



**Yaseen v Cabinet Secretary, Ministry of ICT, Innovation and Youth Affairs  
& 2 others; Kenya Broadcasting Corporation (Interested Party) (Petition  
E119 of 2022) [2022] KEELRC 13127 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13127 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E119 OF 2022**

**K OCHARO, J**

**OCTOBER 31, 2022**

**IN THE MATTER OF: ARTICLES 3(1), 10, 20, 22, 23, 27, 41, 47, 50(1), 159,  
165(3), 232, 236, 258 & 259 (1) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: ALLEGED VIOLATION OF ARTICLES 3(1), 10, 20, 22,  
23, 27, 41, 47, 50(1), 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 5, 9, 45,  
49 OF THE EMPLOYMENT ACT, SECTION 4 OF FAIR ADMINISTRATIVE  
ACTIONS ACT, SECTION 12 OF EMPLOYMENT AND LABOUR  
RELATIONS COURT, SECTION 5 OF KBC ACT AND MWONGOZO CODE**

**IN THE MATTER OF: ACT OF COMMISSION AND OR OMISSION BY CABINET  
SECRETARY, MINISTRY OF ICT, INNOVATION AND YOUTH AFFAIRS**

**IN THE MATTER OF: RENEWAL OF EMPLOYMENT  
CONTRACT OF MANAGING DIRECTOR, KBC**

**BETWEEN**

**NAIM BILAL YASEEN ..... PETITIONER**

**AND**

**CABINET SECRETARY, MINISTRY OF ICT, INNOVATION AND YOUTH  
AFFAIRS ..... 1<sup>ST</sup> RESPONDENT**

**HEAD OF PUBLIC SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**KENYA BROADCASTING CORPORATION ..... INTERESTED PARTY**



## JUDGMENT

1. The Petitioner, the immediate former Managing Director, Kenya Broadcasting Corporation (KBC), has through his petition herein dated the 12<sup>th</sup> day of July 2022, sought for the following reliefs;
  - a) A declaration that the Respondents have violated Articles 10, 20, 27, 41, 47, 232 and 236 of the Constitution.
  - b) A declaration that the Respondents have violated the Petitioner's rights under Articles 27, 41, 47, 232 and 236 of the Constitution.
  - c) A declaration that the 1st Respondent has contravened Chapter six of the Constitution and abused his office by failure to renew the Petitioner's contract of employment on account of extraneous and unlawful considerations.
  - d) A permanent injunction to restrain the Respondents, their agents and/or servants from recruiting any person or other persons for the position of Managing Director, Kenya Broadcasting Corporation.
  - e) A judicial review order of mandamus directed at the Respondents to renew the Petitioner's contract of employment as the Managing Director of Kenya Broadcasting Corporation for a term of 3 years.
  - f) A declaration that the Petitioner is entitled to salary, allowances and attendant privileges for the period commencing 20th March 2022 until the date of payment.
  - g) Costs of the petition.

Against the Respondents and the interested party.

2. It was the Petitioner's case that the 1<sup>st</sup> Respondent is the Cabinet Secretary, Ministry of ICT, Innovation and Youth Affairs, a person and office responsible for appointment, reappointment and or renewal of employment contracts for Managing Director, KBC.
3. The 2<sup>nd</sup> Respondent is the Head of Public Service an office established under the Executive Office of the Presidency by the President pursuant to article 132 of the Constitution of Kenya whose role is inter alia to coordinate civil servants, public officers and state officers on behalf of the President.
4. The 3<sup>rd</sup> Respondent is the Hon. Attorney General, the Chief government legal adviser.
5. The Interested Party is a state corporation established under Section 3 of the KBC Act.
6. The Petitioner asserts that he brings the Petition herein firstly, as a citizen of Kenya who is obligated under Article 3(1) of the Constitution to respect, uphold and defend the Constitution. Secondly, being aggrieved by the decision of the Respondents, he has legal capacity to seek both sanctions and remedies from this court.
7. The Petitioner stated that through Gazette Notice No. 2923 of 29<sup>th</sup> March 2019, he was appointed as the Managing Director of KBC for a term of three (3) years with effect from 20<sup>th</sup> March 2019.



8. The terms of his service were encapsulated in his appointment letter which provided in Clause 6 for renewal of the appointment thus,

“ 6. Renewal of Appointment

Renewal of your contract will be subject to favourable evaluation. Should you wish to be reappointed in the same position, you will be required to make a written request at least six (6) months before the expiry of this contract.”

Pursuant to the said Clause 6, by a letter dated 31<sup>st</sup> August 2021, the Petitioner made an application for renewal of his contract of service.”

9. The Petitioner contended that in consideration of Section 5 of the KBC Act, Cap 221 and Mwongozo Code on Governance for State Corporations, the Board of Directors, KBC, considered and deliberated over his application and unanimously approved the request for renewal of his contract of service.

10. By a letter dated 9<sup>th</sup> September 2021, the Chairman of the Board communicated to the 1<sup>st</sup> Respondent the Board's resolution on the subject, thus;

“ 1. That he has satisfied the performance criteria set out in Sec. 5 of the KBC Act, Mwongozo Guidelines and in Clause 6 of his Letter of Appointment, by scoring 89.53% and 87.30% in the SCAC-mediated Board Evaluation for 2019/20 & 2020/21.

2. Overall, the Corporation has performed substantially well since his appointment, as demonstrated in the abridged corporate and departmental reports.

3. In June 2021, he relaunched three national flagship brands - Channel 1 TV, Radio Taifa and English Service. The MD, as team leader, begs for more time to enhance and steer the relaunched programme to achieve the desired results.

4. The Board and Management of the Corporation require more time to implement a five-year KBC Transformation strategy developed as part of a Cabinet Memorandum sponsored by MICT. The Cabmemo is in progress.

The purpose of this letter is to share the Board Resolution with you and to request you to renew the MD's contract of service by another three years.”

11. He alleged that in pursuance to or furtherance of the favourable evaluation the 1<sup>st</sup> Respondent resolved to renew his contract of employment and took steps and or represented to him of the decision to renew the contract of employment and that by a letter dated 22<sup>nd</sup> February 2022, the 1<sup>st</sup> Respondent forwarded to the offices of the 3<sup>rd</sup> Respondent a draft Gazette Notice for purposes of extension of his term.

12. In violation of the Constitution the Respondents failed and or withheld publication of the Gazette Notice. Subsequently, the 1<sup>st</sup> Respondent directed the interested party's Board to appoint an Acting Managing Director, who was appointed on the 25<sup>th</sup> March 2022.

