



Wendot v Central Rift Valley Water Works Development Agency & 5 others (Employment and Labour Relations Petition E005 of 2023) [2023] KEELRC 1239 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1239 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E005 OF 2023**

HS WASILWA, J

MAY 25, 2023

BETWEEN

HOSEA KIPYEGON WENDOT PETITIONER

AND

**CENTRAL RIFT VALLEY WATER WORKS DEVELOPMENT
AGENCY 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF WATERSANITATION AND
IRRIGATION 2ND RESPONDENT
STATE CORPORATION ADVISORY COMMITTEE 3RD RESPONDENT
BONIFACE KAMANGA MUHIA 4TH RESPONDENT
JULIUS KAMAU MUTHANWA 5TH RESPONDENT
CYNTHIA JEROTICH KIPCHILAT 6TH RESPONDENT**

JUDGMENT

Background

1. The Petitioner describes himself as a resident of Nakuru County and the immediate CEO of the 1st Respondent, who has been adversely affected by the Respondents decision, Specifically the decision made by the 1st Respondent on 30th April, 2021 in which the Respondents declined the request to renew his contract as the Chief Executive officer of the 1st Respondent.
2. He states that he is a beneficiary of the services rendered by the Respondents in provisions of clean water to all Nakuru residents and people within the Central Rift Valley Water Basin and that he is exercising his constitutional right under Article 258(1) & (2) of the Constitution. Therefore, that the



management and running of the Board of the 1st Respondent has a direct impact on the petitioner as a direct consumer of water.

3. He stated that the Respondent have violated the constitution and the law in refusing to renew his contract as the Chief Executive officer without giving reasons.
4. That summary of the case is that on the 11th April, 2018, the now defunct Rift Valley Water Service Board appointed him as its Chief Executive Officer for a term of 3 years commencing 1st May, 2018 to 30th April, 2021. The contract was subject to renewal with the said CEO expressing his interest for that renewal in writing 6 months before expiry of the contract.
5. He states that the contract provided that his employment would be subjected to the Employment laws and Board Staff Rules and Regulations as issued or amended from time to time.
6. Upon receiving his employment letter, he assumed office with effect from 1st May 2018 and performed his duties diligently that earned him a certificate of recognition on 20th December, 2018, issued by the Principal Secretary of the Parent ministry for his exemplary performance conducted during the Ministerial Rapid Results initiative 2018, when he was barely 8 months in office.
7. During his tenure, the Rift Valley Works Development Agency transitioned to the now Central Rift Valley Works Development Agency, complete with a different Board of management that he worked closely with to achieve tremendous achievement for the entire institution.
8. On 30th October, 2020, when he had served 2 and half years of his contract and in compliance with his contract, applied for renewal of his contract in writing. This formed one of the agendas of the meeting held by the Board on the 19th February, 2021. The matter was postponed because there was need to have a special Board deliberate on the issue because the issue was sensitive and needed urgency.
9. In the subsequent meeting held on the 23rd February, 2021, he participated in the meeting but when the agenda regarding the renewal of his contract was mentioned, he excused himself to enable the Board have objective deliberations. The Board resolved to have the issue of renewal of his contract discussed the next day on 24th February, 2021 and have a board paper.
10. On 24th February, 2021, The Board went through the renewal application for the CEO and resolved to postpone the exercise to 1st March, 2021 because the Applicant's letter was incomplete and the evaluation report was not signed. However, on 1st March, 2021, the meeting did not take place and rescheduled to 8th March, 2021 where the Board perused the applicant's documents and resolved to have him prepare a power point presentation detailing his achievements, challenges and the way forward in the next meeting which was now scheduled for 15th March, 2021 but again it failed to take place.
11. On 1st April, 2021, the 2nd Respondent revoked the appointment of Stephen Njunge Kihu as the chairman of the Board of the 1st respondent in the gazette notice number 3188 and in his place, appointed Boniface Kamanga Muhia on 9th April, 2021 *vide* Gazette notice number 3519. On the same day, the 1st respondent revoked the appointment of Johnson Mburu Mwamba Kinyanjui and Franciscar Kamuren as board Members and replaced them with Julius Kamau Muthanwa and Cynthia Jerotich Kipchilat, who are the current Board members.
12. He contends that the appointment of Boniface Kamanga Muhia, Julius Kamau Muthanwa and Cynthia Jerotich Kipchilat was in violation of Section 14(3)(4) and Section 66 of the Water Act and Rule 2(1)(e) and 2 of the First Schedule of the Water Act.



