



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1638 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

KENYA BUILDING CONSTRUCTION

TIMBER & FURNITURE INDUSTRIES

EMPLOYEES UNION.....CLAIMANT

VERSUS

EKOTECH COMPANY LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant is a trade union and he filed a memorandum of claim dated 3rd July, 2017. The Claimants avers that the grievants were employees of the Respondent until 31st March, 2014 when the Respondent's Director ordered them to stop working. The Claimant state that the grievants continued to report to work but were not allowed and eventually their services were terminated.
2. The Claimant allege the grievant's services were terminated because of being members of the union.
3. The Respondents filed their response dated 26th October, 2020. The Respondents were engaged at different times by the Respondent to perform different duties for fixed term contracts.
4. It is the Respondent's averment that all the four grievants had fixed contracts which expired on 31st March, 2014. The Respondents testimony is that the grievants were not terminated but their employment ended by effluxion of time.

EVIDENCE

5. The Claimant presented evidence of one grievant Mac Donald Ogeto who had authority to represent the other three grievants.

The grievant testified that all four were employed by the Respondent on diverse dates but on 31st March, 2014 the Respondent ordered the four grievants to stop working and wait outside the gate for further instructions.

6. The grievants testified that they kept reporting to work but were not admitted.
7. He says that their three months had expired and that the four were the only ones who had three months contract.
8. The Claimant testify that on 31st March, 2014 only the contracts of the four grievants had expired.
9. The Respondent's evidence is that the grievant's contract had expired and that at exit their dues were paid. The Respondent's witness Moses Gitebi says the grievant's employments were not terminated but expired on 31st March, 2014.

THE CLAIMANT'S SUBMISSIONS

Claimant's submissions are that the grievants had legitimate expectation that their contracts would be renewed. The same had been renewed

before for the other past four years.

They relied on the case of **TERESA CARLE OMONDI VS TRANSPARENCY INTERNATIONAL KENYA (2017) eKLR** where it was held that an employer through regular practice or through an express premises can lead the employee to legitimately expect there would be a renewal.

The court went further to state that 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 as anticipation, desire or hope. It is a principle based on a right, grounded on the layer principles of reasonableness and fair dealing between employer and employee.

11. The Claimant avers that the grievants had valid legitimate expectation and so they claim malice in the Respondent renewing their contract for only 3 months.

12. They therefore demand a declaration that their employment was unfairly terminated and it was due to the Respondent's endeavor to reduce trade union activities at the workplace.

RESPONDENT'S SUBMISSIONS

13. The Respondent on the other had submits that the four grievants were issued with fixed term contracts as follows:-

(a) Macdonald Ogeto – last contract 6th January, 2014 to 31st March, 2014 and his salary was Kshs.11,085/= and Kshs.1663/= house allowance.

(b) Leonard Nandi's last contract was to expire on 31st March, 2014 and his salary was Kshs.11,085/= per month and Kshs.1163/= house allowance.

(c) Njeru John Kuria's last contract expired on 31st March, 2014 and his salary was Kshs.9,981/= and Kshs.1,498/= being house allowance.

(d) Eric Mugo Nyaga's last contract was expiring on 31st March, 2014 and his salary was Kshs.9,780/= plus Kshs.1,1440/= house allowance.

14. The Respondent states that the fixed contract is defined in the Employment Act is "an employment not intended to be for a definite 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" (Section 10 (3) (c)).

15. The grievants signed their fixed contracts and so agreed to be bound by the conditions thereto.

The Respondent also referred to the case of **TERESA CARLO OMONDI VS TRANSPARENCY INTERNATIONAL KENYA (SUPRA)** where the court held that the general principle is that a fixed term contracts carry no rights or obligations or expectations beyond the date of expiry.

16. Also in **RAJAB BARASA & 4 OTHERS VS KENY MEAT COMMISSION (2020) eKLR** the court held that the law related to fixed contract of employment does not constitute termination of contract of any of the parties. "There is an automatic termination of the contract by the operation of the law and not dismissal or unfair termination of employment as claimed by the Claimants" so held the court.

17. The Respondent submissions are that the grievants termination of their employment was by effluxion of time.

18. The grievants have claimed that they were discriminated because they were members of the union but the Respondent has differed with that averment as it states there is no proof of such discrimination.

19. The 1st grievant says he joined union in 2011 but his contract ended in March, 2014. If there was discrimination on basis of being a member of the union the Respondent would have refused to offer him employment way back in 2011.

20. The Respondent in his submissions says the grievants were all paid their terminal dues and so no compensation is due to them.

DETERMINATION

21. The grievants employment ended on 31st March, 2014. The Respondent undertook to raise a preliminary objection in their response to the memorandum of claim on the fact that the case was filed out of time.

The claim was filed in August, 2017 and the same is dated 3rd July, 2017.

22. Under Section 90 of the Employment Act 2007 provide that ".....no action or proceedings based on or arising out of this Act or contract of service in general shall or be instituted unless it is commenced within three years next after the Act, negligent or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

23. The court is puzzled why the counsels ignored this fundamental point and proceeded with the suit when it was already time barred. It would be very negligent for a court to overlook the same even if the respective counsels for reasons best known to themselves chose to ignore the same and actually wasted the courts time proceeding with a matter that was already time barred.

24. In the case of **MARIA MACHOCHO VS TOTAL KENYA LIMITED MISC. CIVIL CASE NO. 2 OF 2012** the court held that it neither had the statutory jurisdiction nor discretion to grant leave or to extend time in causes of action based on breach of contract of service or actions arising out of Employment Act 2007.

In **JOHN MUGALLA MWADIMA VS BRAEBURN SCHOOLS LIMITED T/A BRAEBURN INTERNATIONAL SCHOOL MOMBASA CAUSE NO.588 OF 2014** the court found the suit was time barred and so struck it out with no order as to costs.

25. In the current case where the suit was filed out of time the court has no choice but to strike it off even at the point of delivering judgement.

26. In any event even if the suit was not time barred the court is persuaded that the four grievants had fixed contracts over a period of time signed between them and the Respondents. The same were also witnessed by third parties. There is no evidence that the grievant did not sign the fixed contracts voluntarily. The fixed contracts for the four were all expiring on 31st March, 2014.

27. The court is convinced that the four grievants employment terminated not through unlawful termination but by effluxion of time.

The authorities are unanimous that fixed term contracts carry no rights, obligations or expectation beyond the date of expiry of contract.

28. In the case of **WILLY CHANGWONG VS LAIKIPIA UNIVERSITY CASE 229 OF 2015** the court held that the only remedy available to a Claimant at the expiry of fixed contract is provision of certificate of service.

29. Similarly in **STEPHEN M. KITHEKA VS KEVITA INTERNATIONAL LIMTIED CAUSE NO.382 OF 2013 MAUREEN ONYANGO J.** found that a Claimant who was on fixed term contract with ascertained period of expiry was not entitled to the prayers including in lieu of notice claimed.

30. The case of **TERESA CARLO OMONDI VS TRANSPARENCY INTERNATIONAL (Supra)** it was held that a fixed term contract carry no rights or obligations or expectations beyond the date of expiry.

31. The court as earlier stated strikes the suit as it is time barred.

And as a matter of abundant precaution even if the suit was proper before the court I would still not have ruled in favour of the Claimant's because the fixed term contract terminated on the sun set date and it was not extended.

CONCLUSION

The suit is hereby struck out for the reason that it was filed out of time.

Both parties did not raise that fundamental issue and therefore none deserves costs.

No order as to costs.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH DAY OF NOVEMBER, 2021.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court 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 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.

ANNA NGIBUINI MWAURE

JUDGE