



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 102 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 29, 41, 47, 48, 159, 162, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE CONSTITUTIONAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 27, 28, 29, 41, 47 AND 48 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTIONAL PRINCIPLES OF FAIRNESS, REASONABLENESS AND LEGITIMATE EXPECTATIONS**

**AND**

**IN THE MATTER OF SECTION 5, 26, 27, 40 AND 85 OF THE EMPLOYMENT ACT 2007**

**AND**

**IN THE MATTER OF SECTION 3 AND 12 OF THE INDUSTRIAL COURT ACT, NO. 20 OF 2011**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION) HIGH COURT PRACTICE AND PROCEDURE RULES, 2012**

**BETWEEN**

**CAROLINE KWAMBOKA KINYULUSI.....PETITIONER**

**VERSUS**

**NATIONAL ENVIRONMENT TRUST FUND.....RESPONDENT**

**JUDGMENT**

The Petitioner herein who is still serving as an employee of the Respondent, was employed as a Senior Communication and Awards Manager on a 2 year fixed term contract that was to commence on 5<sup>th</sup> June, 2016 and ending on 5<sup>th</sup> June, 2018. She avers that upon the lapse of her contract, the Respondent retained her under the same terms while awaiting a letter of appointment on permanent and pensionable terms.

She avers that since 6<sup>th</sup> June 2018 she has served the Respondent as Manager Corporate Communication. She avers that on 28<sup>th</sup> September 2018 she was issued with a letter dated 20<sup>th</sup> September, 2018 asking her to hand over within 8 hours and stating 1<sup>st</sup> October, 2018 was her last day of service.

She avers that the Respondent stated that the reason for its letter was due to her unsatisfactory performance and frequent lateness. She contends that she was never informed of her lateness or unsatisfactory performance.

She avers that she was never taken through a disciplinary process. She contends that the Respondent's acts and omissions were unreasonable, unfair and irrational and in breach of her legitimate expectations to a process that is procedurally fair, constitutional and law abiding.

She seeks the following prayers in her Petition filed on 2<sup>nd</sup> October 2018:

1. An order of Certiorari, moving into this Court and quashing the letter dated 20<sup>th</sup> September, 2018.
2. A permanent injunction restraining the respondent herein either by itself, employees, servants and/or agents from interfering with the peaceful performance of the applicant's duties as the Manager Corporate Communication without due process.
3. A permanent injunction restraining the respondent herein either by itself, employees, servants and/or agents from discriminating against the Petitioner while working with the Respondent.
4. An order of mandamus compelling the respondent to enforce the National Values of Good governance of equality amongst its employees and fair labour practices as set out under Article 41 of the Constitution of Kenya.

Together with the petition, the petitioner filed a notice of motion. In her Notice of Motion, the Petitioner, seeks the following orders:

1. Spent.
2. A temporary injunction do issue against the respondent by themselves, their servants and agents restraining them from interfering with the peaceful performance of the applicant's duties as the Senior Communication and Awards Manager Information of the Respondent, in accordance with the Petitioner/Applicant's terms and conditions of employment, pending and hearing the determinations of this application.
3. A temporary injunction do issue against the Respondents by themselves, their servants and agents, restraining them from interfering with the peaceful performance of the applicant's duties as the Senior Communication and Awards Manager of the Respondent, in accordance with the Petitioner/Applicant's terms and conditions of employment, pending the hearing and determination of the Petition.
4. Costs of this application be provided for.

The application is based on grounds that:

1. The Respondent is executing an elaborate but illegal scheme designed to terminate the Petitioner/applicant.
2. The Respondent has acted in total violation of Article 41 of the Constitution and all legal provisions relating to termination of contract of employment. Further, that the Respondent as acted in violation of the constitutional threshold set out under Article 10 of the Constitution.

The application is supported by the Affidavit of the Petitioner/ Applicant sworn on 2<sup>nd</sup> October, 2018. She reiterates that she has not been taken through any disciplinary process and that she is likely to be blocked from accessing her desk and work without handing over. She states that she is a casualty of office battles.

The Court on 27<sup>th</sup> February, 2019 directed that the Petition and the

Notice of Motion both filed on even day be consolidated and submissions be filed in respect of both pleadings.

