



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

RULING

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.

Pursuant to the Respondent's Human Resources Policy Manual (the "**HR Manual**"), the Applicant wrote a letter dated 30th September, 2019, to the Respondent's Managing Director, requesting a renewal of his contract. Subsequently, the Respondent's Human Resource and Administration Committee met on 8th January, 2020 where amongst the items on the agenda for consideration were the requests for renewal by the Applicant as General Manager Finance and Administration and that of the Managing Director and General Manager – Phytosanitary Services.

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.

On 16th January, 2020, the Applicant 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.

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

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.

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 vs 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.

On 27th February, 2020, the Applicant 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.

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.

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.

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.

Aggrieved by this decision, the Applicant filed the present suit vide a Petition dated 23rd March, 2020 seeking this Court to make the following declarations and issue the following orders:-

a. That the Court do issue an order that Sections 28 and 41 of the Employment Act, 2007 and Articles 10, 27, 41, 47, 50 and 236 of the Constitution have been violated by the Respondent in declining to renew/extend the Petitioner's contract and issuance of letter dated 27th February, 2020 thus the Respondent's action is null and void.

b. (sic) 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.

c. A permanent order of injunction staying the letter dated 27th February, 2020 issued by the Respondent.

d. 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

e. 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.

f. 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.

g. 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.

h. An order directing the Respondent to pay to the Petitioner his leave days, gratuity and all allowance of end of term contract entitlements.

i. General damages for the constitutional violations of the Petitioner's fundamental rights.

j. The Honourable Court do issue any other Orders and give such directions as it may deem fit to meet the ends of justice.

k. Costs of the Petition.

Simultaneously, the Petitioner filed a Notice of Motion application under certificate of urgency dated 23rd March, 2020 (the "**Application**") seeking the following orders:-

1. Spent

2. Pending the inter-partes hearing and determination of this application, the Honourable Court be pleased to issue and hereby issues an interim order suspending the implementation of the Respondent's letter dated 27th February, 2020.

3. Pending the hearing and determination of this application, a conservatory order do issue restraining the Respondent from effecting the termination of the Applicant from employment and the Respondent do pay the Applicant his salaries, benefits and allowances as and when they fall due.

4. Pending the hearing and determination of this application, an injunction do issue restraining the Respondent, its employees, servants and/or agents from Advertising, recruiting and/or appointing as General Manager, Finance and Administration of the Respondent and/or any other position which affects the Applicant's employment with the Respondent.

5. Pending the hearing and determination of this Petition, the Honourable Court be pleased to issue and hereby issues an interim order suspending the implementation of the Respondent's letter dated 27th February, 2020.

6. Pending the hearing and determination of this Petition, a conservatory order do issue restraining the Respondents, its employees, servants and/or agents from effecting the termination of the Applicant from employment and the Respondent do pay the Applicant his salaries, benefits and allowances as and when they fall due.

7. Pending the hearing and determination of this Petition, conservatory orders do issue restraining the Respondent, its employees, servants, and/or agents from advertising, recruiting and/or appointing as General Manager Finance and Administration of the Respondent and/or any other position which affects the Applicant's employment with the Respondent.

8. The costs of this application be borne by the Respondent.

The Application is stated to be brought under **Articles 22, 23(3), 41(1), 47, 50(1), 162(2), 165(5)(b)** of the Constitution of Kenya, 2010, **Section 12** of the Employment and Labour Relations Court, Act 2014, **Rule 17** of the Employment and Labour Relations Court (Procedure) Rules, 2011, **Section 45** of the Public Service Commission Act, **Section 5** of the Employment Act, **Sections 18, 19 and 24** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all other enabling provisions of the law.

It is supported by the grounds on the face of the Application and the supporting affidavit sworn by **JAMES ANG'AWA OKENYO** on 23rd March, 2020 (the "**Supporting Affidavit**") where in summary, the Applicant collectively pleaded that:-

i. The Respondent has unlawfully without following the due process and the rules of natural justice and contrary to and in violation of the provisions of Articles 27, 41, 47, 50(1) and 236 of the Constitution and Section 41 of the Employment Act, 2007 and in defiance of the terms and conditions of renewal of contract has threatened and indeed written a letter to the Petitioner to terminate his contract that expired on 31st March, 2020, an action that would be tantamount to unfair labour practice and prejudicial to the interests of the Applicant.

ii. The Applicant has never received any adverse appraisal on his performance for the roles assigned to him and he has zealously undertaken his work assignments with seriousness and determination which was evident in the yearly performance appraisal reports.

iii. The fundamental expectation of the Applicant was that the Respondent had made a commitment to him namely that his employment contract would be renewed in accordance with the terms of his contract and the laws. The expectation of such a commitment was within the range of reasonable expectation objectively aroused by the conduct of the Respondent in terms of the appraisal reports conducted by the Respondent.

