



**Songole v Nairobi City Water & Sewerage Company (Employment and Labour Relations  
Petition E103 of 2022) [2023] KEELRC 2801 (KLR) (3 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2801 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E103 OF 2022**

**AN MWAURE, J  
NOVEMBER 3, 2023**

**BETWEEN**

**GRIFFINE SONGOLE ..... PETITIONER**

**AND**

**NAIROBI CITY WATER & SEWERAGE COMPANY ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner filed the petition herein dated 16<sup>th</sup> June 2022.

**Petitioner's Case**

2. The Petitioner avers that he joined the Respondent in 2009, on successful completion of the vigorous interview process he was offered an appointment of 3 years renewable contract in line with the Nairobi City Water & Sewerage Company Limited, Human Resources Policies & Procedure Manual Revised: March 2009 (hereinafter referred to as "the HR Manual").
3. The Petitioner avers that he chose to leave his regular and permanent employment as Senior Consultant Internal Audit, Risk and Compliance Services at KPMG under permanent and pensionable terms and applied for placement and as a result of his hard work and dedication he was promoted to his current position.
4. The Petitioner avers that he served the Respondent as the Manager, Internal Audit and was subsequently promoted as the Director in charge of Internal Audit & Risk Management under renewable fixed contract terms based on performance.
5. The Petitioner avers that in addition to the right guaranteed to him by *the Constitution* of Kenya, the Fair Administration Action Act and the *Employment Act*, he was also entitled to the benefit of the HR Manual.



6. The Petitioner avers that on 13<sup>th</sup> February 2013, the Petitioner signed a contract of employment letter which provided that:

“ the Company has agreed to engage me on contract for a period of 5 years with effect from the 1<sup>st</sup> day of July 2012 and the same was renewable subject to performance.”
7. The Petitioner avers that on 28<sup>th</sup> March 2017, the Petitioner wrote to the Respondent’s Managing Director requesting for renewal of his employment contract as provided in his contract of employment.
8. The Petitioner avers on 23<sup>rd</sup> June 2017, the Petitioner was issued with a renewal of employment contract letter which stated that the contract will be in place up to 30<sup>th</sup> June 2022 contrary to the Petitioner’s lawful expectations.
9. The Petitioner avers that on 8<sup>th</sup> June 2020, the Respondent’s managing director through an internal memo to all management staff brought to his attention the Board resolution passed on 5<sup>th</sup> December 2019 changing the terms of service for staff on contract as follows: -
  - i. Managing Director and Functional Director shall be employed on contract basis with each contract term running for a period of 5 years. The contracts may be renewed based on performance and for a period.
  - ii. Managers, Coordinators and Officers shall be employed on contract basis with each contract term running for a period of 5 years. The contracts may be renewed based on performance.
10. The Petitioner avers that aforesaid term limits were unlawfully introduced discriminatively to apply to Functional Directors. On 29<sup>th</sup> November 2021, the Petitioner alongside 3 other colleagues, wrote a letter to the Managing Director raising this concern.
11. The Petitioner avers that the Managing Director responded directly to him vide a letter dated 14<sup>th</sup> December 2021 denying the claim of discrimination and stated the Petitioner had already been issued with a final contract dated 23<sup>rd</sup> June 2017.
12. The Petitioner avers that he had not been consulted or consented to any process or decision meant to change his terms of service to his detriment and he was never involved in the prejudicial adjustment of his terms of service.
13. The Petitioner avers that on 21<sup>st</sup> March 2022, the Petitioner received a letter signed by the Managing Director issuing a three month notice of expiry of employment contract by 30<sup>th</sup> June 2022.
14. The Petitioner avers that the Respondent acted unfairly and maliciously in applying terms that were not favourable to him to his detriment and the Respondent’s conduct was an abuse of office and in breach of fair labour practices and provisions of *the Constitution*.
15. The Petitioner avers the conduct of the Respondent was a violation of the rights and concept of due process, fairness and justice as entrusted in Article 47 and 50 of *the Constitution*.

