



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 363 OF 2013

JOSEPH MAINA THEURI.....CLAIMANT

v

GITONGA KABUGI.....1ST RESPONDENT

COUNTY GOVERNMENT OF LAIKIPIA.....2ND RESPONDENT

GAKUHI CHEGE.....3RD RESPONDENT

NYAHURU WATER & SANITATION CO. LTD.....4TH RESPONDENT

JUDGMENT

1. This Cause has been fought ferociously. It will therefore be necessary to outline the factual background in as much detail as is material and relevant.
2. Joseph Maina Theuri (Claimant) was offered employment as a Managing Director by Nyahururu Water & Sanitation Co. Ltd (4th Respondent) through a letter dated 15 December 2008. The contract was for 2 years renewable, subject to satisfactory performance.
3. The Claimant accepted the contract on 28 January 2009.
4. When the contract expired, the Claimant was evaluated, and through a letter dated 25 October 2010, the 4th Respondent offered him another contract for 3 years effective 12 January 2011. This contract was also renewable subject to performance being satisfactory.
5. On 12 August 2013, the 4th Respondent's Finance and Administration Committee met and recommended that the Claimant's contract be renewed for a further period of 3 years. This was after a performance appraisal for the year 1 July 2011 to 30 June 2013 was carried out and the Claimant scored 98%.
6. However, in a Full Board meeting held on 11 October 2013, it was resolved that the Claimant's contract would not be renewed

because of poor performance of the company in most of the performance indicators as also clearly seen in financial statements of the company and the fact that he was under investigation ordered by

Laikipia County government and ratified by the Board of Directors.

7. On 10 October 2013, Gitonga Kabugi (1st Respondent) and the Deputy Governor of the County of Laikipia (2nd Respondent) wrote to the Claimant instructing him to step aside to allow for investigations into his (the Claimant's) leadership and management after complaints from employees of the 4th Respondent.

8. The 4th Respondent met on 4 November 2013 and resolved that the process for recruitment of a new Managing Director be commenced.

9. Upon the instructions to the Claimant to step aside, Gakuhi Chege (3rd Respondent) who was serving as the Vice Chairman of the 4th Respondent issued a Notice informing the staff that one James Macharia Mugo had been appointed acting Managing Director of the 4th Respondent.

10. On the same day (11 October 2013), the Claimant wrote to the Chief Executive Officer of the Northern Water Services Board bringing to his attention that he had been forcibly removed from office by the 1st Respondent.

11. That very day, the Chief Executive Officer of the Water Services Regulatory Board wrote to the 1st Respondent informing him that the action they had taken was *illegal* and contrary to the *principles enunciated in the constitution*. The Chief Executive Officer also offered to discuss the issue further with the 1st Respondent's office.

12. On 17 October 2013, the Chairman of the 4th Respondent wrote to the Governor of the 2nd Respondent advising that the Claimant should be allowed to resume duty while the complaints against him were addressed within the existing legal framework by the Board of the 4th Respondent.

13. He also wrote to the Claimant asking him to resume duty as Managing Director.

14. The Claimant attempted to resume duty on 18 October 2013 but was denied entry into office and therefore on 24 October 2013, he moved Court under a certificate of urgency seeking orders

1.

2. THAT the honourable court be pleased to issue a mandatory injunction compelling the Respondents to give the Claimant access to his office, remove the padlocks and guards and allow the Claimant to proceed with his duties and managing director of the 4th Respondent.

3. A mandatory injunction compelling the Respondents to allow the Claimant access to the 4th Respondent's offices pending the hearing and determination of this claim.

4. THAT pending the hearing and determination of this application, this honourable court be pleased to issue a temporary injunction restraining the respondents either by themselves, their agents, servants and or employees from interfering with the employment of the claimant, as the managing director of the 4th Respondent.

5.