13. The Petitioner stated that despite formal and informal inquiries, culminating in a letter his dated 26<sup>th</sup> April 2022, the Respondents have failed and or neglected to renew and or authorize the publication



- of the Gazette Notice in respect of renewal of his term of service. No communication has been made to the him regarding the status of his employment.
14. The Petitioner contends that the 1<sup>st</sup> Respondent's failure to renew his contract is actuated by consideration of unlawful and extraneous matters, action that amounts to abuse of his office.
  15. The Petitioner asserts that having satisfied all the requirements for renewal of his contract of employment, the Respondents' inaction and or omission is in contravention of his right to equal protection and benefit of the law, right not to be discriminated on account of ethnic consideration as guaranteed under Article 27; right to fair labour practices under Article 41; and right to a fair administrative action under Article 47 of the Constitution.
  16. Owing to the above state of affairs, the Petitioner has suffered and continues to suffer pecuniary embarrassment for he has been denied salary, allowance and medical cover by the Respondents' failure to act on the Board's approval. The 1<sup>st</sup> Respondent has exercised his discretion in a whimsical and capricious manner, contrary to the law.
  17. The Petitioner states that the Constitution being the supreme law of the Republic and binds all persons and all State organs at both levels of government and under Article 3 thereof it is required of every person to respect, uphold and defend it.
  18. Article 10 of the Constitution sets out national values and principles of governance that bind all state officers, state organs, and public officers. All persons are required to apply the national values and principles of governance, including *inter alia* the rule of law, participation of the people, social justice, equity, non-discrimination, protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development.
  19. The Petitioner further contended that under Article 41, he has a right to fair labour practices including a legitimate expectation that upon a favourable evaluation his contract of employment would be renewed, and under Article 47, the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  20. The Respondents are and were at all material times subject to the provisions of Article 232 which provides the values and principles of public service which include responsive, prompt, effective, impartial and equitable provision of services; accountability for administrative acts; fair competition and merit as the basis of appointments and promotions.
  21. The Petitioner contended further that under Sections 35, 40, 43, 45, 46 of the Employment Act an employer is obligated to grant a fair hearing to an employee before determining a contract of employment.
  22. The Petitioner contends that his petition herein is further anchored on the provisions of the Fair Administrative Action Act, and relevantly that;
    - i. Section 4 requires that administrative action be taken expeditiously, efficiently, and lawfully.
    - ii. Section 6(1) provides that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review.
    - iii. Section 7(1)(a) provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court.



## Respondents' Response

23. The Respondents opposed the Petitioner's petition upon basis of the grounds obtaining in affidavit Juliana Yipani, the Secretary, Administration in the State Department of Broadcasting and Telecommunications in the Ministry of ICT, Innovation and Youth Affairs, sworn on the 19<sup>th</sup> September 2022 and her further affidavit of the same day.
24. The Respondents contended that the term of the Petitioner as Managing Director of the Kenya Broadcasting Corporation expired on the 19<sup>th</sup> March 2022 and the same was not renewed by the Cabinet Secretary. Under Section 5(1) of the [Kenya Broadcasting Act](#), the 1<sup>st</sup> Respondent had discretion to consider or reject the recommendations of the interested Party's Board.
25. The Respondents allege that the 1<sup>st</sup> Respondent has taken a policy decision to competitively recruit for the position of the Managing Director of the Interested Party as one of the strategies to improve the performance of the Interested Party. The policy decision finds anchor on the provisions of Article 232 of the [Constitution of Kenya](#), 2010.
26. They contended further that evaluation by the Board of Directors of the Interested Party was merely persuasive since there were no other candidates evaluated by the Board for the position of Managing Director. The Petitioner therefore could not have emerged as the best candidate for the position of managing director in a lone competition without consideration of other better qualified and deserving Kenyans by the 1<sup>st</sup> Respondent.
27. In failing to renew the term of the Petitioner, the 1<sup>st</sup> Respondent was exercising the responsibility in line with Clause A.6 of the [Human Resource Policies and Procedures Manual](#) for the Public Service which stipulates the role of the Cabinet Secretaries as being accountable individually and collectively to the President for the exercise of their powers and the performance of their functions concerning a matter for which the Cabinet Secretary is responsible, which includes steering the strategic human resource management matters in the Ministry where the State Corporation falls.
28. The Respondents stated that the Petitioner's contention that he had an automatic right of renewal of term is without foundation. Employers have the liberty to choose their employees. To allow the Petitioner's petition herein and grant the orders sought shall amount to imposing an employee on the interested party, an infringement on the freedom of contract.
29. At the expiry of his contract as Managing Director, the Petitioner's secondment with the Corporation terminated and the Petitioner was required to report to the Ministry for deployment. The Petitioner has not reported to date.

## The Interested Party's Response

30. The Interested Party opposed the petition through two affidavits sworn by Samuel Maina, its Acting Managing Director, the replying affidavit of 27<sup>th</sup> July 2022, and a further affidavit of 31<sup>st</sup> August 2022.
31. The Interested party asserted that there was no constitutional right of the Petitioner that was violated in the manner alleged or at all. Under the provisions of the [Kenya Broadcasting Corporation Act](#), the Managing Director of the Interested Party is an appointee of the Cabinet Secretary. The Cabinet secretary is not bound by the recommendation of the its Board in appointing or declining to appoint a Managing Director.
32. Fixed term contracts as was the Petitioner's are governed by the [Employment Act](#) 2007, which, carry no expectation of renewal, they automatically lapse unless the parties mutually agree to extend them.



33. The Petitioner's expectation that his contract was to be renewed upon basis of the recommendations of the Board is illegitimate and unsustainable. The Petitioner's contract of service terminated by effluxion of time, there is no possibility therefore that he will suffer pecuniary loss.
34. The Petitioner was employed on a fixed term contract by the Interested Party on secondment from the parent Ministry, on the explicit understanding that upon expiry of his contract he would continue with his employment with the parent ministry. This fact was known or ought to have been known by the applicant.

### **The Petitioner's Submissions**

35. The Petitioner distils the following issues as those that emerge for determination by this court, thus;
- i. Whether the Petitioner satisfied the conditions precedent for renewal of his contract of employment.
  - ii. Whether the decision not to renew the Petitioner's contract of employment was in violation of the Petitioner's right to a fair administrative action and principle of legitimate expectation.
  - iii. Whether the Petitioner's contract of employment was constructively renewed and if so whether it should be renewed.
36. On whether the Petitioner's legitimate expectation was violated, Counsel for the Petitioner submitted that the Petitioner had a legitimate expectation that flowed from his contract of employment which provided as follows: -

“ 6. Renewal of Appointment

Renewal of your contract will be subject to favourable evaluation. Should you wish to be reappointed in the same position, you will be required to make a written request at least (6) months before the expiry of date of this contract.”

And to the effect that upon meeting the conditions precedent in his letter of employment, his contract of employment was to be renewed.

37. The said clause 6 of the contract of employment is anchored in law. Section 5 of the [Kenya Broadcasting Corporation Act](#) provides as follows: -

“ 5

(1) There shall be a Managing Director of the Corporation who shall be appointed by the Minister after consultation with the Board whose terms and conditions of service shall be determined by the Minister in the instruments of appointment or otherwise in writing from time to time: Provided that the first Managing Director shall be appointed by the Minister without the consultation under this subsection.