### **Respondent’s Case**

16. In opposition, the Respondent filed a Replying Affidavit dated 27<sup>th</sup> June 2023 sworn by Monica Tuli, a Director, Human Resource and Administrator of the Respondent.
17. The Respondent avers that the Petitioner was employed as Director, Internal Audit, Risk and Compliance Services in July 2012 for 3 years renewable contract.



18. The Respondent avers that on 13<sup>th</sup> February 2013, the Petitioner signed an employment agreement with the Respondent for 5 years effective 1<sup>st</sup> July 2012 and clause 12 of the agreement indicated that the same will be renewable for a further 5 years.
19. The Respondent avers that the agreement signed on 13<sup>th</sup> February 2013 was based on the HR policies and Procedures Manual reviewed and approved by the Board on 18<sup>th</sup> December 2012 which states in clause 4.3.2 that: -

“Managing Director, Functional Directors and Managers shall be employed on contract basis with each contract term running for a period of 5 years. The contracts may be renewed based on performance and for a period not exceeding two terms for the Managing Director and Functional Directors and three terms for managers.”
20. The Respondent avers that the aforesaid was a departure from the previous HR policies and procedures manual, 2009.
21. The Respondent avers that in 2017, the Petitioner made a request to the Board for renewal of his contract in line with clause 12 of the employment agreement and its Managing Director communicated the Board’s decision of the renewal of the Petitioner’s and other employees’ contracts and the letter was clear from the onset the renewal was for a final 5-year term.
22. The Respondent avers that the review of the HR manual in 2012 was done by the Board of Management consisting of the Managing Director Eng. Philip Gichuki, Functional Directors i.e. Finance Director J. Randu; HR & Administration Director Rosemary Kijana; Commercial Director Eng Stephen Mbugua Chege; Director Internal Audit Risk & Compliance Services Griffine Songole; Head of Legal Services & Company Secretary Ivy Nyarango; and Acting Technical Director Eng Nahashon Muguna.
23. The Respondent aver that in a collective letter dated 19<sup>th</sup> November 2021 by the 4 directors addressed to the Managing Director raising issues of being treated in an unfair/discriminatory manner; based on the available records this assertion is unsupported as they had full knowledge of the provisions of the Human Resources Policies and Procedures Manual which they participated in its review as Board of Management members.
24. The Respondent further avers that aforesaid directors participated in the review of their contract terms from 3 years given their initial appointment letters to 5 years as indicated in their employment agreements and which they did not object to and the Respondent communicated to the Petitioner the renewal of his contract in 2017 was for a final term of 5 years.
25. The Respondent avers that from a ruling on ELRC Petition No E161 of 2021, the Public Service Commission in Circular Ref: PSC/LEG/009/21/544(27) dated 10<sup>th</sup> February 2022 wrote to all chairpersons and CEOs of state corporations, all Vice Chancellors of Public Universities and all Principals of constituent Colleges of Public Universities advising them to continue applying the existing human resource instruments as approved by their respective boards, while those in the process of reviewing such instruments were advised to halt the process until a multi stakeholder, robust and more coherent mechanism is established that will ensure pragmatic approach in complying with the existing court orders in the context of the constitutional mandate of the commission.
26. The Respondent avers that it complied fully with its Human Resource Manual and the advice by the Public Service Commission.



### **Petitioner's Submissions**

27. The Petitioner submitted that the Respondent purported to change the terms of his contract vide a HR Manual issued in December 2012 which effected without the Petitioner's consent and/or approval. This attempt to change the contract for renewal to a final term was done in breach of his existing contract and in violation of his constitutional right of expectation.
28. The Petitioner submitted that the Respondent violated Articles 41 and 45 of *the Constitution* by introducing new terms to the Petitioner's contract without his approval and/or consent.
29. The Petitioner submitted that the purported introduction of term limits in his last contract is an attempt to rewrite the contract between the parties should be disregarded and declared null and void and referred to various case laws in support of the discrimination against the Petitioner through introduction of the term limits.