13. After these appointments, the chairman of the Board wrote a letter reference number KWB/ Meeting/3/VOL 1 dated 26th April, 2021, seeking permission from the 2nd Respondent to convene a special Board Meeting to deliberate on the application for renewal of CEO position. This request was granted on the 27th April, 2021 and the meeting was set up for 30th April, 2021, which was the last day to the end of his contract.
14. The meeting was chaired by Boniface Kamanga Muhia with membership of Julius Kamau Muthanwa and Cynthia Jerotich Kipchilat among other members and another unknown person called Samuel Alima, who was alleged to represent the Principal secretary of the ministry of Water, sanitation and Irrigation. After presenting the power power point as instructed, he left the meeting for the Board to deliberate on the renewal. However, in the evening of the same day, he was informed by Eng. Samuel Alima that the Board had decline his Application for renewal of contract. This information was officially communicated to him in writing on 1st May, 2021.
15. It is contended that the letter declining the renewal of the contract did not give reason for declining renewal Nonetheless that his office was occupied by Samuel Oruma in acting capacity who was later confirmed as the CEO of the 1st Respondent. He contends that the Respondent failed to renew his contract despite posting impressive result of 81. 73% as at 10th December, 2020.
16. The Petitioner stated that the actions by the Respondent in failing to renew his contract without giving reasons was in violation of Articles 41 and 47(1) &(2) of the Constitution. Further that his rights were violated when the Board took such a long time and decided on the renewal of contract application of the last day of his previous contract. Moreover, that the Chairman of the Board and the 2 of its members were not appointed in accordance with the law.
17. The Petitioner prayed for the Following Reliefs; -
 - a. A declaration order be issued to the effect that the Chief Executive officer of the 1st Respondent constitutional rights under Article 10(2)(c), Article 41(1) and 47 (1)(2) of the Constitutional were violated by the 1st Respondent's Board of management in its decision of 30th April, 2021.
 - b. A declaration be made that the 1st Respondent breached and violated section 4 and 5 of the Fair Administrative Actions Act.
 - c. A declaration be made that the composition of the 1st Respondent Board of management which sealed the fate of the Chief Executive officer of the 1st Respondent on 30th April, 2021 comprised 2 members (including the chairman) whose appointment was not in accordance with the provisions of section 66 of the Water Act and Schedule 1 to the said Act, hence the Board's decision of 30th April, 2021 and the entire decision should be declared null and void and it be quashed.
 - d. That upon quashing the 1st Respondent's Board of Management's decision made on 30th April 2021 as communicated to Engineer Hosea Kipyegon Wendot by Boniface Kamanga Muhia through a Letter Ref: CRVWDA/CHR/VOL 11/6, be quashed and the status and the said letter be restored with the results that the said Chief Executive Officer who was in office prior to the said letter be allowed to resume duty with all perks, allowances and emoluments he was entitled to before 30th April 2021.
 - e. A declaration be made that the appointment of Boniface Kamanga Muhia(CAMB) as the Chairman of the 1st Respondent Board of Management; Julius Kamau Muthanwa and Cynthia Jerotich Kipchilat as members of Board of Management of the 1st Respondent by



the 2nd Respondent vide Gazette Notice No.3519 and 3520 of 9th April 2021 violated the mandatory provisions of section 66 of the Water Act No.43 of 2016 and the first schedule thereto which calls for such appointments to be conducted through competitive process and that the Board of Management of the 1st Respondent as constituted now is illegitimate, and an illegally constituted Board which should be declared as such and dissolved .