(2} .... ”



38. Further, Mwangozo Code of Governance for State Corporations (which was published pursuant to Section 3 of the [State Corporates Act](#)) provides *inter alia*: -

Clause 1.12 (6)

“ 1.12 Board Evaluation

6. The re-appointment for a subsequent term for any Board member or CEO shall be based on a favourable evaluation as spelt out in the evaluation tool.”

39. As brought forth in the Petitioner’s petition, the evaluation that was done on him was favourable in that he scored 89.53% and 87.30% in evaluation for the years 2019/2020 and 2020/2021. Pursuant to the said performance, the Board passed a resolution recommending renewal of his contract of employment. This was communicated to the 1<sup>st</sup> Respondent through its letter of recommendation dated 9<sup>th</sup> September 2022. This favourable evaluation and subsequent recommendation for renewal fortified his legitimate expectation that his employment was to be continued.
40. Upon receipt of the letter of recommendation, the 1<sup>st</sup> Respondent acted on it and approved the recommendation. Further, he drafted a Gazette Notice for purposes of publication of the renewal of and or re-appointment of the Petitioner. In a letter dated 22<sup>nd</sup> February 2021 the 1<sup>st</sup> Respondent wrote to the 3<sup>rd</sup> Respondent as follows: -

“Gazette Notice for the Appointment of the Managing Director, Kenya Broadcasting Corporation

Noting that the term of the Managing Director has a period of less than 30 days remaining, we re-submit the Gazette Notice for the extension of his term to ensure the seamless continuity of the leadership of the Kenya Broadcasting Corporation. The Ministry requests your consideration and guidance on the Gazette Notice to enable the Cabinet Secretary sign the same.”

41. It was further submitted that in view of the above stated letter, his re-appointment had been approved by the 1<sup>st</sup> Respondent. All that was remaining was publication of the appointment in the Gazette. Accordingly, his legitimate expectation that his contract of employment was to be renewed crystalized.
42. The court is urged to find that the Petitioner’s legitimate expectation was violated, and consequently exercise its authority under Section 7(2)(m) of the [Fair Administrative Actions Act](#), and review the Respondents’ decision of failing to re-appoint the Petitioner.
43. To bolster his submission that in the circumstances of this matter legitimate expectation arose, Counsel for the Petitioner placed reliance on the case of [Communications Commissions of Kenya & 5 others v. Royal Media Services Limited & 5 others](#) [2014] eKLR where the Supreme Court held as follows: -

“Legitimate expectation would arise when a body, by representation or by practice, has aroused an expectation that is within its power to fulfil.

... for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.”

44. The Supreme Court in [Communications Commission of Kenya & 5 others](#) (*supra*) relied on the South African case of [South African Veterinary Council v. Szymanski](#) 2003 (4) S.A. 42 (SCA) which had



considered the concept of legitimate expectation. The Supreme Court extracted the following as the principles for legitimate expectation:

- 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; and
- d. There cannot be a legitimate expectation against clear provisions of the law or the Constitution.”

45. Counsel further submitted that in adjudicating legitimate expectation claims, the court follows a two-step approach as was explained in the case of *Republic v Principal Secretary, Ministry of Transfer, Housing and Urban Development Ex parte Soweto Residents Forum CBO* [2019] eKLR;

“Firstly, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, then;

Secondly, whether the expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation.”

46. On the alleged violation of the Petitioner's right to Fair Administrative Action, the Petitioner's Counsel submitted that there can be no doubt that the 1<sup>st</sup> Respondent acted upon the recommendations of the Board of the Interested Party to the effect that the Petitioner's contract of employment was to be renewed.

47. However, after a draft Gazette Notice had been forwarded to the 3<sup>rd</sup> Respondent for guidance, the 1<sup>st</sup> Respondent failed to take any further step towards either publication of the Gazette Notice or authorizing issuance of a letter of re-appointment or renewal of the Petitioner's contract of employment.

48. The Respondent's act of failing to communicate its decision or act and omission in relation to the Petitioner's application for renewal of his contract of employment was in contravention of the right to a fair administrative action in that; the subsequent decision not to renew the contract of employment was not in writing; there was no reason given for the said decision; and the Petitioner was not granted a hearing before the decision to review the 1<sup>st</sup> Respondent's position was reached.

49. All the above was in contravention of Article 47 the *Constitution* which provides;

“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(1) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action.

(2) .....

50. In giving effect to rights under Article 47(1) of the *Constitution*, Parliament enacted the *Fair Administrative Actions Act*. Section 2 of the said *Act* defines administrative action to include;



- i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
  - ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
51. Counsel further submitted that Section 4(3) of the *Act* stipulates that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the concerned administrator is obligated to give the person affected by the decision:
- i. Prior and adequate notice of the nature and reasons for the proposed administrative action;
  - ii. An opportunity to be heard and to make representations in that regard;
  - iii. Notice of a right to a review of internal appeal against an administrative decision, where applicable;
  - iv. A statement of reasons pursuant to section 6;
  - v. ....
  - vi. ....
- Information, materials and evidence to be relied upon in making the decision or taking the administrative action.
52. It was argued that then Industrial Court of Kenya in the case of *Robert Muriithi Ndegwa v Minister for Tourism* [2012] eKLR, which is in all fours with the instant matter, had an occasion to interrogate the principle of fair administrative action, thus:

“... The contract required the Petitioner to, if he wished to be reappointed in the same position, to make a written request at least six months before the expiry of the date of the contract. The applicant wrote seeking renewal of the contract on 3.04.2012 and the court finds that the Petitioner complied with the contract. The court further finds that the Board evaluated the Petitioner as agreed in the contract and found him suitable for the renewal of the contract.

It was submitted for the Respondent that the Petitioner’s contract lapsed on 18.10.2012 and the office fell vacant to be competitively filled.

It is the court’s considered opinion .... the Board had an accrued contractual obligation and right to renew the contract of the Petitioner subject to compliance with the terms of the contract. The Respondent has not pleaded or submitted that the Petitioner lacks the qualifications set out in the *Act* ....

The renewal process had fallen due and the *Act* clearly provided for the ongoing renewal process. The court finds that the ongoing renewal process as provided for in the contract was protected under subsection 37(3) of the *Act* and the court further finds that the renewal clause was not inconsistent with the provisions of the *Act*.

It was submitted for the Respondent that renewal of the Petitioner’s contract of service would contravene section 37 of the *Tourism Act, 2012* and Article, 10 prescribing democracy and participation of the people, 73 on responsibilities of leadership, 75 on conduct of public officers .... The court has considered these provisions and is of the opinion that the main issue for determination is whether the renewal of the contract would undermine or derogate from any constitutional or statutory provisions governing recruitment, appointment, promotion



or retention in public service. Article 232 of the *constitutions* provides for the values and principles of public service to include ....

