REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 15 OF 2017

LYNETTE S.O INJETTE.....PETITIONER

- VERSUS -

THE BOARD OF DIRECTORS

HABITAT FOR HUMANITY KENYA.....1ST RESPONDENT

THE BOARD OF DIRECTORS HABITAT FOR

HUMANITY INTERNATIONAL, INC.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

JUDGMENT

The petitioner filed the petition on 03.03.2017 through W.G. Wambugu & Company Advocates. The petition was in the matter of the Constitution of Kenya, 2010 Articles10; 19(2); 20 (1), (2), (3), & (4); 21 (1); 27(1) & (2); 165(3) (b) & 258; in the matter of the Non-Governmental organisations co-ordination Act Cap.134 Laws of Kenya; in the matter of the Constitution of Kenya 2010; and in the matter of the of the end of contract of employment by the Vice President, Habitat for Humanity Kenya to take effect on the 2nd March, 2017.The petitioner humbly prayed for the following relief:

a. A declaration that the notice issued to her is illegal, null and void.

b. A declaration that the Vice President of the 2nd respondent did not the mandate to issue the said notice.

c. An order of prohibition, prohibiting the respondents, their staff, agents and servants from terminating the services of the petitioner.

d. The respondents to bear the costs of this petition in any event.

e. Such further orders as this honourable court may deem just and expedient.

The petition was supported with the attached petitioner's verifying affidavit. The petitioner also filed the supplementary affidavit on 18.09.2017.

The respondents filed on 04.08.2017 the replying affidavit of Koome Kiragu, the 1st respondent's chairman, through Coulson Harney LLP. The further replying affidavit of Koome Kiragu was filed on 08.05.2017. Submissions and authorities were filed for the parties and their respective advocates made further oral submissions.

The 1st respondent offered the petitioner a contract of employment in the position of National Director with effect from 02.03.2015 for an initial period of two years. The contract further stated, "**Thereafter the contract shall be renewable for a further period of 2 years subject to performance and subsequent HFHK Strategic Plan and Human Resource policy. Your employment with HFHK will be subject to the terms and conditions set out below.**" The letter of offer was signed by David Kithakye, the 1st respondent's chairman and accepted by the petitioner by signing on the same day, 02.02.2015.

Clause 13 on termination provided thus,

"13.1 It is specifically recorded that this agreement may be terminated at any stage for misconduct, incapacity, poor performance or the operational requirements of the organisation or for any reason justified in law.

13.2 Either party may terminate employment giving TWO months notice or two month's pay in lieu of notice.

13.3 Upon termination of your employment, you shall deliver to the organisation all documents, equipment or other property, which may have come into your possession in the course of your employment with the organization with the written assurance that no organization property remains in your possession."

Clause 1.2 of the contract stated, "**1.2 You shall report to the Board of Directors for Habitat for Humanity Kenya and relate with Habitat for Humanity International (HFHI) as provided in the Memorandum of understanding between HFHK and HFHI, and as agreed or will be agreed with other partners.**"

The contract of employment dated 02.02.2015 followed the letter of offer of employment dated 12.12.2014. On reporting relationship the letter provided, "**Reporting relationship: You report to the Board of directors of HFH Kenya and relate as required with Habitat for Humanity International (HFHI) and other partners.**"

The claimant was to be paid Kshs.580, 000.00 basic salary per month less statutory deductions, pension contributed at 5% basic salary by each party, leave entitlement at 24 working days per year; and a medical cover for the petitioner, spouse, and children below the age of 18 years. The Kenya labour laws governed the contract of employment.

The petitioner received the letter dated 22.02.2017 on notification of the end of her fixed term contract. The letter was signed by one Torre Nelson, Area Vice President, Habitat for Humanity International, Inc, Chair, Habitat for Humanity Kenya. The letter notified the end of the petitioner's fixed term contract thus;

"We refer to your contract of employment dated 2 March 2015. As you are aware, the two – year term of the contract will be expiring on 2 March 2017.

