



**Awino v Human Resource Management Professional Examination Board (Employment and Labour Relations Petition E089 of 2023) [2023] KEELRC 1499 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1499 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E089 OF 2023**

**B ONGAYA, J**

**JUNE 22, 2023**

**IN THE MATTER OF ACTUAL BREACH AND  
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 27, 28, 41, 43,  
47 AND 48 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 28, 30, 34 AND 45 OF THE  
EMPLOYMENT ACT**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS) PRACTICE AND PROCEDURE**

**-BETWEEN-**

**BETWEEN**

**DR. DOUGLAS OGOLLA AWINO ..... PETITIONER**

**AND**

**HUMAN RESOURCE MANAGEMENT PROFESSIONAL EXAMINATION  
BOARD ..... RESPONDENT**

**JUDGMENT**

1. The petitioner is Dr. Douglas Ogolla Awino. He filed the petition on 16.05.2023 through Chimei & Company Advocates. The petition was supported by the annexed petitioner’s affidavit sworn on



15.05.2023 and the petitioner's supplementary affidavit sworn on 21.05.2023. The petitioner prayed for judgment against the respondent for:

- a. A declaration is hereby issued that based on his performance, the terms of conditions of the contract of employment dated 8<sup>th</sup> April, 2020, the applicable provisions of the Respondent's Human Resource Manual and the relevant laws, the Petitioner is entitled to renewal of his term of contract for a further term of three (3) years as the Chief Executive Officer of the Respondent effective 1<sup>st</sup> May, 2023.
  - b. A declaration that the Respondent's decision as contained in the letter dated 3<sup>rd</sup> April, 2023 on the non-renewal of the Petitioner's contract of employment violates the provisions of Articles 10, 27, 41 and 232 is unconstitutional, null and void.
  - c. An order of certiorari to remove to this Honourable Court and quash the Respondent's letter dated 3<sup>rd</sup> April, 2023 communicating the decision on non-renewal of the Petitioner's contract of employment for a further term of three years.
  - d. An order prohibiting or restraining the Respondent whether by itself, its officer, agents or servants or employees from proceeding with the recruitment process of the Chief Executive Officer of the Respondent further to the advertisement contained in the daily newspaper of 24<sup>th</sup> April, 2023 and or any other subsequent advertisement.
  - e. An order of Mandamus compelling the Respondent to renew the Petitioner's contract based on their own assessment which they had conducted for the FY 2020 – 2021 and 2021 – 2022
  - f. Damages for violation of the Petitioner's to fair labour practices, a fair administrative action and his right to human dignity.
  - g. Costs of the Petition and interests thereon
  - h. Any other further relief that this Honourable Court shall deem fit to grant
2. In response to the petition, the respondent filed a Replying Affidavit by CS. Sharon Kisire, the chairperson and sworn on 19.05.2023. It was filed through the Attorney General and learned counsel Daniel Oure, Deputy Chief Litigation Counsel appeared in that behalf.
  3. The petitioner's case is that he was employed by the respondent, a state corporation established under Section 16 of the Human Resources Management Professional Act No. 52 of 2012 in the position of CEO vide an employment contract dated 8<sup>th</sup> April, 2020 for an initial term of three (3) years effective 2<sup>nd</sup> May, 2020 and was to lapse on 30<sup>th</sup> April, 2023.
  4. He maintains that the employment contract as signed provided for renewal of the fixed term contract as provided under Clause 6 and 7 of the contract.
  5. The petitioner states that he performed his duties diligently and to the Respondent's satisfaction as evidenced by the various performances evaluations conducted through self – evaluation, the State Corporation Advisory Committee(SCAC) and by the Board whose results were as follows:



Financial year	Board's Evaluated Performance	Petitioner's Evaluated Performance
2020 – 2021	86.69	81.39
2021 – 2022	81.6000	75.900
Average	84.145	78.645

6. That based on the performance, and in line with clause 1.5 of the Mwongozo Code of Governance for State Corporations (Mwongozo Code) and Clause 2.7.5 of the Respondent's Human Resource policy, the Petitioner on 24.10.2022, more than six (6) months prior the expiry of his contract applied for renewal of his term as CEO.
7. He contends that upon his application for renewal, the respondent's chairperson assured him that the issue was under consideration and that he, the Petitioner would receive communication on his request.
8. The Petitioner avers that he, on 03.04. 2023, 27 days prior to the lapsing of his employment contract, received a letter from the Respondent's chairperson communicating the decision of non - renewal of his employment contract. He was further advised to proceed on terminal leave with effect from 03.04.2023 and further hand over to the Ag. CEO. He was advised that the position of CEO would be advertised soon and that he was free to put in his application.
9. The Petitioner maintains that the non- renewal letter neither contained reasons given for the Respondent's decision of not renewing his employment contract nor did it make any reference to his performance, which in his view, formed the basis of his application and consideration for renewal of his employment contract.
10. That following the Respondent's decision of not renewing his employment contract, the petitioner did lodge an appeal with the Cabinet Secretary, Ministry of Public Service, Gender and Affirmative Action and through the office of the Secretary of the State Corporation Advisory Committee. However, no response was received by the Petitioner.
11. The Petitioner maintains that the Respondent's actions grossly violated his rights as protected under Articles 2, 3, 10, 20, 21, 22, 23, 27, 28, 41, 47 and 48 of the Constitution of Kenya as read with Section 45 of the Employment Act, 2007.
12. He argues that he had legitimately expected his contract would be renewed subject to his satisfactory performance, being the only condition stipulated in his employment contract as a basis for its renewal.
13. In conclusion the petitioner urged this Honourable Court to find his petition with merit and allow it in terms of the reliefs sought therein.
14. In its replying affidavit sworn by CS. Sharon Kisire, the Respondent admits having engaged the Petitioner on a fixed term contract for a period of three (3) years effective 01.05.2020.
15. The respondent further confirmed that the petitioner, pursuant to an eligibility clause on renewal of the terms of service upon satisfactory performance, the petitioner expressed interest for renewal of his employment contract for a further term of three (3) years through his letter dated 24.10.2022.
16. That upon receipt of the petitioner's expression of interest, the same was duly processed through the Human Resource, Finance and Strategy Committee of the Board and in light of the annual board



self - evaluation undertaken by the State Corporation Advisory Committee in both financial years 2020/2021 and 2021/2022 and the CEO's self – evaluation report of 09.07.2021. The Committee prepared its report dated 31<sup>st</sup> March, 2023 for consideration by the full Board.

