



**Songole v Nairobi City Water & Sewerage Company (Employment and Labour Relations
Petition E103 of 2022) [2022] KEELRC 3826 (KLR) (18 August 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3826 (KLR)

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

**AN MWAURE, J
AUGUST 18, 2022**

BETWEEN

GRIFFINE SONGOLE PETITIONER

AND

NAIROBI CITY WATER & SEWERAGE COMPANY RESPONDENT

RULING

1. The application before Court is the Notice of Motion dated June 16, 2022 and filed on June 17, 2022. It is expressed to be brought under Articles 41 and 47 of the Constitution and Rule 17 of the Employment & Labour Relations Court (Procedure Rules) 2016 and all other enabling provisions of the law.
2. The Application seeks the following;
 - a. Spent
 - b. The Honourable Court be pleased to issue an order in favour of the Petitioner/Applicant restraining the Respondent from enforcing its unilateral and unfair decision contained in the internal memo ref: NSWSC/HRD/VOL.1/953/MNT/vn and dated June 8, 2020 varying the Applicant's terms of engagement to his detriment pending the hearing and determination of the suit.
 - c. The Court be pleased to issue an order in favour of the Petitioner/Applicant restraining the Respondent from enforcing its unilateral and unfair decision contained in the internal memo Ref: NCWSC/HRD/VOL1/953/MNT/vn and dated June 8, 2020 varying the Applicant's terms of engagement to his detriment pending the hearing and determination of the suit.
 - d. Costs of this application be provided for.



The Facts of Case

3. The application is anchored on grounds that the Applicant's contract of employment is still in force until June 30, 2022 and due for renewal based on his performance. The applicant will be unable to renew the contract since the Respondent unilaterally introduced term limits unlawfully and contrary to his legitimate expectations.
4. It is in the interests of justice that an injunctive order be issued to halt the irreparable loss, injustice and damage to the Applicant career through unlawful termination. That the Respondent has unfairly discriminated against the Applicant and varied the terms of his employment.
5. The application is supported by the affidavit of the Applicant, Griffin Songole. It amplifies, reiterates and or extrapolates the grounds relied on in the application.
6. The Respondent gave a response via the replying affidavit dated June 27, 2022 deponed by Monica Tuli Respondent's Acting Director Human Resource and Administration. The Respondent says that the Petitioner was employed as Director, Internal Audit, Risk and Compliance Services Director in July 2012 for three years renewable contract.
7. Further the respondent states that on February 13, 2013, the Petitioner signed an employment agreement with the Respondent for a contract period of 5 years effective July 1, 2012 as per the application by the employee requesting for such a renewal.
8. Although the contract given in July 2012 was for 3 years renewable based on performance, a further employment Agreement was signed on February 13, 2013 for a 5 years contract. The Respondent Managing Director wrote to the Petitioner on June 23, 2017 and confirmed the Board of Directors had offered to renew his contract for a further five years final term. The same was to be on existing terms and conditions of service as stipulated in their Human Resource Policy and Procedures Manual.
9. The Petitioner made a request to the Respondent's Board for renewal of his contract in line with clause 12 of the Employment Agreement on March 28, 2017. The Respondent's Board in its meeting held on June 20, 2017 approved renewal of the contract in line with clause 12 of the Employment Agreement dated June 23, 2017. The Respondent's Managing Director communicated the decision of the Board to the various employees including the Petitioner. The letter was clear that the renewable contract was for a final term of 5 years.
10. Four directors including the Petitioner raised issues of being treated in unfair/discriminatory manner in a letter dated November 19, 2021 to the Managing Director. The respondent responded by its letter of December 14, 2021 and stated that the assertion by the employees of discrimination was unsupported and that the said directors had full knowledge of the terms of their renewal which had been communicated to them.
11. The respondent says there is no evidence that the directors including the Petitioner raised any issue at the point of renewal of their contracts and they continued to enjoy the benefits accruing from the said contract and the HR policies and Procedures Manual and further that the renewed contracts of the Petitioner was clear from the onset that it was to be for only five years.
12. The respondent further stated that the issue of term limits is not unique to the Respondent Company. Several State Corporations/ Parastatals have term limits for the Chief Executive Officers and other management staff specifically those reporting to the CEOs and such state corporations are water services Regulatory board which provides their CEO shall be appointed for 3 years. Also KETACO



provided for positions of 5 years. Other state corporation cited are Geothermal Development Company among others.

