



THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 42 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF:

ARTICLES 1, 3, 10, 19, 20, 21, 22, 23, 27, 28, 41, 50, 159, 162(2), 165(5)(b) & 258 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:

ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER

ARTICLES 10, 20, 27, 28, 41 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:

THE ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:

SECTIONS 4, 6, 7, 8, 9 & 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF:

RULES 4, 10, 11, 13, 22, 23, AND 24 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND

PROCEDURE RULES, 2013;

BETWEEN

JAMES ANG'AWA OKEYO.....PETITIONER

VERSUS

KENYA PLANT HEALTH INSPECTORATE SERVICES.....RESPONDENT

JUDGMENT

1. The Petitioner/Applicant was employed by the Respondent as the General Manager – Finance and Administration on 15th March 2017 under a fixed term contract for 3 years’ renewable subject to satisfactory performance and on mutual agreement.
2. The Respondent is a statutory body established under Section 3 of the Kenya Health Inspectorate Service Act No. 54 of 2012. The functions of the Respondent are set out under Section 5 of the said Act.
3. By a letter dated 30th September, 2019, the Petitioner wrote a letter requesting for the renewal of his contract to the Managing Director of the Respondent.
4. The Respondent however issued a letter dated 27th February, 2020, titled “**Notification of End of Contract**” informing the Petitioner that his contract would come to an end on 31st March, 2020 and advising the Petitioner to take any outstanding leave.
5. The Petitioner also received a letter dated 12th March 2020 captioned “**Feedback on Request for Renewal of Contract**” from the Respondent’s Managing Director informing him that his request for contract renewal was not granted.
6. Aggrieved by the decision of the Respondent, the Petitioner filed the present Petition dated 23rd March, 2020 seeking the following orders: -
 - a. *A declaration that the Respondent’s actions in failing to renew the Petitioner’s contract as General Manager Finance and Administration for no reasonable cause or at all is unfair, unlawful and constitutes breach of the Petitioner’s Constitutional rights to fair labour practice, fair hearing and fair administrative action;*
 - b. *A permanent order of injunction staying the letter dated 27th February, 2020 issued by the Respondent;*
 - c. *An order compelling the Respondent to renew the Petitioner’s term for a further term of three years as provided for under Section 45(3) of the Public Service Commission Act, 2017 and other enabling provisions of law; or*
 - d. *Alternatively and without prejudice to prayer (c) above, an order that the Petitioner’s contract of service was constructively renewed for three years effect from 1st April, 2020;*
 - e. *A permanent injunction restraining the Respondent its servants, officials, representatives and/or agents from appointing any person either permanently or temporarily to the office of the General Manager Finance and Administration of the Respondent;*
 - f. *A permanent order prohibiting/restraining the Respondents, its servants, officials, representatives, and/or agents from advertising or having so advertised, from acting thereupon, interviewing, recruiting or otherwise in any other manner replacing the Applicant his position as the General Manager Finance and Administration of the Respondent;*
 - g. *An order directing the Respondent to pay to the Petitioner his leave days, gratuity and all allowance of end of term contract entitlements.*
 - h. *General damages for the constitutional violations of the Petitioner’s fundamental rights;*
 - i. *The Honourable Court do issue any other Orders and give such directions as it may deem fit to meet the ends of justice;*
 - j. *Costs of the Petition.*

7. On 22nd April 2020, the Respondent filed an Answer to Petition dated 21st April, 2020 in opposition the Petition. Pursuant to the directions issued on 9th December, 2020, parties filed and exchanged written submissions. The Petitioner’s filed his written submissions dated 30th March, 2021 while the Respondent filed its written submissions dated 23rd April, 2021.

