



**Chesire v National Aids Control Council (Petition E104 of 2022)
[2022] KEELRC 3829 (KLR) (18 August 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3829 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E104 OF 2022
AN MWAURE, J
AUGUST 18, 2022**

BETWEEN

EMMY CHESIRE CLAIMANT

AND

NATIONAL AIDS CONTROL COUNCIL RESPONDENT

RULING

1. By a Chamber Summons dated June 20, 2022 the Petitioner herein Dr. Emmy Chesire approached this court seeking to forestall retirement of Petitioner from the employment of the respondent which was due to take place on June 22, 2022.

Application

The application sought the following orders:-

- a. Spent
- b. That pending the hearing and determination of the application inter partes, this Honourable Court be pleased to issue a temporary conservatory order restraining the Respondent whether by itself or by its agents, servants and or employees or anybody whosoever acting under it from prematurely and wrongfully retiring the Petitioner from the Respondent's employment pursuant to the letter dated March 11, 2022
- c. That pending the hearing and determination of the Petition filed wherewith, this Honourable Court be pleased to issue a temporary conservatory order restraining the Respondent whether by itself or by its agents, servants and or employees or anybody whosoever acting under it from prematurely, wrongfully retiring the Petitioner from the Respondent's employment pursuant to the letter dated March 11, 2022.



- d. That this Honourable court be pleased to make such orders or other conservatory orders and or directions as would preserve the set of circumstances in such a way that this Petition is not rendered nugatory.
- e. That this Honourable Court be pleased to give such directions and orders as to the hearing of the Petition filed herewith as it may deem just and expedient in the light of all circumstances.
- f. That the cost of this application be in the cause.

Facts of the Petition

- 2. On June 4, 2012 the Director of the National Aids Control Council requested the Director of Kenya Medical Training College to second the Petitioner to the Respondent. The request for secondment was approved for 2 years. On expiry of 2 years she further she was seconded for 3 months and thereafter until June 30, 2015.
- 3. The Petitioner worked for the respondent on various contracts of three (3) years item until January 2021. On January 21, 2021 the Respondent wrote to the Kenya Medical Training College seeking clarification on Petitioner's secondment status prior to considering renewal of the contract. The Kenya Medical Training College in return wrote to the State Corporation Advisory Committee seeking advice on status of Petitioner's secondment to the Respondent.
- 4. Meanwhile the respondent wrote to the Petitioner on February 26, 2021 and informed her that the board had made a decision not to renew her contract as there was no letter from the Kenya Medical Training College indicating termination of her employment with the Kenya Medical Training College the present employer.
- 5. On the February 26, 2021 the Petitioner wrote to Kenya Medical Training College and sought retirement to enable the respondent renew her contract. The Kenya Medical Training College granted the Petitioner her request to retire from its employment. On July 2, 2021 the respondent confirmed to the Petitioner it had renewed her contract for one year. The Petitioner wrote to the respondent inquiring about the redeployment but the Respondent never responded. However, on January 6, 2022 the respondent wrote to the Petitioner and asked her to indicate in writing if she was willing to have her contract renewed.
- 6. The Petitioner wrote back to the Respondent on January 12, 2022 and confirmed her willingness to have her contract renewed for a further three years.
- 7. On March 11, 2022 the respondent confirmed to the Petitioner that her contract would not be renewed. The Petitioner nevertheless appealed and finally on 1 May 8, 2022 got final confirmation that her contract would not be renewed.
- 8. The Respondent in its grounds of opposition dated July 1, 2022 states that the application is an abuse of the court's process as is overtaken by events and the court cannot issue conservatory orders and cannot rewrite a contract between the parties as held in *National Bank of Kenya -vs- Pipelastik Samkolit (k) Ltd & Another* (2001)eKLR where it was held that a court of law cannot purport to rewrite a contract between parties. In the case of C.A 366/1999 *Kenya National Examination Council -vs- The Republic* it was held that prohibition cannot quash a decision already made, it can only prevent a contemplated decision.



