



REPUBLIC OF KENYA



KENYA LAW
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**Otiende v Ligawa & another (Petition E052 of 2022)
[2023] KEELRC 3363 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3363 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E052 OF 2022**

S RADIDO, J

DECEMBER 13, 2023

**IN THE MATTER OF ARTICLES 10, 22, 23, 27, 28, 41, 47 232 AND 236 OF
THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 22, 23,
27, 28, 41, 47, 232 AND 236 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

BETWEEN

GABRIEL M OUMA OTIENDE PETITIONER

AND

STEPHEN OYUGI LIGAWA 1ST RESPONDENT

SOUTH NYANZA SUGAR CO LTD 2ND RESPONDENT

JUDGMENT

1. Gabriel M. Ouma Otiende (the Petitioner) was employed as a Legal Officer by South Nyanza Sugar Co Ltd (the 2nd Respondent) on or around 25 August 2000.
2. The Petitioner served until around 22 December 2016, when he was offered the position of Company Secretary (with effect from 1 January 2017) for a term of 3 years.



3. On 18 August 2020, the Respondents informed the Petitioner that he was being released from employment, backdated to 31 December 2019.
4. The Petitioner was aggrieved and on 28 December 2022, he sued Stephen Oyugi Ligawa and South Nyanza Sugar Co Ltd (the Respondents), alleging breach of legitimate expectation, unfair termination or breach of contract, discrimination, unfair labour practices and violation of the right to fair administrative action.
5. The Petitioner sought the following remedies:
 - i. A declaration that the decision, whether or not to renew the Petitioner's contract of employment, upon the Petitioner's request for renewal made on the 19th June 2019 could only be made by the Board of Directors of the 2nd Respondent and not the Management.
 - ii. A declaration that the Petitioner worked for the 2nd Respondent up to and including the 18th August 2020 when he was released from service by a decision of the Management upon advice and directive of the Cabinet Secretary as was communicated vide the 1st Respondent's letter dated 18th August 2020 to the Petitioner.
 - iii. A declaration that the 1st Respondent and/or the Management of the 2nd Respondent not being the appointing authority had no powers or justifiable reason and justification to release the Petitioner from the service of the 2nd Respondent through the letter dated 18th August 2020 and to backdate the effect of the same to 31st December 2019.
 - iv. A declaration that the 1st Respondent in writing to the Petitioner the letter dated 18th August 2020 allegedly on behalf of the Management acted without legal authority and/or basis and in the process violated the rights of the Petitioner to fair labour practices contrary to Article 41 of *the Constitution*.
 - v. A declaration that in denying to make a decision on the Petitioner's application for renewal of the contract between 19th June 2019 when the request for extension was made to the 18th August 2020 when a decision was made to release the Petitioner from the service, the 2nd Respondent violated the Petitioner's right to fair administrative action.
 - vi. A declaration that the 2nd Respondent in approving the application for extension of contracts of other employees based on appraisal by the then Managing Director and refusing to make a decision on the request for extension by the Petitioner and subjecting it to different considerations amounted to discrimination and differential treatment, was a breach of section 5 of the *Employment Act* and violated the Petitioner's rights contrary to Article 27 of *the Constitution* and is actionable.
 - vii. A declaration that in withholding the Petitioner's salaries and emoluments for the period worked up to and including the 18th August 2020 and in refusing to pay the Petitioner his gratuity even after purporting to have released him from service is an unfair labour practice and violation of the Petitioner's rights under Articles 28 and 41 of *the Constitution*.
 - viii. An order quashing the letter dated 18th August 2020 and the purported decision of the Management releasing the Petitioner from service of the 2nd Respondent and backdating the effect thereof to take effect from 31st December 2019.
 - ix. Special damages as pleaded in paragraph 36 of the Petition.
 - x. Exemplary damages for discrimination.