### **Respondent's Case**

The Respondent filed a Replying Affidavit sworn by Samson Toniok, the Respondent's acting Chief Executive Officer, on 4<sup>th</sup> December, 2018. He avers that the Petitioner was employed as a Senior Communication and Awards Manager on 31<sup>st</sup> May, 2016 on a two year contract commencing on 6<sup>th</sup> June 2016. That the employment contract did not have a provision that the Petitioner would be appointed on permanent and pensionable basis. That the Petitioner was lawfully notified of non-renewal of her contract thus she has in basis on law to assert that she was denied the right to fair labour practice.

He deposes that the Petitioner's employment contract was lawfully terminated on 5<sup>th</sup> June, 2018 in accordance with the terms of the contract. He contends that the continuous engagement of the Petitioner up to the time her contract was terminated did not amount to a renewal of her contract.

He contends that there was no requirement for the Respondent to subject the Petitioner to a disciplinary process since it had already communicated to her that her contract would not be renewed.

He avers that the Respondent had no obligation to respond to the Petitioner's letter dated 1<sup>st</sup> October 2018 since it would have defecated the very basis of the fixed term contract whose relevance the respondent had declined.

### **Petitioner's Further Response**

The Petitioner avers that the retention of her services by the Respondent after the expiry of the 2 year contract created a reasonable expectation that her contract would be renewed on permanent and pensionable terms as she was looking forward to confirmation of her appointment.

She avers that the Respondent by its implied conduct had intentions of renewing her contract vide the letter dated 30<sup>th</sup> April, 2018 appointing her as a member of the NEFUND information communication and Technology Committee for the financial year 2017-2019 and member of the Grants Award and Evaluation Committee for the financial year 2018-2019 and 2019 to 2020. The letter at appendix CKK 033 however refers to the period 2017 – 2019.

She further avers that though the renewal of her contract was at the discretion of the Respondent the decision not to renew her contract ought to have been made and she ought to have been notified of such decision. She further avers that having continuously engaged her services after the lapse of her contract the Respondent ought to have subjected her to a disciplinary process.

### **Petitioner's Submissions**

The Petitioner submits that based on her good performance and competence which positively contributed to the performance of the Respondent, she had reasonably and genuinely expected that the Respondent would not only renew her contract but would improve the terms and conditions of her employment including confirming her on permanent and pensionable terms.

She submits that the Respondent's conduct gave rise to constructive renewal of the contract. She submits that the decision to terminate the Petitioner's contract was malicious and in bad faith. She relied on the case of **United Nations Appeals Tribunal [Tribunal D Appel Des Natins Unies] UNAT, Case No. 2010 -125 between Frenchon v The Secretary General of the United Nations** cited in **Margaret A. Ochieng v National Water Conversation & Pipeline Corporation [2014]**. She further relied on the decision in **Teresa Carlo Omondi v Transparency International Kenya [2017] eKLR**.

She submits that the Respondent's attempt to terminate and not renew her contract on the basis of unsatisfactory performance and frequent lateness to work without giving her any hearing was wrongful, malicious and unfair.

She submits that the Respondent's actions amount to breach of fair labour practices relying on the case of **Elizabeth Washeke and 62 others v Airtel Networks Limited & Another**.

She submits that the Petition and Application are merited and costs should be borne by the Respondent.

### **Respondent's Submissions**

The Respondent submits that the Petition and application contravenes the provision of Rule 4 (1) and Rule 7 (1) and (3) of the Employment and Labour Relations Court (Procedure) Rules 2016. It submits that the cause of action in the Petition and the Application does not reveal any breach of fundamental rights by the employer.

It submits that the Petitioner has failed to explain the nature of the violations and how the same have been violated. It submits that the Petitioner has not met the requirements set out in **Annarita Karimi Njeru v Attorney General [1979] eKLR**.

It urged the Court to be guided by the decision in **Martha Wangari Karua & Another v Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** where the Court found that the Petition did not comply with the provision set by the Court of Appeal in **Anarita Karimi** case and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**.

