



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 255 OF 2017

JULIUS GITIKURI MUNYUA MUTUARUCHIU.....CLAIMANT

VERSUS

NATIONAL IRRIGATION BOARD.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking resolution of disputes he framed as unfair, unlawful and wrongful termination; and non-payment of terminal dues and compensation. He averred that he was employed by the Respondent on 1st December 2011 as a resettlement implementation unit (RIU) coordinator at Mwea Irrigation Scheme. He asserts that he worked in challenging circumstances as the pioneer coordinator for the project as when he assumed office there was no infrastructure, no human resources and that there was little support from the Respondent's head office. He averred that he was predisposed to violence related to land issues due to the nature of his tasks and the unavailability of proper accommodation in the area. He stated that despite these challenges he performed his duties diligently and achieved huge success in his capacity on behalf of the Respondent. The Claimant asserts that he received a letter on 8th May 2017 dated 3rd May 2017 which stated that the Claimant's contract was to end on the 31st May 2017. He averred that as required a 2 month's notice of non-renewal was not issued. The Claimant averred that the letter did not have reason for the non-renewal given that he had become accustomed to renewal every year. He stated that the letter of non-renewal came as a shock as he had constantly received oral assurances from the Respondent that his contract would be renewed. He had hoped that due to his impeccable work the contract would be renewed. He avers that the salary for May 2017 was not paid. He was aggrieved and thus sought his terminal dues being his salary for the month of May 2017 – Kshs. 300,000/-, two months salary *in lieu* of notice of termination – Kshs. 600,000/-, payment for untaken leave for 2016/2017 for 39 days – Kshs. 390,000/-, equivalent of 2 years' salary for the non-renewal of the Claimant's contract – Kshs. 7,200,000/-, service pay for 5 years – Kshs. 465,000/-, maximum compensation for unfair termination – Kshs. 3,600,000/-, costs of the suit, interest on the sums claimed as well as any other relief the court may deem fit to grant.

2. The Respondent filed a defence to the claim and denied that the Claimant began work in an environment devoid of infrastructure, human resources and in a place prone to violence. The Respondent averred that were the conditions of work unfavourable the Claimant would have been able to resign from his employment as provided for in his contract of employment. The Respondent claimed that the Claimant's employment contract was renewed on short term basis to enable him finalize the work that he was initially employed to undertake. The Respondent averred that at the time of expiration of the term of the last contract on 31st May 2017, over 98.5% of the work had been completed and that there was no need for any further extension of the contract. The Respondent denied having terminated the contract of the Claimant unfairly, unlawfully or wrongfully as claimed in his statement of claim. The Respondent denied that it was under any contractual obligation to give the Claimant 2 months' notice of non-renewal of the contract. The Respondent denied that the Claimant was entitled to payment of any terminal or compensatory damages as enumerated in his statement of claim. The Respondent averred that the Claimant's contract was not terminated and that it instead it expired and his salary for May 2017 was awaiting collection upon his clearing with the Respondent. The Respondent averred that there was no notice payable and that the Claimant had no pending leave days nor was he entitled to service pay. The Respondent denied breaching the Claimant's contract of employment and averred that the non-renewal of the contract was done in good faith and for a valid reason after consideration of the Claimant's contract and that the same was within the Respondent's right as an employer. The Respondent denied giving any oral or written assurances that the contract would be renewed. The Respondent thus urged the dismissal of the claim with costs.

3. The Claimant filed an answer to the Respondent's reply to his statement of claim. In the answer, he stated that he began setting up the office of the Resettlement Implementation Unit (RIU) Coordinator with no staff or infrastructure. He averred that as the Respondent had not produced any evidence to prove the contrary the Claimant's averments should be taken as uncontested facts. He averred that the contract of employment did not give him any latitude to quit employment on account of any harsh circumstances he worked under and that he chose to be resilient in the circumstances on account of assurances given to him by the Respondent that conditions would get better. The Claimant averred that the Respondent engaged an acting RIU Coordinator showing there was need for the office to be occupied as the work was not complete. He averred that the renewals of his contract were on account of his performance and that the defence by the Respondent did not raise triable issues and should be dismissed.

4. The Claimant as well as the Respondent's witness Dennis Karoka. The Claimant reiterated his exemplary service to the Respondent and enumerated the work he did on account of the project negotiating for land for resettlement, obtaining compensation for the people relocated and acquiring land for the canals, dam and so forth. The Respondent's witness testified that the Claimant's last contract was renewed after the Respondent factored the workplans and challenges faced in the conclusion of the project. He stated that the Claimant was not entitled to receive any gratuity upon the contract coming to an end. He testified that the Claimant proceeded on terminal leave, handed over the project and deployed to the head office. He stated that the Respondent was winding down operations towards the end of the Claimant's contract.