### **Respondent's Submissions**

30. The Respondent submitted that from the onset and at all times during pendency of his employment the Petitioner was employed under a fixed term contract. The Petitioner was employed on a 3-year renewable contract which was revised to a 5-year period via the changes made to the Human Resource Manual on 18<sup>th</sup> December 2013.
31. The Respondent submitted that the only document that the Respondent varied was the Human Resource Manual which did not introduce any new features that were not already contained in the contract of employment.
32. The Respondent submitted that the Petitioner was a beneficiary of the said variations which were well communicated to him and his acceptance of the said terms are denoted by his signing of the contract.
33. The Respondent submitted that the variations to the Human Resource policies were done prior to the Petitioner signing his contract of employment dated 13<sup>th</sup> February 2013 and the employment contract was subject to the terms of the Human Resource manual and policies. It relied on Geoffrey Mworira V Water Resources Management Authority [2015] eKLR.
34. The Respondent submitted that no fundamental rights that have been breached but rather the Petitioner's contract was terminated by the effluxion of time and the Petitioner has failed to show any misgivings on the part of the Respondent that led to non-renewal of the contract.
35. The Respondent submitted that the Petitioner being on a fixed term contract, he carries no expectation of renewal and as a result the Petitioner cannot purport that he legitimately expected the renewal as was stated in Margaret A Ochieng V National Water Conservation & Pipeline Corporation [2014] eKLR.
36. The Respondent submitted that it never at any time gave the Petitioner any legitimate expectation that his contract will be renewed nor did they give the Petitioner any impression that he had unlimited term. The Respondent in its letter dated 23<sup>rd</sup> June 2017 it made clear and express communication that the Petitioner's contract would be renewed for the last term and this defeats any claim by the Petitioner for legitimate expectation.

### **Analysis and Determination**

37. The issues for determination are:
  - a. Whether the Respondent violated the Petitioner's right to fair labour practices.



- b. Whether the Respondent violated the Petitioners right to legitimate expectation.
  - c. Whether the Petitioner is entitled to the reliefs sought.
38. On the first issue, it is the Petitioner's submission that his right to fair labour practices was violated by the Respondent when it unilaterally varied his employment contract.
39. The Respondent submitted it only varied the Human Resource Manual which did not introduce any new features that were not already contained in the contract of employment. However, vide the Internal Memo provided under pages 87-90 of the Petitioner's documents, the Respondent stated: -
- “Although their employment contracts given in July, August and September 2012 were for 3 years renewable based on performance, the Employment Agreements signed on 19<sup>th</sup> December 2012 for Head of Legal Services and Company Secretary and those of the other 3 directors signed on 13<sup>th</sup> February 2013 provided for 5 years based on the HR Policies and Procedures Manual reviewed on 18<sup>th</sup> December 2012 and which states in paragraph 4.3.2 Contract of employment that Managing Director, functional Directors and managers shall be employed on contract basis with each contract term running for a period of 5 years. The contracts may be renewed based on performance and for a period not exceeding two terms for the Managing Director and functional directors, and three terms for managers.”
40. The contention by the petitioner is that the respondent revised the terms of their employment in their HR manual and provided that there would be a fixed contract of 5 years going back to 2012. The petitioner was given an offer of 5 years and all the terms and benefits were contained therein. It was not an open ended contract but was a fixed contract. The petitioner accepted the contract and continued to offer services as usual. He signed an employment agreement dated 13<sup>th</sup> February 2013 and it provided that the contract would be for 5 years from 1<sup>st</sup> July 2012.
41. On 1<sup>st</sup> July 2017 the petitioner's contract was renewed for another 5 years and it was indicated it was the final year. The same was said to be on existing terms and conditions.
42. Obviously, the petitioner accepted the terms of the renewed contract though they wrote a protest letter in 2021 but he continued working for the respondent being aware he was on a fixed term of contract of five years and it was the final term.
43. His contention is that the respondent reviewed the human resource policies manual and the directors who were said to have participated in the review were managing director engineer Philip Gichuki Functional director, Human resource directors and ICT director, internal audit and risk and compliance director (the petitioner) and Head of Legal services Ms Ivy Nyarango and AG Technical Director. Thereafter on 19<sup>th</sup> November 2021 four of the aforementioned raised issues of discrimination due to the revision of the HR policies manual which revised the contract terms from 3 years to 5 years term.
44. The HR policy manual was revised in 2013 to raise the fixed terms from 3 years to 5 years. The petitioner who was a senior staff with the respondent at that time was aware of the fact that he was on a fixed term of 5 years from 3 years to 5 years and the petitioner never objected to that revision. The objection was only raised in 2021 when the final term was about to expire.
45. The respondent being an employer is not expected to consult all It is employees while amending its human resource policy manual as this may be an impossible task. Therefore, the court is not expected