- iv. The Applicant wrote the letter dated 30th September, 2019 to the Respondent's Managing Director requesting for renewal of his contract in anticipation of conclusion of his contractual period in accordance with his appointment letter and Clause 4.6 of the HR Manual.
- v. He wrote a Memo on 9th December, 2019 to address the underlying issues in regards to his leave application and the reason for the accrued leave days to have it on record to forestall any issue that may arise during the consideration of his contract renewal request.
- vi. On 10th December, 2019, the Managing Director wrote a memo to the Applicant on the matrix of action points from the 90th and 91st Board meeting for implementation. Section 7 of the said memo addresses the issue of consideration and adoption of the Applicant's request for renewal of contracts for the General Manager – Phytosanitary and the General Manager – Finance and Administration.
- vii. Subsequently, the Applicant attended a meeting on 8th January, 2020 held by the Human Resource Administration Committee where renewal of the contracts for the Managing Director, General Manager – Phytosanitary and the General Manager – Finance and Administration.
- viii. The resolution of the said Committee was extension of the Managing Director's contract for a further six months to allow for evaluation but deferred discussions with respect to the renewals for the General Manager – Phytosanitary and the General Manager – Finance and Administration.
- ix. The email of 22nd January, 2020 communicating that the committee on Human Resources and Administration required a written response on a matter that the Applicant to Court between himself and his precious employer in 2014. The matter had been determined through an out of Court settlement and it was confusing, discomforting and curiously telling to the Applicant that the Respondent would request these details given that it had no bearing on his performance.
- x. On 31st January, 2020 he received an internal memo from the Managing Director of the Respondent informing him of reports and documents required by the Human Resource and Administration Committee.
- xi. Thereafter, on 10th February, 2019, a special meeting of the Human Resource and Administration Committee was held where renewal of his contract was itemised in the agenda. Based on the said agenda, it was the Applicant's foregone conclusion that the contracts of the Managing Director and the General Manager – Psychosanitary Services were extended.
- xii. Following the correspondence with the Employment and Labour Relations Court that is already captured hereinabove, the Applicant wrote an email on 27th February, 2020 bringing to the attention of the Managing Director what the Applicant deemed as "un-procedural happenings" specifically in regard to his request for renewal of contract.
- xiii. On the same day, he received the letter captioned "Notification on End of Contract" from the Respondent's Managing Director dated 27th February, 2020.
- xiv. 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. It was following this that he received the letter dated 12th March, 2020 from the Respondent's Managing Director informing him that his request for contract renewal was not granted.
- xv. It was the Applicant's legitimate expectation that he would continue to serve the Respondent in his position as General Manager-Finance and Administration upon the end of his contract.
- xvi. The decision to decline the renewal of the Applicant by the Respondent was effected maliciously and without any due regard to the Applicant's rights, obligations and welfare and was further contrary to the provisions of the Constitution stated hereinabove, the State Corporations Act, the Employment Act, the Fair Administrative Actions Act, the government circular OP/CAB.9/1A dated 11th March, 2020 (in compliance with the Leadership and Integrity Act, 2012) and the Mwongozo Code, the Code of governance of State Corporations.
- xvii. That the Mwongozo Code, the code of governance of State Corporations issued vide the executive order No. 7/2015 overrides all other rules and regulations generated and or developed by the Respondent.
- xviii. The action of the Respondent amounts to unlawful, unilateral and subjective decision bordering on abuse of office and would be a violation of the Applicant's fundamental rights under the Constitution and breach of the Respondent's statutory duty owed to the Applicant, particularly Section 45 of the Public Service Act and the Clause on renewal of contract in both the Applicant's letter of appointment and the Human Resource Manual of the Respondent.
- xix. The effect of the provisions of the renewal clause on the contract is that the contract will be renewed automatically upon expiry and if no communication is issued and the party which so desired to terminate the contract was required to give 3 months' notice. As such, by the conduct of the Respondent, the contract be taken as having been constructively renewed on the following grounds:-
- a. The effect of the renewal clause in the contract is that the contract renewed automatically and the party who desired to terminate was required to give a 3 months' notice.

b. Notice of intention to terminate the contract or salary in lieu of the notice was to be issued which was never issued by the Respondent.

xx. The action of the Respondent if carried to its full effect will subject the Applicant to great loss and harm as he has never been informed of the reasons for the refusal to renew his contract by the Respondent leading to termination of his contract of employment as there has never been any issues of disciplinary proceedings pending before the Respondent in the respect to the Applicant.

