



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

AT NAIROBI

CAUSE NO.1726 OF 2017

ENG. STEPHEN MBUGUA CHEGE CLAIMANT

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY..... RESPONDENT

RULING

1. The claimant by application dated 30th August, 2017 filed through Notice of Motion under the provisions of Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 is seeking for orders that;

1. Spent.

2. The court be pleased to grant the Applicant a temporary Order by way of injunction directed against the Respondent Company restraining it from terminating the Applicant's services from its employment pending the hearing and determination of this suit.

3. The court be pleased to make an order restraining the Respondent from enforcing its letter of 17th of August, 2017 purporting to terminate the Applicant's contract that is still in force up to the 11th of September, 2017 without valid reasons for so doing.

4. Costs of this application be provided for.

2. The application is supported by the affidavit of the claimant on the grounds that that his contract of employment was in force until the 11th of September, 2017 yet the respondent purported to terminate the same without reason. The expired contract was already renewed on the 12th of July, 2017 for an initial period of 6 months yet the respondent company purported to terminate the contract in total violation of the claimant's constitutional rights under article 47, 41 and 50 of the constitution, 2010. It is in the interests of justice that the application herein be allowed.

3. In his affidavit, the claimant avers that prior to joining the respondent's employment he was with the defunct Nairobi City Council on permanent and personable terms for 8 years and vide letter dated 2nd April, 2004 and 18th May, 2004 he was seconded and transferred to the respondent. He has since worked in various capacities for the respondent until 11th September, 2012 when he was competitively recruited as the Commercial Director of the respondent for a 5 years contract, renewable.

4. The claimant also avers that during his tenure of employment, his terms and conditions of service were governed by the Human Resource Policy and Procedures Manual version 5 of 2013 (HR Policy). Such terms and conditions required that the contract was subject to renewal upon appraisal of work performance during the 5 years period and prior to the expiry of the contract which in his case was done by the respondent's Managing Director through an evaluation and rating. In this regard the claimant's performance was rated at 85% against a pass mark of 65% and in accordance with ratings in the HR Policy.

5. As the claimant was waiting for the renewal of his contract, he was informed that he would be subjected to an interview by a committee of the respondent board, which was done on 15th June, 2017 and he was allegedly assessed and scored at 69%. On 12th July, 2017 the claimant received a letter informing him that his contract would be renewed for 6 months with effect from 11th September, 2017.

6. The claimant embarked on his work diligently but was surprised to receive a letter dated 17th August, 2017 informing him that his contract had been terminated with immediate effect. The letter did not disclose the reason for such drastic action to which the claimant lodged a protest letter.

7. On 22nd August, 2017 the respondent replied to the claimant and to the effect that the claimant's employment had been terminated with immediate effect based on the HR Policy. Such brought to a close the employment of the claimant and thus he is seeking the protection of the court on the grounds that there was an on-going contract of employment which had not expired and there was a new contract commencing 11th September, 2017 as confirmed by the respondent. The renewed contract has not been withdrawn or cancelled.

8. The claimant also avers that his constitutional right to a hearing before termination of employment were violated and he is left to suffer in his professional career. Unless the orders sought are issued, there will be irreparable damage and loss.

9. In reply, the respondent filed **Replying Affidavit sworn by Assumpta Mbesa Reuben**, Acting Legal Coordinator of the respondent and who avers that from 11th September, 2012 the respondent employed the claimant as the Commercial Director for 5 years terms, renewable upon terms set out in the employment agreement dated 13th February, 2013. Such renewal was also to be based on the claimant's work performance.

10. Reuben also avers that on 20th June, 2017 the respondent's Board of Directors met and deliberated a report by the HR, Administration and Communication committee. The board conducted performance evaluation for 4 functional directors of the respondent including the claimant. Such performance evaluation would form the basis upon which the respondent would renew or not renew the directors' employment and their contracts.

11. The board had set the pass mark for renewal of the employment contracts at 70%. From the minutes of the board, the claimant score was 68.8% and thus he did not meet the pass mark. By letter dated 9th June, 2017 the claimant requested for renewal of his contract and by letter dated 23rd June, 2017 the respondent replied and informed the claimant his request had been declined. The claimant appealed to the respondent board, such appeal was considered by the board on 10th July, 2017 allowed the appeal and agreed to extend the contract for 6 months. Therefore where the claimant's contract was to expire on 11th September, 2017 the extension for 6 months was to run thereon.