17. In its report, the committee recommended inter- alia that the position of the Chief Executive Officer be subjected to a competitive recruitment process and further that the CEO be allowed to apply for the position.
18. The report went on further to observe under Clause 9.0 as follows:

“9.0. The Committee's Observations

Upon analyzing the performance results of the CEO in the last two years, the committee observed that the CEO underperformed in a number of critical areas that is not addressed can impact on the success of the Board. The areas of shortcomings noted include:

- 9.1. Poor working relationship with employees and not creating a conducive working environment despite Board's intervention on several occasions
- 9.2. Poor facilitation of the Board, late submission of Board Papers and Notices for meetings. The quality of minutes and other Board reports is wanting. Notices and Board Papers are sent to members some few hours to the actual Board meeting thus denying members ample time to critically interrogate fundamental issues for effective Board deliberations and decision making. Mwongozo and good corporate practice advocate for at least fourteen days' notice before a Board meeting.
- 9.3. Poor stakeholder relations and engagements, which includes training institutions, IHRM among others. Stakeholders who are supposed to add value to the operations of HRMPEB are keeping off citing poor relations with the CEO.
- 9.4. Poor stewardship of Board resources leading to Court cases and litigation expenses.
- 9.5. Late submission of statutory reports like Quarterly Financial reports, procurement among others.
- 9.6. Poor records keeping e.g filing of Board minutes, Board expenditure records, resolutions and directions. List of students with fees balances. List of candidates credited so far, Board members' files, records of signed minutes. Establishment of a functional strong room with adequate data backups still remains unimplemented.
- 9.7. Poor execution of Board resolutions: there are decisions that the Board has pronounced itself yet they lie un implemented. The example of short Certification Courses suffices not to mention the direct fees payment by students to HRMPEB accounts.
- 9.8. Unchecked Examination malpractices and examination leakages tainting the image of HRMPEB as an examination body.



9.9. Inability to implement Audit findings and recommendations. Internal Audit has flagged out pertinent issues that require immediate and serious attention but nothing is forthcoming. This may lead the organization being cited for non-compliance, which has dire consequences. HRMPEB being a State Corporation. Examples include issues on procurement, Financial Management, Statutory reporting timelines among others.

9.10. Failure to establish financial systems to ensure integrity.”

19. The respondent further avers that its Board considered the aforementioned report in its meeting held on 01.04. 2023 and resolved on non-renewal of the CEO’s contract and further that the position be advertised to pave way for a competitive recruitment exercise.
20. The respondent further admits having communicated the Board’s decision to the petitioner and further directed him to proceed on terminal leave to pave way for the recruitment and appointment of a new CEO by the Board and that to avoid governance lapse the Board resolved to appoint the Manager, Test Development – Ms. Margaret Nguu being its senior most officer to act in the position of CEO for a period of three (3) months pending the recruitment and appointment of a substantive office holder.
21. Further that the petitioner’s employment contract having been for a fixed term would expire automatically upon expiry of the fixed term and does not in any way create an expectation of its renewal upon expiry.
22. The respondent argues that the petition as was filed is devoid of merit and therefore urged this Honourable Court to dismiss it with costs to the respondent.
23. The parties filed submissions on the petition. The Court has considered all the material on record.
24. To answer the 1<sup>st</sup> issue, the Court returns that the renewal clause was that the petitioner’s employment contract would be renewed subject to performance. As submitted for the petitioner, Rika J in *Teresa Carlo Omondi v Transparency International Kenya* [2017] eKLR held, “It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not be ignored by the employer, when managerial prerogative on the subject is exercised.” Taking into account that holding and taking into account the undisputed renewal clause, the Court returns that indeed, the renewal clause evolved into a legitimate expectation for the petitioner that renewal would be considered as agreed.
25. The 2<sup>nd</sup> issue is whether the respondent performed the renewal clause. There is no dispute that for 2020/2021 and 2021/ 2022 the petitioner’s score was at 78.645%. That appears a very good performance. However, in the contractual clause, performance was not weighted as to whatever constituted a satisfactory performance for the renewal clause to be performed in favour of the respondent. The respondent has disclosed performance considerations that led to the decline of the renewal. The petitioner has not rebutted those committee findings as being true and adverse performance appraisal that could justify the decision to decline the renewal. It therefore appears to the Court that the renewal was declined upon performance consideration in the contract. It could be that the scores should have counted but it appears that the parties did not limit the performance considerations to the scores obtained as relied upon by the petitioner. The Court finds that the respondent acted within the contractual renewal clause in declining the renewal and the Court will not read into the clause beyond whatever the parties agreed upon. As urged for the respondent the renewal



was not automatic but was subject to performance and the respondent has established performance considerations that led to the decline of the renewal.

26. To answer the 3<sup>rd</sup> issue, the Court returns that the petitioner has failed to establish the violations as pleaded and urged for him. The Court has considered all the circumstances of the petition and each party to bear own costs.

In conclusion the petition is dismissed with orders each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 22<sup>ND</sup> JUNE, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