In the instant case, the Petitioner was recruited competitively and it is not said that he lacks qualifications. ... The court finds that the Petitioner's initial appointment has not been shown to have offended any of the salient ingredients of a suitable and meritorious appointment. The court further finds that the Petitioner's performance for the initial three years has not been shown to have breached any of the constitutional values and principles of public service ....

Article 47 of the *constitution* entitled the Petitioner to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Further, any adverse decision by the Respondent, the Petitioner was entitled to receive written reasons from the Respondent for the refusal to renew the contract. Despite making a unilaterally decision not to renew the contract, the Respondent failed to convey his position and the reasons before and after the due date for the renewal. The court finds that the Respondent acted in contravention of the Article.

The court has considered the evaluation report by the Board and awards for excellent performance accorded to the Petitioner and finds that failure to renew the Petitioner's contract amounted to victimization. ....The court further finds that refusal to renew the contract also amounted to the Respondents attempt to remove the Petitioner from public office without due process of law. The court holds that such Respondent's actions and omissions did not only contravene Article 236 of the *Constitution* that protects public officers, but also amounted to unfair labour practices as protected in Article 41 of the *constitution*.”

53. Further reliance was placed on 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 dealing with a situation where the Cabinet Secretary changed his earlier decision to renew a contract for a CEO, stated as follows:

“Having already made a decision to renew the contract of the Petitioner, any review of the decision to his detriment should only have been taken after giving him an opportunity to respond to the new issues relied upon to revoke the decision as provided for under the *Fair Administrative Actions Act*”

54. Counsel submitted that Petitioner acknowledges the general principle as established by judicial pronouncements, that a fixed term contract does not carry any expectation of renewal. See *Rajab Barasa & 4 others v Kenya Meat Commission* [2016] eKLR and *Fatuma Abdi v Kenya School of Monetary Studies* [2017] eKLR. However, there are limited exceptions to the said general principle.

In circumstances where a fixed term contract has a renewal clause and an employer conducts himself in a manner suggesting that the fixed term contract will be renewed then legitimate expectation accrues and an employee is entitled to the renewal.

55. Similarly, where failure to renew a contract is based on improper motive then a court of law may intervene to order a renewal of the contract.



56. In the case of *Margaret A. Ochieng v. National Water Conservation & Pipeline Corporation* [2014] eKLR, the court held;

“The general principle is that fixed-term contracts carry no expectation of renewal. Exceptions to this general principle are limited. The expiring contract may contain a clause giving expectancy of renewal as discussed by Hon. Justice Byram Ongaya in Industrial Court Case between *Ruth Cathoni Ngotho Kariuki v the Presbytery Church of East Africa & Anor*, [20121 eKLR ...”

57. It was submitted further that the conduct of the employer may result to a legitimate expectation that a contract of employment could be renewed, reliance was placed on the case of *Cleopatra Kama Mgyenyi v Aidspar* [2019] eKLR, where the court expressed itself as follows: -

“It is imperative to note that the Claimants were on fixed contract, which came to term. As opined by my learned colleague in *Fatuma Abdi v Kenya School of Monetary Studies* (2017) eKLR above and in *Rajab Barasa & 4 Others v Kenya Meat Commission* (2016) eKLR, a fixed contract cannot be renewed automatically. There must have been an indication by act or omission from the employer to indicate renewal was forthcoming to wet the Claimant’s appetite that their contracts would be renewed and hence submit legitimate expectation.”

58. Counsel submitted that in their responses to the Petition, the Respondents and the Interested Party have inter alia taken the position that, the Petition is unmerited because the Cabinet Secretary has/had absolute unfettered discretion to renew the Petitioner’s contract of employment.

59. This position taken by the Respondents cannot have any place under the current constitutional dispensation and in a democratic state governed by principles of good governance, an appointing authority cannot exercise a discretion whimsically or arbitrarily. The suggestion by the Respondents that the 1<sup>st</sup> Respondent could exercise the discretion in any manner as he deems fit amounts to applying the pleasure doctrine. That is to say that the Petitioner served and was to continue serving at the pleasure of the Cabinet Secretary.

60. The pleasure doctrine has limited application in Kenya and other Commonwealth jurisdictions. Courts have held that the said doctrine has evolved to the extent that public servants do not serve at the pleasure of the crown or state. The crown has no right to determine at pleasure who should or should not serve. Such a decision must be arrived at following a due process.

61. In the case of *B. P. Binghail v. Union of India & Another* (2010) INSC 365 the Supreme Court of India stated as follows: -

“There is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law. in the nineteenth century feudal set-up unfettered power and discretion of the Crown was not an alien concept. However, in a democracy governed by Rule of Law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases. The doctrine of pleasure does not mean a license to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for public good.”



62. The Court of Appeal in the case of *Country Government of Nyeri & Another V. Cecilia Wangechi Ndungu* [2015] eKLR, held as follows:

“The evolution of the doctrine of pleasure has been on the basis of firstly, putting to an end arbitrary action by a public authority and secondly, ensuring that such power is exercised reasonably and for the public good.

The application of the doctrine has been subjected to qualifications expressly through legislation or by implication.

Comparative jurisprudence shows that the evolution of the doctrine of pleasure connotes that a public authority ought to act reasonably and/or fairly in exercising the said power.

We are of the considered view that the section 31 (a) grants power to a Governor to dismiss a member of the County Executive Committee any time, that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously .....

63. As a sum up, the Petitioner’s Counsel urges this Court to exercise its wide authority under the provisions of Section 12[3] of the *Employment and Labour Relations Court Act*, and allow the petition.

#### **Interested Party’s**

64. Counsel for the interested party submitted that under the provisions of the *Kenya Broadcasting Corporation Act*, Cap 221 Laws of Kenya, the Managing Director of KBC is to be appointed by the Cabinet Secretary after consultation with the Board, and though the Cabinet Secretary is obliged to consult with the KBC Board, he is not bound by the KBC Board’s recommendation in appointing, or declining to appoint a Managing Director.

65. The Petitioner’s subject contract was a fixed term contract, Courts have consistently been held that fixed term contracts carry no expectation of renewal, and they automatically lapse unless the parties mutually agree to extend them. To buttress this submission, reliance was placed on the case of *Mombasa Apparels (EPZ) Limited v Tailors and Textile Workers Union* [2016] eKLR.

66. It was further submitted that it is a principle in constitutional litigation that a party seeking reliefs through a constitutional petition on the basis of violation of the constitution, constitutional rights and fundamental freedoms, he or she must plead with a higher degree of precision; show constitutional or fundamental freedoms violated, the manner of violation, the Constitutional provision in question or violated and the jurisdictional basis for the litigation as was held in the case of *Anarita Karimi Njeru v Attorney General* [1979] eKLR. Further reliance was placed on the case of *Julius Meme v Republic* [2004] eKLR, where the Court stated;

“where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed”.