12. Reuben also avers that on 17th August, 2017 the respondent board held a special meeting whose agenda included among others the review of the decision of the board of directors taken on 10th July, 2017 in regard to contracts for the functional directors including the claimant. The board resolved to terminate the claimant's employment with immediate effect and agreed to pay him for 3 months in lieu of notice in terms of clause 9 of the contract.

13. Reuben also avers that the claimant having been taken through the performance review by the respondent was well aware that his contract was terminated for poor performance as he failed to attain the 70% pass mark during the performance review. In view of the claimant's rating the respondent was entitled to terminate the claimant's employment. The injunctive orders sought have thus been overtaken by event and cannot issue as the letter dated 17th August, 2017 has already issued and taken effect. The validity of the reasons for terminating the claimant's employment can only be addressed after the full hearing of the main claim. Such matters cannot be addressed at the interlocutory level. An order for reinstatement can only issue as a final order.

14. The claimant has no *prima facie* case with a likelihood of success to warrant injunctive orders in any case damages would be an adequate remedy to the claimant where at the hearing there is any case and as such, the application should be dismissed.

15. The claimant filed his further Affidavit and avers that the averments by the respondent in the Replying Affidavit that he was reviewed in his performance and found wanting is not correct. The only consideration for the renewal of contract with the respondent was a target of 65% according to the HR Policy at clause 4.8.2 and not 70% as stated by the respondent. The claimant was to be assessed in his performance by the Managing Director and not the board.

16. The claimant had been appraised by the Managing Director at 84.6% with a recommendation for renewal of the contract of employment and such position would not change without a re-evaluation or appraisal. To therefore change the mark to 70% is without basis and in contravention of the HR Policy. The allegation that the claimant was of poor performance was in contradiction of the board deliberations of 20th June, 2017. The termination of employment was therefore was with malice, wrongful and unfair

17. The meeting of 17th August, 2017 was prepared with a vendetta to unlawfully remove the claimant from office without any objective evidence or reasons. There is no mandate of the respondent's board chairman to terminate the claimant from his employment. The HR policy has no provision for the extension of contract save for renewal and for the claimant such was renewed effectively by letter dated 12th July, 2017.

18. The respondent minutes attached to the Replying Affidavit are not signed or confirmed as a true record of transactions of the board. Averments that the board met and passed resolutions should be ignored. The averments that damages are adequate is not correct as there is professional and reputation damage to the claimant and the remedy of reinstatement is a valid remedy available for the court to order.

19. Both parties agreed to file written submissions.

20. The claimant submits that he was prematurely, unfairly and wrongfully terminated from his employment without due regard to the legal processes and requirements as laid in sections 41, 42 and 43 of the Employment Act, 2007. The defence by the respondent that the claimant was terminated on account of poor performance after evaluation is not supported by any evidence.

Section 12 of the Employment and Labour Relations Court Act, 2012 and section 41 and 43 of the Employment Act, 2007 give power to the court to award compensations and reinstatement in a case of unfair termination of employment.

21. The respondent did not wait for the claimant's contract of employment to come to an end but opted to terminate it. The procedure followed was extremely punitive, intimidator and totally unfair. The claimant deserves and order of reinstatement as held by the Court of Appeal in **Bamburi Cement Ltd versus William Kilonzi, Civil Appeal No.62 of 2015** and **Kenfreight E.A. Ltd versus Benson K Nguti Civil Appeal No.31 of 2015**.

22. The respondent submits that by letter dated 9th June, 2017 the claimant asked for renewal of his contract which was declined via letter dated 23rd June, 2017. The claimant appealed and by letter of 10th

July, 2017 the appeal was considered and contract extended for 6 months. On 17th August, 2017 the board reviewed its decision and decided not to renew the claimant's contract and therefore terminated his employment by payment of notice.

23. The respondent retains the discretion to renew the contract of employment as held in **Margret A Ochieng versus National Water Conservation & Pipeline Corporation [2014] eKLR** where fixed term contracts carry no expectancy of renewal.

24. The claimant has not met the conditions for the grant of a temporary injunction as set out in **Giella versus Cassman Brown**. The Court in **Hassan Zubedi versus Patrick Mwangangi Kibanya and Eite Paka Services Limited, Civil Case No.79 of 2014** held that there must be a prima facie case; a demonstration of irreparable harm, and balance of convenience favours that applicant. In this case the claimant has not demonstrated a prima facie case with any chance of success and therefore does not warrant the orders sought as held in **Peter Kinuthia Wathuo versus Co-operative Bank (K) Ltd, Civil Case No.43 of 2010**.

