



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.E765 OF 2021**

**MOHAMED BAYAAN ADAN.....CLAIMANT**

**VERSUS**

**KENYA MEAT COMMISSION.....RESPONDENT**

**RULING**

The claimant filed application dated 17<sup>th</sup> September, 2021 under the provisions of section 43, 45(2) and (5) of the Employment Act, Article 23, 41 and 47 of the Constitution and seeking for orders that the respondent's decision issued on 14<sup>th</sup> April, 2021 terminating his employment and ICT Manager be stayed; he be reinstated to the position of ICT manager; and that a restraining order be issued stopping the respondent from advertising or assigning the duties of ICT manager to any other person pending the hearing of the claim herein.

The application is supported by the claimant's affidavit and on the grounds that the claimant was competitively employed by the respondent on 1<sup>st</sup> September, 2006 as the IT Administrator and on 1<sup>st</sup> July, 2012 he was appointed ICT manager following performance appraisal and good performance. The claimant served the respondent diligently until the Ethic and Anti-Corruption Commission (EACC) commenced investigations at the respondent on alleged irregular recruitment of staff, following which the claimant was interviewed on 28<sup>th</sup> February, 2020.

Through a letter dated 11<sup>th</sup> March, 2021 the EACC in its report recommended that there was irregular recruitment of the ICT manager and advised that the position be competitively filled.

The respondent had renewed the claimant's contract for a period of 3 months ending 14<sup>th</sup> April, 2021 as a result of the pending EACC investigations the contract was not renewed and the board stated that there would be advertisement for the same.

The decision of the respondent board is contrary to the human resource manual with regard to vacant positions which are to be filled competitively from internal sources where applicable. There was no due process before contract was terminated which required a 90 days' notice and prior to the EACC investigations the claimant had been on 3 years contract. The short term contract issued pending EACC investigation were unfair and violated the rights of the claimant and failed to abide the human resource manual.

In his affidavit, the claimant avers that despite working diligently for the respondent, upon the investigations by the EACC his employment was terminated unfairly without fair hearing or fair administrative action. The decision to renew his employment contracts for short terms of 3 months was unfair since he had been recruited through a competitive process and as required under the human resource manual any vacant position ought to be filled internally and where there is no candidate such be advertised externally which was not done in his case.

The recommendation by the EACC that the position of ICT manager be advertised isolated the rights of the claimant and the orders sought should issue with the decision to terminate employment being stayed, there be reinstatement and the respondent be stopped from advertising the position held by the claimant and unless these orders are issued he will suffer irreparable loss and damage.

The respondent in reply filed the Replying Affidavit of Albert Nyauntu the human resource and administration manager and who avers that the application is made in bad faith and the claimant fails to disclose material facts meant to deprive the respondent an opportunity to advertise for the position of ICT manager in view of a vacancy without any lawful justification.

The claimant was first employed by the respondent as the IT assistant manager under a term contract; was promoted as marketing and technology officer; and lastly working at the ICT manager on a contract which was renewed for a year on 2<sup>nd</sup> September, 2013; in the year 2014 the contract was renewed for 6 months pending the respondent's Human Resource Plan from the Kenya School of Government.

Nyauntu also avers that in the year 2019 the claimant was appointed in an acting capacity as the Sales and Marketing in charge as well as the

ICT manager until 14<sup>th</sup> January, 2021 when the contract was renewed for 3 months following a board decision.

The respondent requested for investigations by the EACC on the authenticity of the academic certificates of the claimant and irregular recruitment in December, 2020 and the EACC conducted investigations and advised that the position held by the claimant be advertised and competitively filled in accordance with the policy.

Nyantu also avers that due to the poor historic performance of the respondent, the respondent's ministerial responsibility transferred to the Ministry of Defence through Executive Order Number 3 of 2020 and a new management of Kenya Defence Forces Officers were embedded with the civilian management of the respondent. The respondent's board commissioners vide meeting held on 23<sup>rd</sup> March, 2021 resolved that the claimant's contract should not be renewed and the ICT manager position be advertised for competitive recruitment and the claimant was advised to apply.