67. The Interested Party’s Counsel further submitted that the fair labour practices contemplated by Article 41 of the *Constitution* are elaborately set out in the *Employment Act* and though the Petitioner has alleged a violation of his right to fair labour practices, he has not in the Petition and/or in his submissions set out with a reasonable degree of precision the act and/or omission of which he



complains with reference to particular provisions of the *Employment Act* said to be infringed, so as to anchor a claim for unfair labour practices protected by Article 41 of the *Constitution*.

68. Further still, the Petitioner did not demonstrate that the failure to renew his fixed term contract amounted to an unfair labour practice. In interrogating the existence or otherwise of an unfair labour practice, a subjective judgement is involved. In support of this point, the holding in *Elizabeth Washeke and 62 Others v Airtel Networks (K) Ltd & another* [2013] eKLR was cited, thus;

“Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice: the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties - as well as the interests of the public.”

69. It was submitted that a fixed term contract is a creature Section [10][3][c] of the *Employment Act*, provision which clearly suggests that a fixed term contract such as that of the Petitioner is not intended to be for an indefinite period, it terminates at its appointed date.

70. Therefore, if at the expiry of the stipulated period an employer lets the employee leave, without renewing the said contract, an employer cannot be faulted at all. *Fatuma Abdi v Kenya School of Monetary Studies* [2017] eKLR. The *Employment Act* contemplates that parties can enter into a fixed term contract as a valid mode of employment. Section 10(3) (c) provides that

“A written contract of service shall therefore contain; ...

- (c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

Plainly, a fixed term contract of employment is a lawful mode of employment with a start and end date. The initial contract of employment was in written. At its expiry, the Claimant made an application for renewal, a thing that was not done. After the lapse therefore, there was no written contract from which the legitimate expectation would flow. To support this argument the Interested Party sought to rely on the case of *Raiab Barasa & 4 others v Kenya Meat Commission* [2016] eKLR, where the Court state

“Where the intention of the parties is to have the contract for a fixed term, upon expiry, either party can opt out or invite the other to a new contract as the previous one has ended. The relationship must be renewed under a new contract. Otherwise, there would be no need for a fixed term contract. This is not a departure from the *Employment Act* as the law recognises the freedom of the parties to enter into fixed term contract, seasonal contracts or in some cases piece-work contract. Where the intention of the parties is to rely on any other document in terms of how the employment relationship is to be governed, such must be set out under the written or fixed terms contract. To hold otherwise would be to defeat the very



purpose of such a contract. Indeed, this was the court’s view in the case both parties herein have relied upon, Margaret A Achieng versus National Water Conservation Corporation the rationale being that the purpose of a fixed-term contract is not to renewable it automatically. Such a contract (fixed-term) does not carry the expectation for renewal. The exceptions to this general rule are few and limited based on each case and its circumstances where strictly an employer should not act in a manner so as to avoid legal obligations.”

71. To further buttress this line of submissions, the decision in *Bernard Wanjobi Muriuki v Kirinyaga Water and Sanitation Company Limited & another* [2012 eKLR, in which the Court stated;

“In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed- term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. The contract required the claimant to express his interest to renew six months before the expiry. He did this in December 2009. This clause did not create any obligation on the 1st Respondent to renew; it merely directed the claimant on the procedure of seeking renewal. Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination ....”

72. Given the foregoing, the Petitioner’s case as premised on unfair labour practice as contemplated by Article 41 of the *Constitution*, or the *Employment Act* are without merit and the same should be dismissed.

73. In response to the Petitioner’s contention that his right under Article 47 of the *Constitution* was infringed upon, it was submitted that he has heavily relied on the fact that the interested party’s Board evaluated him favourably and recommended that he be re-appointed. The recommendation to the appointing authority, the 1<sup>st</sup> Respondent was not binding at all. The Recommendation letter did not emanate from the 1<sup>st</sup> Respondent, in the manner it was couched, it did not promise a renewal of the contract, there cannot be therefore any basis resulting from the letter, for the assertion that the 1<sup>st</sup> Respondent did breach the Petitioner’s right under the constitutional provision above stated.

74. The Interested party’s Counsel submitted that the case of *Robert Muriithi Ndegwa v Minister for Tourism* (2012) eKLR, relied on by the Petitioner in support of his submissions on the alleged violation of his right under Article 47, is distinguishable from the instant matter. The distinction sets in on the fact[s] that;

- I. Whereas both S. 5 (1) of the *KBC Act* and S. 37(1) of the *Tourism Act* both stipulate that the Managing Director of KBC and Tourist Board respectively are to be appointed by the relevant Cabinet Secretary after consultation with the Board, in the case of the Tourism Board, unlike the KBC situation, S. 37(3) of the *Tourism Act* further provides that “The Chief Executive Officer shall hold office for a term of three years but shall be eligible for reappointment for one further term of three years.”
- II. By reason of the foregoing statutory provision, in the Tourist Board’s case the Managing Director/CEO is statutorily eligible for a reappointment for a further period of three years,



unlike in the situation obtaining in this case in which there is no similar statutory right of extension.

- III. Given the aforesaid statutory provision in the *Tourist Act* in which the CEO is statutorily eligible for renewal, the refusal to renew such a CEO's contract would, by dint of Article 47 of the *Constitution* and the relevant provisions of the *Fair Administrative Actions Act* require an aggrieved party to be given an opportunity to be heard and written reasons for such refusal given in writing. Conversely to the extent that the *KBC Act* does not provide for renewal of the fixed term for a further three-year period, contract must be interpreted as having no statutory underpinning for renewal.
  - IV. unlike in the Tourist Board Case in which the refusal to renew the subject fixed contract, when statute made the CEO's term eligible for renewal, thereby effectively terminated the CEO's engagement with the Public Service, in the instant matter, the Managing Director was seconded to Interested Party KBC from the Parent ICT Ministry, and is expected, unless the contract is renewed, to recede to his parent ministry where he is still gainfully employed.
75. It was submitted that given the above stated premises, the tenets of Fair Administrative Action do not apply in this case.
76. As to whether the Petitioner did acquire a legitimate expectation which has been violated, it was submitted the burden of proof lies on the Petitioner. This was so established in the case of *Teresa Carlo Omondi v Transparency International-Kenya* (2017) eKLR, thus:
- “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.”
77. In order for the Petitioner to sustain a claim based on legitimate expectation the following threshold should be satisfied as was noted in the case of Miscellaneous Civil Application 363 of 2018 - *Republic v Commissioner of Domestic Taxes Ex parte Sony Holdings Limited* [2019] eKLR
- I. There must be a representation which is clear, unambiguous and devoid of relevant qualification;
  - II. That the expectation must be reasonable in the sense that a reasonable person would act upon it;
  - III. that the expectation must have been induced by the decision-maker.