- x. Damages for violation of the rights and fundamental freedoms under the Bill of Rights as pleaded in the Petition.
 - xii. Costs of these proceedings.
 - xiii. Interest on money awards made with effect from 18th August 2020 when the same fell due and payable until payment shall be made in full.
 - xiv. Any other appropriate relief which the Court may deem just in contemplation of Article 23 of *the Constitution*.
6. The Respondents filed a replying affidavit in opposition to the Petition on 3 February 2023, and the Court gave the following directions on 6 February 2023:
- i. Respondents to file and serve Cross-Petition on or before 15 February 2023.
 - ii. Petitioner to file and serve a response to the Cross-Petition on or before 1 March 2023.
 - iii. Petitioner to file and serve submissions before 1 March 2023.
 - iv. Respondents to file and serve submissions on or before 15 March 2023.
 - v. Judgment on 22 March 2023.
7. Pursuant to the directions, the Respondents filed a Cross-Petition on 23 February 2023. The Petitioner filed a further affidavit on 23 February 2023, and his submissions on 6 March 2023 (no explicit Issues for determination were isolated).
8. However, on 7 March 2023, the Petitioner filed an application seeking the cross-examination of the deponents of the affidavits on record.
9. The Court allowed the application and directed that the Petition proceeds on the basis of viva voce evidence (the delivery of the judgment was therefore not possible).
10. The hearing therefore commenced on 18 April 2023 and continued on 12 June 2023, 26 June 2023, 27 June 2023 and 25 September 2023. The Petitioner and the 1st Respondent testified.
11. The Petitioner filed further submissions on 26 October 2023. In the further submissions, the Petitioner outlined the Issues for adjudication as:
- Constitutional violations
- i. Discrimination.
 - ii. Legitimate expectation.
 - iii. Cross-Appeal.
12. The Respondents filed their submissions on 10 November 2023 and they identified the Issues for adjudication as:
- i. Whether the Petitioner had a legitimate expectation for the renewal of his fixed-term contract?
 - ii. Whether the Petitioner was discriminated against?
 - iii. How much was the Petitioner paid contrary to the Staff Administration Code and final dues computation



13. The Court has given due consideration to the pleadings, evidence and submissions.

Whether Petitioner had legitimate expectation on renewal of the contract?

14. The main facts surrounding the Petitioner's contractual relationship with the Respondents are not in dispute.
15. On 1 January 2017, the 2nd Respondent appointed the Petitioner as the Company Secretary for a 3-year fixed term. The contract was to lapse on 31 December 2019.
16. 6 months before the expiry of the contract, on 28 June 2019, the Petitioner applied for the renewal of the contract.
17. Sometime in July 2019, the then Managing Director prepared and presented a report on the Petitioner's request for renewal of contract to the General Purposes Committee of the Board (the report included the request for renewal of contracts by the Head of ICT and Medical Officer).
18. The Committee met on 25 July 2019 and recommended that the contract of the Medical Officer be renewed for 6 months pending recruitment of a new Medical Officer.
19. In respect to the Petitioner and Head of ICT, the Committee requested the Management to clarify the terms of reference and prepare relevant documentation related to the Petitioner's (and Head of ICT) performance evaluation and also to submit a Balanced Scorecard.
20. The Committee presented a report to the full Board on 26 July 2019, and the Board resolved that the Management present evaluation reports in respect to the Petitioner's and the Head of ICT to the Committee for further deliberations and recommendations.
21. The Managing Director submitted the reports to the Committee on or around 19 September 2019. In the report, the Managing Director recommended the renewal of the contracts of the Petitioner, Head of ICT and Head of Human Resource.
22. The Committee deliberated on the reports and made a presentation to the Board during its meeting held on 27 September 2019. During the meeting, the Board discussed the extension of contracts of 5 Senior Managers.
23. The Board resolved at the meeting that the contracts for the Head of ICT and Medical Officer be extended while the requests for extension of contracts by the Petitioner and the Head of Human Resources be progressed through the General Purposes Committee.
24. On or around 29 October 2019, the Petitioner applied for a 120 days' annual leave and on 6 November 2019, the Respondents approved the annual leave application by the Petitioner. The leave was to terminate on or around 29 April 2020.
25. The Board then held a Special Board meeting on 20 December 2019. The Board however opted to defer the agenda item on the Petitioner's request for extension of contract and directed that it be progressed through the General Purposes Committee.
26. The next time the Board met on 20 March 2020, it decided to expunge the Petitioner's request for extension of contract from the agenda and the reasons recorded were that he was facing investigations by the Ethics and Anti-Corruption Commission and the Retirement Benefits Authority over loss of funds by the Pension Scheme.
27. From the above, it is clear that the Petitioner's request for extension of contract was not resolved by the time the contract was expiring. The Board was subsequently dissolved before it could take a decision.