13. The respondent also referred to a Ruling delivered on the ELRC Petition No E161 of 2021 and the Public Service Commission in Circular Ref; PSC/LEG/009/21/544(27) dated February 10, 2022 which was addressed to Chairpersons of State Corporations, all Chief Executive Officers of State Corporations, All Vice Chancellors of Public Universities and All the 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 organisation and in the process of reviewing such instruments were advised to halt the process. The Respondent says that it fully complied with and the advice by the Public Service Commission.
14. The applicant however says the respondent is not a state corporation but a private company.

Applicant's Submissions

15. The applicant submission in brief was first that the respondent changed his term of contract and that was in breach of his existing contract and a violation of his constitutional right of expectation.
16. He says the introduction of a term chance was an attempt to rewrite the contract and was an outright discrimination. The claimant relies on the cases of *Eng Stephen Mbugua Chege vs Nairobi City Water And Sewerage Company* ELRC Cause No 1726 of 2016 And *Alex Wainaina vs Kenya Airways Ltd* Elrc Cause No 430 of 2013 in seeking the prayers sought in his application.

Respondent's Submission

17. The Respondent submits that the petitioner's application is scandalous, vexation and an abuse of the court process. The petitioner states that order 2 Rule 15 of *Civil Procedure rules* provide that at any stage of the court proceedings the court may order to be struck out or amended any pleadings that are scandalous, frivolously or vexatious or any abuse of the process of the court.
18. The respondent goes further to say that in March 2017 he informed the claimant his contract would commence on June 23, 2017 for a 5 years term upto June 30, 2022. He says, on 21st march 2022 through his Human Resource Manager the Petitioner was served with notice and the same was sent to his office. He says he rightfully informed Petitioner of his final renewal of his contract.
19. He says further he never gave the Petitioner legitimate expectation regarding the alleged renewal of his contract of employment after the final term. The respondent depends on the case of *Pharmaceutical manufacturing (K) Co Ltd & 3 others vs Commissioner General of Kenya Revenue Authority & 20 Others* (2017) eKLR.
20. The respondent avers it never gave the claimant any legitimate expectation and so prays the petitioner's notice of motion application dated June 16, 2022 be dismissed.

Analysis & Determination

21. From the pleadings, evidence and submissions filed the claimant has been employed by the Respondent for a period of 10 years from the year 2012 and that is not in dispute. This entailed two 5 year contracts, the last contract being issued in June 2017. The second contract made it clear it was a final term of five years. The issues that fall for determination can be summarized thus;
 - a. Whether the Petitioner is entitled to renewal of contract of employment and or had legitimate expectation that his contract of employment would be renewed.



- b. Whether failure to renew the contract gives rise to unfair termination of contract of employment and whether his termination was as a result of discrimination or effluxion of time.
- c. Whether the claimant is entitled to the reliefs sought in the application.
22. In *Giella –Versus- Cassman Brown & Company Limited* [1973] EA 358 at 17 – 20, it was held that in ‘considering whether to grant a prohibitory injunction, the applicant must show the court a *prima facie* case with a probability of success; if the injunction is not granted, that the applicant stands to suffer irreparable harm which would not adequately be compensated by an award of damages; and if the Court is in doubt, then the Court will decide the application on a balance of convenience.
23. Ongaya J in *John Moogi Omare v Kenya National Commission for UNESCO* [2020] eKLR had the following to say ‘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-Versus- Water Resources Management Authority and 2 others* [2015] 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 provision 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 employer’s internal process’.
24. I have carefully looked at the employment contract dated February 13, 2013 which is the main document prescribing the requisite terms of employment between the Petitioner and the Respondent. The contract provided at paragraph 15 that it included all the terms of the employment service between the Respondent and Petitioner.
25. The Petitioner under clause 1 was engaged on contractual basis for a period of 5 years which under clause 12 was renewable for a further period of 5 years. It is specifically provided that the employee was to write signifying his intention to renew the contract which the respondent was to respond to within one month failure of which the contract stood renewed for a further period of 5 years with all the rights and privileges thereto.
26. In the later contract the petitioner had a fixed term contract issued on June 23, 2017 and was clearly indicated as final. On March 1, 2022 the Petitioner was sent a letter notifying him his contract was coming to an end on June 30, 2022. The Court finds no inconsistency with the respondents averments that the petitioner was well aware of the term of his contract from the onset and he served under the said terms and conditions and enjoyed the benefits therein to the end.
27. In reliance in the case of *Enid Nkirote Mukire vs Kenya Yearbook Editorial Board* Petition E029 OF 2021, the Court held that an employee on a fixed term contract is aware of the date of expiry of the contract from the date the contract is signed. Such an employee need no notice for termination of the contract as the contract terminates by the expiry of its term.
28. Such an employee does not go through the provision of section 41 of the *employment Act* or section 45. The reason for termination need not be given to the employee as it is its expiry of the term of the contract that brings the employment relationship to an end.
29. The court went further to say that there is no legitimate expectation of renewal of the *employment act* unless the employer has expressly communicated contrary to terms of the employee.