### **Determination**

The Petitioner herein was initially employed by the Respondent vide the contract dated 3<sup>rd</sup> May 2016 which was a 2 year fixed contract from 6<sup>th</sup> June 2016 to 5<sup>th</sup> May, 2018. The Petitioner avers that after the lapse of her contract, the Respondent retained her and appointed her to serve in committees for 2 years. She contends that the Respondent's letter dated 20<sup>th</sup> September, 2018 terminating her contract violated her rights as she was never invited to disciplinary hearing.

Upon consideration of the pleadings and submissions, the issues for determination are

- a. Whether there was legitimate expectation that the Petitioner would be retained and her issued with permanent and pensionable terms
- b. Whether the Petitioner's rights were violated

c. Whether the Petitioner is entitled to the reliefs sought.

**Whether there was legitimate expectation that the Petitioner would be retained and her issued with permanent and pensionable terms**

It is the Petitioner's case that after the lapse of her contract on 5<sup>th</sup> June, 2018 the Respondent retained her under the same terms as she was awaiting a letter of appointment. She avers in her Further Affidavit that the Respondent had all intentions of renewing her contract vide the letter dated 30<sup>th</sup> April, 2018 which appointed her as a Committee member for the financial year 2017-2019 and 2019-2020. She submitted that the Respondent led her to legitimately expect renewal of her contract by its continued retention of her services.

The Respondent on its part avers that it lawfully notified the Claimant of the non-renewal of her contract and that the continuous engagement of the Petitioner did not amount to renewal of the contract.

The contract of employment dated 3<sup>rd</sup> May, 2016 provided:

*"We are pleased to offer you employment as a Senior Communication and Awards Manager in the Resource Mobilization and Communication. Your appointment takes effect from 6 June 2016 and will end on 5 May 2018..."*

The contract did not have a provision for its renewal thus it was to lapse on 5<sup>th</sup> May, 2018. The Respondent in a letter dated 30<sup>th</sup> April, 2018 appointed the Petitioner as a member of the NETFUND Information, Communication and Technology Committee for the Financial year 2017-2019. It is by appointment that the Petitioner states that the Respondent implied renewed her contract.

The Petitioner claimed that she was awaiting her letter of appointment on permanent and pensionable terms but did not prove that there was any agreement with the Respondent that she would be retained or expect better employment terms. The Respondent in its letter dated 20<sup>th</sup> September, 2018 stated:

*"...*

*Dear Ms. Kinyulusi,*

*RE: NON-RENEWAL OF CONTRACT*

*Your employment contract came to an end on May 2018 and NETFUND retained you on the payroll to allow for the end of year performance appraisals to be undertaken.*

*The performance appraisals have now been completed and National Environment Trust Fund (NETFUND) will not renew your contract on the following grounds:*

*I. Unsatisfactory performance*

*II. Frequent lateness to work*

*Your last day of service will be October 01, 2018..."*

According to this letter, the Petitioner's retention was not for the renewal of her contract of employment but to allow for the completion of the end of year performance appraisals. The Petitioner's definite term of employment came to an end on 5<sup>th</sup> May, 2018. Thus for the period between 6<sup>th</sup> May, 2018 to 20<sup>th</sup> September, 2018 the Petitioner did not have a contract of employment with the Respondent. In her response dated 1<sup>st</sup> October, 2018 to the non-renewal letter the Petitioner stated that she did not receive a notice of renewal before expiry of the contract and that she continued receiving her salary. She further stated that she verbally enquired on the renewal from the Human Resource Manager and was verbally informed that she would be informed of the matter after the appraisals of June 2018.

The contract of employment did not provide for the requirement that the Petitioner was to be informed of the renewal of her contract. From both letter dated 20<sup>th</sup> September 2018 and 1<sup>st</sup> October 2018, the Petitioner was retained and would know of her the status of her employment after the appraisals were completed.

The Petitioner in her submissions admits that she is cognizant of the principle that fixed term contracts carry no expectancy of renewal. Indeed the Petitioner was aware that her engagement with the Respondent was to come to an end on a definite date being 5<sup>th</sup> May, 2018. The Petitioner avers that having been retained and appointed to the Committee for the Financial Year 2017-2019, she had legitimate expectation to work for the Respondent.

