



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 240 OF 2019

PAUL KIPLANGAT KIRUI.....CLAIMANT

- VERSUS -

NAIROBI WATER AND SEWERAGE COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th July, 2019)

RULING

The claimant filed the application on 11.04.2019 through M’Njau & Mageto Advocates. The application was under sections 3, 4, 12 and 20 of the Employment and Labour Relations Court Act; rules 14, 16, 27, and 28 of the Employment and Labour Relations Court (Procedure) Rules 2016; section 26 of the Employment Act; Article 41 of the Constitution of Kenya 2010; section 10 of the Judicature Act; and rule 3(1) of the High Court Practice and Procedure Rules and all enabling provisions of the law.

The substantive prayer is that pending the hearing and determination of the application, the Honourable Court be pleased to issue a temporary injunction to restrain the respondent and or its agents and or servants from terminating the claimant’s employment contract dated 09.10.2015 by prematurely retiring the claimant on 16.04.2019; and costs of the application be provided for. The application is based on the attached supporting affidavit by the claimant and upon the following grounds:

- a) The claimant is serving upon a fixed term contract and not on permanent and pensionable terms of service.
- b) The contract of 09.10.2015 had no retirement age of sixty years.
- c) Section 4.3.2 of the respondent’s Human Resource Policy and Procedure Manual provides for employees in the category of managing director, managers and co-ordinators and officers be employed on contract basis for a fixed term of 5 years renewable for a period not exceeding two terms for managing director and functional heads and, three terms for managers and four terms for co-ordinators and officers.
- d) The respondent has served upon the claimant a retirement notice to retire upon attaining 60 years of age.
- e) The contract entered into by the claimant on 11.10.2015 failed to comply with provisions of section 4.3.2 of the respondent’s Human Resource Policy and Procedure Manual because it renewed the contract for 3 years and 6 months instead of 5 years. It was therefore a discriminatory contract.
- f) On 03.05.2016 the claimant received the notice to retire effective 16.04.2019 upon attainment of 60 years of age but which age was not a term in the contract of service.
- g) The retirement means that the claimant will lose two years of service.

The respondent filed on 16.05.2019 the replying affidavit of George Oketch through Kipkenda & Company Advocates. The respondent urges that the claimant has declared to the respondent that his date of birth is 16.04.1959 as per his birth certificate issued on 24.06.1993. The claimant had been employed initially as a Customer Care Officer per letter dated 18.02.2010 and the HR manual of 2005 that applied gave the respondent discretion to determine tenure of a fixed term contract per clause 3.3.2 thereof. Thus clause 4.3.2 relied on by the claimant did not apply as it was not in existence as the clause came into force in 2013 when the new manual was issued. The claimant’s contract was renewed effective 11.10.2015 in the position of Planning, Monitoring and Evaluation Coordinator for a period of 3 years 6 months (lapsing on or about 11.04.2019). Thus the renewal took into account the mandatory retirement age of 60 years hence the retirement notice that he retires effective 16.04.2019. The claimant never protested the contract as renewed and he is bound. Clause 8.27.4 of the 2013 manual

prescribes mandatory retirement age at 60 years of age. It would be prejudicial to issue an injunction that the claimant continues in employment beyond age of 60 years.

The Court has considered the material on record. It is clear that the parties voluntarily signed the last contract of service for a term of 3 years and 6 months. The HR Manual provides for a mandatory retirement age of 60 years. *Prima facie*, the parties appear to have given effect to that age of retirement and there was no dispute that the claimant attained the age of retirement effective that date. The Court returns that in view of that evidence parties are bound by their own last contract of service as aligned to the mandatory retirement age of 60 years and the claimant has failed to establish a *prima facie* case for grant of a temporary injunction as prayed for.

The Court further finds that the prayer for injunction is worded as pending hearing and determination of the application and it would not apply after determination of the application as the prayer as drafted would be in vanity. That finding serves as an impetus to dismissal of the application. In conclusion, the application is hereby dismissed with costs in the cause.

Signed, dated and delivered in court at **Nairobi** this **Friday 5th July, 2019**.

BYRAM ONGAYA

JUDGE