5. The parties filed submissions and the Claimant submitted that he had a legitimate expectation that the contract would be renewed and that the non-renewal of the contract amounted to unfair, unlawful and wrongful dismissal. He relied on the case of **Teresa Carlo Omondi v Transparency International Kenya [2017] eKLR** and **Eunice Mwikali Munyao v Elys Chemical Industries Limited [2017] eKLR** which both borrowed the definition of the term legitimate expectation from South Africa. He submitted that the criteria for establishing reasonable expectation for renewal of contract is

- i. evaluation of all the surrounding circumstances,
- ii. the significance or otherwise of the contractual stipulation,
- iii. past practice or custom
- iv. the availability of the post,
- v. the purpose of or reason for concluding the fixed term contract,
- vi. inconsistent conduct,
- vii. failure to give reasonable notice, and
- viii. nature of the employer's business.

6. The Claimant submitted that his case fit the criteria for legitimate expectation. He stated that it was not until 8th May 2017 that he received notification that his contract would not be renewed. He submitted that the non-renewal amounted to unfair, unlawful and wrongful dismissal. He relied on the case of **Eunice Mwikali Munyao v Elys Chemical (supra)** for the proposition that this amounted to unfair dismissal. He submitted that he therefore was entitled to the damages sought.

7. The Respondent submitted that the Claimant in his final request for renewal of contract sought an extension to November 2017 to enable him complete the ongoing activities which was the same reason as in previous requests. The Respondent submitted that the letter of non-renewal was communicated to the Claimant but he declined to acknowledge the same prompting the re-sending of the letter on 8th May 2017 as a reminder. The Respondent submitted that the contract the Claimant received was time bound and that he knew it would lapse hence his request for extension. It was submitted that the extension was not automatic. The Respondent relied on the case of **Rajab Barasa & 4 Others v Kenya Meat Commission [2016] eKLR** where the court held that the expectation that the fixed term contract would be extended had no basis as there was no express or clear promise that it would be extended. The Respondent also relied on the case of **Teresa Carlo Omondi v Transparency international Kenya (supra)** that Kenya has no legislation on the principle of legitimate expectation. The Respondent submitted that there was no obligation on the Respondent to give any reasons whatsoever for the non-renewal as the contract had expired by that time. Reliance was placed on the case of **Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company & Another [2012] eKLR** where the court stated that the discretion of the employer in renewal of a fixed term contract had no obligation to give reasons why renewal should not be granted. The Respondent submitted that the Claimant was not entitled to any of the reliefs sought. It urged the dismissal of the suit with costs.

8. The claim revolves around the non-renewal of a fixed term. The parameters of the legitimate expectation espoused to repose in the Claimant are captured in his pleadings and testimony as well as submissions. He had served as the coordinator for the Respondent in a project at Mwea Irrigation Scheme. He was from all accounts given renewals save for the final contract at the time the Respondent asserts the project was winding down. Without giving the details of the statistical data the parties displayed, it was clear the project had been executed to some large extent in some areas while in others it required further work. In the rubric for legitimate expectation, in order for the court to find in favour of the Claimant, the court would have to evaluate of all the surrounding circumstances, assess the significance or otherwise of the contractual stipulation, consider past practice or custom, the availability of the post, the purpose of or reason for concluding the fixed term contract, take into account any inconsistent conduct, find out whether there was failure to give reasonable notice, and consider the nature of the employer's business. In this case, the Board of the Respondent determined in November 2016 that the term of the Claimant's contract would expire on 31st May 2017 as the project was nearly concluded and that the Claimant's service was therefore to come to an end. This position informed the Claimant's terminal leave prior to the expiry date. The letter that he wrote regarding leave on 9th November 2016 was clear. He indicated that leave sought was from July 2016 to May 2017. Why would he mention May 2017 unless he was aware of the contract stipulating his contract would end in May 2017? The letter notifying him of the non-extension of contract is dated 12th October 2016. A copy of the letter was forwarded on 8th May 2017 after the Claimant indicated that he had not seen it yet his own correspondence betrays him. He stated that he served with distinction yet he wrote a letter in which he apologized for a perception of attitude and insubordination and regretted the inconvenience the letter of 9th November 2016 may have caused. He wrote on 27th February 2017 stating that he could only rely on hearsay that his contract had been extended to May 2017. He therefore knew of the expiry and there was no legitimate expectation that it would be renewed. The authorities he cites thus do not support the alleged legitimate expectation. As his contract was not terminated there is no remedy available save his terminal dues per the policy of the Respondent inclusive of his salary.

9. I agree with Rika J. as he held in the case of **Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company & Another**

(*supra*), the employer has discretion on extension of a fixed term contract and the employer does not owe the employee an explanation for the non-renewal of a fixed term contract. The Claimant should proceed to the Respondent and collect his dues within 14 days of the judgment. Suit is dismissed and each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 16th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar