



**Chesire v National Aids Control Council (Employment and Labour Relations
Petition E104 of 2022) [2023] KEELRC 665 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 665 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E104 OF 2022**

AN MWAURE, J

MARCH 17, 2023

BETWEEN

DR EMMY CHESIRE PETITIONER

AND

NATIONAL AIDS CONTROL COUNCIL RESPONDENT

JUDGMENT

1. The petitioner filed an amended petition dated September 9, 2022.
2. The prayers therein are as hereunder:-
 - a. The impugned decision of the respondent to terminate the petitioner's contract of employment from service be rescinded.
 - b. The respondent's letter dated March 11, 2022 for premature and wrongful termination of the petitioner's contract of service be declared null and void.
 - c. A declaration that the respondent is bound to the contract dated June 22, 2015 and the petitioners shall remain in the employment of the respondent based on the exiting employment contract until June 21, 2024.
 - d. In the alternative to the prayers above, a declaration that the respondent is bound to pay the petitioner full remuneration and benefits inclusive of yearly salary increments and gratuity as provided for under the contract of employment up to June 22, 2024. D1 a mandatory injunction do issue compelling the respondent to reinstate the petitioner to her employment with full salary, allowance and all other benefits that accrue to the office held by the petitioner.



- e. The petitioner be awarded general damages/compensation for violation of her fundamental rights and freedoms.
 - f. The cost of this petition be borne by the respondent.
 - g. Any other or such further relief that this honourable court may deem fit and just to grant.
3. The petitioner on her verifying affidavit had the following to say:
- a. That she used to work as a Chief Principal Lecturer at Kenya Medical Training College (KMTC) as at June 4, 2012 but National Aids Control council requested KMTC to second her to the respondent and the same was approved for two years.
 - b. She says that upon expiry of the two years her contract kept being renewed up to the year 2021.
 - c. She says that contrary to clause 1(ii) of her contract of employment executed on June 22, 2015 her contract was renewed for one year instead of three years.
 - d. She says she sought clarification for the renewal of her contract for one year and never got a response.
 - e. She says that on January 6, 2021 the respondent wrote to ask if she was willing for her contract to be renewed and she applied for a renewal of her contract on January 12, 2021 but she says on March 11, 2022 she got communication that renewal of her contract had been denied.
 - f. She says she appealed to the board on April 25, 2022 and she got a response on May 18, 2022 that her appeal was unsuccessful.
 - g. She says since she got her one year contract she was not informed of her specific duties and she reckons the respondent wanted to frustrate her so that she resigns.
 - h. She avers that she was terminated at the age of 57 years and had expectation to work till the age of 60 years.
 - i. She says she resigned from KMTC at the influence of the respondent.
 - j. She says her constitutional rights were clearly violated.

Respondent's Replying Affidavit

4. The respondent in his replying affidavit avers as follows:
- a. The respondent avers that at their request the petitioner was seconded to the respondent by KMTC for 2 years and thereafter they offered her three years contracts until 2021.
 - b. She says on August 30, 2017 the respondent notified the petitioner that he need to regularise her secondment which would be 3 years and 3 years renewable and the petitioner did not do so until she expressed her desire to retire in 2021 July.



- c. The respondent in the meantime avers that they got an advisory from the state corporation advisory committee who informed them that the petitioner's contract with KMTC expired on June 22, 2015. Thereafter they renewed the petitioner's contract for one year and same was to expire on June 22, 2022 and the petitioner accepted the same with gratitude by her letter dated August 26, 2021.
- d. The respondent avers that the contract of employment between the petitioner and the respondent conferred the rights on the respondent to alter duties and responsibilities of the petitioner from time to time.
- e. They state that the petitioner continued to work in the varied role and on 11th March the Board communicated to the petitioner that the Board had made a decision not to renew her contract.
- f. She says according to Human Resources Administration Policies and regulations 2009 renewal of employment contract is not guaranteed and is a prerogative of the board. He further says that throughout her employment petitioner was employed by KMTC as evidenced by her resignation letter and State Corporation Advisory Committee advice on her status.
- g. That respondent states that all the petitioners' contracts were distinct in terms of position, duties and responsibilities and all lapsed after petitioner discharged her duties.
- h. He further avers that the courts of law cannot rewrite contracts the by parties.
- i. He also avers that a person cannot escape from a bad bargain unless it is entered through fraud, undue influence or coercion.
- j. He says the petitioner did not demonstrate constructive dismissal either.
- k. He also says that filed contracts carry no expectation of renewal and respondent was under no obligation to renew the same.
- l. That the petitioner's amended application has no basis in law and should be dismissed with costs.

Petitioner's Submissions

5. The petitioner in his submissions says that the petitioner and respondent entered into a contract on June 10, 2015 which was to be subject to renewal from time to time. The petition says her contract was renewed constantly until 2021 when due to the respondent's influence she retired from her mother employer KMTC and the respondent had made it a condition to renew her contract.
6. She says that the renewal of her contract was to be effected every three years and the respondent has not proved otherwise.
7. He submits that the petitioner has demonstrated she has a high chance of success as hers satisfied all the conditions set out in the case of *Board of management of Uhuro Secondary School vs City County Director of Education and 2 Others [2015]eKLR* and *Gatirao Peter Munya vs Dickens Mwenda Kitbinji & 2 Others* where the Supreme Court held that:

' Courts have responsibility to safeguard the resources and interest in relation to active instructions and processes of governance provided the courts have established a perception on the public interest and concept of good governance that runs in tandem with the deployment of the scarce resources drawn from the public.'



