



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 108 OF 2020

IN THE MATTER OF ARTICLES 21, 22, 23, 162 AND 165 OF THE CONSTITUTION

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES
27, 28, 36, 41 AND 47 OF THE CONSTITUTION**

BETWEEN

RISHI PRAKASH AGGARWALPETITIONER

VERSUS

SCANAD (SCAN GROUP) KENYA LTD.....RESPONDENT

JUDGMENT

1. Rishi Prakash Aggarwal (Petitioner) is a citizen of India and was offered employment around 28 July 2014 as Executive Creative Head after being headhunted by Scanad (Scanad Group) Kenya Ltd (Respondent).
2. Upon taking up the offer, the Petitioner relocated with his family to Kenya.
3. Being a non-citizen, the Petitioner had to be issued with a work permit and his last work permit was to expire on 21 July 2020.
4. On 7 May 2020, an employee of the Respondent requested the Petitioner to furnish her with a copy of his Tax Compliance Certificate to enable the Respondent to apply for the renewal of the work permit. The Petitioner provided the Certificate as requested.
5. However, on 2 June 2020, the Respondent notified the Petitioner through email that his contract would not be renewed and the email was followed with a letter dated 19 June 2020 informing him that since his work permit was expiring on 21 July 2020, the Respondent would not retain him in the role of Creative Head.
6. The move compelled the Petitioner to move to Court alleging violations of his rights to equality and freedom from discrimination, human dignity, freedom of association, fair labour practices and fair administrative action.
7. Filed together with the Petition was a Motion under a certificate of urgency seeking several interim orders.
8. When the motion was placed before the Principal Judge on 22 July 2020, she directed that the Respondent file and serve Responses to the Petition and Motion within 7 days. The Judge also issued an order-preserving the Petitioner's employment ahead of hearing on 3 August 2020.
9. When the Petition was called out on 3 August 2020, it turned out that the Respondent had filed a replying affidavit sworn by its Legal Manager only that morning.
10. The Court directed the filing and exchange of further affidavits and submissions.
11. The following further documents were filed
 - (a) Supplementary Affidavit by Petitioner on 21 August 2020.

(b) Submissions by Petitioner on 28 August 2020. (c) Authorities by Petitioner on 31 August 2020.

(d) Submissions by the Respondent on 1 October 2020 (should have been filed by 11 September 2020).

12. In his submissions, the Petitioner identified 9 Issues to wit:

(a) Whether this Petition is for dismissal on the allegation of a non-existent company?

(b) Whether the unsigned purported letter of offer is admissible in Court?

(c) Whether the filing of this Constitutional Petition is a wrong procedure and unavailable to the Petitioner.

(d) Whether the Petitioner was discriminated against, harassed and frustrated during his employment and in the course of terminating his service contrary to Articles 27 and 28 of the Constitution.

(e) Whether the Respondent failed to give the Petitioner a fair hearing before deliberately refusing and failing to renew the Petitioner's work permit and thereafter terminating his contract contrary to Articles 41 and 47 of the Constitution.

(f) Whether there was substantive justification for the Petitioner's termination of service.

(g) If the answer to (f) above is in the affirmative, whether proper legal procedures was followed while terminating the Petitioner's services.

(h) Whether the Petitioner is entitled to the reliefs sought.

(i) Who bears the costs of the suit?

13. The Respondent identified 7 Issues for the Court's determination, to wit:

(i) Whether the Respondent can abrogate the operation of law and statute to continue with the employment of the Petitioner without a valid work permit and against the Kenya Citizenship and Immigration Act, No. 12 of 2011.

(ii) Whether the Petition is for striking out on basis of a misjoinder of a party.

(iii) Whether the Petitioner exhausted internal administrative mechanisms of the Respondent.

(iv) Whether the Petition grossly offends the provisions of the Employment Act by advancing the same vide a Constitutional Petition.

(v) Whether the Court can force sustenance of an illegal contract.

(vi) Whether the decision of the Respondent is subject to the Court's interference.

(vii) Whether the Petitioner is entitled to the grant of orders sought.

Non-existent company/misjoinder

14. The Respondent objected to the competency of the Petition on the ground that Scanad Kenya Ltd and WPP Scanad Group PLC were related though different and independent entities and that the sued entity Scanad (Scanad Group) Kenya Ltd was a non-existent entity.

15. Rebuffing the challenge, the Petitioner contended that during his employment relationship, the Respondent used the names Scanad Kenya Ltd and Scan Group interchangeably.

16. Further, the Petitioner asserted that the employment contract was with Scanad Kenya Ltd while emails had the signature of Scangroup.