Brief facts

8. Pursuant to the terms of the Respondent’ Human Resources Policies and Procedures Manual (the “**HR Manual**”), the Petitioner wrote a letter dated 30th September, 2019, to the Respondent’s Managing Director, requesting a renewal of his contract.
9. Subsequently, the Respondent’s Human Resource and Administration Committee of the Board met on 8th January, 2020 where amongst the items on the agenda for consideration were the requests for renewal by the Petitioner as General Manager Finance and Administration and that of the Managing Director and General Manager – Phytosanitary Services.
10. The Respondent’s said Committee deferred the request for renewal of contract for the Managing Director, the General Manager Phytosanitary Services and that of the Applicant as the General Manager – Finance and Administration.
11. On 16th January, 2020, the Petitioner received an internal Memo from the Respondent informing him that his request for renewal of his contract had been discussed during the special 11th Human Resource Administration Committee Meeting held on 9th January, 2020 and their directions were as follows: -

i. That you be appraised using customized form to indicate July 2019 to December 2019 only on output for six (6) months and rate it 100%. Extract the target for discussion with Managing Director and appraisal on 17th January 2020.

ii. Prepare and respond to issues relating to audit queries on Finance, Human Resource and Procurement and respond to each of the issues raised in a table format and the status on each item for the last two and a half years. Also indicate commitment on how you will ensure they do not occur again.

iii. Clarify to the committee on the court case with a former employer.

12. On 22nd January 2020, the Petitioner received email communication to the effect that the Committee on Human Resource and Administration required a written response on a Court matter that the Petitioner had between himself and a former employer.

13. On 10th February, 2020, a special meeting of the Respondent's Human Resource and Administration Committee was once again convened and one of the items on the agenda for discussion was the consideration and adoption of the request for extension and renewal of the Applicant's contract for the position of General Manager – Finance and Administration.

14. The Respondent's Managing Director wrote a letter dated 12th February, 2020 to the Deputy Registrar of the Employment and Labour Relations Court at Kisumu requesting for an update on the status of the case in **INDUSTRIAL COURT CASE NO. 272 OF 2014: JAMES ANG'AWA OKEYO v KIWASCO** which the Deputy Registrar responded to vide a letter dated 13th February, 2020 indicating that the matter had been settled through a consent that was adopted as an order of the Court.

15. On 27th February, 2020, the Petitioner wrote an email to the Respondent's Managing Director attaching an Internal Memo detailing his concerns on the proceedings with respect to his contract renewal and leave application. It was on this day that the Petitioner received the Notification of End of Contract.

16. On 27th February, 2020, the Applicant received a letter under the title **"Notification of End of Contract"** from the Respondent's Managing Director notifying him that his contract would expire on 31st March, 2020.

17. On the following day, the Applicant wrote an email to the Board of Directors of the Respondent detailing what he termed as glaring administrative injustices being meted on him and his subjection to outrageous processes in the request for renewal of his contract.

18. Subsequently, he received a letter dated 12th March 2020 captioned **"Feedback on Request for Renewal of Contract"** from the Respondent's Managing Director informing him that his request for contract renewal was not granted.

Analysis and Determination

19. I have considered the pleadings filed by the parties and evidence relied on as well as their respective submissions. Both parties in their respective submissions have identified

the following as the issues for this Court's determination.

- i) Whether the Petitioner had a legitimate expectation of renewal of his contract of employment for a further period.
- ii) Whether the failure to renew the Petitioner's contract for 3 years amounted to unfair termination of his employment contract.
- iii) Whether the Petitioner's fundamental rights and freedoms and other constitutional protections were violated by the Respondent.
- iv) Whether the Petitioner is entitled to the remedies sought.

20. I will adopt the issue.

Legitimate Expectation

21. The Petitioner has submitted that his appointment letter and **Clause 4.5 (b)** and **Clause 4.6** of the Respondent's HR Manual provided that his contract was renewable subject to satisfactory performance. He submitted that he had not received any adverse appraisal on his performance for the roles assigned to him over the period of his work with the Respondent. It was the Petitioner's submission that the Respondent had made a commitment to him by the provision that his contract was renewable subject to his satisfactory performance.

22. It was the Petitioner's submission that the Courts have held that an employee under a fixed term contract can indeed have a legitimate expectation that the contract will be renewed based on certain conditions being met. He relied on the case of **Teresa Carlo Omondi v Transparency International Kenya [2017] eKLR** where it was held as follows: -

"105. The Court is satisfied the Claimant had legitimate expectation her contract would be renewed. It was not merely a wish, a hope or a desire for continuity; it was legitimate expectation, rooted in the contract of employment. There was a promise for renewal, subject to fulfillment of certain conditions. These conditions were fulfilled. The Claimant performed satisfactorily. She was appointed as an Independent Consultant for a key partner. There is no doubt her services were still required by the Respondent.

Another Employee took up the position of Head of Programmes 8 days after the Claimant was ejected.”

23. The Respondent on the other hand submitted that the Petitioner’s sense of entitlement to an automatic renewal of contract just because he applied for renewal and in his opinion performed well, is not founded in the contract between the parties or in law.

24. The Respondent cited an array of cases from this Court and the Court of Appeal in support of its submissions that fixed term contracts carry no expectancy of renewal.

25. The Respondent further submitted that the fact that the Petitioner was to apply for renewal of the contract of employment means that there was a chance of acceptance or rejection of the application.

26. It was the Respondent’s submission that the Petitioner’s only claim of his legitimate expectation is based on the performance of his duties to the satisfaction of the Respondent which the Respondent disputes.

27. The Respondent further submitted that performance was not the only condition for renewal based on the letter of appointment that provided that the contract is renewable subject to satisfactory performance and on mutual agreement.

28. It was the Respondent’s submission that the satisfactory performance alone could not create a legitimate expectation without the second requirement of a mutual agreement between the Petitioner and the Respondent. The Respondent relied on the case of The Registered Trustees of the **Presbyterian Church of East Africa (PCEA) & Another v Ruth Gathoni Ngotho Kariuki [2017] eKLR**.

29. As cited by the Petitioner, the Supreme Court in the case of **Communication Commission of Kenya & 5 Others v Royal Media Services [2014] eKLR**.

30. I agree with the Petitioner’s submission on the requirements for legitimate expectation which I have found aptly captured by my learned brother **Mativo J.** in the case of **Republic v Principal Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR**. Relying on the South African case of **National Director of Public Prosecutions v Philips 2002 (4) SA 60 (W)** the Court set out the requirements as follows:-

i. The representation underlying the expectation must be clear unambiguous and devoid of relevant qualification.

ii. The expectation must be reasonable.

iii. The representation must have been induced by the decision maker.

iv. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.

31. The same was also captured by the Supreme Court in the case of **Communication Commissions of Kenya & 5 Others v Royal Media Services [2014] eKLR** which further held that: -

“An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”

32. **Clause 1** of the Petitioner’s Appointment letter dated 15th March, 2017 provides that the contract is renewable subject to satisfactory performance and on mutual agreement. **Clause 4.5** of the Respondent’s Human Resource Policy provides that an employee serving under contract terms and wishing to be considered for a further term is required to notify the Managing Director in writing six (6) months before the expiry of the contract.

33. A plain reading of the provisions related to renewal in the Petitioner’s Appointment Letter and in the HR Policy clearly shows that the renewal of a contract is not automatic. It was subject to the satisfactory performance of the Petitioner and mutual agreement by the parties.

34. While the Petitioner and the Respondent have conflicting positions on whether or not the Petitioner’s performance was factory, it is clear that the renewal was subject to mutual agreement. In the absence of either party’s agreement to the renewal, the contract was not capable of being renewed. As such the notification by the Petitioner for a consideration of a further term of the contract in my view was not sufficient to create a legitimate expectation that his contract would be automatically renewed.

Unfair termination

35. The Petitioner submitted that the Petitioner’s termination was not grounded on a valid and fair reason and that fair procedure was not followed. The Petitioner’s submission was based on the fact that not renewing his contract without reason the Respondent’s action amounted to an unfair termination.

36. He submitted further that fair procedure was not followed as the contract was required to be renewed automatically upon expiry and if no communication is issued, then the party which so desired to terminate the contract was required to give 3 months’ notice or salary in lieu of notice.

37. It was the Petitioner's submission that he was not accorded an opportunity to be heard by the Board and to make representations on his case for renewal of contract. Further, that there was no evidence on record that the Respondent gave such notice before 30th September, 2019 or any time before the said date. He submitted that the Respondent allowed the Petitioner to continue in employment until 12th March, 2020 when he was informed his contract would expire on 31st March, 2020.

38. It is undisputed that the appointment of the Petitioner was based on a fixed term contract with a possibility of renewal subject to the terms that have been discussed in this judgment. The Petitioner was thus not dismissed – his employment was determined by the effluxion of time and thus the expiry contract.