The Respondent on the other hand filed a Replying Affidavit sworn by **SIMEON KIBET** on 21st April, 2020 (the “**Replying Affidavit**”) where the Respondent deposed that:-

i. It indeed appointed the Applicant to the position of General Manager – Finance and Administration under a contract employment for a fixed period of three years ending 31st March, 2020.

ii. The Petitioner requested for renewal of the contract which request was tabled before the Respondent’s Board of Directors (the “**Board**”) for consideration. The Board did not find merit in the request and rejected it for the reason that while it was monitoring the Respondent’s overall performance, the Board had seen red flags raised in the internal audit reports on the dockets under the charge of the Applicant.

iii. The audit reports were brought to the attention of the Applicant requiring him to remedy and improve on his performance which performance had a negative impact on the overall standing and sustainability of the Applicant. The Respondent requested the Applicant to address it on the malpractices raised by the Internal Audit Reports and particularly explain how he intended to remedy them.

iv. The Respondent confirmed that the Committee on Human Resources and Administration requested the Applicant to provide a written response on the Court case between him and his former employer which the Applicant failed to give and instead insisted the same was long settled and in any event not relevant to his request for renewal.

v. The Applicant also failed to commit himself in writing on what he intended to do to ensure that the malpractices raised in the Audit reports do not recur if his contract were renewed for another three years. Whereas the Applicant responded to some of the audit queries raised in the audit reports, he left most of them largely unanswered or not satisfactorily answered.

vi. The concerns raised in the Internal Audit Reports and by the Board were legitimate and serious touching on the Applicant’s duties in revenue collection, procurement, administration and spending of the resources of the Respondent. The performance of the Applicant did not inspire the Board.

vii. The Applicant creates the false impression that his contract was for automatic renewal not requiring Board evaluation. As acknowledged by the Applicant, the former Managing Director and General Manager- Phytosanitary also applied to the Board for renewal of their contracts and had to support their case for renewal. Whereas the General Manager Phytosanitary got a renewal upon terms, the Managing Director and the Applicant did not.

viii. The Respondent then proceeded to detail at **paragraph 25-31** all the alleged concerns noted in the Internal Audit Reports of the procurement and finance/revenue and administration related discrepancies that fell in the Applicant’s work docket.

ix. The fixed term contract between the Respondent and the Applicant carried no rights, obligations and expectations beyond the date of expiry. Based on the facts narrated by the Applicant, it is clear that the Board gave the matter adequate consideration before reaching its decision and the same was not out of malice, arbitrary, illegal or an abuse of office. Further, that it was not true that the Petitioner being an Applicant for a job was entitled to reasons why a renewal was not granted.

x. The orders issued by this Court restricting the Respondent from advertising and recruiting anybody to General Manager – Finance and Administration would negatively impact the operations of the Respondent and needed service to the people of Kenya as the said order does not protect any right of the Applicant under his expired contract and prays that the same be lifted.

xi. This Court has no jurisdiction to renew the contract of the Applicant or to impose him upon the Respondent making it an exercise in futility to restrain the recruitment of a proper person to the post that is now vacant.

In response to the Replying Affidavit, the Applicant filed a Further

Affidavit sworn by **JAMES ANG’AWA OKENYO** on 27th April, 2020 (the “**Further Affidavit**”). Therein, the Applicant pleaded in summary that:-

i. He applied for a renewal of his contract that subjected him to outrageous processes and grave administrative injustice.

ii. He never received any adverse appraisal or complaint with respect to his performance of the roles assigned to him and the appraisal reports for the term of his contract were a pointer to his industrious nature.

iii. He was only asked to undergo an appraisal exercise using a customized form developed by the Respondent’s Human Resource and Administration Committee for the period of July 2019 to December 2019 only on output for six(6) months and rate it 100% and not for the duration of his employment.

iv. The Board only sought information about the case he had with his previous employer a week after the Human Resource and Administration Committee had sat to consider his request for renewal of contract yet the matter did not have any bearing on his performance.

v. The request for information regarding litigation with his previous employer was irrelevant and did not touch on his performance. The Applicant did indeed read malice into the request as the same was not sought when he requested for a renewal of his contract.

vi. He denied the allegations of breaches and discrepancies in procurement, finance/revenue and administration particularized in the Replying Affidavit. His deposition was that the issues raised by the Respondent in the Replying Affidavit were never presented before him to enable him to adequately respond to them.

vii. Given that he performed his duties diligently in a satisfactory manner and that the contracts of the Managing Director and General Manager – Phytosanitary services had been renewed, he had a legitimate expectation that his contract would be renewed under Section 45(3) of the Public Service Commission Act.

viii. He only became aware of the meetings held by the Human Resource and Administration Committee after they had been concluded.

ix. The Respondent has not demonstrated how the orders granted by this Court will prejudice them, neither has it filed an application seeking to set aside, vary or vacate the orders.

x. Unless the orders sought are granted, the Respondent will continue to violate the Applicant's rights. The Court has a right by to interpose by way of injunction to restrain the Respondent from carrying out any intended/threatened acts which infringe on his rights having established a prima facie case.

Submissions

The Claimant filed written submissions dated 27th April, 2020 in support of its Application together with the authorities relied on therein.