78. The Interested Party held the view that the Petitioner failed to discharge his evidentiary burden to demonstrate a violation of his legitimate expectation to have his contract renewed, and totally failed to meet the set legal threshold because;
- I. It is unreasonable for one to rely on Interested Party’s Board’s positive appraisal and recommendation for renewal of contract, and the relevant ministry’s communication to the Attorney General and the relevant Cabinet Secretary, as a basis for his legitimate expectation to have his contract renewed, when in fact his appointment is to be made by the Cabinet Secretary
  - II. The representations purporting to create a legitimate expectation have been made by the Board, which is not the appointing authority/decision maker.
  - III. The Letter of the 22<sup>nd</sup> February 2022 heavily relied upon by the Petitioner as a basis for its claim based on legitimate expectation is not from the appointing authority (the Cabinet Secretary ICT Ministry) but it emanates from the Principal Secretary, and is clearly in response to a letter emanating from the Office of the 3<sup>rd</sup> Respondent, the contents of which have not been placed before the Court.
  - IV. The Letter of the 22<sup>nd</sup> February 2022 heavily relied upon by the Petitioner as a basis for his claim based on legitimate expectation is not addressed or copied to the Petitioner herein, by reason of which it is a total misconception for the Petitioner to state the letter of die 22<sup>nd</sup> February 2022 made any representation to him, on the basis of which he then had a legitimate expectation for his contract renewal.
  - V. The purported created expectation is illegitimate to the extent that its being enforced would override the clear provisions of Section 5 of the *Kenya Broadcasting Corporation Act*, Cap 221 Laws of Kenya, in which the appointing authority is specified, and it is neither the KBC Board or the Principal Secretary of the ICT Board.
79. It was submitted that Article 27 of the Constitutional safeguard persons against discrimination of any form of kind. In *Emmah Muthoni Njeri v Nairobi Women’s Hospital*, cited with approval in the case of *Peter Waweru v Republic* [2006] eKLR discrimination as a violation was described as follows;
- “Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.”
- The Petitioner did not place before this Court any material to demonstrate that he was differentially treated. Indeed, from the case law shewn hereinabove on the manner in which fixed term contracts are legally dealt with, it cannot be said that the Petitioner has been discriminated against as alleged or at all.
80. Article 232 of the *Constitution* stipulates the values and principals expected of the Public Service, and though the Petitioner has in his Petition cited the values and principals contemplated by Article 232 of the *Constitution*, he has not in the Petition and/or in his submissions set out with a reasonable degree of precision the act and/or omission of which he complains with reference to particular value or principal being infringed upon, so as to anchor a claim for violation of Article 232 of the *Constitution*. Further he has not made any submissions in this regard. To the extent that the Petitioner has not pleaded this violation with particularity, this limb of the Petition should be totally disregarded.



81. It was submitted that the Mwongozo Code merely permits a state corporation to extend a fixed term contract for one term. It does not make it mandatory for a state corporation to extend every fixed term contract for a further single three-year term.
82. To interpret the Mwongozo Code as making it mandatory for a State Corporation to extend every fixed term contract for a further single three-year term would bring the said Code in conflict with the statutory provision of Section 5 of the KBC Act.
83. The Interested Party contended that the Petitioner is guilty of none disclosure of material facts. That the affidavit of Samuel Maina sworn on the 31<sup>st</sup> August 2022 and the Annexures thereto clearly demonstrates that the Petitioner was and is an employee of the 2<sup>nd</sup> Respondent working with the ICT Ministry, who was seconded to work at KBC as Managing Director on a fixed term contract and it was expected that upon expiry of the said contract the Petitioner would recede to his work at the ICT Ministry.
84. It is noteworthy however that the Petitioner did not disclose this material fact at all. Conversely in paragraph 14 of his supporting affidavit he has deposed as follows;

“Unless a Conservatory Order is issued the Respondents will appoint a Managing Director, which action will render the entire Petition Academic. Further by the Respondent’s inaction I have been rendered unemployed without any earnings and the income which has occasioned me pecuniary embarrassment.”

85. According to the Interested Party this is not a mere concealment of material facts, but a deliberate attempt to mislead the Court and as the Court has variously held, a Constitutional Petition shall fail on this ground alone. To support this point, reliance was placed on the case of Lawrence Nieru Munyi & 10 others v Musa Niau Mithuro & 2 others [2020] eKLR where the Court held;

“The court is of the opinion that even if the petition had raised constitutional issues, the Petitioners are guilty of non-disclosure of material facts in consequence whereof they became disentitled to any remedy.”

### **Analysis and Determination**

86. From the material placed before this Court by the parties, the following issues emerge for determination on this petition, thus;
- I. Whether in the circumstances of this matter, the Petitioner acquired a legitimate expectation, which has been violated.
  - II. Whether the Petitioner’s Constitutional rights under Article 27, 41, and 47 of the Constitution or any of them were violated by the Respondents.
  - III. Whether there was a breach of the provisions of Article 232 of the Constitution.
  - IV. Whether the Petitioner is entitled to the reliefs sought or any of them.
  - V. Who should bear the costs of this suit.

### **Of the Legitimate Expectation**

87. It was the Petitioner’s case that he acquired a legitimate expectation that his employment as the Managing Director of the Interested Party would be extended for a further three years after the initial



three-year fixed term contract expired, and that the acquired legitimate expectation was breached by the Respondents when they failed to cause his re-appointment. According to the Petitioner, the expectation flowed from his contract of employment, the [Kenya Broadcasting Corporation Act](#), the Interested Party's evaluation and recommendations, the correspondence between the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, and the Draft Gazette Notice. All that he summed up as representations and actions that underpinned the legitimate expectation.

88. [Black's Law Dictionary](#), 10<sup>th</sup> Edition defines legitimate expectation, thus;

“Expectation arising from the reasonable belief that a private or public body will adhere to a well-established practice or will keep a promise.”

89. The Supreme Court in the case of [Communications Commission of Kenya and Five others v Royal Media Services Ltd](#) [2014] eKLR, defined legitimate expectation, thus;

“legitimate expectation would arise when a body, by representation or by practice has aroused an expectation that is within its power to fulfil.”

90. Imperative to state that the employee alleging existence of a legitimate expectation assumes the duty to prove the basis of his expectation, and this cannot be said to be a shift of the burden of proof. It is an elementary principle of evidence that he who alleges must prove his allegations. In the South African Case of [Fedblife Assurance Ltd v Wolfaard](#) [2001] 22 11 J 2407 [SCA], the court was categorical that to discharge the burden, the employee must prove that he or she actually expected the contract to be renewed and only then would the question whether the expectation was reasonable arise.

91. Court tasked to interrogate whether an employee acquired a legitimate expectation for renewal of a fixed term contract, has to appreciate that the test is objective: would a reasonable person expect re-engagement? And that it requires an assessment of all circumstances of the case. On this I am fortified by the South African case of [Dierks v University of South Africa](#) [199] 20 ILT 1227, in which it was stated;

“133. A number of criteria have been identified as considerations which have influenced the findings of the past judgments of the Industrial Labour Appeals Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulations, 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 including the fixed term contract, inconsistent conduct, failure to give reasonable notice, and the employers business.”

