



**Jefwa v County Government of Kilifi & another (Petition
1 of 2023) [2023] KEELRC 1683 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1683 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION 1 OF 2023**

**AK NZEI, J
JULY 10, 2023**

BETWEEN

ARNOLD MKARE JEFWA PETITIONER

AND

COUNTY GOVERNMENT OF KILIFI & ANOTHER RESPONDENT

RULING

1. By a Petition dated January 4, 2023 and filed against the 1st and the 2nd Respondents, the Petitioner sought the following reliefs:-
 - a. a declaration that:-
 - i. a letter dated November 8, 2022 sending the Petitioner on compulsory terminal leave was illegal, null and void for violating the Petitioner's rights to fair labour practices under Article 41 of the Constitution, and
 - ii. the Petitioner's termination was unfair and/or unlawful.
 - b. an order for reinstatement of the Petitioner as the County Secretary Kilifi County Government, without loss of benefits and victimization and/or interference with his employment by the Respondents without following due process of law.
 - c. in the alternative to (b) above, the Respondents to create for the Petitioner a portfolio and/or position within Kilifi County Government equivalent to the Petitioner's job group (T) with similar benefits and remuneration as the County Secretary.
 - d. in further alternative to (b) and (c) above, the Respondents be compelled to pay the Petitioner dues as follows:-
 - i. salary in lieu of noticeksh 274,000



- ii. general damages for unfair termination
(12) months @ ksh 274,000)..... ksh 3,288,000
 - iii. unexpounded contract (from September 2022 to September 2023 12 months
@ ksh 274,000).....ksh 3,288,000
 - iv. NHIF for the unexpounded contract
(12 months @ ksh 1,700).....ksh 20,400
 - v. leave days for the unexpounded contract (26/30X274,000)ksh,
237,466.70
Total ksh 7,107,466.70
- e. Interest on (d) above as Court rates.
 - f. An order of permanent injunction restraining the Respondents from terminating the Petitioner's contract until the completion on 30/9/2023 without reasons or following due process.
 - g. Certificate of service, and
 - h. The Respondents to pay costs of the petition together with interest thereto from the date of judgment until payment in full.
 - i. Such other reliefs the Court shall deem fit to grant in the circumstances.
2. The Petitioner pleaded that he was the Kilifi County Secretary until his termination, having been appointed to the position vide a letter of appointment executed on 22/2/2018; and that his termination was abrupt and did not follow the procedure provided for in law. The Petitioner further pleaded:-
- a. that having been appointed in 2018, the Petitioner's employment was to determine in March 2023 pursuant to Section 44(2E) of the County Government Act.
 - b. that vide a letter dated 30/8/2022, the Petitioner's contract was extended for a further period of six (6) months, hence the contract was set to expire in September 2023, but after barely two months, the 2nd Respondent sent the Petitioner on compulsory terminal leave vide a letter dated 8/11/2022.
 - c. that the Petitioner wrote a letter on 9/11/2022 outlining his dissatisfaction with the terminal leave, but his letter did not elicit any response.
 - d. that the Petitioner was never served with any notice prior to the termination, and was not given an opportunity to be heard.
 - e. that the Petitioner's termination ought to have complied with not only constitution (Article 27(1) on equality and Article 41(1) (on fair labour practices) and the Employment Act, but also the County government Act.
 - f. that the Petitioner's termination was without justification as grounds for removal of a County Secretary as set out in Section 44(3A) of the County Government Act did not exist, and that even where grounds for removal exist, the Secretary must be informed of such reasons (intended removal) in writing, which was not the case with the Petitioner.