28. The Petitioner relied on the doctrine of legitimate expectation to assert that the Respondents unlawfully or unfairly declined to renew his employment contract.
29. According to the Petitioner, he had a legitimate expectation of the renewal of his contract because he had submitted his request for the renewal of the contract within the time stipulated in the contract; his supervisor the Managing Director had re-evaluated his performance and recommended renewal of the contract; the Respondents had approved his leave request which went beyond the term of the contract; the approval of the leave signified that the contract had been extended in terms of clause 1(iv) of the contract; the Respondents had assured him the request for renewal was still under consideration through a letter dated 20 January 2020, and up to the time of the dissolution of the Board.
30. Citing Article 47 of *the Constitution* and the *Fair Administrative Actions Act* and *John Nduba v African Medical Research Foundation (Amref Health Africa)* (2021) eKLR the Petitioner contended that the Respondents denied him the right to expeditious, efficient, lawful and reasonable and procedural fairness.
31. The Respondents however denied that the doctrine of legitimate expectation was available to the Petitioner because he was on a fixed-term contract which had lapsed and the Respondents had no obligation to renew it or give reasons for failure to renew.
32. Despite not giving the reasons to the Petitioner, the Respondents contended that they could not renew the contract because the Petitioner was facing investigations by the Ethics and Anti-Corruption Commission and he had not met the agreed performance target having scored 81.12% during evaluation.
33. Renewal of the contract, the Respondents argued was at their discretion. The cases of *Margaret Ochieng v National Water Conservation & Pipeline Corporation* (2014) eKLR, *Transparency International v Teresa Carlo Omondi* (KECA 174), *Samuel Chacha Mwita v Kenya Medical Research Institute* (2014) eKLR were cited.
34. The Court has keenly looked at the Petitioner's contract.
35. The contract provided at the material parts:
 1. Terms of Contract
 - (i) This contract is for the duration of thirty-six (36) months effective 1st Jan 2017, subject however to the provisions of paragraph 1(ii) hereunder.
 - (ii) ... (probation)
 - (iii)
 - (iv) The employee may, notwithstanding the completion of his term of engagement and at the sole discretion of the employer, be retained for a further period as shall be directed by the employer depending on satisfactory performance of the contract by the employee as judged by the Board and if a medical officer certifies that the employee engaged is physically fit to be so retained, and the provisions of this contract shall apply to such extended period accordingly.
 2. Further employment

In the event that the employee is desirous in renewing this engagement contract, he shall within a period of four months prior to expiry of the same give notice in writing to the Managing



Director of the employer of such intention whereupon the Managing Director in consultation with the Board shall thereupon decide whether the employee shall be re-engaged or not. In the event that the employee shall be re-engaged, the same shall be on such terms and conditions as shall be mutually agreed upon by the employer and the employee.

36. The Court of Appeal addressed the question of legitimate expectation within the context of renewal of a contract in *Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union* (2021) KECA 352.

42. The Court stated therein:

In *Registered Trustees of the Presbyterian Church of East Africa & Ar v Ruth Gathoni Ngotho-Kariuki* [2017] eKLR, where a fixed term contract contained a clause providing for notice of non-renewal 3 months to the end of the contract, this Court rejected the contention that failure to give the notice amounted to an automatic renewal as the conduct of the employer such as removal of the employee from the payroll once the contract expired was a clear indication of the employer's position.