92. The Respondents and the Interested Party took a position that fixed term contracts expire automatically upon expiry of the appointed period, with no reasonable expectation for renewal. With due respect, this is only to the extent of the general rule. The position ignores the fact that there is now firm jurisprudence that there are situations that can impel a departure from this general rule. With due respect I am not persuaded by the decisions cited by Counsel for the interested party, wherein the exception to the general principle has not been appreciated.

93. In order for an employee who was employed on a fixed term contract basis to successfully argue that after the expiry of the contract he legitimately expected that he could be re-employed, he or she must demonstrate to court that there was an objective basis for creation of the reasonable expectation.



Reasonable which is often used interchangeably with legitimate, is defined by the *Cambridge Advanced Learners Dictionary* as

“based on or using good judgment and therefore fair and practical”

and *Black’s Law Dictionary*,

“Fair, proper, and sensible.”

94. As indicated hereinabove, the Respondent asserted that one of those that aroused the expectation was his contract of employment. In determining whether the contract would be basis for a legitimate expectation, the terms of the contract are a factor to be considered and remain relevant. The contract itself reveals what the intention of the parties was. The Petitioner’s contract of employment that lapsed by effluxion of time, had a clause for renewal of the contract upon him fulfilling two conditions, first expressing his desire for a renewed contract by applying for it, within the time that was stipulated in the contract, second, secure a positive evaluation by the Interested Party’s Board. The interested Party and the Respondents did not dispute the existence of the renewal clause. Upon basis of the principle that parties intend to be bound by the terms that they have set out in their contract, I am convinced that the contract was an objective basis for the expectation, and any reasonable employer engaging good judgment would have a genuine belief that the contract was to be renewed therefore.
95. The Respondents and the Interested Party do not dispute that upon receipt of the recommendation letter from the Interested Party, the 1<sup>st</sup> Respondent wrote the letter dated 22<sup>nd</sup> February 2021, that read in part;

“Gazette Notice for the Appointment of the Managing Director, Kenya Broadcasting Corporation.

Noting that the term of the Managing Director has a period of less than 30 days remaining, we re-submit the Gazette Notice for the extension of his term to ensure the seamless continuity of the leadership of the Kenya Broadcasting Corporation. The Ministry requests for your consideration and guidance on the Gazette Notice to enable the Cabinet Secretary sign the same.”

It will be an absurd consideration of the contents of the letter to conclude otherwise than that it is all indicative that upon the recommendation by the Interested Party, the 1<sup>st</sup> Respondent agreed with the same and made a decision to have the Petitioner re-employed. That what remained was formalization of the decision by the Gazettement of the same. I am of the view that in this circumstance, the Petitioner had a further sound basis that stirred his legitimate expectation.

96. That the appointing authority drafted a Gazette notice, for approval by the 3<sup>rd</sup> Respondent on the reappointment of the Petitioner, before its publication, was in itself an act by the 2<sup>nd</sup> Respondent that reasonably attracted the Petitioner’s expectation that his contract was renewed.
97. The argument that the letter forwarding the draft Gazette notice to the 3<sup>rd</sup> Respondent was not by the 2<sup>nd</sup> Respondent himself, but by the office of the Principal Secretary, is with due respect off the mark and makes no sense. It deliberately ignores the role of the Principal Secretary, the authorised officer role, under the *Public Service Act, 2016*. In the whole process, I am of the view that the role of the 1<sup>st</sup> Respondent was the approval of the recommendation by the Interested Party, which I have concluded he did, and sign the Gazette notice, a duty that the letter by the office of the Principal Secretary, copied to the second Respondent, apparently appreciated.



98. The Interested Party in an attempt to draw a distinction between the instant matter and the case of *Robert Muriithi Ndegwa v The Minister for Tourism* [2012]eKLR , submitted that whereas the Tourism Act specifically provided for reappointment of the Chief Executive Officer for a further term of three years, the Kenya Broadcasting Corporation Act, didn't have such a stipulation. That might be true, but what about the Mwongozo Code of Governance which is a generally accepted Government policy document, that was put into place for a harmonized day today management of state Corporations? What about the stipulations of the contract of employment, both that provides for renewal of the fixed term contract? The Interested Party submitted that though the code, allows an extension of a fixed term- contract of an officer for a period of three years, it doesn't make the extension mandatory. Yes, all I see is that it permits, the permission is where the legality and the authority for the representation and action drew from. The Respondents and the Interested Party didn't address this Court as to whether or not the contract of employment could be construed as a document from which a decision maker can, derive legality and authority to make a representation, or act in a manner that can be basis for a legitimate expectation.
99. In the circumstances of the matter, the provisions of the *Kenya Broadcasting Corporation Act*, the Mwongozo Code of Governance and the stipulations of the employment contract that was between the Interested Party and the Petitioner, I am convinced that the representations, and actions that the Petitioner contends aroused the legitimate expectation, and which this court has found were, were by those who had competent and lawful authority to make, the Interested Party and the Respondents. I am not persuaded that the Petitioner's expectation was against any provisions of the law or the *Constitution*.
100. In the Miscellaneous Civil Application 363 of 2018- *Republic v Commissioner of Domestic Taxes Ex Parte Sony Holdings Limited* [2019], cited by counsel for the Interested Party, the Court did set forth the factors necessary for establishment by a party to successfully argue existence of a legitimate expectation, thus; there must be a representation which is clear, unambiguous and devoid of relevant qualification; that the expectation must be reasonable in the sense that a reasonable person would act upon it; that the expectation must have been induced by the decision -maker and; that it must have been lawful for the decision-maker to make such representation. This Court finds that the conditions were established by the Petitioner by cogent evidence.
101. In sum, the Petitioner did prove that he had a legitimate expectation that the contract was to be renewed and that the Respondents have violated the same and continue to, by withholding publication of the Gazette notice for his reappointment.

**Whether the Petitioner's Constitutional Rights under Article 27, 41, and 47 of the Constitution were breached.**

102. Before this Court delves deeper into interrogating this issue, it is imperative to answer one preliminary issue raised by the Interested Party, that the Petition herein does not meet the threshold of a proper petition presented. Counsel for the Interested Party submitted that a party seeking reliefs through a constitutional petition on basis of a violation of rights, constitutional freedoms or the constitution, has to plead with a high degree of precision; show the constitutional or fundamental freedoms violated, the manner of violation, the constitutional provisions in question and the jurisdictional basis. The case of *Anerita Karima Njeru v Attorney General* [1976-1980] KLR 1272 was cited to buttress this submission. While this Court appreciates the principle set out in the decision, I am of the view that the court did not insist on or suggest that mathematical precision was required of the pleading. The Interested Party does not in any way assert that the manner in which the petition is drafted has prejudiced them in one way or the other.