It identified the issues for this Court's determination as those espoused in **Giella vs Cassman Brown and Company Limited [1973] EA 358:-**

- a. *Whether the Applicant has a prima facie case with a high probability of success.*
- b. *Whether the Applicant will suffer irreparable loss if the orders sought are not granted*
- c. *Whether the Court can decide this case on a balance of probabilities.*

With respect to the Applicant's submissions on whether he had established a prima facie case, the Applicant relied on the case of **Mrao Limited vs First American Bank of Kenya & 2 Others**, specifically that:-

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

The standard set by the case being whether the Applicant has raised an issue which can be tried by this Court. He submitted that his letter for renewal in anticipation of the conclusion of his contract period was done in accordance with his appointment letter and Clause 4.6 of the Respondent's HR Manual that provides that:-

"Officers at Grade KEPHIS 2 shall be engaged on contracts of up to five (5) years renewable once subject to performance.

(a) An employee serving under the 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. In case of the Managing Director, he will be required to notify the Board of Directors.

(b) If such a notification is not made, the employee will be deemed to complete his term on the date specified in the contract and the contract shall be renewed or extended. However, the Board upon review of the performance appraisal reports of such an employee, may request him to seek renewal of his terms if the performance has been satisfactory.

The Applicant also relied on the provisions of **Section 45(3) of the Public Service Commission Act No. 10 of 2017** that provides that:-

(3) The extension of a term of contract may be allowed by the Commission or other appointing authority if —

(a) the workload justifies further engagement;

(b) the performance of the public officer is satisfactory;

(c) the public officer has expressed, in writing, the willingness to engage for a further term of service;

(d) the decision shall in no way disadvantage any public officer employed on permanent terms; and

(e) the decision is made at least three months before the expiry of the affected public officer's term of contract.

It is the Applicant's submission that he followed the procedure as outlined in both the HR Manual and the Public Service Commission Act. He contends that the Public Service Commission is applicable as Section 2 of the Public Service Commission Act defines a Public Body as **"any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; including statutory public bodies."**

The Applicant urged the Court to find similarity with case of **Okiya Omtatah vs Joseph Kinyua & Another [2018] eKLR** where it was stated:-

"The circular simply asserts that:-

- *Persons serving on contract terms are subject to the contract terms and no other considerations outside the contract terms including age unless the same is incorporated as a specific term of contract.*
- *That notwithstanding how long a CEO has served a current term, or expectation of serving a second term, the renewal of CEO contracts shall be subject to performance, business requirement and approval of respective Boards...*

... I would recommend that whereas the terms of service for State corporations Chief Executive Officers would henceforth as per the circular, be renewable based on performance and business requirement such renewal ought to be subject to values and principles of public service as laid down under article 232 of the Constitution."

The Applicant submitted that Article 27(1) of the Constitution entitles the Applicant to equal protection and benefit of the law. It was his contention that he has established that the Respondent deliberately discriminated against him by subjecting him to a different process of renewal of contract. Further, he submitted that he has successfully proved that his termination of contract was discriminative and was a glaring administrative injustice which necessitates this Court issues the order as sought.

On whether the Applicant will suffer irreparable loss if the orders sought are not granted, the Applicant submitted that where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds, first that the injury is irreparable and second that it is continuous. Irreparable injury is that which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired. The Applicant's submission was that the Respondent's action trampled on the Applicant's right to be heard and violates the rules of natural justice as the Applicant's performance appraisal indicated that his performance was exceptional yet the Respondent went ahead to decline the renewal of the contract without proper reason.

The Claimant submitted that the test for grant of conservatory orders was put forth in the case of: - **CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) & 7 OTHERS vs ATTORNEY GENERAL [2011] eKLR**. Musinga J. as he then was observed as follows:-

"It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

He also relied of **MUSLIM FOR HUMAN RIGHTS (MUHURI) AND 2 OTHERS v ATTORNEY GENERAL AND 2 OTHERS [2011] eKLR** where it was stated that:-

"Article 23 (3), confers on the court discretion to grant a Conservatory Order. The exercise of discretion as is usually the case must be exercised judiciously and not capriciously taking into account all the facts and circumstances of the case. The court in exercise of the discretion must act cautiously and with a great degree of care but still with reasonableness or flexibility and fairness to promote the enhancement and enforcement of fundamental rights and freedoms of the individual and the public at large, where appropriate."

It was the Applicant's submission that the grant of conservatory orders is discretionary and that while exercising the discretion, the Court must consider the effect of the failure to grant the conservatory orders. The Applicant also relied on the Supreme Court decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others** where the Court held:-

"Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

With respect to the determining the matter on a balance of convenience, the Applicant submitted that where any doubt exists as to the Applicant's right, or if the right is not disputed, but its violation is denied, the Court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience.

The Applicant submitted that he is currently terminated from employment which if permitted to continue especially when there are issues that have been raised, the Applicant will suffer immense harm if in the ultimate analysis it is found that indeed the sections impugned are unconstitutional. He relied on **THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY & 2 OTHERS vs THE JUDGES AND MAGISTRATES VETTING BOARD & 2 OTHERS [2012] eKLR**, where the Court observed:-

“Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court had powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. That was meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

It is the Applicant's submission that the Respondent has not demonstrated any prejudice it will suffer if the orders sought are not granted. That it is in fact the Applicant who is likely to suffer irreparable harm. That being the case, this Court has to provide appropriate relief as enjoined by Article 23 of the Constitution. The harm need not be monumental as even the slightest of harm is enough for the Court to grant conservatory orders. The Applicant relied on the court's finding in **SULEIMAN v AMBOSELI LIMITED [2014] eKLR** where Ojwang J. as he then was observed as follows:-

“A fundamental principle is...that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’....”

*Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in **Giella v. Cassman Brown**, the court has had to consider the following questions before granting injunctive relief:*

- (i) is there a prima facie case with a probability of success?*
- (ii) does the applicant stand to suffer irreparable harm, if relief is denied?*
- (iii) on which side does the balance of convenience lie?*

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.

The Respondent correspondingly filed written submissions dated 27th April, 2020 together with the authorities it relied on.

The Respondent contended that the Applicant filed suit aggrieved with the decision of the Respondent to reject renewal of his contract and further filed the present application seeking to stop recruitment of any other person to his office that apparently and outside the expired contract, the Constitution of Kenya and the Public Service Commission Act donate to him the sole right to work for the Respondent to the exclusion of all people in Kenya.

The Respondent submitted that there was no promise made by the Respondent that his contract will be extended or renewed. There is nothing in the contract to suggest that the contract will be extended or renewed automatically and that the same is a sense of entitlement that is not founded in the contract between the parties or the law. It referred the Court to the decisions in **RAJAB BARASA & 4 OTHERS vs KENYA MEAT COMMISSION [2016] eKLR**; **BERNARD WANJOHI MURIUKI vs KIRINYAGA WATER SERVICES [2012] eKLR**; **MARGARET OCHIENG VS NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION [2014] eKLR**; and **CLEOPATRA MUGYENYI VS AIDSPAN [2019] eKLR** in support of the submission that a request for renewal did not oblige an employer to renew a contract.

The Respondent contends that the only ground which the Applicant relies on to assert his claim for legitimate expectation is that he performed his duties to the satisfaction of the Respondent. It is disputed by the Respondent that the performance by the Applicant was satisfactory based on the Internal Audit Reports produced by the Respondent in the Replying Affidavit and enumerated in the body of the Replying Affidavit. Specifically, to address the Applicant's claim based on legitimate expectation, the Respondent relied on the Court of Appeal decision in **TROICARE v CATHERINE WAMBUI KARUNO [2018] eKLR** where it was held that:-

*“It is clear from the evidence on record that the respondent's employment was governed by fixed term contracts. As aptly observed by Lord Denning MR in **British Broadcasting Corporation vs Ioannou [1975] 2 All ER 999** such a contract binds parties for the term stated in the agreement. In our view, the duration for the third contract was expressly stipulated therein, that is, for a period of four months running from 1st March, 2014 up to 30th June, 2014. To us the fact that there were earlier expressions by the appellant to extend the contract for a further period of at least two years did not give rise to a legitimate expectation that the contract would be extended for such duration as suggested by the respondent. This is because as this Court expressed in **Registered Trustees of the Presbyterian Church of East Africa & another vs. Ruth Gathoni Ngotho- Kariuki [2017] eKLR** fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry.*

In any event, even if we were to find that the earlier expressions

raised the respondent's expectation that her contract would be extended for a period of two years, it is not in dispute that prior to the expiry of the second contract and after the aforementioned expressions were made, the appellant unequivocally indicated that firstly, it would only extend the contract for a period of four months and secondly it had no desire to extend the same upon expiry. The respondent confirmed as much in her evidence. Perhaps this is why she requested the appellant to reconsider the terms which request was turned down. This should clearly have informed the respondent that her earlier expectations would not materialize.

Similarly, it is clear that she executed the third contract voluntarily and being fully aware of the terms thereunder; her allegation that she executed the contract with reservation does not hold any weight, also for the simple reason that the appellant gave her an option of either accepting or declining the new terms and she choose to accept. It is trite that the function of a court is to enforce a contract as agreed by the parties. It should not make additions to such a contract by implying a term merely because it deems it would be reasonable to do so. See *Liverpool City Council vs. Irwin* [1977] A.C 239. Therefore, we find that the respondent was bound by the contractual terms of the third contract and could not rely on the earlier representations.

The Respondent further contends that it invited the Applicant to write to it committing himself that if his contract were renewed the malpractices shown in the Audit reports will not occur which the Applicant acknowledged to have received in the Supporting Affidavit. He however refused to write or commit himself and left the Board to make a decision. It is not therefore surprising that the Board declined the request for renewal.

The Respondent referred the Court to a catena of judicial authorities upholding the principle that fixed term contracts carry no expectancy of renewal. These included, **THE REGISTERED TRUSTEES OF THE PRESBYTERIAN CHURCH OF EAST AFRICA (PCEA) & ANOTHER v RUTH GATHONI NGOTHO KARIUKI** [2017] eKLR; **TROCAIRE v CATHERINE WAMBUI KARUNO** [2018] eKLR and **OSHWAL ACADEMY (NAIROBI) & ANOTHER v INDU VISHWANATH** [2015] eKLR.

