



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 15 OF 2019**

**IN THE MATTER OF THE WATER ACT 2016**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE NOTICE OF TERMINATION OF RENEWAL OF CONTRACT**

**MADE BY THE WATER SERVICES REGULATORY BOARD ON 12TH JULY 2019**

**-BETWEEN-**

**BERNADETTE NYAMBURA NJOROGE.....APPLICANT**

**-VERSUS-**

**HON. ATTORNEY GENERAL.....1ST RESPONDENT**

**WATER SERVICES REGULATORY BOARD.....2ND RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22nd November, 2019)

**JUDGMENT**

The application by a notice of motion was filed on 04.09.2019 through Gitau J.H. Mwara & Company Advocates. It is under Order 53 rules 1, 2, and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all enabling provisions of the law. It is for orders:

- a) That leave be granted to the applicant to apply for an order of certiorari to quash the special board resolution of 12.07.2019, the letter of termination of the applicant's employment dated 05.08.2019 and the Board's Press Advertisement dated 13.08.2019 and the subsequent Press Advertisement dated 27.08.2019.
- b) In alternative the respondent compensates the applicant for equivalent of monthly salaries for the remaining contractual period up to 02.01.2021 plus gratuity and all terminal benefits.
- c) The respondents should be condemned to bear the costs of the application.

The application was based on the applicant's verifying affidavit, the statement of facts and the following grounds:

- a) The applicant was employed by the 2nd respondent by a contract of employment dated 09.11.2015. It was for a term of 3 years effective 02.01.2016. The term was lapsing on or about 02.01.2019. The contract was a renewal of an earlier contract. Clause 6 on renewal of appointment stated, "**Should you wish to be reappointed in the same position you will be required to make a written request at least six months before the expiry date of this contract. This term is subject to directives on the public sector which are issued by the Salaries and Remuneration Commission, Public Service Commission or any other authority from time to time.**"

b) The applicant wrote on 19.03.2018 requesting for a renewal of the contract. Her letter was replied by the 2nd respondent's Chief Executive Officer's (CEO's) letter dated 31.10.2018. The reply was that the 2nd respondent's Board of Directors had not been appointed under the Water Act, 2016 and in the circumstances a no objection had been sought from the parent Ministry. The Ministry had replied granting a no objection for renewal of the contract for a term of one year or until the new Board of Directors is in place whichever was earlier. The other terms of service would remain as per the letter dated 09.11.2015 as adjusted from time to time in accordance with the Human Resource Policy.

c) The applicant's case is that under clause 4.8 (1) (b) on appointment on contract terms, the 2nd respondent's Human Resource Policy and Procedures Manual, employees serving on contract terms of service who wish to have their contracts renewed shall tender to the CEO written requests not more than 6 months and not less than 3 months before the expiry of the contract. Clause 4.8 (1) (i) provides that contract appointments shall not exceed 3 years renewable based on satisfactory performance.

d) The Board was subsequently appointed and it held its inaugural meeting on 15.04.2019. The Board again met on 20.05.2019 and received a report of the Committee recommending renewal of contracts for, inter alia, Director for Legal and Enforcement 9DLE), the Claimant. The CEO advised the Board that the applicant had served the 2nd respondent exceptionally well and would be prudent to have the contract renewed considering the dynamics and emerging issues in the regulatory environment that require the 2nd respondent's strategic intervention under the Water Act, 2016. The Board then resolved to renew the applicant's contract of service for 2 years effective 02.01.2019. The minutes are duly signed on 04.07.2019 by the Chairman of the Board Hon. Joshua Wakahora Irungu and the CEO Eng. Robert Gakubia.

e) The 2nd respondent's CEO addressed to the applicant the letter dated 05.08.2019 conveying, "**You are aware that the Board of Directors was constituted and is now in place. In this regard, we regret to inform you that the Board of Directors during their Special Board meeting held on 12th July 2019 considered but did not approve renewal of your contract for a further term. Consequently, your term of employment with WASREB will be ending as of 15th November 2019. Please consider the aforementioned date as your last day of work. The Board therefore hereby serves you with three months' notice with effect from 15th August 2019. This is in compliance with the minimum notice period required for renewal of appointment on contract and termination as per the Board's Human Resources Policy and Procedures Manual.**" The 2nd respondent then advertised the position of Director Legal and Enforcement in the print media on 13.08.2019 which was closing on 30.08.2019 at 23.59 hours. The applicant's case is that the decision as conveyed is adverse, amounts to impunity, was highly un-procedural, unlawful and illegal as was contrary to rules of natural justice because her contract of service had already been renewed from 01.01.2019 to 02.01.2021 and could not be switched on and off at the whims of the Board. The decision offends sections 7, 8, 9, 10 and 11 of the Fair Administrative Action Act, 2015 and Article 47 of the Constitution.

f) The applicant's advocates gave 7 days' notice to sue and the demand had received no response.