- f. That Gazette Notice No. 3519 and 3520 through which the 2nd Respondent appointed the persons mentioned above be quashed and the appointees be ordered to vacate their positions; refund all the allowances and other emoluments they have so far received or allocated themselves to the 1st Respondent's Account and their positions be declared vacant.
 - g. That all the sittings, deliberations, minutes and other businesses conducted by the Appointees above either jointly or severally and or whenever they deliberated on issues relating to the businesses of the 1st Respondent's Board from the date of their appointment be declared null and void.
 - h. That a declaration order be issued that decision to decline to renew the Chief Executive Officer's contract with the 1st Respondent which decision was arrived at in a Board of Management Meeting of the 1st Respondent on 30th April 2021, which meeting compromised the three appointees mentioned above; is null and void and it be quashed since it amounted to an illegal and null unfair termination of the Chief Executive Officer's employment.
 - i. That an order for injunction be issued stopping any meetings or deliberations by the Board of Management of the 1st Respondent until his case is heard and decided since the said Board has constituted on 9 April 2021 is illegal and illegitimate because 3 of its members' appointment was in violation of the law.
 - j. In the alternative the 1st Respondent be ordered to pay the chief Executive officer of the 1st Respondent (Engineer Hosea Kipyegon Wendot) salary and all allowances and benefits for a period of 3 years.
 - k. Damages for violation of the Chief Executive Officer's constitutional rights.
 - l. Any other or further reliefs.
 - m. Costs of this Petition be provide for.
18. The Petition is opposed by the Respondents, with the 1st, 4th, 5th and 6th Respondents filling a replying affidavit deposed upon on 24th February, 2023 by Boniface Kamanga Muhia, the 4th Respondent. The 2nd and 3rd Respondents represented by the Attorney General, swore a replying affidavit deposed upon on the 2nd March, 2023, by Alice Muthoni Wahome, the 2nd Respondent herein.

1st, 4th, 5th and 6th Respondents' Response.

19. Boniface Kamanga Muhia , the affiant herein, stated that sometime in February, 2021, he came across an advertisement in the website of the ministry of water, sanitation and Irrigation at www.water.go.ke , calling for applications for interested applicants to fill in the position of the Board Chairpersons and Board members for various institutions such as Kenya water Institute, Coast water Works Development Agency, Regional centre on Ground water Resources Education, Training and Research in Eastern Africa and Central Rift Valley Water Works Development Agency. The applications were to be submitted by 15th February, 2023.



20. The terms of service as per the advertisement was 3 years' contract, renewable once subject to performance. Based on this, the Affiant herein tendered his application to the office of the Cabinet Secretary Ministry of Water and Sanitation and Irrigation on 9th February, 2021. The 5th and 6th Respondents also applied for the aforementioned position on 10th and 11th February, 2021 respectively.
21. The affiant herein was shortlisted for the position of Chairperson while the 5th and 6th Respondents were shortlisted under category of members of the Board. Interviews were conducted and the deponent was selected as the Chairperson of the Board while the 5th and 6th Respondents were appointed to be members of the Board. He thus avers that their appointment as Chairperson and Members of the Board was done in a competitive manner as per the law.
22. He stated that upon appointment he assumed the office of the Chairperson of the Board and carried out the business appertaining to that office. Among the first agenda was to consider the Application for renewal of the Chief Executive Officer which had been tendered before the former Chairperson. The board after lengthy review and deliberations unanimously resolved not to renew the contract of the said CEO, which decision was promptly communicated to him.
23. Following the decision by the Board, Eng. Wendot was advised to clear with the Board, hand over and all his dues were paid to him.
24. Subsequently, the process of filling in the position of CEO began. Meanwhile, Eng. Samuel Kipampi Oruma was appointed in acting capacity. After applications were received, interviews conducted, Eng. Samuel Kipampi Oruma, who had applied for the said Position and emerged the best after interviews was recommended for appointment by the Board and his name was sent to the Cabinet Secretary Ministry of Water, Sanitation and Irrigation who appointed him as the Substantive CEO with effect from 6th January, 2022 for a period of 3 years till 25th October, 2024.
25. He stated that renewal or non-renewal of contracts of employment are on discretion of the Employer and not as of right as was held in the Court of Appeal decision of *Transparency International v Teresa Carlo Omondi*, Civil Appel No. 81 of 2018(Unreported) which decision binds this Court.
26. Further that a similar suit was filed in this Court serialized as Nakuru ELRC Petition number E014 of 2021, *Joel Ondieki V Central Rift Valley Water Works Development Agency and 5 others*, which case is similar in all fours with this case and was dismissed by this Court on 7th July, 2022. Therefore, that the case herein is *re-judicata* and aimed at embarrassing this Court.
27. The Affiant urged this Court to discharge and or set aside its orders issued on the 14th February, 2023 and dismiss the Petition herein for lack in merit.

2nd and 3rd Respondents' Response.