The respondent's board decision was not informed on the EACC investigations as alleged but such followed the lapse of the claimant's contract period.

Upon the transfer of ministerial responsibility to the Ministry of Defence, Kenya Defence Forces officers were seconded to work under the respondent and appointed as deputies to all managers. The claimant was deputised by a military officer who took up the duties of the ICT manager upon the non-renewal of the contract.

The claimant appealed against the decision of non-renewal of contract which appeal was heard as required under the human resource policy and a finding made that the contract lapsed lawfully and there is no case of unfair termination of employment as alleged. The respondent processed all terminal dues amounting to Ksh.2, 531,055 and Ksh.442, 853.80 being salary arrears and gratuity pay.

The application before court is therefore in abuse of court process as employment terminated lawfully and there are no unpaid dues and should be dismissed with costs.

Both parties attended and made oral submissions.

The court has considered the application, affidavits and submissions and from the claimant's affidavit sworn on 17<sup>th</sup> September, 2021 at paragraph 13 he confirms that employment terminated on 14<sup>th</sup> April, 2021.

Termination of employment is challenged on the grounds that following EACC investigations, the respondent kept the claimant on short term contracts and the last contract prior to termination of employment had been renewed for 3 months ending 14<sup>th</sup> April, 2021. The board refused to renew the contract on the grounds that the EACC had recommended the position of ICT manager be advertised and filled competitively. The claim is hence that there was unfair termination of employment and due process was not followed.

The claimant in his application is seeking that the decision of the respondent on 14<sup>th</sup> April, 2021 be stayed, there be reinstatement and the respondent stopped from advertising for the position held by the claimant.

As noted above, employment has since been terminated. To vacate the respondent's decision of 14<sup>th</sup> April, 2021 would effectively take parties back to position subsisting on 13<sup>th</sup> April, 2021 when he claimant was serving under a 3 months contract which lapsed on its terms on 14<sup>th</sup> April, 2021 and by extension reinstate the claimant back to a term not defined as he acknowledges that his 3 months term contract lapsed on such date.

The order of reinstatement requires specific performance. It means restoration of an employment contract so as to ensure continuity of an employment relationship. It places an employee back in service, on same terms and conditions of employment; reverting to the situation before dismissal.

The effect of an order of reinstatement is to restore an employment contract without loss of benefits. The Court of Appeal in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** held that before the court can issue the remedy of reinstatement there are factors to be considered and that;

*... the Court is required to be guided by factors stipulated in section 49(4) of the Employment Act which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract of employment should not be offered except in very exceptional circumstances. The Court should also balance the interest of the employee with the interest of the employer.*

In this regard, section 49 (4) of the Employment Act, 2007 on the factors to be considered before the order of reinstatement can issue must be read together with section 12(3) of the Employment and Labour Relations Court Act, 2011 which allow for reinstatement within 3 years since employment terminated and further Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which requires that;

***(10) Notwithstanding anything contained in this Rule, the Court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated.***

Employment having terminated on 14<sup>th</sup> April, 2021 and due process and fairness of the same challenged herein, without going into the merits of the same, to stay the decision contained in the respondent's letter of 14<sup>th</sup> April 2021 to the claimant and to reinstatement the claimant at

this stage would deny the court material evidence which ordinarily would be available in a full trial.

To stop the respondent from advertising the position of ICT manager at this stage taking the above into account and the claimant having acknowledged that his term contract ended on 14<sup>th</sup> April, 2021 would be to deny the respondent a key function of its operations without the court taking evidence. Such would not meet the ends of justice.

**Accordingly, application dated 17<sup>th</sup> September, 2021 is declined. Costs in the cause.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021.**

**M. MBARU**

**JUDGE**