



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NUMBER 512 OF 2016**  
**BETWEEN**  
**JOHN OGUTU RAGAMA.....CLAIMANT**  
**VERSUS**  
**BANDARI SACCO LIMITED.....RESPONDENT**  
**RULING**

1. The Claimant filed a Statement of Claim against the Respondent on 23<sup>rd</sup> June 2016, seeking the following prayers:-

- a. A declaration that the letter dated 24<sup>th</sup> May 2016 is null and void.
- b. A determination that termination of the Claimant's employment is illegal, unlawful, null and void.
- c. A Declaration that the 3<sup>rd</sup>, 3 year contractual period is subsisting.
- d. Reinstatement of the Claimant to his employment, and position of Chief Executive Officer, without loss of benefits.
- e. Costs of the Suit.

**Alternatively**

- f. 1 month salary in lieu of notice at Kshs. 241,493.
- g. 36 months' salary as damages for the un-expired, 3<sup>rd</sup> 3 year contractual period at Kshs. 8,703,468.
- h. Gratuity at Kshs. 1,465,776.
- i. Interest on the above sums at Court rates.
- j. Progressive salary increment for 2016-2019.

k. 12 months' salary in compensation for unfair termination.

l. Certificate of Service.

2. On the same date the Claimant lodged an Application for interim measures, brought under Certificate of Urgency, asking the Court to order, principally:-

a. The Respondent [or other Persons associated with the Respondent] is restrained from interviewing, selecting, recruiting and/ or appointing any Persons to the position of Chief Executive Officer pending hearing and determination of the Application.

b. Similar order as in [a] pending hearing and determination of the Suit.

The Application is supported by the Affidavit of the Claimant, sworn on the 22<sup>nd</sup> June 2016.

3. The Respondent filed a Replying Affidavit sworn by its Secretary Robert Ziro, on the 5<sup>th</sup> July 2016.

4. Interim Order in terms paragraph 2 [a] above, issued on 23<sup>rd</sup> June 2016.

5. Subsequently Parties agreed to have the Application considered and determined, on the strength of the record. They confirmed filing of Submissions at the last mention on the 16<sup>th</sup> December 2016. The Application is the subject matter of today's Ruling.

### **The Application**

6. The Claimant states he was employed by the Respondent as its Chief Executive Officer. He worked under fixed term contracts. There is no dispute with regard to the 1<sup>st</sup> and 2<sup>nd</sup> contracts. The dispute relates to the 3<sup>rd</sup> contract.

7. The 2<sup>nd</sup> contract expired in 2015. The Claimant applied for a 3<sup>rd</sup>, 3 year contract on 26<sup>th</sup> February 2015. The Respondent accepted his application, offering him a 3<sup>rd</sup>, 3 year contract, commencing 8<sup>th</sup> June 2015, to 8<sup>th</sup> June 2018.

8. He states the Respondent's Board met on 17<sup>th</sup> October 2015, and approved his application, based on its assessment of his performance. The letter offering the Claimant the 3<sup>rd</sup> contract is dated 19<sup>th</sup> October 2015. The Board and the Supervisory Committee confirmed renewal in subsequent communication to the Claimant.

9. Through the Press, the Claimant came to learn he had been sent on 30 day compulsory leave, and upon its lapse, received a letter from the Respondent, extending compulsory leave. When he visited the workplace in the period of compulsory leave, he found the Respondent had broken into his office, taken away some vital documents, and changed locks.

10. On 24<sup>th</sup> May 2016, the Respondent wrote to the Claimant, stating it had decided not to renew the Claimant's contract. The Respondent went on to advertise for a replacement in the Press. The Claimant states he had legitimate expectation he would go on to serve his 3<sup>rd</sup> contractual term. The decision by the Respondent was unfair, unjustified and placed him at great financial difficulty. He prays the Court to allow the Application.

### **Reply**

11. The Respondent holds that the Application is defective, bad in law, and fatally flawed. The Claimant has not availed to the Court grounds to warrant grant of the orders sought.

12. It is accepted the Claimant was employed as CEO in a contract which expired 7<sup>th</sup> June 2015. After expiry, he continued working without a contract.

13. It is accepted the Board wrote to the Claimant on 19<sup>th</sup> October 2015, stating the Claimant's application for renewal, had been approved. The letter however, did not constitute a renewal. The Claimant was supposed to execute a contract.

14. A contract document was prepared. It was signed by other Officers of the Respondent, but not the Treasurer. The Claimant himself was supposed to sign as the Employee. He did not sign on his slot, but signed on the slot reserved for the Treasurer. The contract of 17<sup>th</sup> October 2015 was therefore not valid. After expiry of the 2<sup>nd</sup> Contract, the Claimant worked under an ordinary, implied, month to month employment relationship.

15. He had not taken annual leave contrary to the terms of his 2<sup>nd</sup> contract. The Board therefore decided to send him on compulsory leave on 6<sup>th</sup> April 2016. Rather than accept the terms of his compulsory leave, he returned with goons, and vandalized Respondent's premises.

16. In the meantime, investigations carried out on the activities of the Claimant at the Respondent revealed cases of financial mismanagement, which placed the Respondent at the risk of cancellation of license by the relevant Regulator.

17. The Respondent therefore made a decision, not to renew the Claimant's contract. There was no expectation of renewal. Refusal to renew did not amount to termination. Recruitment of the CEO is a managerial prerogative of the Respondent. The Court and the Claimant should not interfere with the prerogative.