28. The Cabinet secretary, Ms. Alice Muthoni Wahome, stated that the Petition herein and the 13 annexures attached to the Petition were similar to those attached to ELRC Petition number E014 of 2021, which was struck out by this Court on 7th July, 2021, therefore the Petition herein is *res-judicata*.
29. She stated that the Orders issued by the Court on 14th February, 2023 has effect of deposing off the main Petition without hearing the parties.
30. She maintained that the Board Chairperson and the members of the Board were appointed after undergoing a competitive recruitment process. Further that the Petitioner is seeking to dissolve the Board without giving proper justification.



31. It is her case that the issue before Court is a private matter of employer-employee relationship which the Constitutional Court lacks jurisdiction to determine. In any event that the issue in dispute is on non-renewal of contract which is not a right of the said employee. She maintained that the entire petition is couched with non-existent constitutional right in the name of legitimate expectation to employment.
32. She avers that the case of *Transparency International V Teresa Carlo Omondi*, held that the doctrine of legitimate expectations is not applicable to contracts of Employment which are for a fixed term and are extendable subject to the discretion of the Employer.
33. It was her case that the petitioner completed his 3 year term but the Employer for good reason did not renew his contract but choose to inject new blood into the said Position, but paid all the terminal benefits due to him, therefore that there was no constitutional breach in the way in which the Respondents conducted themselves in this case.
34. She stated that the interim Orders issued by this Court potent more harm than good in that it has caused more anarchy and has it disrupted the operations of the agency by attempting to freeze the operations of the Board and install a new CEO who does not have a contract with the 1st Respondent.
35. She reiterated that the orders sought in this Petition are unenforceable.
36. Directions were taken on 27th April, 2023 for the Petition herein to be canvassed by written submissions.

Petitioner's Submissions.

37. It was submitted for the Petitioner submitted that the Petition herein is not opposed. He argued that the replying affidavit by Alice Muthoni Wahome and Boniface Kamanga Muhia were with regard to applications and not the Petition herein. Also that the Grounds of Opposition filed by the Respondents were in response to an Application which was not subject for determination herein, therefore that the Petition on facts has not be controverted and urged the Court to allow it as prayed.
38. In support of his submissions, the Petitioner relied full on the decision in the case of *George Omondi V Cabinet Secretary Ministry of Water, sanitation and Irrigation and 2 others; Boaz Okoth Akello (Interested parties)* [2021] eKLR and the case of *Republic V Cabinet Secretary Ministry of Water and Sanitation and Irrigation & 7 others Ex parte Allan Kipruto Tuwei* [2020] eKLR and urged this Court to allow the Petition with costs.

1st, 4th, 5th and 6th Respondents' Submissions.

39. The Respondent herein relied on the submissions filed on 27th April, 2023 and their earlier submissions dated 13th March. 2023.
40. The Respondents submitted from the onset on whether the doctrine of res judicata is applicable in this case and argued that *res-judicata* is provided for under section 7 of the *Civil Procedure Act* and bars the re-litigation of suit in instances where the claim is based on the same transaction that was in issue in the first action, the party seeks another remedy that was not sought in the first action and the claim should be of such nature as could have been enjoined in the first action.
41. Based on that, it was submitted that the current petition is a replica of another petition filed in this Court serialized as ELRC Petition number E014 of 2021 with similar contents save for the Petitioners. It was argued that, the petitioner herein just like the previous one, took issue with the appointment of Board members of the 1st respondent which issue was duly dealt with by this Court in the Ruling



of 7th July, 2022 dismissing the suit for want of jurisdiction with regard to appointment of directors of the 1st Respondent.

42. On the issue of legitimate expectation of a fixed term contract, the Respondents submitted that the petitioner was appointed for a 3-year renewable contract with effect from 1st May, 2019 till 30th April, 2021 but on expiry of the contract, it was not renewed. It argued that the Petitioner is challenging the non-renewal of the contract and pegging its arguments on legitimate expectation when none was created. To support this argument, they relied on the Supreme Court case of Communication Commission of Kenya & 5 others V Royal Media Services & 5 others [2014] eKLR , where the apex court summarized what constitute legitimate expectations as follows;

- a. There must be express, clear and unambiguous promise given by a public authority,
- b. The expectations itself must be reasonable;
- c. The Representation must be one which was competent and lawful for the decision maker to make and
- d. There cannot be legitimate expectations against clear provisions of the law or the Constitution.

43. Based on that, the Respondent submitted that legitimate expectation cannot be derived from fixed term contract such as the one the Petitioner was subjected to. In this they relied on the case of Margaret A Ochieng V National Water Conservation and Pipeline Corporation[2014] eKLR where Justice Arika held that;-

“ Automatic renewal would undermine the very purpose of the fixed-term contract, and revert to indeterminate contracts of employment... Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities... The Court is persuaded the Claim has no merit. The fixed-term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three-year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011.”