The Respondent further referred this Court to more authorities from this Court including **GEORGE ONYANGO v NUMERICAL MACHINING COMPLEX LTD AND 2 OTHERS** [2014] eKLR; **BENARD WANJOHI MURIUKI v KIRINYAGA WATER SERVICES** [2012] eKLR; **MARGARET OCHIENG v NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION** [2014] eKLR; **KENNEDY OURU v JAMES FINLAY** [2016] eKLR; **FATUMA ABDI v KENYA SCHOOL OF MONETARY STUDIES** [2017] eKLR and **RAJAB BARASA & 4 OTHERS VS KENYA MEAT COMMISSION** [2016] eKLR.

The Respondent cited the findings of the Court of Appeal in **TROCAIRE v CATHERINE WAMBUI KARUNO** (supra) in that:-

*“It follows that the contract in question automatically lapsed on 30th June, 2014 by effluxion of time. That being the case the reason given by the appellant in its letter to the Ministry of labour for its decision not to renew the respondent's contract and the payment of what was termed as a redundancy package in our view, has no relevance to this dispute. We also find that the same could not have been a basis of finding that the respondent had been declared redundant. Once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period. This much was appreciated by this Court in *Oshwal Academy (Nairobi) & another vs. Indu Vishwanath* [2015] eKLR which quoted with approval Rika, J.'s sentiment in *Bernard Wanjohi Muriuki vs. Kirinyaga Water and Sanitation Company Limited & Another* [2012] eKLR:-*

“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. ... 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.”

The Respondent invited this Court to look at the Applicant's disdain for the Board disclosed in his Supporting Affidavit to see the working relationship between the parties with respect to the Applicant's prayer for the Court to compel the Respondent to renew his contract and return him to employment with the Respondent. It is the Respondent's submission that it would be impossible for the Applicant to work with the Board in the circumstances. In support of this submission, it relied on the case of **THE REGISTERED TRUSTEES OF THE PRESBYTERIAN CHURCH OF EAST AFRICA (PCEA) & ANOTHER v RUTH GATHONI NGOTHO KARIUKI** (supra) where the Court of Appeal held that a Court of law cannot impose an employee on an employer and cited the following excerpts of the decision:-

*“The rights and obligations of an employer and employee generally flow from the contract of service. Therefore, the construction of such a contract is to determine the terms and the legal effect of the same. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what is stated in the agreement. As succinctly put by this Court in *Savings and Loan Kenya Limited vs. Mayfair Holdings Limited* [2012] eKLR:*

“...the object of construction of terms of a written agreement is to establish there from the intention of the parties to the Agreement which must be approached objectively. The question in this appeal is not what the appellant or the respondent meant or understood by the words used but the meaning which the particular clause would convey to a reasonable person having all the background information that was available to the parties at the time of the contract.”

*We concur with the trial Judge to the extent that as per the contract of service the appellants' were required to inform the respondent of their intention of whether they would renew her contract 3 months prior to the expiry of the same. However, we respectfully disagree that the failure to do so amounted to an automatic renewal. Why do we say so? It is clear from the wording of the above clauses as well the hospital's human resource manual that the renewal was subject to the mutual consent of the respondent as the employee and the appellants' as the employer. To hold otherwise would be tantamount to holding at servitude a party who wishes to exercise his/her right of termination in terms of the contract as observed by this Court in *Minnie Mbue vs. Jamii Bora Bank Limited* [2017] eKLR. Further, this Court in its own words in *Kenneth Karisa Kasemo vs. Kenya Bureau of Standards* [2013] eKLR held:*

“We have carefully considered the law and the facts surrounding this case, suffice to say that the law on employment does not normally envisage a situation where an employee is “forced” upon an employer (and vice versa) and case law is rife on this subject and indeed this Court has time without number honoured the contract existing between the parties.”

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.”

The Respondent submitted that the Applicant seeks a conservatory order to stop the effect or implementation of the letter dated 27th February, 2020 informing him that the Board was not renewing his contract yet the letter only sought to inform him that his contract would expire on 31st March, 2020 and that in fact, the Applicant’s employment of the Petitioner expired on 31st March, 2020 by effluxion of time and the same cannot be revised by an order by this Court.

The Respondent further submitted that there was nothing left in the contract of employment with the Applicant to be performed. The Respondent relied on the finding of the Court of Appeal in **THE REGISTERED TRUSTEES OF THE PRESBYTERIAN CHURCH OF EAST AFRICA (PCEA) & ANOTHER v RUTH GATHONI NGOTHO KARIUKI** (supra) that:-

“In the result, we find that the letter dated 5th May, 2010 was not a termination letter but a letter communicating the appellants’ intention not to renew the expired contract.”

The Respondent also relied on **KENNETH KARISA KASEMO VS. KENYA BUREAU OF STANDARDS [2013] ECLR**.

The Respondent submitted that whereas Rule 7(3) of Employment & Labour Relations Court Rules 2016 permits the Applicant to bring claims for violations of rights under Article 23 of the Constitution, the Courts have held that the Applicant must demonstrate that the remedies under the Employment Act are insufficient in redressing the violation so as to require the Court to look outside the Employment Act. The Respondent referred this Court to **TERESA CARLO OMONDI V TRANSPARENCY INTERNATIONAL KENYA (2017) eCLR** where the Court held:-

“The Claimant testified, and states at paragraph 15 of her Statement of Claim, that the Respondent violated her constitutional rights. Rule 7[3] of the Employment & Labour Relations Court Rules 2016, confirms that a Party may seek the enforcement of any constitutional rights and freedoms or any constitutional provision through a Statement of Claim, or other Suit filed before the Court. The Court is entitled to consider remedies under Article 23 of the Constitution, which would include damages beyond any statutory capping. While the Court finds the Respondent acted unfairly and unlawfully, the Claimant did not demonstrate that the remedies granted under legislation are insufficient in redressing the violation, so as to require the Court to look outside the Employment Act 2007, and the Employment and Labour Relations Court Act.”

It is the submission of the Applicant that the invocation of the Constitution was unnecessary and the grievance pleaded in the Petition could be fully addressed under the Employment Act. Further, that to invoke the Constitution in this suit is an abuse of the Court process as there is no constitutional issue raised. The Respondent relied on the case of **GEORGE ONYANGO v NUMERICAL MACHINING COMPLEX LTD AND 2 OTHERS** (supra) that:-

“It is generally accepted through a catena of judicial precedents, that the Constitution should not be used for settlement of everyday litigation, as discussed in High Court Petition Number 564 of 2004, Alphonse Mwangemi Munga & 11 others v. Africa Safari Club. The Industrial Court adopted this approach in the Petition involving East African Portland Cement Company Limited v. the Attorney- General & Another [2013] e-KLR, concluding that Courts must guard against the distortion or manipulation of the constitutional jurisdiction. To characterize everyday dispute as a constitutional violation, transforms the Constitution from a blueprint of fundamental freedoms and rights to a document for litigating everyday disputes. Its moral force is diminished. This is the thread running through the decisions cited by the Respondents, in particular Uhuru Muigai Kenyatta v. Nairobi Publications Limited [2013] e-KLR and Alex Malikhe Wafubwa & 7 Others v. Elias Nambakha Wamita & 4 Others [2012] e-KLR. Where a fundamental right is regulated by legislation such as the Employment Act 2007, such legislation and not the underlying constitutional right becomes the primary means of giving effect to the constitutional right. The principle was discussed by this Court in the recent decision involving GMV v. the Bank of Africa Limited [2013] e-KLR. If an employer adopts a labour practice thought to be unfair, an aggrieved employee would at first instance seek remedy under the relevant legislation. If the employee finds no remedy there, the legislation might come under scrutiny for not giving adequate protection to a constitutional right. The dominant principle in cases where a wrong is thought to touch on the Constitution, Common Law and Legislation, is that the remedy should be pursued from the first port of entry. The first impression to be made from these decisions is that, the Petitioner Mr. Onyango wrongly invoked the constitutional jurisdiction, and should have searched for remedy from his contract of employment and the legislation governing that contract.”

The Respondent contends that for the avoidance of doubt, **Section 45(3) of Public Service Commission Act** does not apply to the Applicant for the reason that the Applicant is not an employee of the Public Service Commission and did not contract to serve the Public Service Commission. The Applicant was hired by the Respondent who has its Human Resource Policies and Procedures Manual.

In conclusion, the Respondent submitter that an order of injunction will deny the Respond the opportunity to hire an officer to fill the office of the General Manager – Finance and Administration which would be of no advantage to the Applicant. They asked this Court to vacate the orders in the interests of justice.

Determination

The first matter I wish to deal with is the interim orders referred to by the Applicant in its submissions and by the Respondent in their Replying Affidavit and submissions. I have reviewed the Court record and I have not seen any such orders in the said proceedings. The Application brought under a certificate of urgency was first placed before my brother Honourable Justice Makau on 26th March, 2020 when he certified the Application as urgent and directed the Applicant to serve the Respondent and return for a mention before the duty Judge on 5th April, 2020. The next entry on the Court record shows that the file was placed before the Deputy Registrar on 5th May, 2020 who directed that the file be mentioned in this Court on 7th May, 2020 on which day parties indicated that they had filed written submissions and took the Ruling date for this matter.

There is no extracted order in the file and indeed the record confirms that no order was made in any event. The position therefore is that there are no interim orders in place in this matter.

I now proceed to the Application that is before me. As enumerated above the Applicant seeks conservatory orders by way of injunction to restrain the Respondent from implementing the letter dated 27th February, 2020, from effecting the termination of the Applicant and from advertising, recruiting or interviewing any person to replace the Applicant pending hearing and determination of the suit.

