



**Kibere v Nairobi City Water & Sewerage Company Ltd (Petition
E178 of 2022) [2023] KEELRC 1899 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1899 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E178 OF 2022**

**L NDOLO, J
JULY 27, 2023**

BETWEEN

SOPHIA WACUKA KIBERE PETITIONER

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LTD RESPONDENT

JUDGMENT

The Petition

1. By her Petition dated 11th October 2022, the Petitioner seeks the following remedies:
 - a. A declaration that the Respondent's action of keeping the Petitioner in an acting capacity for 1 year and 8 months was unlawful and violated the Petitioner's right to fair labour practices;
 - b. A declaration that the refusal by the Respondent to pay the Petitioner the full remuneration for Regional Manager amounted to a violation of the Petitioner's right to equal remuneration for equal work or work of equal value and was a violation of her right to freedom from servitude and right to human dignity and self-worth;
 - c. A declaration that from the date of appointment to act, the Petitioner performed equal work as a substantive Regional Manager would and is therefore entitled to equal remuneration payable to a substantive Regional Manager, backdated from the date of her appointment to act until her last day in the position for 53 months, which amounts to Kshs 61,373,921;
 - d. A declaration that causing the Petitioner to serve in the office of Regional Manager beyond the lawful acting period amounted to constructive confirmation of the Petitioner as a substantive holder of that office;



- e. A declaration that refusal by the Respondent to provide the Petitioner with information relating to her performance violated the Petitioner's right of access to information as protected under Article 35 of the Constitution;
 - f. A declaration that the Respondent has violated the Petitioner's right to legitimate expectation by not confirming or appointing her as Regional Manager;
 - g. An order for general damages for discrimination, violation of the Petitioner's right to human dignity and self-worth, violation of the Petitioner's right of access to information, fair labour practices, fair administrative action and freedom from servitude;
 - h. A permanent injunction restraining the Respondent from taking the Petitioner back to a position which is lower than the position of Regional Manager or victimising or treating the Petitioner unfairly on account of instituting this Petition;
 - i. Costs of the Petition;
 - j. Interest at court rates on the backdated underpayment from the date they fell due to the date of payment in full.
2. The Petitioner states that she joined the Nairobi City Council in the year 1999 and was subsequently seconded to the Respondent upon its formation in 2005, where she worked in various capacities.
 3. While serving in the position of Meter Reading and Billing Coordinator, the Petitioner was appointed in an acting capacity as Regional Manager, North Eastern Region.
 4. She states that as Meter Reading and Billing Coordinator, she earned a monthly salary of Kshs 277,000. In addition, she was paid a responsibility allowance of Kshs 100,000 and an acting allowance of Kshs 43,969.75.
 5. The Petitioner served as Acting Regional Manager, North Eastern Region until 6th May 2019. She accuses the Respondent of unjustifiably demoting/relegating her back to her position, while she was away for sponsored further studies.
 6. The Petitioner points out that under Clauses 5.3 and 5.4 of the Respondent's Human Resource Policies and Procedures, an employee is expected to serve in an acting capacity for a period of 3 months which can be extended for up to 6 months.
 7. The Petitioner states that she had a legitimate expectation that she would be confirmed upon expiry of 6 months. She adds that she was qualified for the position of Regional Manager and had performed well during the time she acted in the position. She states that the Respondent failed to appraise her performance over this period.
 8. The Petitioner also accuses the Respondent of transferring her to the lower position of Monitoring Coordinator at the non-revenue water department, which she terms as a demotion.
 9. The Petitioner deems her transfer as malicious, unjustified and discriminatory.

The Respondent's Response

10. The Respondent's response is contained in a replying affidavit sworn by its Human Resource Manager, Titus Tuitoek on 2nd February 2023.



11. Tuitoek states that the Petitioner has been in the Respondent's employment working in various capacities from Customer Care Officer in 2009, Customer Care Coordinator from 2011 and Meter Reading and Billing Coordinator from 2013.
12. Regarding the Petitioner's appointment as Acting Regional Manager, Tuitoek states that a vacancy was created after the appointment of Rachel Ng'ethe as Acting Director-Commercial Services.
13. He adds that Eng. Stephen Mbugua, the Director-Commercial Services, who had separated from the Respondent was reinstated back to the position pursuant to a court order. He further states that Rachel Ng'ethe reverted back to her position of Regional Manager and was deployed to the North Eastern Region. According to Tuitoek, this caused the Respondent to revert the Petitioner back to her position of Meter Reading and Billing Coordinator.
14. Tuitoek depones that upon her appointment as Acting Regional Manager, the Petitioner enjoyed all the attendant benefits in accordance with Clause 6.3 of the Respondent's Human Resource Manual. He asserts that the Petitioner's substantive position was Meter Reading and Billing Coordinator and disagrees that she had a legitimate expectation that she would be confirmed in the position of Regional Manager.
15. The Respondent's case is that there was no guarantee that the Petitioner would be confirmed to the position of Regional Manager, which would have been subject to competitive recruitment in accordance with Clause 4.2.3 of the Human Resource Manual.
16. With respect to the period within which the Petitioner served as Acting Regional Manager, Tuitoek points to Clause 6.3 of the Human Resource Manual which empowers the appointing authority to determine the acting period.

Determination

17. The Petitioner's complaint is premised on her assertion that she had a legitimate expectation that she would be confirmed in the position of Regional Manager in which she had acted for over a year.
18. In her written submissions in support of the Petition, the Petitioner relied on the decision in *Republic v Principal Secretary, Ministry of Transport, Housing and Urban Development Ex Parte Soweto Residents Forum CBO* [2019] eKLR where the application of legitimate expectation was expounded in the following words:

“In adjudicating legitimate expectation claims the court follows a two step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to the question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweigh the individual's expectation.”



19. On its part, the Respondent relies on the decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where the Supreme Court of Kenya restated the applicable principles in determining legitimate expectation as follows:
- a. There must be an express, clear and unambiguous promise given by a public authority;
 - b. The expectation itself must be reasonable;
 - c. The representation must be one which it was competent and lawful for the decision-maker to make; and
 - d. There cannot be a legitimate expectation against clear provisions of the law or the *Constitution*.
20. The Respondent further relies on *Kenya Revenue Authority v Export Trading Company Limited* [2022] KESC 31 (KLR) also by the Supreme Court where it was held that:
- “...the question whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate.”
21. In its Response to the Petition, the Respondent explains that following a court order by which Eng. Stephen Mbugua was reinstated to the position of Director-Commercial Services, Rachel Ng’ethe, who was acting in that position reverted back to the position of Regional Manager and was deployed to the North Eastern Region. The ripple effect was that the Petitioner reverted back to her substantive position of Meter Reading and Billing Coordinator.
22. I find nothing wrong with the deployment actions taken by the Respondent, following the court order which reinstated Eng. Stephen Mbugua to the position of Director-Commercial Services. Regarding the period during which the Petitioner acted in the position of Regional Manager, I find that Clause 6.3 of the Respondent’s Human Resource Manual allowed for the extended period.
23. On the whole, I find this Petition to be without merit and proceed to dismiss it in its entirety.
24. Each party will bear their own costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Malenya for the Petitioner

Miss Mudibo for the Respondent

