Kenya, 2010.

42. That the Human Resource Manual, 2013 was neither subjected to public participation nor approved by the Public Service Commission pursuant to Article 234 (2) of *the Constitution*.

43. It was submitted that the introduction of two term limit for Directors and the Managing Director was discriminatory and an unfair labour practice.

44. That based on the foregoing, the Applicant had established a prima facie case.

45. As regards irreparable loss, it was submitted that Applicant will be ineligible for renewal of contract notwithstanding exemplary performance.

46. It was urged that the substratum of the petition was the legality of the Respondent's Human Resource Manual, 2013 and the memo dated 8<sup>th</sup> June, 2020.

47. Finally, it was submitted that the balance of convenience was tilted in favour of the Applicant as the Respondent is a public body and its Human Resource Manual was unconstitutional.

48. On 6<sup>th</sup> October, 2022 at the hearing of the Application, counsels agreed that the application be canvassed by way of written submissions and parties were accorded 14 days a piece to file written submissions and mention was slated for 1<sup>st</sup> November, 2022 to confirm compliance on which date



counsel for the Respondent applied for 7 days to file and serve submissions which the court granted and a ruling date set.

49. By 20<sup>th</sup> December, 2022 when the court retired to prepare this ruling, the Respondent had not filed submissions.

### **Determination**

50. The singular issue for determination is whether the Applicant's Notice of Motion dated 29<sup>th</sup> July, 2022 is merited.

51. As correctly submitted by the Applicant's counsel, the reliefs sought are injunctive in nature and the test enunciated in *Giella V Cassman Brown and Co. Ltd (supra)* and restated in *Jan Bonde Nielsen V Nguruman & 2 other (2014) eKLR* as follows;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at prima facie level.
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V Afraha Education Society (2001) 1 EA 86*. If the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the Respondent will suffer, in the event that injunction is not granted will be irreparable. In other words, if damages recovered in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should be granted however strong the applicant's claim may appear at that stage. If a prima facie is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap frogging” by the applicant to injunction already without crossing the other hurdles in between.”

52. The court is guided by these sentiments.

53. As regards prima facie case in *Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003) KLR 125*, the Court of Appeal stated as follows;

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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”



54. This formulation of prima facie was adopted by the Court of Appeal in *Jan Bonde Nielsen V Nguruman & 2 others (supra)*, where the court emphasized that the Applicant had to show “a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained.”
55. The threatened infringement must be material and the need to obviate irreparable harm must be apparent.
56. In the instant case, it is not in dispute that the Applicant joined the Respondent in 2012 on a three (3) year contract and on 13<sup>th</sup> February, 2013, the parties executed another contract for a period of 5 years renewable subject to performance and when he applied for renewal on 5<sup>th</sup> May, 2017, he was issued with letter of renewal which stated that the contract would lapse on 22<sup>nd</sup> August, 2022.
57. More significantly, by an internal memo dated 8<sup>th</sup> June, 2020, the Managing Director of the Respondent informed staff that the Board had by a resolution passed on 5<sup>th</sup> December, 2019, introduced term limits for various categories of staff ostensibly on the basis of Clause 4.3.2 of the Human Resource Manual, 2013.
58. Without deriving into the merits of the case, it is unclear why the Respondent’s Board of Directors did not implement the Human Resource Manual, 2013 in 2013 but opted to do it in 2019 and applied it retrospectively to the detriment of its employees.
59. To the extent that the memo dated 8<sup>th</sup> June, 2020 purported to alter the terms of employment between the parties, the Applicant has in the court’s view demonstrated a threatened infringement of the right to work by the Respondent and thus established a prima facie case.
60. As regards irreparable injury, the Court of Appeal expressed itself as follows in the *Jan Bonde Nielsen V Nguruman & others (Supra)*,
 

“On the second factor, that the Applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury, that injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never be adequate remedy.”
61. As regards irreparable loss, the Applicant narrated how he left a permanent and pensionable job at KETEPA where he was the Head of ICT to join the Respondent under a fixed term contract of 3 years renewable subject to performance.
62. The advertisement dated 22<sup>nd</sup> February, 2012 made no reference to a term limit and perhaps trusting his abilities to performance, the Applicant took up the gauntlet and the evidence on record attests to his abilities.
63. As has been adverted to in many decisions affecting employees, employment in a multifaceted relationship between an employer and an employee and is much more than the terms and conditions of service. To some employees, work is a joyous occasion from which they derive satisfaction and fulfilment, the terms and conditions of service notwithstanding. To others, it is a source of pride while to others, it is divine; all essential in human endeavour.



64. In sum, the court is satisfied that the Applicant could suffer irreparable injury in the circumstances.
65. Having fulfilled the first two essential requirements for the grant of injunctive relief, the court is equally satisfied that the balance of convenience leans in favour of the Applicant.
66. In the upshot, the Notice of Motion dated 29<sup>th</sup> July, 2022 is meritorious and is granted in the following terms;
- a. The Respondent is hereby restrained from enforcing the contents of the Internal Memo Ref: NCWSC/HRD/VOL.1/953/MNT/vn dated 8<sup>th</sup> June, 2020 is so far as it affects the Applicant pending the hearing and determination of the Petition herein.
  - b. Costs shall be in the cause.
- 67 It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF FEBRUARY 2023**

**DR. JACOB GAKERI**

**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 *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.