- g. that notice of termination is a statutory right under Sections 35 and 36 of the [Employment Act](#), and that the Petitioner's termination did not comply with the said statutory provisions.
 - h. that the Petitioner's termination was unfair, unlawful for failure to comply with the relevant labour laws, and violated the Petitioner's Constitutional rights.
3. On 5/1/2023, the Petitioner filed an urgent Notice of Motion dated 4/1/2023 seeking the following orders:-
- a. that pending inter-partes hearing and determination of the application, the Court be pleased to issue a conservatory order of injunction against the Respondents or any of their officers (sic) from nominating and/or appointing, either substantively or in an acting capacity, advertising or in any way filling the position of the County Secretary, Kilifi county Government.
 - b. that pending inter-partes hearing and determination of the application, the Court do issue an order directing that the Petitioner/Applicant continues serving the 1st Respondent as the County Secretary with full benefits and remuneration as contained in the contract executed on 22/2/2018 without victimization and/or interference with his employment.
 - c. that pending hearing and determination of the petition, the Court do issue a conservatory order of injunction against the Respondents or any of their officers (sic) from nominating and/or appointing, either substantively or in an acting capacity, advertising or in any way filling the position of the County secretary, Kilifi County Government.
 - d. that pending hearing and determination of the petition, the Court be pleased to issue an order directing that the Petitioner/Applicant continues serving the 1st Respondent as the County Secretary with full benefits and remuneration as contained in the contract executed on 22/2/2018 without victimization and/or interference with his employment.
 - e. that the Respondent be condemned to bear costs of the application.
4. The application was placed before the vacation Judge at Nairobi on 5/1/2023, and the Court granted an interim order restraining the Respondents by themselves, or by their agents or officials from substantively filling the purported vacancy in the office of the County Secretary as flowing from the letter of compulsory leave directed at the Applicant and dated 8/11/2022. The Court also directed that the Court file be transferred from Malindi sub registry to this Court.
5. The application is opposed by the Respondents. The 1st Respondent filed a replying affidavit sworn by Martin Mangi Mwaro, the 1st Respondent's Acting County Secretary and Head of County Public Service, on 2/2/2023. It was deponed in the said replying affidavit that according to documents exhibited by the Petitioner/Applicant (letter of appointment dated 22/2/2018), the Petitioner was engaged by the 1st Respondent for a term commensurate to the term of the Governor, his Excellency Amason Jeffah Kingi; and that the Petitioner/Applicant accepted the appointment on 1/3/2018.
6. It was further deponed on the part of the 1st Respondent:-
- a. that the 2nd Respondent, having been elected on 9/8/2022, and having been sworn into office as Governor of Kilifi County on 25/8/2022, he extended the Petitioner/Applicant's contract of service by six(6) months from 30/8/2023.
 - b. that vide a letter dated 8/11/2022, the 2nd Respondent released the Petitioner/Applicant to proceed on leave.



- c. that the Petitioner/Applicant was in the employment of the 1st Respondent; and had not been removed from office as contemplated in Sections 44(3A) (3B) and (3C) of the County Government Act and Section 35 and 36 of the Employment Act. That the Petitioner/Applicant has not demonstrated how the Respondents have violated the said provisions of the law.
- d. that the Petitioner/Applicant has continued to draw a salary from the 1st Respondent and will, after expiry of the extension of his contract, be entitled to his benefits.
7. The 2nd Respondent filed a replying affidavit, sworn by himself on January 9, 2023, and echoed the averments made in the 1st Respondent's replying affidavit reproduced in paragraphs 5 and 6 of this Ruling. The 2nd Respondent further deponed that the petition herein does not raise a constitutional moment, that it is a simple claim for compensation for an alleged breach of contract. That the procedure for such claims is not to approach the constitutional jurisdiction of this Court.
8. Paragraph 1 of the Petitioner/Applicant's letter of appointment dated 22/2/2018 reads:-
- “you will be engaged on contract for a term commensurate to the term of the Governor, commencing 1st March 2018.”
9. The Petitioner/Applicant duly executed an acceptance of the appointment and the terms and conditions indicated therein on 1/3/2018.
10. Upon expiry of the Petitioner/Applicant's contract term in August 2022 upon election of a new Governor, the Petitioner's contract of service was, vide a letter dated 30/8/2022, extended for a period of six (6) months from the date of the letter. The letter, signed by the new Governor, stated in part:-
- “following the expiration of the terms of your contract of employment, I am pleased to convey the decision of the County Government of Kilifi to extend your contract under the same terms of service for a period of six(6) months from the date of this letter.”
11. The said letter is copied to the Secretary, County Public Service Board, County Government of Kilifi.
12. Vide the 1st Respondent's letter to the Petitioner dated 8/11/2022 and signed by the 2nd Respondent (the new Governor) the Petitioner/Applicant was released to proceed on leave, and was directed to hand over to the 1st Respondent's Director of Administration. The letter reads in part:-
- “a decision has been made that you proceed on leave. While on leave, you may be called upon to clarify certain issues when need arises. After the expiry of the extension of your contract, you will be entitled to your benefits. The benefits will be released upon satisfactory clearance. You are directed to hand over to the Director of Administration Martin M Mwaro, who will hold the office in acting capacity until a substantive holder of the office is appointed.”
13. The letter was copied to the County Public Service Board. It is this letter that sparked off the proceedings herein. The Respondents deponed that during the leave period referred to in the said letter, the Petitioner/Applicant remained an employee of the 1st Respondent, and drew a salary from the 1st Respondent. The Petitioner/Applicant never disputed this fact. Indeed, the letter dated 8/11/2022 did not state that the Petitioner/Applicant was proceeding on an unpaid leave, and did not state that the Petitioner/Applicant was proceeding on compulsory leave. Further, no charges or allegations of wrongdoing were levelled against the Petitioner/Applicant by his employer (the 1st Respondent).