The principle issue for determination is whether the Applicant has satisfied the requirements for grant of conservatory orders pending the hearing and determination of the Petition.

The principles governing the grant of conservatory orders in a constitutional petition were set out by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others, SCK Petition No. 2 of 2013** in which Ojwang and Wanjala JJSC stated that:-

“Conservancy orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

It is not in dispute that the Applicant was employed by the Respondent under a fixed term contract for a period of 3 years running from 15th March, 2017 to 31st March, 2020 renewable subject to satisfactory performance or based on mutual agreement by the Parties. It is also not in dispute that the Applicant received a notification of expiry of his contract on 27th February, 2020 and a letter dated 12th March, 2020 confirming that the Respondent would not be renewing the contract with the Applicant.

The Applicant claims that the process of considering the renewal of his contract was discriminatory and violated various statutory provisions including constitutional provisions. By way of the application, the Application seeks the Court’s intervention through the issuance of conservatory orders by way of injunction to restrain the Respondent from implementing the notification of expiry as well as restraining the Respondent from recruiting a 3rd Party to take up the position held by the Respondent under the contract. The Applicant’s claim is largely based on Clause 4.6 of the Respondent’s HR Manual as read with **Section 45(3)** of the Public Service Commission Act. The former states:-

(a) An employee serving under the 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. In case of the Managing Director, he will be required to notify the Board of Directors.

(b) If such a notification is not made, the employee will be deemed to complete his term on the date specified in the contract and the contract shall be renewed or extended. However, the Board upon review of the performance appraisal reports of such an employee, may request him to seek renewal of his terms if the performance has been satisfactory.

The latter states:

(3) The extension of a term of contract may be allowed by the Commission or other appointing authority if —

(a) the workload justifies further engagement;

(b) the performance of the public officer is satisfactory;

(c) the public officer has expressed, in writing, the willingness to engage for a further term of service;

(d) the decision shall in no way disadvantage any public officer employed on permanent terms; and

(e) the decision is made at least three months before the expiry of the affected public officer's term of contract.

It is the Applicant’s contention that the effect of the provisions of the renewal clause on the contract and Section 45(3) of the Public Service Commission Act is that the contract will 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 and that notice of intention to terminate the contract or salary in lieu of the notice was to be issued which was never issued by the Respondent.

The cited provisions for renewal of the contract in the Respondent’s Human Resource Manual do not provide for any notice to be issued to

the employee on whether or not it would renew the contract. When read with Section 45(3) of the Public Service Commission Act then a notice of 3 months is imposed. I however find that the said provisions do not apply to the Applicant. I agree with the submissions of the Respondent that the Applicant is not an employee of the Public Service Commission and did not contract to serve the Public Service Commission.

With respect to the Applicant's prayer seeking this Court to stay the implementation of the letter dated 27th February, 2020, I also agree with the Respondent's submission that the letter is simply a notification of the expiry of the contract. The contract has expired and any order to stay the same will be tantamount to renewing the contract on behalf of the Respondent which this Court cannot do.

With respect to the prayer seeking an order to restrain the Respondent from advertising, recruiting or interviewing potential candidates to take up the role of General Manager – Finance and Administration as was held by the Applicant, the Applicant did not submit on the same but pleaded in the Application that he would be condemned to suffer irreparable loss, injury and devastating damage and will render this Petition nugatory. Further, that he was apprehensive that the Respondent may order the advertisement, recruitment and appointment of a 3rd party to his position thus effectively making him jobless.

On the other hand, it was the Respondent's submission that if the orders are indeed granted, they will deny the Respondent the opportunity to hire an officer in the very important role of the General Manager- Finance and Administration which would be to its detriment and of no advantage to the Applicant.

It is not disputed that the General Manager – Finance and Administration has a crucial role in the procurement, finance, revenue and administrative aspects of the Respondent which I appreciate are critical in the running of any organisation. It is difficult as both parties would concede to ascertain how long it would take for the Petition to be heard and determined. If this Court were to grant the orders to restrain the Respondent from filling the vacant position pending hearing and determination of the Petition, it cannot be said how long the Respondent would need or indeed be able to operate without a General Manager – Finance and Administration charged with crucial roles in the Procurement, Finance, Revenue and Administration of the Respondent.

The likely outcome of which would impair the operations of the Respondent greatly subjecting it to irreparable harm. In comparison, in the event that the orders are not granted and the position is filled, if the Applicant is successful in the Petition, he would have recourse in damages. I find that there are no reasons advanced to justify this Court issuing such an order. I do not see any irreparable harm that would befall the Applicant that is not capable of being remedied by an award of damages should the Petitioner succeed in the Petition.

In view of the foregoing, I find that the interest of justice would be best served if the respondent is allowed to recruit a replacement for the position previously held by the applicant.

Consequently, I dismiss the Notice of Motion application dated 23rd March, 2020 and order that the costs will abide the outcome of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JUNE 2020

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