There may, however, be instances where the unique circumstances of the employment relationship may create a legitimate expectation that a fixed term contract would be renewed. In the *Oshwal Academy Case* (supra), for instance, this Court upheld the trial court's determination that despite the fixed term contract lapsing by effluxion of time, the respondent had a legitimate expectation of continuity from the conduct of the parties in the course of the employment relationship; and that the respondent was in employment for over 23 years and had developed a bond as to expect to work until retirement.

Regarding the considerations to be made when considering whether a legitimate expectation for renewal of a fixed term contract was created, the sentiments of Rika J. in *Teresa Carlo Omondi v Transparency International- Kenya* [2017] eKLR are particularly persuasive: "The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation."

For the sake of comparative jurisprudence, a number of South African cases explore the element of "reasonable expectation" as provided in Section 186 (b) of South Africa's Labour Relations Act that provides one definition of dismissal as being where an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it at all.



Some of the factors that are taken into account to determine the presence or absence of this reasonable expectation were, in *Dierks v University of South Africa* (J399/98) [1998] ZALC 126 para 133, held to include:

“...all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business.”

In *Mediterranean Woollen Mills (Pty) Ltd. v South African Clothing and Textile Workers' Union* (143/96) [1998] ZASCA 11, the Supreme Court of Appeal of South Africa held that despite a clause of a fixed term contract stipulating that no reasonable expectation for renewal of the contract could arise from the contract, a reasonable expectation could arise where assurances made by the employer and other conduct by the employer led the employees that they could entertain such an expectation.

In *South African Clothing and Textile Workers Union and Another v CADEMA Industries (Pty) Ltd* (C 277/05) [2008] ZALC 5, a worker was similarly employed on several fixed term contracts on a continuous and unbroken period of 4 ½ years. The court held that the several renewals or extensions over this period without any discussions as to why they were renewed, in addition to the fact that the last renewal was done after a plea from the worker and the worker was permitted to continue working for another 7 days after expiry of the contract created a reasonable expectation that the contract would be renewed.

37. The Petitioner requested for renewal or extension of the contract within the period stipulated in the contract. The Board did not make any decision on the request by the time the contract was expiring.
38. The Managing Director had evaluated the Petitioner's performance and recommended renewal.
39. The Managing Director was acting in the normal course of his duties and responsibilities in evaluating the performance of the Petitioner and making a recommendation. It was up to the Board to accept or reject the recommendation. The evaluation of the Petitioner was equally a yearly requirement under the policies in place.
40. The granting of the Petitioner's leave was also in the normal course of contract and it was up to the employer to consider the material circumstances before allowing the request. Of course it was open to the Respondents to pay the Petitioner commuted leave if the contract was not going to be extended.
41. The Respondents made decisions on requests by other Heads of Departments without undergoing through any training on the Balance Scorecard. The Petitioner's evaluation report was presented by the Managing Director well before the lapse of the Petitioner's contract.
42. The allegations that the Petitioner was facing investigations by the Ethics and Anti-Corruption Commission and Retirement Benefits Authority only came before the Board long after the lapse of the Petitioner's contract.
43. The Petitioner was only informed that he was being released from the contract in August 2020, after the dissolution of the Board.
44. In the Court's view, the conduct of the Respondents not only created a legitimate expectation on the Petitioner but also led to an inference that he was still an employee until released formally in terms of clause 1(iv) of the contract.