Following a review of the Habitat Kenya strategy for growth and impact, and owing to subsequent changes to its Strategic and Human Resources Plans, Habitat for Humanity Kenya (HFHK) will not be in a position to renew your contract following its expiry on March 2. We therefore write to confirm that we will not be renewing the contract and consequently your employment with HFHK will terminate by effluxion of time on 2 March 2017." The letter stated that all terminal dues would be paid per the contract of service and applicable policies. The letter advised the petitioner to contact the said Torre Nelson to facilitate the handover. The certificate of service would be issued.

The petitioner being dissatisfied with the turn of events filed the present petition.

The **1st issue** for determination is whether the said Torre Nelson had authority to issue the notification of the end of the petitioner's fixed term contract. It is urged and submitted for the petitioner that he lacked authority to issue the letter because the search from the Non-Governmental Organization (NGOs) Board per letter dated 02.03.2017 shows that the said Torre was not the chairman of the 1st respondent's board as at the time of the notification letter. The search showed that the chairperson was one David Iluve Kithakye. For the respondents it is submitted that David Iluve Kithakya had resigned from the position of chairman of the 1st respondent's board and one Koome Kiragu had been appointed the chairman of the board effective 05.07.2017. The respondents have also filed minutes of the 1st respondent's board meeting of 02.03.2017. The minutes show that David Iluve Kithakya had resigned on 21.02.2017 and Torre Nelson was appointed chairman of the board effective 21.02.2017. Thus as at time of the search on 02.03.2017, it was urged for the respondents, that the stated changes had obviously not been registered with the NGOs Board. Further, by a special board meeting of the 1st respondent held on 05.07.2017, the decision not to review the petitioner's contract of service assigned by Torre Nelson on behalf of HFHK was affirmed, ratified and made effective as an official action and decision of the 1st respondent's board as of the date of the letter.

The Court has considered the evidence and returns that as submitted for the petitioner the search at the NGOs Board was prima facie evidence that the said Torre Nelson was not the 1st respondent's chairman as at the issuance of the notification letter. However, the evidence by the respondents is clear that at that material time David Iluve Kithakya named in the search as the 1st respondent's chairman had in fact resigned and Torre had by resolution of the board taken over as chairman. The evidence is that at the material time the leadership of the 1st respondent's board was in transition and it is also clear that Torre Nelson had the authority to act as he did by issuing the letter – that the respondents do not deny such authority is conclusive evidence that the said Torre Nelson had the authority to act and bind the respondents.

While making that finding the court considers that the notification was a conveyance of the decision not to renew the ending two year contract – it was not the decision not to renew but the communication of such decision. The Court finds that parties did not agree on the authority to communicate decisions about the contract of employment. It is the opinion of the Court that where parties have not agreed on the person to convey or communicate matters arising from the contract of employment, it is sufficient that any person authorised by the respondent (the employer) does so despite the rank or designation.

Thus the Court returns that Torre Nelson had authority to issue the notification of the end of the petitioner's fixed term contract.

The **2nd issue** for determination is whether the termination was unconstitutional. It is the petitioner's case that the notification was without due process as it was not with her participation per the contract of employment. That it was her legitimate expectation that the decision that the contract would not be renewed would be arrived at through due process of a fair hearing because such decision amounted to an administrative decision under Article 47 (1) &(2) and the decision as made was in violation of Article 41 on fair labour practices.