to supervise employers in performing their daily human resource functions. In the case of John Muogi Omare vs Kenya National Commission for UNESCO (2020) eKLR the court held:

“first in cases urging the court to intervene in the performance of human resource functions by the employer the court is guided by its opinion in Geoffrey Mworira vs Water Resources Management Authority & Others (2013) eKLR thus, “the principles are clear. The court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provisions of *the constitution* or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employers internal process”

46. The court is persuaded the respondent did not discriminate against the petitioner and was in his right to revise the term of the contract of his employees if it was going to serve the company more prudently.

47. The court is further persuaded by the case of Enid Nkirote Mukire vs Kenya Year Book Editorial Board Petition E 029 of 2021 where court pronounced itself as such

“an employee on a fixed terms contract is aware of the date of expiry of the contract from the date the contract is signed. Such an employee need no notice of termination of the contract as the contract terminates by the expiry of its term”

48. As to the issue of legitimate expectation the respondent never provided the petitioner with legitimate expectation that his contract would be extended beyond the five years. That is why it was even indicated it was “final”.

49. Persuaded by the case of Pharmaceutical Manufacturing (k) Co Ltd & 3 Others vs Commissioner General of Kenya Revenue Authority & 2 Others (2017) eKLR where the court stated:

“the combined effect of the decisions in Keroche Industries Ltd vs Commissioner General of Kenya Revenue Authority & Others (2007) eKLR 240 and Communication Commission of Kenya & 5 Others vs Royal Media Services & 5 Others S.C. Petition Nos 14, 14A, 14B and 14C of 2014 in a series of others, is that before a person can rely on the doctrine of legitimate expectation, that person must demonstrate that there was an express clear and unambiguous promise, that the promise was not kept; that as a result, the decision made in breach of that promise affected him by depriving him of some benefit or advantage which either; (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reason for contending that they should not be withdrawn. The expectation must itself be legitimate, reasonable and not contrary to the express provisions of the law.”

50. The case herein the respondent did not provide express or implied expectation to the petitioner. The doctrine of legitimate expectation has not been proved in this case. In any event where parties have a



contract the court must follow the covenants in the said contract and has to enforce it rather than to rewrite it.

51. The court is persuaded the prayers by the petitioner have not been proved by the petitioner and are not merited. The cases referred by the petitioner are not similar to the present case where clearly like in the case of Alex Wainaina vs Kenya Airways Ltd ELRC cause No 430 of 2011 termination was on poor performance not by affluxion of time.
52. In view of the foregoing and having considered the pleadings and submissions carefully the court is persuaded the petition is not merited and the prayers thereto are not granted. It is dismissed accordingly.
53. Each party will meet their costs of the application and of the petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