17. The Petitioner asked the Court to follow in the footsteps in *Philp Ateng Oguk & 27 Ors v Westmont Power Kenya Ltd & Ar* (2015) eKLR and *Donald Oricho v National Vision Party & 2 Ors* (2014) eKLR and find that the presence and/or use of various legal entities in the workplace should not be used to obfuscate or defeat a claim.

18. The Petitioner also found refuge in section 2 of the Employment Act, 2007 which defines an employer to hold that the doctrine of legal separateness of limited liability companies is of limited utility in employment disputes.

19. The Respondent communicated with the Petitioner under several brand names including Scanad Kenya Ltd and ScanGroup. It has also admitted that there is a relationship between the 2 entities (name change notwithstanding).

20. Clause 1.4 of the contract also made reference to the Group or any subsidiary thereof.

21. In the circumstances, and in consideration of the definition of employer in section 2 of the Employment Act, 2007, the Court holds that the objection raised by the Respondent is not material or relevant to the competency of the Petition.

22. Equally, there has been no demonstration of any factual or legal handicap caused to the Respondent in defending the Petition.

Exhaustion of internal dispute resolution mechanisms

23. Citing section 2 of schedule 1 of the contract which outlines grievance redress procedures, the Respondent asserted that the Petitioner was bound to refer a formal complaint to the Chief Executive Officer of Scan group Ltd and because he did not exhaust the set procedures the Petition was premature.

24. The Respondent drew the attention of the Court to *Geoffrey Muthinja Kibugu & 2 Ors v Samuel Munga Henry & 1756 Ors* (2015) eKLR and urged the Court to find the Petition premature.

25. The Court agrees with the legal proposition expressed in the *Kibugu case* about the doctrine of exhaustion of domestic dispute resolution mechanisms but is of the view that section 2 of schedule 1 of the contract applied to grievances during the life of the contract and not after separation.

Admissibility of letter of offer

26. The Respondent objected to the admissibility of the letter of offer dated 27 June 2017.

27. The Petitioner denied knowledge of the letter in his supplementary affidavit.

28. Section 9(2) & (3) of the Employment Act, 2007 places a statutory duty on the employer to draw up a contract of service and to cause the employee to consent to it by signifying such consent by affixing a sign or imprint in the presence of a witness.

29. With this specific statutory obligation on the employer, it should not come from the mouth of the Respondent that the Petitioner did not sign the contractual document when it allowed him to provide services on the basis of such an unsigned document.

Invoking wrong Procedure/Constitutional Petition threshold

30. The Respondent urged the Court to reject the Petition and/or decline to issue any remedies because the Petitioner had invoked the wrong mode of moving the Court.

31. The Respondent further contended that the Petition did not meet the threshold as set out in *Anarita Karimi Njeru v the Attorney General* (1979) KLR 54.

32. It is now trite that where a statute has provided for the redress of any legal wrongs, a party should not take the Constitutional violation route.

33. All of the wrongs alleged by the Petitioner to have been breached by the Respondent have been given content and context in statute and more so sections 5, 35(1), 41, 43 and 45 of the Employment Act as well under the Fair Administrative Actions Act.

34. Further, there is nothing stopping a party from alleging violations of constitutional rights and freedoms in an ordinary suit.

35. In the view of the Court, the violations and breaches alleged by the Petitioner could have been competently raised in the manner contemplated by the Employment and Labour Relations Court (Procedure) Rules, 2016.

36. As to the effect of approaching the Court through a Petition rather than in the ordinary way, it is the view of the Court that a denial of costs even where successful rather than dismissal, or the converting the Petition into a Statement of Claim with the attendant normal procedures would meet the ends of justice.

37. Having disposed of the objections, the Court will now turn its mind to the 3 substantive Issues arising from the Petition, namely, procedural fairness, substantive fairness and discrimination.

Unfair termination of employment and fair administrative action

Procedural fairness

38. The relationship between the Petitioner and the Respondent was governed by a service agreement dated 28 July 2014. The contract was preceded by an undated letter of offer.

39. The service agreement provided for termination by the giving of 2-months written notice or pay in lieu of notice and that the employment was on a *permanent basis*.

40. Apart from the contractual documents, the contract was subject to the laws of Kenya such as the Employment Act, 2007 and the Kenya Citizenship and Immigration Act.

41. On 7 May 2020, the Respondent requested the Petitioner to provide a copy of his Tax Compliance Certificate for purposes of seeking a renewal of his work permit. Soon thereafter, the Petitioner was informed through email that upon the expiry of the work permit, his contract would not be renewed.

42. The Petitioner was however formally informed through a letter dated 19 June 2020 that his work permit was lapsing on 21 July 2020 and that the Respondent would not apply for a renewal.