Legitimate expectation was discussed by the court in the case of **Teresa Carlo Omondi v Transparency International Kenya [2017] eKLR** the Court held;

*"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.”*

In the present case, the petitioner’s contract expired on 5<sup>th</sup> June 2018. There was no express communication that the contract would be renewed or that it would not be renewed. The communication of non-renewal came for the respondent on 20<sup>th</sup> September 2018, almost 4 months after the lapse of the contract. The petitioner has stated that during this period she made several inquiries about renewal of her contract but did not get a definite response.

The petitioner stated that some colleagues whose contracts expired with hers had their contracts renewed, although she did not support this with any evidence. If there was an intention to renew the contract subject to appraisal, this should have been communicated to the employee in good time to create certainty.

The petitioner stated that her retention gave her legitimate expectation. That this was reinforced by her appointment to NETFUND for financial year 2017-2019, on 30<sup>th</sup> April 2018, just over a month before the expiry date of her contract, and her other appointment on 14<sup>th</sup> May 2018 as a member of Grants Award and Evaluation committee for a duration of 2 years for financial years 2018-2019 and 2019-2020 as both appointments were for periods beyond her fixed time contract.

I would agree with the petitioner that for a desperate employee who is holding on an expired contract, and whose colleagues’ contracts have been renewed, who has not expressly been informed of the renewal or non-renewal of her contract, these circumstances would create very valid expectation of renewal after being kept on the payroll for more than 3 months.

I thus agree with the petitioner that the commissions and omissions of the respondent created a legitimate expectation of renewal.

Further the letter of non-renewal is instructive. It informs the claimant that her contract would not be renewed for reasons of unsatisfactory performance and frequent lateness. The petitioner has questioned both. She has demonstrated in the attached performance evaluation report at “CKK-0011” that her performance was not poor. She has further contested that she was frequently late to work. The respondent has not supported these positions.

The foregoing notwithstanding, the general rule is that when an employee holds over after expiry of a fixed term contract, the contract converts to a month on month contract, so that should the employer wish to terminate the same, there ought to be reasonable notice. A letter dated 20<sup>th</sup> September and informing an employee of termination date of 1<sup>st</sup> October is by no means reasonable notice after keeping the petitioner in limbo over the renewal of her contract for more than 3 months, in my estimation 3 months’ notice would have been reasonable notice to enable her reorganise herself. 10 days’ notice given to the petitioner is tantamount to a summary dismissal for gross misconduct, which was not the case herein.

**In Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & Another [2012] eKLR the Court held:**

*“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 respondent herein however gave reasons for the non-renewal thus opening itself up to question as to whether the reasons given were genuine and valid. The petitioner has stated they are not. I therefore find that the Petitioner had legitimate expectation that her contract would be renewed or that she would be given reasonable notice should the contract not be renewed.

#### **Whether the Petitioner is entitled to the reliefs sought**

As much as I find that the petitioner had legitimate expectation of renewal of her contract. I have also find that in the absence of renewal, she was entitled to reasonable notice which in my considered view, would have been 3 months.

The prayers by the claimant of certiorari, permanent injunction and mandamus are in my view misplaced as this is a private employment contract where the prayers sought are inapplicable.

An order of certiorari cannot issue to quash a letter of termination of a private contract by an employer nor can an employer be permanently restrained from termination the employment contract of an employee which by its very nature terminable under terms of the contract. Similarly, an order of mandamus cannot issue in a private contract in the manner framed in the petitioner’s prayers.

The notice to the petitioner was to leave office by 1<sup>st</sup> October 2018 which is long past. Even if the petitioner’s contract was renewed the same would be due to expire on 5<sup>th</sup> June 2020.

It would only make sense for the respondent to deem the period between 5<sup>th</sup> June 2018 and now as a renewal of the contract, although as I

have already stated, legally the petitioner is deemed to be on a month to month contract terminable in the manner provided in the Employment Act or in the respondent's terms and conditions of employment for its regular staff.

The respondent is at liberty to elect either to treat the term between 5<sup>th</sup> June 2018 to date as a renewal of the contract or to treat the petitioner as being on a month to month contract terminable by notice as per contract.

There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**