Discrimination

45. The Petitioner alleged that the Respondents discriminated against him in that he was treated differently in comparison to other management employees under the Board whose contracts were renewed.
46. According to the Petitioner whilst the Board deliberated on requests for the renewal of other similarly situated managers (IT Manager, Medical Officer and a manager seconded to Chemelil Sugar Co Ltd), in his case, the Board purportedly asked to be put through training on the appraisal process before making a decision despite the Managing Director having evaluated his performance and recommending renewal of the contract.
47. The Petitioner asserted that an employee under investigations was seconded to head another sugar mill while at the same time, the Respondents declined to consider his request for renewal on the ground that he was facing investigations.
48. Lastly, on discrimination, the Petitioner contended that another employee was compensated by the insurance company and also paid full remuneration during absence due to injury without being asked to make a refund of the remuneration.
49. The Respondents denied discriminating against the Petitioner and they asserted that the Petitioner had a distinct contract upon which he was evaluated. The Respondents also contended that the case of the Petitioner was different from that of the other Managers because he had been away for most of the term of his contract and the other Managers were not under investigations by other public bodies.
50. The Petitioner was a Head of Department. The Head of ICT and Medical Officer were also heads of departments and they were, therefore, similarly situated. The Board did not insist on getting performance scorecard training before deciding whether to extend their contracts.
51. The Court finds that the Respondents discriminated against the Petitioner when considering his request for extension of contract.

Cross-Petition

52. The Respondents Cross-Petitioned for Kshs 1,892,000/- allegedly being salaries paid for 14 months when the Petitioner was away on sick-leave and for which period he was also paid insurance compensation of Kshs 9,455,566/-.
53. In making the claim, the Respondents relied on clause 7.9(a) of the Staff Administrative Code which provides that:

Sick leave may be granted up to a maximum of 60 days on full pay and on half pay thereafter for a further period of up to 60 days in any calendar year to staff on Supervisory & Managerial grades.
54. The Respondents further contended that the payment was not procedural and that the payment was made on the understanding that recoveries would be made from the insurance compensation.
55. The Petitioner urged the Court not to allow the Cross-Petition since it did not meet the threshold of a constitutional claim as the claims related to for monies allegedly owed.
56. The Petitioner also contended that the insurer had not made any claims in respect to the compensation it had paid nor were policy documents between the insurer and the 2nd Respondent put before the Court.



57. The Cross-Petition, the Petitioner maintained was an afterthought as the claims were only made after he moved to Court.
58. Records produced before the Court indicate that the insurer made payment of compensation on or around 16 October 2019. The Petitioner was out of work from around 15 April 2018 for 14 months. This suggests that the Petitioner resumed work around May 2019.
59. By dint of section 90 of the Employment Act, 2007, the Respondents had 3-years within which to bring an action to recover any salaries unprocedurally or unlawfully allegedly paid to the Petitioner. The 3-years lapsed on or around May 2022.
60. The Cross-Petition is thus caught up by the law of limitation.

Conclusion and Orders

61. Flowing from the above, the Court finds and orders that:
 - i. A declaration be and is hereby issued that the Petitioner worked for the 2nd Respondent up to and including the 18 August 2020 when he was released from service upon a decision by the Management upon the advice and directive of the Cabinet Secretary as was communicated vide the 1st Respondent's letter dated 18th August 2020.
 - ii. A declaration be and is hereby issued that the withholding of the Petitioner's salaries and emoluments for the period worked up to and including the 18th August 2020 and the refusal to pay the Petitioner his gratuity even after purporting to release him from service was an unfair labour practice and violation of the Petitioner's right under Articles 28 and 41 of the Constitution.
 - iii. The Respondents to pay the Petitioner Kshs 7,252,848/- being remuneration from April 2019 to 18 August 2020.
 - iv. The Respondents to pay the Petitioner Kshs 4,496,766/- being gratuity.
 - v. The Respondents to pay the Petitioner Kshs 125,968/- unpaid leave allowance.
62. The Petitioner admitted receiving some payments. The same should be discounted from the awards herein.
63. The Petitioner to have costs and interest on the award from date of judgment.
64. The Cross-Petition is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISII ON THIS 13TH DAY OF DECEMBER 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Petitioner Agnes Awuor, Advocate

For Respondents TripleOKLaw LLP, Advocates

Court Assistant Chrispo Aura