She asks the court to grant the conservatory orders.

Respondent's submissions.

8. The respondent submits that the petitioner's contract expired on June 22, 2022 and the averment that the petitioner's contract was renewable for very three years is misleading to the court.
9. He says that the position in law as regard to binding nature of a contract executed willingly by the parties has now followed a well beaten path. They rely on *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & Another 2011 eKLR* where court was categorical that:

' It is clear beyond para adventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.'
10. Also in the case of *Pius Kimatya Langat vs Co-operative Bank of Kenya Ltd 2017 eKLR* court held:

' We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.'
11. The respondent further submit that the petitioner is attempting to get the court to rewrite or change a contract and as such is an abuse of court process.
12. As to the prayer to grant conservatory order the respondent submits that the petitioner has not demonstrated merit of the case and how it is going to impact on the public interest, the constitutional values and the proportional magnitude and priority levels attributable to the relevant cause.
13. Relying on the case of *Centre for Rights Education and Awareness (CREW) & 7 Others* the court stated:

' At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.'
14. The respondent urges the court to dismiss the application as the petitioner has not demonstrated a prima facie case.

Determination.

15. The court identifies the issues for determination as to whether the petitioner was terminated unlawfully or whether her contract expired by effluxion of time.
16. The petitioner was employed on fixed contract terms from 2012 but in particular relies on contract of employment and the letter of June 2015 which had a rider that renewal would be available subject to satisfactory performance and approval of the council. She first joined the respondent in 2012 for a two years contract at the secondment of the Kenya Medical Training College.
17. The said contract of appointment of June 2015 provided that the claimant could be terminated by the respondent or she could also give a 3 months' notice or pay one month salary in lieu of the notice. The claimant accepted the contract and signed her acceptance letter.



18. Thereafter her contract was renewed from June 2018 for another three years which lapsed in June 2021. The contract thereafter was renewed for one year from June 2021.
19. She says that the respondent breached the terms of her contract as per the June 22, 2015 executed by herself and in particular paragraph 1(ii) which stated:-
- ' At least 6 months before the end of three (3) years contract period you shall give notice to terminate or renew the contract. The decision whether or not to renew the contract will be made by the council. The council will communicate the decision of acceptance or rejection of such intent three (3) months before the end of the contract.'
- 20 Her position then was Deputy Director Coordination & Support NACC '2'.
20. The last contract she signed with the respondent was for one year from July 2021. It was not for three years. She accepted it and promised to continue doing her role as in her letter of August 2021. She was now 'Technical Advisor to Her Excellency the First lady of the Republic of Kenya.
21. The court finds the petitioner was employed on fixed contracts and each contract expired by effluxion of time. The different contracts were not connected to each other. The terms were different and the positions were different. There was no guarantee for automatic renewal of any of her contracts.
22. The court therefore finds the petitioner was erroneous to refer to the clause of the contract that already expired in 2018 which was issued in June 2015.
23. In any event the clause she is relying on paragraph 1(ii) does not give any automatic legitimate expectation of renewal of her contract. It actually provides that it will depend on the decision of the council. Paragraph 1(i) also provide renewal was subject to satisfactory performance and approval of the board. It is the courts view that the respondent never gave the petitioner blanket expectation that her contracts would be renewed automatically.
24. The court agrees with many cited authorities pertaining to fixed contracts. In the case of National bank of Kenya vs Pipe Plastic Amkolit K Ltd supra the court held:
- ' It is clear beyond para adventure that save for those special cases equity might be prepared to relieve a party from a bad bargain it is ordinarily no part of equity's function to allow a party on bad bargain'.
25. In the case of Pipus Kimaiyo Langat vs Co-operative Bank of Kenya Ltd 2017 eKLR the court stated:
- ' We are not alone to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by terms of their contracts unless coercion, fraud or undue influence is pleaded and proved'.
26. The court is satisfied that no coercion, fraud or undue influence is proved in the fixed contract signed between the petitioner and the respondent in July 2021 where she accepted the one year contract by her letter of August 26, 2021.
27. In numerous authorities courts have ruled that fixed term contracts expire by effluxion of time and that courts do not rewrite contracts between parties but merely enforce their contract. (See *case No 096 of 2021 Anytime Limited vs Fredrick Omuraya*).
28. The petitioner's contract expired by effluxion of time and was not by termination by the respondent.



29. As for the submission that the petitioner has satisfied the conditions set out in the case of Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others [2015] eKLR the court finds the petitioner has not argued out a case with high chance of probability. A fixed contract cannot be supported once it expires unless there are very compelling reasons as already stated hereinbefore. Therefore the petitioner has no compelling reasons to justify granting of mandatory injunction to reinstate her to her employment and so is declined.
30. Furthermore having said so there is not evidence that this is a case of public interest. No evidence has been adduced to that effect. The court is therefore not convinced that the prayers by the petitioner vide her petition dated September 9, 2021 as listed hereunder are proved and so the said prayers A, B, C, D, D1, E, F & G are dismissed for lack of evidence that the petitioner was terminated unlawfully and illegally and unconstitutionally as alleged in her petition.
- 31 Each party will bear their costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF MARCH 2023.

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 15th March 2020 and subsequent directions of 21st 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.