30. Also in the case of *Pharmaceutical manufacturing (K) Co. Ltd & 3 others vs commissioner General of Kenya Revenue Authority & 2 others* [2017]eKLR the court stated:-

“The combined effect of the decisions in, *Keroche Industries Ltd v Commissioner General of Kenya Revenue Authority & Others* [2007] eKLR 240 and *Communication Commission of Kenya & 5 others v 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 reasons 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”

31. In the instant case there was neither express nor implied expectation given by the respondent to the Petitioner towards the renewal of his contract. In fact the respondent expressed itself clearly that the five years contract was the last one. The respondent went further and three months before the expiration of the contract notified the petitioner that his contract was to terminate on 30/6/2022 and hence prepared him adequately. This was also as provided in the respondents human resource policies and procedure manual revised in 2009 in clause 3.3.2 where it was provided that NSWSC will engage most of their management staff on contract basis for a specific period. The contract may be renewed based on performance and gratuity will be payable at the rate of 3.1% of total basic salary for each completed year of service.
32. Also clause 4.3.2 of Human Resources Policy and Procedures manual code NCWSC/HRD/01 provided that Managing Director, Financial Directors, Managers and Coordinators and officers shall be employed on contract basis with each contract term running for period of 5 years. The same could be renewed for a further two terms for the Managing Director and Functional Directors and three terms for managers. The Coordinators and Officers would be entitled to a renewal for four terms. It seems the same was approved in December 2012.
33. The Petitioner was a Director and there was no way he was not aware of the said policy. In any event he received his renewed contract and continued to work as per the existing terms and conditions of services, (his letter of renewal of contract dated June 23, 2017). It was only on 19th November 2021 he wrote to the board and alleged he was discriminated against by being placed on a five year contract. The board of the respondent responded by its letter of December 14, 2021 and informed him that he was aware of his contract and had willingly accepted it and so assertion for discrimination did not arise.
34. The respondent also asserts and the court has taken cognizance of the same that the state corporations were to comply with judgement E161 of 2021. The same case basically provided organisations review their policies based on the Kenya Constitution. There is no deviation of the provisions of constitutional provision in an agreed contract period where the respective parties have consented to the said terms as in this case.
35. Furthermore a human resource policy document is a document by the employer and cannot expect every employee to concede to it. It is not practical for the claimant to aver that the “manuals and policies



were imposed on him without his consent or approval.” As in the case of *John Moogi Omare vs- Kenya National Commission for Unesco* [2020]eKLR it was held that 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 *Goeffrey Mworira vs Water Resources Management Authority & 2 Others* [2015] eKLR- where court held it will very sparingly interfere in the employer’s entitlement to perform any of its human resource functions”

36. Furthermore where there is a contract between the employer and employee the court will not endeavour to rewrite the terms of such a contract. The court will only enforce the terms agreed by the parties.
37. In conclusion the court has considered the crucial document is the contract which is dated February 13, 2013 where Petitioner was offered a contract of five years from July 1, 2012 and on June 23, 2017 petitioner was offered a further five years contract and was notified it was the final term.
38. The court has painstakingly considered all the pleadings, submissions and authorities cited by the respective parties. In particular the authorities cited by the petitioner to support his prayers are not similar to this case as the same *Eng Stephen Mbugua Chege vs Nairobi City Water* Cause No 1726 of 2017 & *Alex Wainaina Mbugua vs Kenya Airways Limited* Cause No 430 of 2016 refer to termination of the petitioner on the grounds of poor performance not by effluxion of time as in this one. hence the court did not find the two helpful to this case.
39. The court finds the petitioner has not proved his case on balance of probability to warrant the prayer for an injunction to restrain the respondent from terminating the petitioner/applicant from its employment on June 30, 2022. Indeed the termination is by effluxion of time and not by termination. The court finds therefore the prayers in the petitioner/applicants notice of motion dated June 16, 2022 are not merited and the application is dismissed accordingly.
40. Cost are in the cause.

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