43. The letter informed the Petitioner that his last date of service would be 21 July 2020. The dues payable were also set out in the letter.

44. The Petitioner asserted that the letter of 19 June 2020 was an unfair termination of employment as the service agreement did not tie the life of the contract to lapse of a work permit.

45. Asserting there was unfairness, the Petitioner contended that he was serving on permanent and pensionable terms with a retirement age of 60 years and that there were no prior discussions with him before the bringing of the contract to a premature end.

46. The decision not to renew the work permit and bring the contract to an end, the Petitioner argued was an administrative function and therefore he was entitled to a hearing.

47. The contract of 28 July 2014 provided for 2-months' notice of termination of the contract. The Petitioner was not issued with a 2-month notice of termination of the contract. The contract was not a fixed-term contract but one of a definite duration, up to retirement.

48. By dint of section 35(1)(c) of the Employment Act, 2007 as read with clause 7 of the service contract, the Respondent should have given 2-months' notice of termination of employment, but it did not. He was nevertheless offered pay in lieu of notice for the balance of the days.

49. Nevertheless, the letter of 19 June 2020 referred to previous discussions with the Petitioner on the status of his work permit and employment contract. Emails exchanged between the Petitioner and the Respondent were exhibited and they confirm the discussions.

50. The Court is therefore unable to agree with the Petitioner that he was not afforded an opportunity to be heard.

51. The Petitioner was given less than 2-months written notice but the Respondent made good the short notice by offering pay in lieu of notice.

52. The Court finds that the Respondent was in substantial compliance with the dictates of sections 35(1)(c) and 41 of the Employment Act.

Substantive fairness

53. Pursuant to sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to not only prove, but prove as valid and fair, the reasons for terminating the Petitioner's contract.

54. The principal reason advanced by the Respondent in the notice dated 19 June 2020 was the expiry of the work permit and that an understudy had been identified and trained to take over from the Petitioner.

55. Although the Petitioner advanced an argument that his contract was not tied to the issuance of a work permit, that argument is hollow as being a non-citizen, his employment and presence in Kenya was governed by the provisions of sections 34, 36 and 40 of the Kenya Citizenship and Immigration Act and Regulation 24 of the Kenya Citizenship and Immigration Regulations, 2012.

56. Regulation 24 in particular provides that a work permit cannot be renewed for more than 5 years. It is not in dispute that the Petitioner was first issued with a work permit in 2014 and the 5 years lapsed around 2019.

57. The Petitioner did not also rebut in any meaningful way the evidence that a named person had been identified, and had been trained to take over from him.

58. The Court finds in the circumstances that the Respondent had and did prove that there were statutory, valid and fair reasons not apply for the renewal of the Petitioner's work permit with the consequence that the contract could not be sustained beyond the date of lapse of the work permit. The real reason for separation was legal incapacity/frustration of the contract.

Unfair administrative action

59. The Petitioner also raised the question of fair administrative action in terms of Article 47 as read with the Fair Administrative Actions Act.

60. In the view of the Court, the Petitioner did not demonstrate and in any case, the Court is of the opinion that this being ordinary employment, the Respondent was not exercising administrative function. It was exercising its powers as an employer.

Discrimination

61. In the supporting affidavit, the Petitioner deposed that he was discriminated and harassed in the course of employment and this violated his rights to equality and freedom from discrimination and human dignity.

62. The Petitioner primarily pleaded discrimination and harassment in paragraphs 23, 24, 25, 26, 27, 33, 34, 42, 43, 44, 45, 46 and 48.

63. However, the Petitioner did not give particulars or file affidavits of the 4 other Creative Directors who were treated differently from him or when their work permits expired and were renewed.

64. The Petitioner did not also disclose the nature of abuse, rebuke and admonishment he got from the Respondent's Chief Executive Officer or the places or dates of such.

65. In respect to allegations of discrimination and harassment on the basis of close interactions with Kenyans, again no particulars were disclosed.

66. The Court finds that the Petitioner did not provide any iota of evidence to demonstrate discrimination or harassment of any nature on the part of the Respondent.

Conclusion and Orders

67. From the foregoing, the Petition is found without merit and is dismissed.

68. Considering that the parties were in a contractual employment relationship and that the separation was not on account of disciplinary grounds, the Court orders each party to bear own costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 16th day of October 2020.

Radido Stephen

Judge

Appearances

For Petitioner Ms. Anyango Opiyo instructed by A.T. Oluoch & Co. Advocates

For Respondent Mr. Kipkorir instructed by KTK Advocates

Court Assistant Lindsey