Upon consent of the 1st respondent and other parties, the 1st respondent did not participate in the proceedings. The 2nd respondent opposed the application by filing on 05.11.2019 the replying affidavit of its CEO Engineer Robert Gakubia and the further affidavit of the CEO filed on the same 05.11.2019. The 2nd respondent's case is as follows:

a) The flow of facts as stated for the applicant are true only that the applicant was not present at the Board meeting held on 20.05.2019 and the resolutions of that meeting were not communicated to the applicant or any other member of the 2nd respondent's staff. That Clause 3.7 of the 2nd respondent's Human Resource Policy and Procedures Manual provides that Board of Directors' resolutions shall be documented by the Board Secretary and communicated to concerned staff by the CEO. Further any official communication from the Board of Directors shall be made in writing. In so far as the resolution of the meeting of 20.05.2019 was not communicated to the applicant per Clause 3.7 of the Manual, there was no official communication accordingly and the applicant cannot rely on a resolution but which was never communicated to her.

b) The Board met on 04.07.2019 and was informed about some matters that had not been stated at the meeting of 20.05.2019 about employment in the public sector. In particular the Board was informed that the appointments must be competitive, transparent, and equitable per Clause 4.1 of the Manual and various constitutional and legal provisions. Thus the Board resolved three posts of Directors for Technical Services; Consumer and Public Affairs; and Legal and Enforcement should be considered by an Ad hoc Committee appointed for that purpose. The applicant exhibited unsigned draft of the minutes of the meeting of 04.07.2019 and the Court returns that there is no reason to doubt the signed minutes exhibited for the 2nd respondent.

c) On 12.07.2019 the Ad hoc Committee presented its report to the Board meeting. The Ad hoc Committee recommended that the contracts for the three Directors should not be renewed because the extension would be in contravention of Article 232 of the Constitution on filling vacancies transparently and competitively with merit as a yard stick. The Board's decision of 12.07.2019 was conveyed to the applicant by the CEO's letter dated 05.08.2019. The Board's decision was lawful as arrived at and duly conveyed. Section 10 of the Public Service (Values and Principles) Act, 2015 and section 73 of the Water Act, No. 43 of 2016 required the Board to fill the vacancies openly and competitively.

d) The applicant has failed to exhaust internal grievance procedures in the Manual and therefore the application offends section 9(3) of the Fair Administrative Action Act, 2015 for want of exhaustion of internal review and appeal procedures.

e) The Court in judicial review application should review the procedure and not the merits of the decision.

f) The Board enjoys the discretion to renew the contract and in the circumstances the applicant enjoyed no legitimate expectation that the contract would be renewed.

g) The applicant's contract lapsed in January 2019 and the continued service was only in terms of the letter dated 31.10.2019.

h) The Board has considered the applicant's request for renewal and decided against the renewal.

i) The application is lacking in merits and should be dismissed with costs.

The parties filed their respective submissions. The Court has considered the material on record and makes the following findings on the matter in dispute.

**First**, it is clear that the applicant's contract of service was lapsing on 02.01.2019 or thereabouts and at the time there was no Board to consider her request for renewal. It is clear that only the Board could consider her timely application for renewal. In absence of the Board, the Court finds that the contractual clause that the contract could be renewed or the applicant reappointed was thereby frustrated. It is clear that the terms of service were remedial and they were that the applicant would serve on a renewed term of one year or until the new Board of Directors was in place whichever was earlier. The Court considers that clearly the request for renewal of the contract ending on 02.01.2019 had been frustrated and the "renewal" as granted by the Ministerial approval as conveyed in the letter to the applicant dated 31.10.2018 was a service with a clear terminal date being end of one year or the appointment of the new Board. If the new Board had not been appointed, the claimant's service would have automatically lapsed at the end of one year without an expectation for a renewal – and the request for renewal had been frustrated. As submitted for the respondent, the Court returns that there was no case for renewal of the contract as at the time the new Board was handling the applicant's case or that in alternative the Board was entitled to decline the renewal. While the letter of 05.08.2019 conveyed that the Board had considered the renewal but declined to grant the same, it is clear that the contract between the 2nd respondent and the applicant had indeed lapsed on 02.01.2019 and the arrangements in the letter dated 31.10.2018 were exclusive of the contractual expectation for the Board to consider and reappoint or decline to renew the contract.