The respondent's case is that the contract lapsed by effluxion of time. The Court agrees with the respondent. The relevant clause in the letter of the contract of employment stated, "**Thereafter the contract shall be renewable for a further period of 2 years subject to performance and subsequent HFHK Strategic Plan and Human Resource policy. Your employment with HFHK will be subject to the terms and conditions set out below.**" The conditions for renewal were two and the Court returns that any of the two would justify failure to renew. In this case the reason for not renewing the contract was stated as, "...**a review of the Habitat Kenya strategy for growth and impact, and owing to subsequent changes to its Strategic and Human Resources Plans,...".** The Court returns that the failure to renew was in strict compliance with the terms of the contract of service. In the petition the petitioner did not render pleadings to challenge the validity or veracity of the reason as was advanced and that issue would therefore not be before the court for determination because parties are bound by their pleadings. In any event the Court has considered the minutes of the 1st respondent's board meeting of 21.02.2017 where resolutions were made to change the 1st respondent's leadership in its entirety. The Court returns that in view of those resolutions, the notification not to renew the petitioner's contract was genuine. Parties made out in their affidavits details about the petitioner's performance but the Court considers that the performance of the petitioner was not the reason for not renewing the contract so that it will serve no practical purpose to delve into those details in view of the real matter in dispute. Thus to answer the 2nd issue for determination the Court returns that the termination was not unconstitutional as was alleged for the petitioner. Since the termination was in accordance with contractual terms on renewal, the Court returns that it was misconceived for the petitioner to urge that she held a legitimate expectation that the contract would be renewed but which expectation had thereby been thwarted.

To answer the **3rd issue** for determination, the Court returns that the petitioner's contract of service got terminated by reason of effluxion of time and was not renewed in line with the terms of the contract. The petitioner relied upon **Ruth Gathoni Ngotho-Kariuki –Versus- Presbyterian Church of East Africa and Presbyterian Foundation [2012]eKLR**, and **Teresa Carlo Omondi –Versus- Transparency International – Kenya [2017]eKLR**. In those cases the Court held that the termination of the fixed term contract was unfair because the employer had failed to serve the employee with the contractual 3 months notice that the renewal would be declined. In those cases, clearly distinguishable from the present case, the fixed term contracts had been terminated in breach of the contractual clause on notice about refusal of the renewal or the decision not to renew. There was no such breach by the 1st respondent in the instant case.

The **4th issue** for determination is whether the petition was fatally defective. It was submitted for the respondents that the petitioner cited Articles of the Constitution and alleged their violation without stating the material facts demonstrating the alleged violation. It was further submitted that the dispute should have been initiated as an ordinary action under the rules of the Court. The respondents relied upon **Geoffrey Ndungu Theuri –Versus- Law society of Kenya [1988]eKLR**, where Apaloo JA stated, "**I cannot see how when the legislature provided in mandatory terms how a suit like the present should be commenced, the court could properly use inherent powers conferred by section 3A (of the Civil Procedure Act, Cap. 21) to sanction any other method. It is certainly inadmissible that the court should hold that a suit could be commenced by any other method because the plaintiff is unlearned in the law. I should have thought the law is the same of lawyers and lay-men alike.**"

The respondents further cited the opinion in Mumo **Matemu –Versus- Trusted Society of Human Rights Alliance & 5 Others [2013]eKLRr** that it was a misconception to claim as it had been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap.21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap.9). Further, procedure is a handmaiden of just determination of cases.

The Court has considered the submissions and returns that on the face of the petition, the petitioner pleaded alleged contravention of the cited rights. As to whether that was true, the same would be determined at the full hearing and in this case the Court has found that the Petitioner has failed to establish the violation as was alleged. After the full hearing it has also become clearer that the matter in dispute would have been decided in an ordinary action brought in accordance with the rules of the Court. It appears that the full hearing of the petition was necessary to establish the full effect of the pleadings.

As to procedural manner litigants should approach the Court, the Court follows **Peter Muchai Muhura –Versus- Teachers Service Commission [2015]eKLR** thus: **"It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by the Constitution of Kenya, 2010. The Constitution has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in Article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted."**

Again, in **Professor Elijah Biama –Versus- University of Eldoret and 2 Others [2014]eKLR** the court stated as follows, **"…The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court's opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of Harrikson –Versus- Attornney General of Trinidad and Tobacco (1980) AC 265. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order."**

The Court has considered all the circumstances of the case including that the leadership of the 1st respondent was being changed and the

petitioner appears not to have been properly notified prompting her to think that she was being removed without proper authority. In such circumstances the Court considers that each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondents against the claimant for dismissal of the petition with orders that each party will bear own costs of the proceedings.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 22nd June, 2018.**

BYRAM ONGAYA

JUDGE