15. In the meantime, the 3rd Respondent had written to the Claimant on 23 October 2013 informing him of a resolution of the Board of the 4th Respondent taken on 11 October 2013 asking him to step aside to allow investigations

16. In a ruling delivered on 1 November 2013, the Court allowed the application by the Claimant.

17. An oral attempt by the Respondents to secure a stay was declined on the same day.
18. On 4 November 2013, the 3rd Respondent wrote again to the Claimant but this time informing him that the Board of the 4th Respondent had resolved that he proceed on leave pending expiry of contract on 11 January 2014 (this was preceded with an advertisement in the Daily Nation of 31 October 2013 for the post of Managing Director for the 4th Respondent).
19. This prompted the Claimant to move Court on 8 November 2014 seeking orders stopping recruitment of a new Managing Director for the 4th Respondent and stay of the resolution to send him on leave, among other reliefs.
20. The Court stayed the process of recruitment of a new Managing Director and the resolution to send the Claimant on leave at the *ex parte* stage.
21. On 15 November 2013, the Claimant filed an Amended Statement of Claim in which he brought in a fourth issue in dispute, namely, *Intended illegal recruitment of the Managing Director and Renewal of the contract of the Managing Director* (4th Respondent filed a Response to the Amended Statement of Claim on 28 November 2013, the 3rd Respondent on 3 December 2013 while the 1st and 2nd Respondents filed on 23 December 2013). Documents in support were also filed on different dates.
22. On 21 November 2013, the 3rd Respondent unsuccessfully moved the Judge who was handling the dispute at the time to recuse himself from further handling the Cause (ruling was on 11 December 2013). An appeal was filed against the ruling refusing recusal.
23. On 3 December 2013, the 1st and 2nd Respondents filed an application seeking that the Cause be transferred to Nairobi for hearing and determination.
24. When the Cause came up for hearing on 10 March 2014, all the parties agreed by consent that all previous interim orders be vacated and that the 4th Respondent be allowed to recruit a Managing Director.
25. Come 29 April 2014, the Claimant filed a *Further Amended Statement of Claim* to add a cause of action of *Illegal refusal to renew the Claimant's contract* (4th Respondent filed an Amended Response on 28 May 2014).
26. On 20 March 2015, the Court gave directions that *Agreed Issues* be filed and that if the parties could not agree on issues, the Claimant would file his proposed Issues.
27. It turned out the parties could not agree on the Issues for determination and the 4th Respondent filed its version on 12 May 2015 while the Claimant filed his version on 13 May 2015.
28. Oral evidence was taken on 19 November 2015 when the Claimant testified and 26 October 2016 when the 3rd Respondent and 4th Respondent's Finance & Administration Manager testified.
29. After close of the oral hearing, the Claimant filed his written submissions on 29 November 2016, while the 4th Respondent filed its submissions on 15 December 2016. The submissions from 1st to 3rd Respondents were not on file by 15 December 2016 when judgment date was being scheduled.
30. The Court has given due consideration to the pleadings, evidence and submissions and will address the Issues for determination as proposed and filed by the Claimant and 4th Respondent and which were reduced to one in the written submissions, to wit, *whether there was legitimate expectation to renew the contract*, but the question *whether there was termination is also material and relevant*.

Was there termination of employment?

31. This issue was issue no. 4 in the Claimant's proposed Issues for Determination and no. 3 in the 4th Respondent's version.

32. By time of separation, the Claimant's employment was anchored on among others, an employment contract dated 25 October 2010.

33. Clause 7 of the contract provided

Termination of Contract

Termination of employment will occur in the event of one of the following: Expiry of contract without renewal. (my emphasis) retirement, summary dismissal, protracted illness, permanent disability or death.

Either party shall be entitled to terminate the employment, with just cause, by giving 3 months' notice of intention, in writing to the other party or, forthwith by paying to the other party 3 months' basic salary in lieu of notice.

34. Taking the above cited clause literally and in ordinary parlance, it would appear that the parties intended the non-renewal of the contract to be a termination of contract and not just expiry through effluxion of time or lapse.

35. In so far as the 4th Respondent did not renew the contract, the Court would reach a conclusion that it terminated the Claimant's contract.