25. The assertion by the claimant that he scored highly in the performance evaluation is not correct as he cannot assume the position of the human resource committee. The application is aimed at causing the respondent great prejudice as termination has already been effected. A party cannot seek an equitable remedy to occasion injustice on the other party as held in **Amir Suleiman versus Amboseli Resort Limited, Civil Case No.1078 of 2003**. In employment cases an applicant must demonstrate that on the evidence the respondent has no case with reasonable prospects of success at trial; dismissal of employment was invalid; and that sufficient relevant confidence subsists between the employer and employee as held in the case of **Dr Anne Kinyua versus Nyayo Tea Zone Development Corporation & 3 Others, Cause No.1065 of 2012**.

26. The respondent also submits that the application by the claimant has failed to meet the requisite threshold for the grant of injunctive orders or a reinstatement back to employment.

27. It is common ground that the claimant was employed by the respondent from 11th September, 2012 on a 5 years contract, renewable vide agreement dated 13th February, 2013. The term contract was ending on 11th September, 2017.

28. The claimant's case is that he initiated the process of renewal of his employment contract with the respondent and to this end he was appraised by his supervisor and managing director where he scored 85% against a set out mark of 65%. The respondent board assessed his performance on 15th June, 2017 and gave him a score of 68.8%.

29. on 12th July, 2017 the claimant was issued with a letter confirming his employment contract was renewed for an initial 6 months starting 11th September, 2017. However on 17th August, 2017 the claimant was issued with a letter terminating his employment with the respondent without giving any reason.

30. The respondent assert that the board reviewed the claimant's work performance and he scored 68.8% against a score of 70%. On this basis, on 9th June, 2017 the respondent informed the claimant that his request for renewal of contract had been declined to which he made an appeal and in response, the respondent allowed him an extension of 6 months. However, in a board special meeting on 17th August, 2017 the decision to extend the contract was reviewed and the same terminated immediately with payment in lieu of notice.

31. The Replying Affidavit by the respondent sworn by Assumpta Reuben is devoid of any material, record or supporting documents in support of the averment made therein. The only record attached is the alleged Board minutes leading to the termination of the claimant's employment. As correctly submitted by the claimant, these minutes are not signed. The authenticity of the same thus challenged, the probative value is lost.

32. Noting the above, there is a statutory duty placed on an employer such as the respondent to submit all work records of an employee in proceedings such as this. Such requirement has not changed. This is in accordance with section 10(6) and (7) of the Employment Act, 2007 which provides as follows;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

33. The rationale to the above is that as the custodian of all work records, the employer, once a claim has been filed by an employee should submit all such work records in addressing the allegations made by the employee. In the absence of such a record, the word of the employee is to be believed.

34. The respondent in the Replying Affidavit of Assumpta Mbesa Reuben dated 7th September, 2017 avers at paragraph 9, 10 and 12 avers that;

9. It is clear that the HR Committee had set the pass mark for renewal of the employment contract at 70%. I confirm that from the minutes of the respondent's Board meeting, the claimant did not attain the pass mark set by the HR Committee and only scored 68.8%.

10. I am aware that by letter dated 9th June, 2017 the claimant requested for renewal of his contract. By letter dated 23rd June, 2017 the respondent replied to the claimant's request and informed him that the board had declined to grant his request.

12. I confirm that the respondent's board considered the appeal on 10th July, 2017 allowed the appeal and agreed to extend the claimant's employment for a period of six (6) months from the expiry date of the contract.

35. However, the HR policy allegedly setting the pass mark for renewal of the contract to employment at 70% is not attached. The averments that the claimant scored at 68.8% is not supported by any material evidence. Further, the alleged letter of 23rd June, 2017 rejecting the claimant's appeal against a score of 68.8% is also not attached. The mandate of the respondent board to extend the employment contract by 6 months is equally not supported by any record(s).

36. In the end, the reply to the claimant's application is left bare.

37. It is trite that a fixed term contract has its start and end date as correctly submitted by the respondent and as held in the case of **Margaret A Ohieng versus National Water Conservation & Pipeline Corporation [2014] eKLR** and in **Samuel Chacha Mwita versus Kenya Medical Research Institute [2014] eKLR**. Indeed, where an employee enjoys a fixed term contract, such contract unless renewed upon lapse or as contemplated under the terms and conditions thereof, it automatically ends on its due date.

