



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariuki v Micro and Small Enterprises Authority & another (Petition  
E086 of 2023) [2023] KEELRC 1764 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1764 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E086 OF 2023**

**B ONGAYA, J**

**JULY 24, 2023**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 41,  
232,258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTION 3, 5, 10, 40, 45, AND 49 OF THE EMPLOYMENT ACT**

**IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT  
AND LABOUR RELATIONS COURT ACT, 2011**

**IN THE MATTER OF SECTION 4 AND 11 OF THE  
FAIR ADMINISTRATIVE ACTIONS ACT NO.4 OF 2015**

**IN THE MATTER OF SECTION 3, 29, 30, 31 AND 35 OF THE  
MICRO AND SMALL ENTERPRISES ACT NO.55 OF 2012**

**IN THE MATTER OF RULES 3, 10, 11, 23 AND 24 OF THE  
CONSTITUTION OF KENYA 2010 (PROTECTION OF RIGHTS  
AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**IN THE MATTER OF RULE 7(1) OF THE EMPLOYMENT AND  
LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**BETWEEN**

**NAOMI WANGARI KARIUKI ..... PETITIONER**

**AND**

**MICRO AND SMALL ENTERPRISES AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**HENRY M RITHAA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The petitioner filed on 04.05.2023 an application by the notice of motion through Okoth Obara Law Advocates. The application was under articles 159, 10, and 73 of the [Constitution of Kenya](#), rule



23 and 24 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, Order 51 rule 1(2) of the *Civil Procedure Rules 2010* and Rule 7 of the *Employment and Labour Relations Court (Procedure) Rules 2016*. The petitioner prayed for orders as follows:

- a. .... (spent).
  - b. That pending the hearing and determination of the application the Honourable Court be and is here pleased to issue a conservatory order of stay suspending the implementation of the 2<sup>nd</sup> respondent's letter dated April 24, 2023 sent to the petitioner by the 1<sup>st</sup> respondent jointly or severally through the 1<sup>st</sup> respondent's agent.
  - c. That pending the hearing and determination of the petition filed herein the Honourable Court be pleased to issue a temporary order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and severally, his servants, officials, representatives or agents from intimidating, harassing, threatening and bullying the petitioner.
  - d. That costs of the application be borne by the 2<sup>nd</sup> respondent.
2. The application was based upon the annexed supporting affidavit of the petitioner and the following grounds:
- a. The petitioner was employed by the 1<sup>st</sup> respondent on September 1, 2019 in the position of Director of Human Capital Development and Administration, Grade MSEA 2, in line with the 1<sup>st</sup> respondent's staff establishment for a period of 4 years' renewable subject to satisfactory performance.
  - b. The 2<sup>nd</sup> respondent is the petitioner's immediate supervisor. As per contract the petitioner expressed interest to renew her contract by letter dated January 31, 2023 being 6 months prior to lapsing of the contract on July 31, 2023.
  - c. By letter dated April 24, 2023 the 2<sup>nd</sup> respondent wrote to the petitioner notifying that the request for the renewal of contract was declined on the basis that the petitioner's position is not available within the 1<sup>st</sup> respondent's new approved organization structure. The petitioner was shocked because she had a legitimate expectation of the renewal in view of her satisfactory performance.
  - d. The petitioner had no prior notice that her position had been abolished in a restructuring process.
  - e. The petitioner's further case is that her request for renewal had not been tabled before the Board by the 2<sup>nd</sup> respondent and in breach of the 1<sup>st</sup> respondent's policy and procedure manual which vests in the Board matters of appointment of staff in Grades MSEA 1 TO 3.
  - f. It is the petitioner's case that the 2<sup>nd</sup> respondent unilaterally decided to bring to an end the petitioner's request for renewal by letter dated April 24, 2023 and the letter was ultra vires as the 2<sup>nd</sup> respondent had no authority to determine the application for renewal as was done.
  - g. It is just that the application is heard and determined urgently and be granted to meet ends of justice.
3. The respondents opposed the application by filing the notice of preliminary objection dated May 10, 2023 and through Kogai & Company Advocates. It was urged for the respondent's as follows:



- a. The Court lacks jurisdiction to hear and determine the petition and the application because the petitioner has not exhausted internal dispute resolution mechanism per clause 2.6.4 of the 1<sup>st</sup> respondent's Human Resource Policy and Procedures Manual and section 9(2) of the *Fair Administrative Actions Act* has been offended.
  - b. The petition discloses no reasonable cause of action against the 2<sup>nd</sup> respondent who is the Chief Executive Officer (CEO) of the 1<sup>st</sup> respondent and the case against the 2<sup>nd</sup> respondent should be struck out. It is contrary to section 29 of the *Micro and Small Enterprises Act* No 55 of 2012.
4. The respondents also filed the replying affidavit of the 1<sup>st</sup> respondent sworn on May 18, 2023 and opposed the application as follows:
- a. By letter dated July 10, 2019 the 1<sup>st</sup> respondent employed the petitioner effective September 1, 2019 as the Director, Human Capital Development.
  - b. Per clause 2.6.1 of the 1<sup>st</sup> respondent's Human Resource Policy and Procedure Manual notified the CEO by letter dated January 31, 2023 that she wished to renew her contract of service which was due to lapse on July 31, 2023.
  - c. By letter dated April 24, 2021 the 2<sup>nd</sup> respondent informed the petitioner that the contract would not be renewed.
  - d. The 1<sup>st</sup> or 2<sup>nd</sup> respondent was not under obligation to give reasons for the decision not to renew but the 2<sup>nd</sup> respondent acted in good faith to explain that the position she held was not within the 1<sup>st</sup> respondent's approved organisation structure and she would continue to serve per prevailing terms of service until July 31, 2023. The letter also informed the petitioner that in the new structure there were new senior positions such as Deputy Director Human Resource Management and which she could apply for consideration. She was also advised that if dissatisfied she should appeal to the Board within 14 days per clause 2.6.2 of the Manual. The petitioner did not appeal but filed the instant petition and application.
  - e. The letter of April 24, 2023 communicated the fact of the new organisation structure duly approved by the Board.
  - f. Per clause 2.6.3 of the manual the 2<sup>nd</sup> respondent was authorised to consider the request for renewal of the contract and it was not necessary to table the matter before the Board.
  - g. There is no material before the Court to justify the petitioner's case that she had a legitimate expectation that her contract expiring on July 31, 2023 would be renewed. Being a fixed term contract, there was no reason to explain failure to renew. The contract would lapse without further explanation.
  - h. The petitioner had all along been aware of the new organisation structure and had raised no objection.
  - i. The petitioner's contract was lapsing on July 31, 2023 and it was not a redundancy situation so that section 40 of the *Employment Act, 2007* did not apply.
5. Parties have filed submissions on the preliminary objection and the application.
6. The 1<sup>st</sup> issue is whether the 2<sup>nd</sup> respondent is a proper party. The petitioner has made specific allegations against the 2<sup>nd</sup> respondent and in particular that the 2<sup>nd</sup> respondent acted unilaterally in issuing the letter dated April 24, 2023 and a fact the 2<sup>nd</sup> respondent has admitted in his replying affidavit. By



that admission and other allegations in the petition against the 2<sup>nd</sup> respondent, the Court finds that personally and as the CEO, the 2<sup>nd</sup> respondent is such a proper respondent and a necessary party for the just, efficient, effective, and complete determination of the matters in dispute. That ground of the preliminary objection will fail.

7. The 2<sup>nd</sup> issue is whether the petition should fail for want of exhaustion of internal dispute resolution procedure. This issue is related to the 3<sup>rd</sup> issue being whether the 2<sup>nd</sup> respondent had authority, at least in the first instance, to determine the petitioner's request for renewal. Clause 2.6.1 of the Manual provides that 6 months prior to the lapsing of a fixed term contract, the officer desirous of renewing shall notify the CEO 6 months prior to date of lapsing. Clause 2.6.3 states that the CEO shall consider any notification from an employee wishing to be considered for a further term and the employee informed the decision to renew, not to renew, or to extend the contract in writing 3 months before the expiry. Clause 2.6.4 provides that an employee dissatisfied with the decision may apply to the Board for reconsideration within (14) days of receipt of the decision. The Court finds that the 2<sup>nd</sup> respondent duly complied but the petitioner failed to comply with the clear appeal procedure. The preliminary objection that the petition should fail for want of exhausting the internal procedures is upheld as is liable to being struck out.
8. To answer the 4<sup>th</sup> issue and being needless to do so, the Court returns that the petitioner has failed to show the provision by which the 2<sup>nd</sup> respondent was barred to determine the request for renewal and the 2<sup>nd</sup> respondent did not act without authority in that regard by issuing the letter of April 24, 2023. However, the 2<sup>nd</sup> respondent advisory asserting that he was not under obligation to give reasons is found misguided because Article 47 required him to always give reasons whenever an adverse decision was made like in the instant case. The 2<sup>nd</sup> respondent nevertheless acted within the provisions of Article 47 when he gave the reason for declining the renewal and which was consistent with the constitutional obligation.
9. In view of the findings the petition and the application are liable to being struck out. The petitioner is still in the respondent's employment and to foster good and stable work relationship, each party will bear own costs of the proceedings.

In conclusion the petition and the application are hereby struck out with orders each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 24<sup>TH</sup> JULY, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