103. All that is needed is a petition presented in a manner that one can easily discern the constitutional provision, and the rights and fundamental freedoms alleged to have been violated. The constitutional and legal provisions and facts anchor for the petition, and the reliefs sought. Looking at the Petitioner's petition and the affidavits filed by the Petitioner herein, I find it difficult to hold that the petition is deficient of the ingredients.

104. The Petitioner contended that his right against discrimination under Article 27 of the Constitution were violated. The court in the case of *Emmah Muthoni Njeri v Nairobi Women's Hospital*, cited with approval in the case of *Peter K Waweru v Republic* [ 2006] eKLR, spoke of discrimination, thus;

“Discrimination means affording different treatment of different persons attributable wholly or mainly to their description whereby persons of one description are subjected to .... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to the person of such other description. .... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex, pregnancy marital status, health status, ethnic or social origin, colour, age, religion, conscience, belief, culture, dress, language, or birth.”

105. I have carefully, considered the petition, and the affidavit in support thereof, I do not see anywhere whereat the petitioner contends that the impugned acts or omissions of the Respondents was based on all or any of those prohibited grounds under Article 27 of the *Constitution*. I am not therefore convinced that the Petitioner was discriminated against in any manner.

106. The Petitioner contended that his right under Article 47 of the *Constitution* was infringed upon by the Respondents. The Article provides;

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- [1]. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
- [2]. If a right or fundamental freedom of a person has been or is likely to be adversely affected by the administrative action, the person has the right to be given written reasons for the action.
- [3]. Parliament shall enact legislation to give effect to the rights in clause [1] and that legislation shall-
  - [a]. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - [b]. promote efficient administration.

109. In pursuance to the provision forestated Parliament enacted the *Fair Administrative Action Act*, that is where the details are as regards enforcement of the right under the Article.

110. Both the Respondents and the Interested Party argue that at the termination of a fixed term contract by effluxion of time, the employer is not obliged to give a notice of termination of employment. They cited a number of decisions in support of their position. The court agrees with them that that is the true legal position. However, keenly considering the manner in which the Petitioner has raised the issue of the notice both in the petition, the supporting affidavit, and submissions, the Court gets a clear impression that the Petitioner, is not alleging that a termination notice ought to have been issued, he



is referring to a different type of notice, one that is contemplated under the provisions of Article, 47 of the Constitution and the provisions of the Fair Administrative Actions Act.

111. I hereinabove pointed out that the letter by the 2<sup>nd</sup> Respondent through the office of his Principal Secretary, and the draft Gazette, were all testament that upon the recommendation by the Interested Party for renewal of the Petitioner's Contract, the 2<sup>nd</sup> Respondent decided to have the recommendation effected. For reasons not known to the Petitioner, the Respondents seem to have changed mind and made a decision not to complete the process of re-appointment which had been initiated and was moving towards completion. It is as regards this action, that the Petitioner argued that he was entitled to a notice pursuant to the provisions of Article 47, and the provisions of the Fair Administrative Actions Act, giving him the reasons thereof as the action was prejudicial to him. I am persuaded that considering the circumstances of this matter in total, the Petitioner was entitled to a notice, and a hearing on the change of decision.
112. In reaching the above conclusion, I am inspired by the holding in Robert Muriithi Ndegwa v Minister for Tourism [Supra], where the Court held inter alia:
- “ ... Article 47 of the Constitution, entitled the Petitioner to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioner was entitled to receive written reasons from the Respondent for the refusal to renew the contract. Despite making a unilateral decision not to renew the contract, the Respondent failed to convey his position and the reasons before and after the due date of the renewal. The Court finds that the Respondent acted in contravention of the Article. ....”
113. An unfair practice is that act which is whimsical, capricious, and unreasonable. The 2<sup>nd</sup> Respondent's action to change mind of Gazetting the Petitioner for reappointment notwithstanding, the excellent performance and recommendation by the Interested Party, without conveying this position to the Petitioner at any time or at all, and yet the process of reappointment was almost complete, is in my mind an unfair labour practice contrary to Article 41 of the Constitution.
114. Article 232 of the Constitution, provides for principles and values of public service which include; high professional standards; efficient, effective, and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; accountability for administrative acts; transparency and provision to timely, accurate information, *Inter alia*. I have carefully considered the Respondents' actions and inactions hereinabove brought forth, and have no hesitation to conclude that they do not reflect transparency, accountability, efficiency, responsiveness, promptness, and effectiveness, on their part. The constitutional provisions under the Article were breached.
115. The Respondents and the Interested Party argued that reappointment of the Petitioner was at the discretion of the 2<sup>nd</sup> Respondent and therefore, his actions and inactions complained of by the Petitioner couldn't be construed in any manner as being a violation of the latter's Constitutional rights. I find it difficult to agree with this line of thinking, which appears to be in ignorance of the true constitutional dispensation in which our democracy operates. In a dispensation where National values and principles of governance, principles of leadership an integrity and values and principles of public service, are entrenched in the Constitution, a state officer or any other person entrusted with the authority to exercise a discretion should know that the discretion is not one at large to be exercised whimsically, capriciously and unreasonably.
116. The Respondents and the Interested Party asserted that the recommendation by the latter's Board, was not binding on the 2<sup>nd</sup> Respondent. In my view, the recommendation by a Board that, knows the employee, has the record of the employee and mechanisms of evaluating the employee's performance,



cannot be in anyway trivialised. If the appointing authority has to decline the recommendation, it must do it with reasons and disclose the same. Otherwise, what will be the essence of the consultations contemplated under Section 5 of the KBC Act, between the Board and the Cabinet Secretary. The provision keenly considered does not suggest that the Board is a weaker party in the process. It does not suggest that the recommendation is subject to approval by the Secretary.

117. In the upshot, I find the petition herein merited and enter judgment in favour of the Petitioner in the following terms;

- I. A declaration that the Petitioner had a legitimate expectation that his contract of employment could be renewed, legitimate expectation, the Respondents have violated.
- II. A declaration that the Respondents have violated the constitutional provisions under Article 10, 41 47, and 232, of the Constitution.
- III. A declaration that the Respondents violated the Petitioner's rights under Article, 41 and 47 of the Constitution.
- IV. The Respondents are hereby restrained by way of a permanent injunction from recruiting any other person for the position of the Managing Director, Kenya Broadcasting Corporation.
- V. An order of mandamus is hereby issued against the 1<sup>st</sup> Respondent directing them to reappoint the Petitioner pursuant to the recommendation of the Interested Party's Board, and have the same Gazetted as required by law.
- VI. Costs of this petition to be in favour of the Petitioner against the Respondents.

**READ, SIGNED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF OCTOBER, 2022.**

**OCHARO KEBIRA**

**JUDGE**

**In presence of**

Mr. Kalii holding brief for Erick Muchina for the Petitioner.

Mr. Karani for Mr. Wadabwa for Interested Party.

**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 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.

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

**OCHARO KEBIRA**

**JUDGE**

