



REPUBLIC OF KENYA



KENYA LAW
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**Mwara v Kirinyaga County Public Service Board (Cause E002 of 2021)
[2023] KEELRC 2295 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2295 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E002 OF 2021
ON MAKAU, J
SEPTEMBER 29, 2023**

BETWEEN

JAMES NYAMU MWARA CLAIMANT

AND

KIRINYAGA COUNTY PUBLIC SERVICE BOARD RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 27th January, 2021 the claimant alleged that his employment was unfairly terminated by the respondent and prayed for the following reliefs:-
 - a. A declaration that he was wrongfully and unfairly dismissed from his employment.
 - b. Unpaid dues totaling Kshs.417,600.00
 - c. 12 months' salary as compensation for wrongful and unfair termination Kshs.58,000.00 x 12 = Kshs.696,000.00
 - d. Punitive and aggravated damages for breach of the claimant's Constitutional Rights.
 - e. Costs and incidentals to the suit.
2. The respondent filed a Response to the claim dated 15th November, 2022 admitting that it employed the claimant as chairman of Kirinyaga County Alcoholic Drinks Control Board on part-time basis. It further averred that after the lapse of the claimant's three year contract it was improperly renewed by a person lacking the mandate to do so. Therefore, it averred that the renewal was unlawful and a nullity, and the claimant is not entitled to the reliefs sought.



Evidence

3. The claimant testified as CW1 and adopted his written statement. He also produced 6 documents as exhibits to support his case. His case in brief is that he was competitively appointed as the chairman of the said Board for a renewable term of three years in July 2014. The appointment was remunerated by allowance set out in the appointment letter. As at February the total allowances amounted to Kshs.58,000.00 per month.
4. His contract was lapsing in June 2017 and by a letter dated 16th June 2017 the Secretary, County Public Service Board, Kirinyaga renewed his contract for one year. However the same Secretary wrote another letter dated 17th January 2018, terminating the renewed contract. The chief officer under whom the docket of Alcoholic Drinks Control fell also wrote to him a similar letter. As such he cleared with the department in May, 2019.
5. He maintained that his employment was unfairly terminated by the respondent and prayed for judgment as prayed.
6. On cross examination, he admitted that his appointment was on part time basis. He further admitted that his letter of appointment dated 24th July, 2014 stated that his engagement was under Section 9 of Kirinyaga County *Alcoholic Drinks Control Act* of 2014. He also admitted that after the lapse of the first contract, he was paid terminal due but no dues were paid for the renewed contract.
7. He confirmed that his appointment letter did not provide for leave. He further confirmed that the termination letter dated 17th January, 2018 stated that the termination of his appointment was that the Governor was constituting a new committee for Liquor Licensing. In his view the said reason did not constitute a valid reason for termination. Finally he stated that he was not given one month notice before the termination.
8. The respondent called Dennis Muciimi, County Executive Committee Member, Sports, Culture and Social Services as RW1. He adopted his written statement as his evidence in chief and produced 5 documents as exhibits. His evidence in brief is that the procedure for appointment of the chairman of Kirinyaga County Alcoholic Drinks Regulation and Licensing Committee is provided under Section 9 (4) (a) of the Kirinyaga County *Alcoholic Drinks Control Act*, 2014. The appointment of the chairman of the committee is done by the Governor.
9. RW1 stated that the claimant was appointed the chairman of the committee by the Governor on 24th July, 2014 for a term of 3 years. The contract expired in June 2017. By a letter dated 16th June 2017, the respondent's secretary wrote to the claimant renewing the contract for one year with effect from 1st July, 2017. However by a letter dated 17th January 2018, the respondent's secretary terminated the new contract after it was discovered that the respondent's secretary was not a proper appointing authority under the said County statute.
10. RW1, therefore contended that the irregular renewal had to give way to a proper appointment by the Governor. He maintained that renewal of the claimant's contract was illegal and of no consequence. Consequently he contended that the reliefs sought are not merited.
11. On cross examination, RW1 maintained that the reason for the termination was that the claimant was not appointed by the Governor after the expiry of the initial contract. He confirmed that the claimant had not committed any misconduct but his contract was renewed illegally. Consequently, he contended that the claimant's contract had ended by operation of the law.



Submissions

12. The claimant submitted that the termination of his contract amounted to a breach since he committed no misconduct. He maintained that his appointment and the renewal were genuine as they were sanctioned by the Governor. He further contended that the reason for the termination was not explained to him until this suit was filed. For emphasis *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR was cited.
13. In view of the foregoing submissions that the termination of his contract was substantively and procedurally unfair, the claimant prayed for the reliefs sought in the suit.
14. The respondent, on the other hand submitted that there was no employer-employee relationship between the claimant and itself because he was not employed for any salary, but only honorarium of allowances. For emphasis, reliance was placed on the case of *Wambeye Kimweli Marakia v Board of Directors Nzoia Water Services Co.Ltd & 2 others* (2019) eKLR where the court dismissed a claim of the Water Company Board because he was an employee but a Director earning for honorarium.
15. In addition, it was submitted that the claimant's appointment was not terminated through breach but for a valid and fair reason. Further that, the renewal of the contract was illegally done by the wrong person contrary to the relevant County statute. Consequently, it was submitted that the claimant cannot be awarded the reliefs sought based on the said illegality. Further that, the claim for salary for the remainder of the term of his contract cannot issue because it is not provided in the law.

Issues for determination

16. There is no dispute that claimant was lawfully appointed by the Governor as the chairman of the Alcohol Licensing Board for 3 years under section 9 (4) (a) of the Act. There is also no dispute that the claimant served through that period of 3 years and received all his dues including terminal benefits. There is further no dispute that by a letter dated 16th June 2017, the respondent's secretary renewed the claimant's appointment for a further one year. The following issues arise for determination:-
 - a. Whether the contract was validly renewed by the letter dated 16th June 2017.
 - b. Whether the renewed contract was unfairly terminated.
 - c. Whether the claimant is entitled to the reliefs sought.

Renewal of Appointment

17. Section 9(4)(a) of Kirinyaga County *Alcoholic Drinks Control Act*, 2014 provides as follows:-

“The County Liquor Licensing Committee shall consist of-

- a. Chairperson who shall be appointed by the Governor with the approval of the County Assembly.
- b. ...”

18. The letter for renewal stated as follows:-

“Re: Contract Renewal

The County Public Service Board is pleased to inform you that your contract of service has been renewed for one year with effect from 1st July 2017 on the same status.



You will be expected to proceed on the current Job Group with the current salary and allowances. You are further encouraged to continue rendering your invaluable services to the County.”

19. The appointment was made by the County Public Service Board as opposed to appointment by the Governor as required by Section 9(4)(a) of the Act above. There was no recommendation from the Governor to have the renewal of the claimant’s contract by the County Public Service Board. The view I take in agreeing with the respondent’s case is that the claimant ought to have applied for the renewal of the contract to the Governor.
20. The Board has no legal mandate to renew the contract and with the request from the Governor. Consequently, I find and hold that the renewal of the claimant’s contract was done ultra vires by the County Public Service Board, and it was therefore null and void. It follows that the contract lapsed automatically on 30th June 2017 by effluxion of time and the issue of unfair termination does not arise.

Reliefs

21. In view of the foregoing, the claimant is not entitled to the reliefs sought and the suit is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF SEPTEMBER, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

