



**Mwarania v Cabinet Secretary, National Treasury & Planning & 2 others;  
Corporation Limited (Interested Party) (Employment and Labour Relations  
Petition E034 of 2023) [2023] KEELRC 2541 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2541 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E034 OF 2023  
NJ ABUODHA, J  
OCTOBER 19, 2023**

**BETWEEN**

**JADIAH M MWARANIA ..... PETITIONER**

**AND**

**CABINET SECRETARY, NATIONAL TREASURY & PLANNING .... 1<sup>ST</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**KENYA REINSURANCE CORPORATION LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CORPORATION LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner through a Petition dated 22<sup>nd</sup> February, 2023 alleged inter alia;
  - a. That he was employed by the Interested Party herein after its Board of directors approved his appointment in April, 2016 to serve for a term of five years as the Managing Director/Chief Executive Officer which contract lapsed on 11<sup>th</sup> April, 2021.
  - b. That prior to the lapse of the Petitioner’s contract the Interested Party’s Board Human Resource and Nominations Committee, a committee of the Board of Directors, held a meeting on 3<sup>rd</sup> November, 2020 which resolved that the Petitioner’s contract as the managing Director be renewed for a further 5 years while noting his good performance and the noted that the Mwongozo recommendations of the term limits for state corporations CEO’S was superceded by a government circular from the head of the Public Service referenced OP/CAB.9/1A dated 27<sup>th</sup> February,2018.



- c. On or about 18<sup>th</sup> January, 2021 the Interested Party informed the 1<sup>st</sup> Respondent of its decision to renew the Petitioner's Contract in furtherance of the objectives of the corporation and to ensure stability and smooth transition noting the sensitivity of the Corporation's business and the 1<sup>st</sup> Respondent responded to the Interested Party's letter vide a letter dated 21<sup>st</sup> January, 2021 directing the Interested Party to limit the period of extension of the Petitioner's contract to 1 year.
- d. Prior to the lapse of the extended one year being dissatisfied with the said directive the Human Resource and Nominations Committee of the Interested Party's Board held a meeting on 13<sup>th</sup> August, 2021 and reiterated the resolution for extension of the Petitioner's contract for the next four years based on the Petitioner's performance as per the Corporation's Article of Association, the state Corporations Act and the Government Circular dated 27<sup>th</sup> February, 2018 among others.
- e. The Interested Party's Board constituted a special meeting on 19<sup>th</sup> August, 2021 whose agenda was to discuss the Committees Recommendations on extension of the Petitioner's contract after lapse of one year in April 2021 and the meeting resolved to extend the Petitioner's contract for another 4 years after the one year extension lapsed in April 2022 due to the Petitioner's good performance.
- f. The Interested Party informed the 1<sup>st</sup> Respondent vide a letter dated 20<sup>th</sup> August, 2021 of its resolution to extend and renew the Petitioner's contract for a further 4 years as per circular of 2018 which stipulated that the Petitioner's position was not bound by any term limits.
- g. On 30<sup>th</sup> September, 2021 the 1<sup>st</sup> Respondent vide a letter of even date approved and concurred with the 1<sup>st</sup> Interested Party's Resolutions to extend the Petitioner's Contract of employment effective 11<sup>th</sup> April,2022 to complete a term of five years for a sustained success and profitability of the Interested Party.
- h. That in a strange twist of events the 1<sup>st</sup> Respondent vide a letter dated 9<sup>th</sup> May,2022 allegedly acting on instructions of the Head of Public Service directed that the Interested Party to limit the extension/renewal of the Petitioner's contract for only a further term of one year and to initiate the process of recruitment of a managing Director.
- i. That the decision of the 1<sup>st</sup> Respondent to reduce the Petitioner's term of contract extension from the five years as approved by his Employer, the Interested Party herein was so done without affording him the right to fair hearing before making the impugned decision and the Interested Party while disagreeing and dissatisfied with the said directive wrote to the 1<sup>st</sup> Respondent on 30<sup>th</sup> May,2022 requiring him to reconsider the extension of the Petitioner's Contract by a further 4 years as the one year extension was not sufficient noting that the business of insurance is sensitive needs some stability.
- j. That the Interested Party further positioned that the regulatory changes in international markets like Nepal have put the Interested Party at a risk of loosing an entire portfolio of around Kshs 500,000,000/= which requires the Petitioner's skilled and experienced intervention.
- k. That the 1<sup>st</sup> Respondent while acting ultra vires vide a letter of 19<sup>th</sup> July, 2022 directed the Petitioner's Employer to start the process of recruiting CEO and while the Interested Party was dissatisfied with this directive wrote a letter to 1<sup>st</sup> Respondent on 27<sup>th</sup> October,2022 requiring him to reconsider the directive against the Petitioner's contract renewal but the 1<sup>st</sup> Respondent





provisions of Mwongozo Code of Governance for state Corporations which is issued under section 7 of the State Corporation Act.