39. The notification of the expiration of the contract vide the Respondent's letter dated 27th February 2020 and the letter dated 12th March, 2020 were issued prior to expiry of the contract. Had the notices been issued after the expiry of the contract, then the Court may have been inclined to consider if the contract was constructively renewed and the Respondent was thus terminating the services of the Petitioner. However, this was not the case, the Respondent communicated in advance its intention not to renew the contract.

40. In the Court of Appeal decision in the case of the **Registered Trustees of the Presbyterian Church of East Africa (PCEA) & Another** (supra) which this Court agrees with fully, the Court stated: -

“Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained. This is in relation to the salary for the months of April up to 5th May, 2010. Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”

41. It is further the Petitioner's submission that since the Respondent's HR Manual is silent on a notice being issued on renewal or non-renewal within 6 months, the principle applied should be that contained in Section 45(3) of the Public Service Commission Act. The Petitioner posited that he is a public officer within the meaning of Article 260 of the Constitution and thus capable of invoking the provisions of Public Service Commission Act.

42. I reiterate my sentiments in the Ruling delivered on 12th June, 2020 that the Petitioner is not an employee of the Public Service Commission and did not contract to serve the Public Service Commission. The provisions are thus inapplicable in the present case where there is a specific contract. It is trite that the Court cannot rewrite a contract for parties.

Violation of Petitioner's Constitutional Rights

43. The Petitioner has submitted that the Respondent's actions have violated his constitutional rights enshrined in Articles **10, 27, 41, 47, 50** and **236** of the Constitution.

44. I have considered the pleadings in this regard, the submissions and the authorities relied on by the Petitioner with respect to the alleged contravention of the Petitioner's Constitutional rights.

45. I do not find that the Petitioner has established that the Respondent contravened **Article 10** of the Constitution. The action of the Respondent in appointing an Acting Director in the position previously occupied by the Petitioner is not a violation of Article 10. It is an exercise of the Respondent's prerogative to ensure proper administration and continuity of the Respondent's services.

46. I also find that the Petitioner has not proved discrimination or inequality in the applicability of the law in reference to the actions of the Respondent as relates to **Article 27** of the Constitution. The Petitioner has not shown how he was singled out by the Respondent or that the non-renewal of his contract was unique to him. Indeed, the Respondent has in the Replying Affidavit sworn by Simon Kibet on 21st April, 2020 that forms part of the Court record confirmed that the contract of the Managing Director serving at the same time as the Petitioner was also not renewed.

47. From the finding of this Court hereinabove, there has been no instance pleaded or proved of the Respondent's actions amounting to unfair labour practices in contravention of Article 41 of the Constitution.

48. As relates contravention of **Article 47** and **50** with respect to his right to fair administrative action and fair hearing, the Petitioner's submissions is that the Respondent contravened his right to fair administrative action by failing to accord the Petitioner a hearing before taking any adverse action against him.

49. The Petitioner has urged this Court to find similarity as the holding in the case of **Robert Muriithi Ndegwa v Minister for Tourism [2012] eKLR**. This Court is not bound by the said decision as it is a Court of concurrent jurisdiction. Further, the same is distinguishable from the set of facts in that case. In the said case, the Petitioner's appointment was subject to the Ministerial prerogative. He had undergone an evaluation by the relevant Board who issued a recommendation for renewal of his contract. The Minister then proceeded against the recommendation without providing reasons for doing so, which authority the Minister was not clothed with.

50. In the present case, the Board did not recommend the Petitioner's request for renewal and raised concerns with respect to his performance. From the correspondence between the Petitioner and Respondent produced by the Petitioner, it is apparent that the Petitioner participated in the process and was gain set to allege discrimination during the evaluation process.

51. The aspect of mutual agreement was key for the renewal of the Petitioner's contract and it is apparent that there was no mutual agreement for the renewal that required the concurrence of the Respondent.

52. The Respondent cannot be faulted or forced to agree to a renewal of the Petitioner's contract nor be punished for not renewing the contract. There was no legitimate expectation other than that the present contract would determine at the end of three years. Whether or not it would be renewed was dependent of agreement of the parties and cannot to be said to be an unfair administrative action.

53. In view of the foregoing, the petition fails on all counts and is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF AUGUST 2021

MAUREEN ONYANGO

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 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.

MAUREEN ONYANGO

JUDGE