44. The Respondents also relied on the case of Transparency international-Kenya V Teresa Carlo Omondi ,Civil Appeal No. 81 of 2018 where the Court stated that;

“ ...Indeed, the doctrine of legitimate expectation does not arise in the renewal of a fixed-term contract and its non-renewal cannot constitute unfair termination or dismissal. Having noted that the respondent was in employment under a fixed-term contract and that the contract came to an end at the appointed time, we are of the view that any relief sought by the respondent on basis of her assertion that her employment was unfairly terminated was automatically not available to her. The Court of Appeal decision in Registered Trustees of the Presbyterian Church of East Africa & Another vs. Ruth Gathoni Ngotho [2017] eKLR lends credence to our holding, where the Court pronounced itself, thus:- Bearing the foregoing in mind we note that fixed term contract carries no rights, obligations or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the Respondent’s contract ought not to have been maintained. This is in relation to the salary of the months 5th of April up to May,2010. Similarly since the respondent’s contract came to an end by effluxion of time, ay claim for wrongful termination could not be maintained.”



45. The same issue was also addressed in the case of *Francis Chire Chachi vs. Amatsi Water Services Company Limited*, [2012] eKLR in which the Court stated that;

“This Court has recently stated that employers are not under any obligation to give employees reasons for non-renewal of fixed term contract, unless there is such an obligation created in the expiring contract.”

46. Accordingly, it was submitted that that the Petitioner has not demonstrated any of the principle for legitimate expectation to urge this Court to allow its Petition and thus urged this Court to dismiss the Petition for lacking merit.

47. On whether the petition herein satisfies the constitutional threshold for Petitions, the Respondents submitted that the jurisprudence in Kenya is now well settled and requires a petitioner to be specific as to the right violated and give particulars of the violation as was held in the case of *Anarita Karimi Njeru V Republic* [1979] 1 KLR 1272 where the Court stated as follows; -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

48. It was submitted that the *Constitution* of Kenya (Protection of Rights and Procedures) Rules, 2013, has reiterated the conditions set out in Anarita Karimi case, under its Rule 10(2) that requires all constitutional Petition to have; the facts relied upon, constitutional provisions violated, nature of injury caused or likely to be caused and the relief sought.

49. A similar position was amplified in the court of Appeal case of *Mumo Matemu v Trusted Society for Human Rights Alliance & 5 others* [2013] eKLR which Court held that; -

“It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and



thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

50. Accordingly, it was submitted that the Petitioner has not raised any constitutional questions worthy of determination by this Court, rather that the issues of non-renewal of contract is a purely employment issue that can be decided in a normal claim. They urged this Court to strike out the Petition herein with costs to them.
51. I have examined all evidence and submissions of the parties herein.
52. The gist of this claim is the failure by the 1st respondent to renew the petitioner’s contract which had expired on 30th April 2021.
53. The petitioner contends that he had a legitimate expectation that his contract would be renewed as he had performed well during his 3 year tenure and scored an impressive 73%.
54. I note that the petitioner was appointed on a fixed term contract which had a definite date of expiry.
55. This court has had occasion to deal with fixed term employment contracts where the employee claimed that they had a legitimate expectation of renewal.
56. The COA in *Transparency International V Teresa Carlo Omondi (Supra)* held that such fixed term contracts are liable to either renewal or non-renewal on the discretion of the employer and not as a right.
57. The above authority binds this court and is the same scenario as the petitioner herein.
58. The petitioner having been appointed on a fixed term contract cannot insist that the contract be renewed for another term.
59. The contracts renewal was at the discretion of the employer and the insistence of its renewal by the petitioner cannot stand.
60. On the issue of the appointment of the current board members, the respondents have demonstrated the manner in which everything was carried out.
61. There is no reason presented before this court to warrant a finding that the appointments were not done above board.
62. In the circumstances, I find that the Petition before me has no merit.
63. I dismiss it accordingly with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF MAY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Karbola holding brief for Muchiri for AG – present

Akango for 1st, 4th, 5th & 6th respondents – present

Kariuki holding brief for Mbogo for Petitioner – present

Ombui for Interested Parties – present

Nduna for 2nd & 3rd respondents – present



Court Assistant - Fred