14. The matter was mentioned in Court on 19/1/2023 and 9/2/2023 respectively, and parties were given time to file their responses to both the petition and the application herein. On 16/2/2023, I gave directions on filing of written submissions on the application and extended the interim orders to the extent of the Petitioner's Contract as extended vide the Respondent's letter dated 30/8/ 2023 referred to in paragraph 10 of this Ruling. Only the 1st Respondent complied with the directions to file written submissions, which I have considered. The 2nd Respondent and the Petitioner/Applicant did not file written submissions.
15. Issues that fall for determination in the present Applicant, in my view, are:-
- a. whether the Petitioner/Applicant has demonstrated violation or threatened violation of his fundamental rights guaranteed in the [Constitution of Kenya](#).
 - b. whether the Petitioner/Applicant's employment has been terminated or is threatened with termination by the Respondents.
 - c. whether the Petitioner/Applicant is entitled to the orders sought.
16. On the first issue, and as rightly deposed by the 2nd Respondent, the petition herein does not raise any constitutional moment. It is a simple claim for compensation arising from an alleged breach of an employment contract. The petition and the application do not demonstrate any question of interpretation or application of the [Constitution](#). The Court of appeal stated as follows in the case of [Summaya Athman Hassan -vs- Paul Masinde Simidi & Another](#) [2019] eKLR:-

“It is evident that the petition was hybrid combining violations of various rights, employment rights under the employment Act and breach of Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st Respondent by the Corporation Appellant. The specific remedies sought were general damages, terminal benefits and issuance of a certificate of service. In determining the Petition, the ELRC relied wholly on the provisions of the Employment Act.

The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a petition directly relying on the provisions of the constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution. We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the *Communication's Commission Case* (supra).”

17. Still on the same issue, it was stated as follows in [Francis Atonya Ayeka -vs- Kenya Police Service & Another](#) [2017] eKLR:-

“...the cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the Respondent. Whether a Memorandum of Claim was filed or a Petition, the Cause of action does not change due to the name assigned to the pleadings.



A litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and the Labour Relations Act are primary.

The primary legislation should not be circumvented by seeking to rely directly on a Constitutional provision. Both the Employment Act and the Labour Relations Act give effect to Constitutional rights.”

18. I find and hold that the Petitioner’s application herein does not demonstrate violation or threatened violation of the Petitioner/Applicant’s fundamental rights as guaranteed in the *Constitution*.
19. On the second and third issues, it is clear from documents exhibited by the Petitioner/Applicant that he was employed by the 1st Respondent vide a letter of appointment dated 22/2/2018, and that his contract of service was fixed, in that it was commensurate to the term of the appointing Governor. The Governor’s term came to an end on 9/8/2022 upon election of the 2nd Respondent as the Governor. On 30/8/2022, the Petitioner’s contract was extended for a fixed term of six months. The Petitioner has not demonstrated that his contract as extended was either unfairly terminated by the Respondents or was threatened with termination. All that the Respondents did was to release the Petitioner/Applicant to proceed on leave, and assured him that his benefits would be paid upon expiry of the extended contract period. The Applicant has not demonstrated any illegality in what the Respondents did. The Petitioner/Applicant’s fixed term contract, including the six months’ extension, has since lapsed; and the orders ought in the application cannot issue.
20. In *Registered Trustees of the Presbyterian Church of East Africa -vs- Ruth Gathoni Ngotho* 2017, Cited In *Transparency International Kenya -vs- Teresa Carlo Omndi* [2023] eKLR, the Court of Appeal stated as follows:-
 - “29. Bearing the foregoing in mind, we note that a fixed term contract carries no rights, obligation, or expectation 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 of 5th of April upto May 2010. Similarly, since the Respondent’s contract came to an end by effluxion of time, any claim for wrongful termination could not be maintained.”
21. Further, the Court of Appeal stated as follows in *Registered Trustees De La Salle Christian Brothers t/ a St Mary’s Boys Secondary School -vs- Julius M D Bainin* [2017] eKLR as follows:
 - “In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed is the same thing as demanding from an employer to give reasons why, a potential employee should not be employer.....”
22. The Petitioner/Applicant’s contract of employment having been a fixed term contract which came to an end by effluxion of time, he does not face any threat of termination, and reliefs sought cannot issue.
23. The Petitioner/Applicant’s Notice of Motion dated 4/1/2023 is without merit, and is hereby dismissed. Each party will bear its own costs of the application.



24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH JULY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. K. Mungai for Petitioner

Mr. Gambo for 1st Respondent

Mr. Binyenga for 2nd Respondent