**The Court Finds:-**

18. The Claimant's 2<sup>nd</sup> term contract expired on 7<sup>th</sup> June 2015. He continued to work, without a written contract. He applied for renewal before expiry, on the 26<sup>th</sup> February 2015. The Respondent's Board met on 17<sup>th</sup> October 2015, and approved Claimant's application for renewal. The new contract was for a period of 3 years, beginning 8<sup>th</sup> June 2015, to 8<sup>th</sup> June 2018. There is a letter dated 19<sup>th</sup> October 2015, unequivocally granting the Claimant renewal.

19. The letter was followed up by contract document dated 17<sup>th</sup> October 2015, signed by the Respondent's Chairman and Secretary. The Claimant signed on the slot reserved for Treasurer/ CEO. The Respondent argues this was not a valid employment contract, because the Claimant signed on the wrong slot, and the Treasurer did not sign.

20. In the view of the Court, the letter offering the Claimant a 3<sup>rd</sup> term, and the contract document made on 17<sup>th</sup> October 2015, amounted to a valid employment contract.

21. The Claimant signed the slot reserved for the CEO. It is not clear why the Respondent placed the CEO and the Treasurer in the same slot. The Claimant was serving as the CEO at the time he signed the contract. Parties accept he continued to serve as CEO, after the expiry of the 2<sup>nd</sup> contract. The contract cannot be faulted on the ground that the Claimant signed on the slot reserved for the Treasurer, or that he did not sign the slot reserved for the Employee. He was at the time an Employee / CEO of the Respondent. It similarly cannot be said that the Claimant gave to himself a 3<sup>rd</sup> term. The letter renewing his contract communicated the decision of the Board. The contract dated 17<sup>th</sup> October 2015, was signed by other authorized Officers of the Respondent.

22. Section 9[2] of the Employment Act requires the Employer to draw, or cause to be drawn up, the contract of employment. The Employee accepts the contract, by signing his name, or by imprinting

thereon, his thumb or one of his fingers. The Respondent in this case drew up the contract. The Claimant signified his acceptance by signing the document. It does not matter at what space in the document he signed. It is agreed he signed, accepting the terms and conditions of service contained in the document.

23. It was therefore too late in the day, for the Respondent to communicate its decision on 24<sup>th</sup> May 2016, not to renew what had already been renewed. The Claimant had worked for almost 1 year after the 2<sup>nd</sup> contract expired.

24. The Respondent states it sent him on compulsory leave, because it was realized he had not taken annual leave under the previous contracts. This is not persuasive. Ordinarily Employees are not sent on compulsory leave, as a way of utilization of annual leave. Compulsory leave is administrative leave, imposed on the Employee pending investigation of employment offences and disciplinary action.

25. If the Respondent had reports of financial mismanagement against the Claimant, the correct procedure would have been; call on the Claimant to show cause why he should not be disciplined; probably send him on compulsory leave pending investigation, but not as a way of enforced annual leave utilization; take him through a disciplinary process; and terminate his 3<sup>rd</sup> contract, in accordance with the law. Reverting to the renewal argument, almost a year after expiry of the 2<sup>nd</sup> contract was a strange recourse.

26. Even assuming the contract of 17<sup>th</sup> October 2015 was not valid, the Claimant has a strong argument based on legitimate expectation. He had gone on working months after his 2<sup>nd</sup> contract expired. He had already lodged an application for renewal. The Respondent did not reject the application which was lodged way back on 26<sup>th</sup> February 2015. He was allowed to continue serving for months after his contract expired. When the offer was made, there was allusion to Claimant's good past performance.

27. Employers as submitted by the Respondent ordinarily have the managerial prerogative in renewal of contracts. Decision not to renew is challengeable only on limited grounds. This has been the ruling in Industrial Court of Kenya cases of *Margaret Ochieng' v. National Water Conservation and Pipeline Corporation [Cause Number 23 of 2012 at Nairobi]* ; *Ruth Gathoni Ngotho-Kariuki v. the Presbytery Church of E.A. & Another 2012 e-KLR*; and the *United Nations Appeal Tribunal [UNAT] Case Number 2010-125 between Frenchon v. the Secretary General United Nations*. The holding was that whereas the Employer has discretion in renewal of contracts, refusal to renew can be challenged where Employer's actions give rise to legitimate expectation there would be renewal; and secondly, where the decision not to renew is based on improper motive, or where there are countervailing circumstances. The Claimant would, assuming there was no valid contract, have a strong case based on the principle of legitimate expectation.

28. The Court has an obligation in protecting legitimate contracts of employment. The Court has formed the view, based on the material before it, that there was a valid 3<sup>rd</sup> contract between the Parties. The Claimant prays for an order of reinstatement, or compensation. He has shown a strong *prima facie* case, with probability of success. His Application is merited.

***IT IS ORDERED:-***

***a. An injunction is hereby issued against the Respondent, whether by itself, its Agents, Employees, and/ or Servants, restraining them from interviewing, selecting, recruiting and/or appointing any Persons or Individuals to the position of Chief Executive Officer pending hearing and determination of this Claim.***

***b. The Parties to make concerted effort at voluntary settlement of the main dispute, noting the preliminary views expressed by the Court in this Ruling.***

***c. Costs in the cause.***

Dated and delivered at Mombasa this 24<sup>th</sup> day of February 2017.

James Rika

Judge