Was there legitimate expectation to renew?

36. The parties dwelt at some length on this question in their submissions and case law, domestic and comparative was liberally cited (*Samuel Chacha Mwita v Kenya Medical Research Institute* (2014) eKLR, *Ruth Gathoni Ngotho Kariuki v Presbyterian Church of East Africa & Ors* (2012) eKLR, *Communications Commission of Kenya & 5 Ors v Royal Media Services Ltd & 5 Ors* (2014) eKLR, *Dierks v University of South Africa* (1999) 4 BLLR 304 (LC), *Frenchon v Secretary General of the United Nations*, Case No. 2010-125, *Administrator, Transvaal v Traub* (1989) 10 ILJ 823, *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529, *South African Democratic Teachers Union & Ors v Education Labour Relations Council*, Case No. JR : 2575/09 and many others)

37. The parties have also interchangeably used the terms *legitimate expectation* and *reasonable expectation*.

38. The Claimant asserted that he had *legitimate expectation(s)* that the contract(s) would be renewed on better or similar terms and conditions as the then existing contract including on remuneration and that the expectation(s) was founded on the then existing contract.

39. In Kenya, the principle of legitimate expectation was discussed at length by the Supreme Court in *Communications Commission of Kenya & 5 Ors v Royal Media Services Ltd & 5 Ors* (2014) eKLR wherein the Supreme Court summarised the ingredients of legitimate expectation thus

The emerging principles may be succinctly set out as follows:

there must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision-maker to make; and there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

40. In my view, the mere fact that the Claimant's contract had a clause on renewal subject to fulfilment of certain conditions was not sufficient to create legitimate expectation of renewal of contract without more

or that the proviso on renewal amounted to *an express, clear and unambiguous promise given by a public authority*.

41. The 4th Respondent in entering into the contract was not acting as a public authority but as any other employer.

42. On the authorities from South Africa and the statutory concept of *reasonable expectation*, there is no equivalent provision in any of the Kenyan statutes and therefore in my view, it is doubtful whether the decisions from *South Africa* would apply generally.

43. This doubt arises because the South African cases turned on an interpretation of a particular statutory framework (section 186(1) of the South African Labour Relations Act) which expressly provides that a dismissal occurs when an employer refuses to renew a fixed term contract when an employee reasonably expected a renewal.

44. Further, the legal principle within that framework is one of *reasonable expectation* and not *legitimate expectation*.

45. The Claimant herein did not attempt to draw any lines between the statutory concept of *reasonable expectation* as obtains in South Africa and *legitimate expectation* as understood in this jurisdiction.

46. On contextualising whether there was legitimate expectation in the case at hand, the Court must of necessity refer back to the contract between the parties herein.

47. In the view of the Court, two particular clauses are not only relevant but also material.

48. Clause 1 of the employment contract of 25 October 2010 provided

e) You will be employed for a period of 3 years. Your contract will be effective from 12th January 2011.

f) Your employment may be extended upon expiry of the period stated in 1(e) above provided:

?You have met the performance targets agreed with the Board of Directors to the satisfaction of the Company.

?The Company considers that you are in every respect suitable to continue in the position of the Managing Director; and

?you wish to continue serving the Company

49. The other clause is clause 7 already referred to in the preceding paragraphs.

50. In my view, the above clauses created a *contractual expectation* that is akin to the South African statutory concept of *reasonable expectation* rather than *legitimate expectation* on the Claimant that if he *performed his duties well by meeting set targets, met suitability test and expressed a desire to continue serving*, the 4th Respondent would renew his contract.

51. And therefore whether the 4th Respondent breached that contractual expectation should be measured against the Constitutional imperative of *right to fair practices* in Article 41.

52. It is not disputed that the Claimant expressed a desire to continue serving and that a performance appraisal conducted by a Committee of the 4th Respondent's Board awarded the Claimant 98%. That by any standards was not a by the way achievement.

53. The 4th Respondent's grouse was instead that the Full Board was not bound to accept that appraisal.
54. In my view, without giving any reasons for rejecting that appraisal or asking the Claimant to make further representations before declining the recommendation, the 4th Respondent was attempting to steal a match on the Claimant and taking into account extraneous considerations unknown to the Claimant.
55. Such conduct would neatly fit in within the hallmarks of unfair labour practice in terms of Article 41 of the Constitution.
56. The other *consideration* agreed in the contract was suitability.
57. On this aspect, the 4th Respondent appears to have been acting on the basis of the allegations received from employees against the Claimant and for which he was requested to step aside pending investigations.
58. The results of the investigations were not disclosed to the Claimant, nor to the Court. It is not clear whether the Claimant was formally asked to respond to the allegations.
59. Again, in this era of justification and fairness in employment relationships, as demanded by Article 41 of the Constitution, the 4th Respondent cannot be allowed to have its cake and eat it.
60. The attention of the Court was not drawn to any other legal impediment which would have stopped the renewal of the Claimant's contract for a third term.
61. The Claimant performed well in performance appraisal, expressed a desire to continue but was not confronted with allegations which could have affected suitability and the Court would therefore conclude that the 4th Respondent violated the Claimant's *contractual expectation* to renewal of contract in circumstances which rendered the non-renewal an unfair termination of employment.
62. Because the parties did not make the other proposed issues part of the submissions, the Court will not consider them.

Whether recommendation of Finance Committee was binding upon the 4th Respondent's Board

63. The fulcrum of the employment relationship in this country is fair labour practices as envisaged under Article 41 of the Constitution. What is fair straddles and goes beyond what is lawful or legal.
64. In the circumstances of this case therefore, for the Full Board to reject a recommendation of its Committee based on a performance appraisal of an employee, such rejection ought to have been based on very cogent reasons and which reasons it would only be fair ought to be placed before the employee for a response.
65. In the employment relationship and under the principle of fair labour practices, Courts frown upon employers altering or varying recommendations of a Committee or panel which have had the occasion to listen to the employee before making recommendations, if the employee is not afforded an opportunity to be heard before a variation/alteration of such recommendation(s).

Appropriate remedies

Declaration dismissal was unlawful and invalid

66. In lieu of the declaration sought, the Court would declare that the 4th Respondent violated the Claimant's contractual expectation to renewal of contract and which violation amounted to unfair labour practice.

Mandatory injunction

67. This mandatory injunction compelling the 4th Respondent to allow the Claimant access to his office has not only been overtaken by events as the Claimant secured alternative employment but would also amount to reinstatement when such an order was not substantively pleaded.

Perpetual injunction

68. This order has also been overtaken by events.

Automatic renewal

69. The declaration proposed in paragraph 66 above makes grant of this remedy superfluous.

Declaration advertisement for new Managing Director was breach of contract

70. Nothing turns on this head of relief.

General damages

71. The Claimant secured alternative employment soon after separating with the 4th Respondent and was also paid all contractually agreed dues thus mitigating any losses and therefore the Court would award a nominal amount equivalent to 4 months' salary assessed as Kshs 706,560/- on account of damages.

Costs

72. The Statement of Claim was amended more than two times and further no serious attempt was made by the parties to agree or settle Issues for determination but in consideration that the Claimant has succeeded, the Court would award him costs on 3/4 scale.

Conclusion and Orders

73. Flowing from the above, the Court orders that

- (a) A declaration do issue that the 4th Respondent violated the Claimant's contractual expectation to renewal of contract and which violation amounted to unfair labour practice.
- (b) 4th Respondent pays the Claimant Kshs 706,560/- as damages.

74. 4th Respondent to meet the costs to Claimant on 3/4 scale.

Delivered, dated and signed in Nakuru on this 10th day of March 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates

For 1st and 2nd Respondents Mr. Kariuki instructed by Kariuki Mwangi & Co. Advocates

For 3rd Respondent Gakuhi Chege Advocate (in person)

For 4th Respondent Mr. Kiprof instructed by Kiprof & Co. Advocates

Court Assistant Nixon/Daisy