- c. The Interested Party averred that under the Mwongozo Code the term of the office for the position of CEO was limited to two terms of three years each and that in Petition No. 75 of 2016 Peter Macithi Mungai Vs the Cabinet Secretary for Environment, Natural Resources & Regional Development Authorities and others the court held that the Mwongozo was binding and enforceable code.
- d. The Interested Party further averred that following its Board meeting held on 8<sup>th</sup> April, 2010 the petitioner was appointed to serve as the Managing Director of the Interested Party in acting capacity where the Petitioner was appointed as the Managing Director with effect from 12<sup>th</sup> April, 2011 for a term of five years where its Board sought the National Treasury's approval of his salary and the 1<sup>st</sup> Respondent approved hence the Petitioner's assertion that 1<sup>st</sup> Respondent has no jurisdiction on the appointment of himself when his salary was approved by the 1<sup>st</sup> Respondent is strange.
- e. The Interested Party averred that on April 2016 it renewed the Petitioner's contract for the position of Managing Director for a further term of five years commencing on 12<sup>th</sup> April, 2016 and terminating on 11<sup>th</sup> April, 2021 and in November 2020 the Board Human Resource and Nominations committee of the Interested Party recommended to the Board a renewal of the Petitioner's contract for a third and final term of 5 years where the committee while recommending to the Board believed that the Mwongozo Code had been suspended by a circular from the Head of Public service.
- f. The Interested Party averred that the Board received a clarification issued vide the Press release dated 12<sup>th</sup> April, 2018 on the purport and intention of circular number OP/CAB.9/1A of 27<sup>th</sup> February, 2018 and the Recommendation made by the Human Resources and Nomination Committee was not a resolution because it was pending consideration and approval by the Board of the Interested Party where the board requested for guidance from its Parent ministry the 1<sup>st</sup> Respondent herein on the extension of the Petitioner's contract and its terms.
- g. The Interested Party averred that through a letter dated 21<sup>st</sup> January, 2021 the 1<sup>st</sup> Respondent advised the Interested Party's Board that the Petitioner had served a maximum of two terms and the Board should have ensured that there is in place succession plan to ensure seamless transition at the expiry of the Second contract but the 1<sup>st</sup> Respondent allowed the Interested Party Board request and granted approval to the Board to extend the contract of the Petitioner as the CEO for a period of one year with effect from 11<sup>th</sup> April, 2021 to allow for smooth transition with the Board being advised to immediately embark on process of the recruitment of CEO.
- h. The Interested Party further averred that its Human Resource and Nominations committee held on 13<sup>th</sup> August, 2021 an appeal was made to the Board on behalf of the Petitioner to extend his contract for the remaining four years that were not granted to make it 5 years where the board held a special meeting and resolved to recommend the Petitioner's extension of employment contract and sought approval from the 1<sup>st</sup> Respondent who extended the Petitioner's Employment for only one year terming it as the last one and Interested Party was to immediately start the process of recruitment of CEO not later than 30<sup>th</sup> June, 2022.
- i. The Interested Party averred that with approval of the 1<sup>st</sup> Respondent it issued the Petitioner with extension of contract of Employment dated 20<sup>th</sup> April, 2022 for a term of one year which



terms were duly accepted and signed by the Petitioner and there was no reduction of the term as no five year contract was granted in the first place and the extension granted after the two terms was only granted to ensure smooth transition of the Interested Party.

- j. The Interested Party averred that since the Petitioner's Contract was to expire in 11<sup>th</sup> April, 2023 it was a requirement for the CEO to be sent on terminal leave when recruitment process was ongoing to ensure non- interference with the process in compliance with Head of Public Service circular number OP/CAB.9/1A issued on 23<sup>rd</sup> November,2010 titled Procedure for Reappointment of service CEO in state Corporations and the Applicant continues to enjoy all his salary and benefits until the end of his contract period.
- k. The Interested Party averred that the 1<sup>st</sup> Respondent being the parent ministry of the Interested Party had the Mandate to set the terms and conditions of service of the Interested Party's staff under Section 5(3) of the *state Corporations Act* and the Petitioner has not produced before the court any contract of employment past 11<sup>th</sup> April,2023 to deserve the orders sought and he mischievously intends to extend his employment contract when his contract lapsed by effluxion of time extended and the Court should allow the Interested Party to proceed with the process of recruitment of the Petitioner's replacement.