**Second**, the Court has re-examined the contract of service including the renewal clause. There are no contractual provisions limiting the matters the Board would consider in allowing or rejecting a renewal or a reappointment. The discretion is open and was not chained by the applicant's performance. It is true that the letter dated 05.08.2019 did not state the reasons for the purported denial of the renewal but also, the letter referred to the letter dated 31.10.2019 where the no objection by the Ministry was that the applicant continues to serve for one year (effective 02.01.2019) or until the new Board of Directors is in place, whichever was earlier. Thus the Court finds that the applicant's service as renewed in the letter of 31.10.2019 was lapsing automatically upon attaching of the preconditions therein. Thus, the Court returns that there was no adverse decision against the applicant in view of her undisputed acceptance of the terms of the letter dated 31.10.2019 so that in any event, she knew she would automatically vacate office if the new Board was appointed. The Court returns that violation of the rules of natural justice and fair administrative action as per Article 47 of the Constitution has not been established. The Court further finds that the applicant's request for renewal having been frustrated by reason of absence of the Board to consider it, there was no continuing legitimate expectation for the renewal or reappointment and the new Board was entitled to invoke the constitutional, statutory and policy provisions on competitive filling of the accruing vacancy. The Court considers that the same considerations were within the Board's wide discretion to allow or deny a renewal or a reappointment. Even if the Board was validly considering a regular request for a renewal, the discretion was contractually unchained on parameters to allow or disallow a request for renewal.

**Third**, there is no dispute that the decision to renew the contract was made as per the Board resolution made on 20.05.2019. The Court considers that the 2nd respondent has exhibited all the record of the proceedings subsequent to the resolutions of 20.05.2019 and in that regard, it has been shown that the Board of Directors as the mind and will of the 2nd respondent internally changed its mind in the manner it was handling the applicant's tenure of service. The Court returns that the Board was entitled to proceed as was done and on the material before the Court, there is no established breach of internal decision making procedure. The Court considers that as submitted for the 2nd respondent, in so far as the resolution had not been communicated to the applicant, it remained an internal matter within the Board's mind and will to vary one way or the other as it remained open as not implemented by the CEO by way of relevant communication. If the resolution had been communicated then there would be a closure but in the present case, the Board will not be faulted especially that bad faith, malice or other valid reason has not been established as impairing the Board's change of mind and will. The applicant urged that there was a standing committee to handle the matter as per the Manual but the Court returns that no legal provision has been established barring the new Board from appointing the Ad hoc Committee and it was not shown that in fact, the new Board had constituted the Ad hoc Committee with the intention to defeat the work of the relevant standing committee in that regard. The Court will not therefore fault the Board merely on account of appointing and adopting the report of the Ad hoc Committee.

**Fourth**, it was urged for the 2nd respondent that the applicant had not exhausted the internal review and appeal procedure. The Court has revisited the replying and further replying affidavits and the 2nd respondent has not identified a specific internal appeal or review procedure that the applicant failed to comply with. The letter dated 05.08.2019 did not confer or refer to a right for review or appeal and the demand letter did not receive a reply in that regard. Accordingly, the 2nd respondent's submission in that regard will collapse as unjustified.

**Fifth**, while the applicant had already obtained leave to apply for judicial review order of certiorari, the substantive motion repeats the prayer for leave and that serves as an impetus to declining the prayers as made.

Thus, in view of the findings the Court returns that the applicant has failed to justify the grant of the prayers made. They will fail. The Court has considered the undisputed renewal resolution by the Board on 20.05.2019 which was not communicated and might have made the applicant to sense unfair treatment in the manner the events turned against her. The Court has also considered the 2nd respondent's failure to reply the demand letter. The Court returns that each party shall bear own costs of the proceedings.

While making the findings, the Court reckons that the advertisement might have closed but the applicant was the serving officer with respect to that vacancy. The Court has found that the Board made its decision in good faith and without malice. Further nothing adverse was reported against the applicant by the CEO. The CEO has reported to the Board that the applicant was a good employee and was still needed as a strategic officer of proven track record towards the full implementation of the Water Act, 2016 and in light of the complex emerging issues. In such circumstances, the Court considers that the competitive recruitment did not prejudice the applicant in any manner and within the Constitutional, statutory and the 2nd respondent's human resource systems and procedures the applicant should be willing, permitted and able to participate in the impending recruitment, selection and appointment to the vacancy in the office of Director, Legal and Enforcement, and, to do so on equal footing with such other candidates that may express interest in filling the vacancy.

The Court has carefully examined the rare and complex situation that confronted the Board in the instant case. It is clear that the situation was novel leading to the making, unmaking and redesigning of the Board's resolution. The dispute has invariably set clarity by way of this judgment and which might be useful to the Board and the public service generally in similar cases in the days to come. Accordingly, each party shall bear own costs of the proceedings.

In conclusion judgment is hereby entered for the 2nd respondent against the applicant for dismissal of the notice of motion dated 04.09.2019 with orders each party to bear own costs of the proceedings.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 22nd November, 2019.**

**BYRAM ONGAYA**

**JUDGE**