Petitioner Submission

9. The Petitioner in her submissions relies on the cases of [Board of Management of Uburu Secondary School -vs- City County Director of Education & 2 Others](#)(2015)eKLR which list three criterias to be satisfied in granting a conservatory orders.
 - (a) One is the *Prima facie* case with likelihood of success and prejudice likely to be suffered by the applicant if such orders are not granted.
 - (b) On this point the Petitioner avers she was seconded from her mother employer, the Kenya Medical Training College to the respondent in 2012 where she was on permanent employment. The secondment was at the request of the respondent.
10. She says she retired from the parent employer in 2021 to pave way for a three year contract by the respondent. Instead she was offered a one year contract.
11. The Petitioner says she has an arguable case and is entitled to the grant of the conservatory order.
12. The second principle is whether denial of the conservatory relief will enhance constitutional values and objects of specific right or freedom in the bill of rights. The petitioner submits she left her mother employer at the invitation of the respondent and just to have her term cut short. She avers that is a contravention of fair labour practices as provided in article 41 of [the constitution](#).
13. On the third principle whether the petitioner's substratum will be rendered nugatory if this application is not granted it is the petitioner's submission that if the conservatory orders are not granted she may not get her dues and wages.
14. As to the fourth principle on whether public interest will be served or prejudiced by the decision to grant the conservatory order the Petitioner submit that she is serving the public and especially in the areas of health related to HIV & AIDS. She therefore prays to be granted her orders as prayed so as to continue serving the public.

Respondent's Submissions

15. The Respondent in its submissions avers this application is an abuse of court process as the Petitioner's contract lapsed and she consented to her contract in the first place. It is the respondent's averment that the petitioner signed her contract voluntarily. The respondent submission is that the Petitioner has not also demonstrated a prima facie with high probability of success and so the application should be dismissed with costs.

Decision

16. The grant of conservatory order is indeed as well provided in several authorities. The main one is as Application No. 5 of 2014 [Gatirau Peter Munya -vs- Dickson Mwenda Githinji](#) where the court stated as follows:-

“Conservatory orders consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values and the proportionate magnitude and priority levels attributable to the relevant courses.

So as to whether the Petitioner has established a prima facie in this case with likelihood of success the court has considered that it is correct the Petitioner signed a one year contract with the respondent. Then it can be rightly summarized that she accepted the terms of her



contract. It is trite law that the courts are not expected to rewrite a contract between the parties as was well stated in the case of National Bank of Kenya -vs- Pipelastik Samkolit(k) Ltd & Another(2001)eKLR. The court is merely to enforce a contract between the parties.

17. Having said so the court observed that the respondent requested original employer being Kenya Medical Training College for the Petitioner's secondment to the respondent. The claimant worked with the respondent on 3 years contracts upto the year 2021. It was the respondent who wrote to the Petitioner in January 2021 and asked her if she was willing to renew her contract. With the expectation that she would be offered her usual three years contract she retired from her mother employer and when she retired from her mother company.
18. At that point she was offered a contract on July 12, 2021 of one year and there is no evidence that she was informed her contract was to be only one year not the three years she had been working under from when she was seconded to the respondent.
19. On the above grounds the court find the petitioner has an arguable case in the main petition.
20. The second principle of whether the petitioner's violation rights will be rendered nugatory the court noted the petitioner is 57 years old and if she loses her employment now she will not likely get a job and will lose the benefit of the two years pending to her final contract if she had been offered the three years as done in the past.
21. As to the principle of public interest which must be considered the Petitioner described herself by her letter of January 12, 2022 when she was requesting for the renewal of her contract. She described herself as Deputy Director supporting First Lady as Technical Advisor and especially in championing of HIV and Syphilis. This is to be done as advisory and support in line with Kenya Aids Strategic Framework II. The court finds the service she is to render is definitely of public benefit and should be completed.
22. The court finds this is a case even if the petitioner was on a fixed contract there was legitimate expectation created by the respondent that she would be offered a contract of three years just as in the past. So she even resigned from her Mother employer on that legitimate expectation. In the case of *Kenya School of Law And Republic* Misc. Application No. 261 of 2018 the court held that a legitimate expectation rests on presumption that a public authority will follow certain procedure in advance of a decision being taken.
23. In this case the answer to the question of legitimate expectation is in the affirmative. It is however unfortunate that the claimant made her application two days to the expiry of her contract and you know equity does not aid the indolent unfortunately.
24. There was no way the court was to hear her application and grant her conservatory orders within a day. As it were the application is overtaken by events and cannot grant a conservatory order of that which has already been effected. The court therefore dismisses the application dated June 20, 2022 as is overtaken by events. The parties can set the main petition for hearing on priority basis.
25. Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH AUGUST, 2022

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 15th March 2020 and subsequent directions of 21st 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 had 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 Civil 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.

ANNA NGIBUINI MWAURE

JUDGE