4. The parties agreed to dispose this Petition by written submissions.

#### **Petitioner's submission**

5. On the issue whether the 1<sup>st</sup> Respondent had legal mandate to direct the Interested Party on matters relating to employment of its staff, Ms Guserwa submitted that the letter of Appointment of 12<sup>th</sup> April,2016 showed that it was executed by the Chairman of the Board of directors of the Interested Party, Petitioner was therefore answerable to the Board and the Board reserved the right to terminate or extend the contract depending on performance of the Petitioner.
6. It was the Petitioner's submission that Section 5(3) of the State Corporation Act relied on by the Interested Party and the Respondents provided for consultation with the parent ministry when it came to terms of service and did not grant the 1<sup>st</sup> Respondent veto powers to overrule the Board of a corporation.
7. On this issue it was the Petitioner's Submissions that the governing document between the Petitioner and the Interested Party was the letter of the appointment which had not mentioned the 1<sup>st</sup> Respondent as the final decision maker. Section 5(3) of the State Corporation Act did not change the fact that the role of the minister was limited to approval of terms and conditions of already appointed officers. In this respect the petitioner relied on the cases *Mary Munyuli Luseka v Brand Kenya Board; Cabinet Secretary, Ministry of Industry, Trade and Cooperatives (Interested Party)* and *Paul Kipsang Kosgei V National Industrial Training Authority & Another; Cabinet Secretary, Ministry of Labour & Social Services(Interested Party)* (2020) eKLR where the courts held that the Minister had no power in renewal of the contracts and the only role they had was to approve the terms and conditions of service for CEO and staff.
8. On the issue of whether the Petitioner had a legitimate expectation to continue serving the Interested Party for another term of five years the Petitioner relied on the case of *Teresa Carlo Omondi v Transparency International-Kenya*(2017) eKLR to submit that the Interested Party took steps to retain the Petitioner for five years but it is the 1<sup>st</sup> Respondent who interfered with the process and submitted that the letter of appointment had a renewal clause for a similar term not the one year recommended by the 1<sup>st</sup> Respondent and the decision to send him on terminal leave was against his rights to fair



labour practices under Articles 41,47 and 50 of the Constitution. Counsel relied on the case of Paul Kipsang above and further submitted that the interested Party was estopped from doing otherwise after pushing for the Petitioner's extension of contract and further relied on case of Serah Njeri Mwobi v John Kimani Njoroge(2013) eKLR.

9. On the issue of whether the Petitioner was entitled to general damages for constitutional violations the Petitioner submitted that the Interested Party's Board purporting to appoint a new CEO to prevent him resuming his position connoted malice hence the petitioner should be granted general damages for breach of his constitutional rights and relied on the case of Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others(Civil Appeal 243 of 2017) (2021) KECA 328(KLR) (17 December,2021) which stated that it was the discretion of court to award general damages and submitted that the Petitioner will lose salary for the remaining three years where each month he was earning a salary of Kshs 2,071,500/= and in three years it would be Kshs 109,414,800/=
10. The Petitioner prayed for reinstatement and in the alternative he be granted Kshs 109,414,800 loss of salary for the three years.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's submissions**

11. Through their Submissions dated 8<sup>th</sup> June,2023 the Respondents submitted on the issue of refusal of extension of the contract causing legitimate expectation that the same was done procedurally and within the confines of the State Corporation Act, the code of Governance for state Corporations(Mwongozo code) and the Constitution and relied on the case of Ben Chikamai & Another v Peter Macithi Muigai & 2 others. Counsel further Ms Rop submitted that the Interested Party's Human Resource Board and Nominations Committee which resolved to extend the Petitioner's contract did not have legal mandate under Section 5(3) of the State Corporation Act to appoint or extend the terms of contract of CEO.
12. On the issue of legitimate expectation the Respondents relied on the Paul Kipsang Case above and Jacob Kimutai Torutt v Coast Water Works Development Agency & Another; Commission for Human Rights and Justice (Interested Party) (2021) eKLR to submit that the Petitioner did not establish the alleged legitimate expectation since the Mwongozo Code provided that the tenure of the CEO was three year term renewable once subject to performance evaluation by the Board and the Cabinet Secretary extended the Contract for one year to allow transition and the Petitioner signed the extension of the one year voluntarily.
13. On the issue whether the Petition raised constitutional issues the Respondents submitted that what the Petitioner was seeking was available under section 49 of the Employment Act read together with Section 12(3) of the Employment and Labour Relations Court Act 2011. The Petitioner had therefore not illustrated that the remedies sought were inadequate catered for in the statute to justify a constitutional petition. In this regard counsel relied on the case of Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others(2014) eKLR ; KKB V SCM & 5 Others Constitutional Petition 014 of 2020)(2022) KEHC 289(KLR); ELRC Petition 1 of 2013 Josphat Ndirangu v Henkel Chemicals(EA) Limited(2013) eKLR; Petition No. 11 of 2018 Peter Ndegwa Nderitu vs Teachers Service Commission (2019) eKLR; among others.
14. In addition it was the Respondent's Case that the Petition did not illustrate the petitioner's constitutional rights had been violated and relied on the case of Judicial Service Commission v Gladys Boss Shollei & Anther(2014) eKLR. According to Counsel there was no failure of compliance with the law by the Respondents or Interested Party to amount to infringement the petitioner's right as



was held in Francis James Ndegwa v Tetu Dairy Co-operative Society Limited(2016) eKLR and James Mukuha Gichane V National Hospital Insurance Fund & 3 others (2017) eKLR.

15. It was the Respondent's case that the Petitioner did not bring out the alleged breach precisely as was stated in Anarita Karimi Njeru v Republic(No 1) (1979) K.L.R 154 and Gladys Shollei's cases above.
16. On the issue of the letter dated 30<sup>th</sup> Septmber,2021 between Cabinet Secretary and head of Public Service approving his appointment for a further third term as being confidential the Respondent submitted that the Petitioner did not adhere to the procedure laid down by the [Access to Information Act](#) 2016 on how to access information from Public entities. That is to say, he never made an application under section 8 of the [Access to Information Act](#) to access the letter and relied on case of Katiba Institute v President Delivery Unit & 3 others(2017) eKLR to submit that the letter was illegally acquired and should be expunged from the court's proceedings.
17. On whether the Applicant was entitled to the remedies sought the Respondents submitted that the Petitioner was not entitled to the same and the prayer for reinstatement was overtaken by events since another Managing Director was appointed and that the Petition be disallowed.

## DETERMINATION

18. The Court reviewed and considered the pleadings and submissions by both counsels in support and opposition to the case; the Court also considered authorities relied on by Counsels and has come up with three main issues;
  - a. I have Aa. aa.Whether the Petitioner is entitled to extension of his contract for a third term of five years and if he had legitimate expectation over the same.
  - b. Whether Whether the Petitioner is entitled to general damages for breach of constitutional rights
  - c. Whether WhrherWhether the Petitioner is entitled to reliefs sought

### **Whether the Petitioner was entitled for extension of his contract for a third term of five year contract and if he had legitimate expectations over the same.**

19. It was not in dispute that the Petitioner started working with the Interested Party on 9<sup>th</sup> April 2010 as an acting Managing director where he was confirmed to the position on 3<sup>rd</sup> April, 2012 and the same renewed for another five years in 12<sup>th</sup> April, 2016 to end in April 2021. This means the Petitioner had served for two terms of five years each and was seeking for a third term. He had served for two years as he sought full extension of his contract for a third term of five years.
20. The Contract the Petitioner and the Interested Party signed provided among others that the Petitioner was responsible to the Board, the Board reserved the right to terminate or extend the contract and that the 1<sup>st</sup> Respondent as per section 5(3) of the state Corporation Act had the mandate over the appointed staff to set their terms and conditions of service and not the appointment or reappointment.
21. The said section 5(3) of the [State Corporations Act](#) provides

“A state Corporation may engage and employ such number of staff, including the Chief Executive, on such terms and conditions of service as the Minister May, in Consultation with the Committee, approve”
22. To this extent the Court agrees with the Petitioner that the Minister could not overrule the Board since from the onset the contract gave the board the power to terminate or extend the Contract. This was set



out in the case of Paul Kipsang Kosgei V national Industrial Training Authority & Another; Cabinet Secretary, Ministry of labour & Social Services (Interested Party) (2020) eKLR where the Court stated:

“Further under Section 5(3) of the *State Corporations Act*, the Minister had no power in the renewal of the contract. The only role of the Minister is to approve the terms and conditions of service for the Chief Executive Officer and staff. This is confirmed by the fact that the Petitioner’s original appointment letter was signed by the Chairman, Prof. Thomas E. Akuja PhD who also signed the gazette notice dated 27<sup>th</sup> June 2014. The Minister thus has no role in the appointment and could therefore not veto the decision of the Board.”

23. The *Kenya Reinsurance Corporation Act* does not provide for appointment or reappointment of the CEO. However the Interested Party being a state corporation is subject to Mwongozo Code. The Code provides that the tenure of CEO’s for state corporations shall be three years renewable once. In this particular case the Petitioner’s term was five years and he relied on the circular from the head of Public Service OP/CAB.9/1A dated 27<sup>th</sup> February, 2018 which provided for the term to be for five years or less and the CEO and further provide that the terms of CEO’s was not subject to limit as to number of terms served.
24. The Court has noted that the Interested Party’s Board recommended the Petitioner for a third term after it was resolved by the Board Human Resource and Nominations Committee. This Committee however lacked the mandate recommend the appointment of the Petitioner and the two extensions for one year each was done to ensure smooth transition since the Petitioner had already served his two terms as per the Mwongozo code.
25. This court faced with the similar issue of the said circular and the Mwongozo Code had this to say in David Kipchumba Kimosop v Kerio Valley Development Authority [2022] eKLR;  

What this implies therefore is that whereas Mwongozo remain the governing instrument in the running of State Corporations generally, it remains a policy document which whenever circumstances demand and are justifiable, can be deviated from.
26. In the case before me, there was no apparent explanation or reason to deviate from the Mwongozo code since the Petitioner had served for two terms of 5 years and got two extensions of one year each which was only made for transition purposes.
27. The Court has further noted that the Petitioner signed the two extension contracts of one year each which stipulated that they were for transition purposes. There was no allegation of duress or misrepresentation or fraud directed to the petitioner by the Interested Party. The Court therefore can safely assume that the petitioner signed the two annual extensions voluntarily. He is therefore estopped from seeking a five year contract when he voluntarily signed twice, one year contracts with the knowledge that his original two contracts that expired were for five years each. Besides, the petitioner was aware that the contracts were for transition purposes.
28. On the issue of the legitimate expectation on the part of the Petitioner it was the duty of the Petitioner to prove the same existed. The threshold in determining a claim for alleged breach of a legitimate expectation was considered by the Supreme Court in the case of Communications Commission of Kenya & 5 others vs Royal Media Services & 5 others [2015]eKLR These are:
  - (a) 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
  - (d) there cannot be a legitimate expectation against a clear provision of the law.
29. The same Court further in the case of Kenya Revenue Authority v Export Tradind Company Limited [2022]KESCC31 restated that:
- “As can be discerned from these two definitions, legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing... respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate”.
30. In this case it has been illustrated and observed above that the Petitioner voluntarily signed the two one year extension contracts for smooth transition. He was aware or presumed to be aware that they would lapse through effluxion of time hence the issue of legitimate expectation for a five year contract did not arise

**Whether the Petitioner is entitled to general damages for breach of constitutional rights**

31. The Petitioner needed to prove first that there were constitutional issues raised in this petition and illustrate the many in which they were infringed before the court can delve into the issue of compensation for infringement of constitutional rights. As correctly submitted by Counsel for the respondent, the prayers sought by the Petitioner could well be handled by this court as employment claims without having to be filed as a constitutional petition. To qualify as a constitution question the Petition ought to have shown that the Employment Act did not adequately cover his complaints against the respondent. This was the holding in *Judicial Service Commission v Gladys Boss Shollei & Another* (2014) eKLR which relied on principles established in *Anarita Karimi and Matemo Mumo* cases. Where it was stated that the Petitioner needed to define the dispute to be decided by court and plead with particularity and reasonable precision on the provisions breached and the manner of breach alleged.
32. In this particular case the Petitioner has not met that test of pleading with particularity the infringed rights and hence he does not deserve the general damages for breach of constitutional rights.
33. In Conclusion the Court finds the Petition without merit and the same is hereby dismissed with costs.
34. It is so ordered.

**Dated at Nairobi this 19<sup>th</sup> day of October, 2023**

**Delivered virtually this 19<sup>th</sup> day of October, 2023**

**Abuodha Jorum Nelson**

**Judge**