38. In this case, the respondent by letter dated 12th July, 2017 renewed the claimant's employment contract in the following terms;

...further to ours dated 04 July, 2017, the Board of Directors approved renewal of your contract for the position of Director- Commercial Service for an initial term of six (6) months commencing 11th September, 2017. The renewal will be on existing terms and conditions of service subject to the contents of this letter and review from time to time at the company's discretion as stipulated in the Human Resource Policy and Procedures Manual. [Underline added].

39. The claimant was thus effectively issued with a new contract of service *for an initial term of 6 months*. As at this date, the 12th July, 2017 the claimant had an on-going contract of service for 5 years

ending 11th September, 2017. Effectively therefore, employment with the respondent was on-going and would continue for the new term in accordance with the extension.

40. The events leading to the claimant's employment termination are therefore important to address as follows;

The claimant was under a 5 years contract ending 11th September, 2017;

On 20th June, 2017 the respondent board met and deliberated on the human resource committee reports from 7th April, 2017 and 15th June, 2017 and the interview of functional directors where the committee had set the pass mark for renewal of contracts at 70%. With regard to the claimant he scored 68.8% and it was resolved that the matter be placed with the board with a resolution not to renew his contract;

On 21st June, 2017 the respondent managing director wrote to the Governor, Nairobi City County with regard to the renewal of employment contract for the functional heads noting the HR Policy at clauses 4.2.2, 4.3.2 and 4.8.2 on issuance of 5 years term contract; performance appraisal and renewal of contracts; and the functional heads appraisal by the managing director as the supervisor respectively. The managing director made a recommendation that based on the appraisal of the claimant, his contract be renewed;

On 23rd June, 2017 the respondent replied to the claimant that his contract would not be renewed following his request of 9th June, 2017;

On 23rd June, 2017 the claimant lodged an appeal seeking the renewal of his contract and giving reasons for the request and review of the decision not to renew his contract of employment;

On 12th July, 2017 the respondent wrote to the claimant noting his contract had been given an extension of contract for 6 initial months; and

On 17th August, 2017 the claimant was issued with a notice terminating his employment with the respondent.

41. In addressing the claimant's employment, the respondent has the HR Policy. Such policy is to give guidance to a fair and reasonable assessment of all employees. The HR Policy therefore is a guide to ensure objective criteria is applied with equality and fairness. That there is predictability and rationale to each position under consideration. To thus go outside such policy, the respondent must have a very objective reason applicable across the board.

42. . As noted above, the claimant as the Director – Commercial Services had been appraised by his supervisor, the managing director and given a score of 84.8% against a score of 65%. The need to have the claimant assessed by the board, or any other body after the managing director's score had to be established in an objective manner. I do not find such a criteria herein.

43. In the HR Policy at clause 4.3.2 it provides as follows;

4.3.2 Contract employment

Managing Director, Functional Directors ... shall be employed on contract basis with each contract running for a period of five years. The contracts may be renewed based on performance and for a period not exceeding two terms for the managing director and functional directors ...

44. Therefore, for the position held by the claimant as a functional director and Director – Commercial Services, his contract of employment was running for a term of 5 years. The HR Policy is clear to the

extent that such term of 5 years is a matter given by the use of a mandatory provision of *shall be employed with each contract running for a period of five years*. Any renewal was to be for a similar term based on performance *for a period not exceeding two terms*.

45. To this end, the HR Policy set the criteria and standard at clause 4.8.2 as follows;

4.8.2 Performance Standards or Appraisal Criteria

Performance standards will be set for each job so as to have criteria for appraising staff for the purposes mentioned above. ...

Performance pass mark shall be at 65% of the agreed target between the appraisers and appraise. A performance appraisal score above 85% shall receive a commendation letter. Where the performance appraisal score is below 65%, an employee shall be expected to explain in writing the reasons for performing below part. ...

46. The respondent has therefore set for itself the objective criteria to apply with regard to renewal of contract, the performance appraisal for employees and the rationale for the score of above 85% or below 65%. To make any changes thereof and reduce or increase the appraisal scores or the mean score, reason or basis must be established.

47. On 17th August, 2017 the respondent then wrote to the claimant as follows;

EMPLOYMENT CONTRACT

I refer to the above and hereby inform you that the Board of Directors has decided to discontinue your services to the Company effective immediately.

In line with your contract of employment, you will be paid three months' salary in lieu of notice. ...

48. The contract which was terminated is not clarified. Was it the contract ending 11th September, 2017 or the one commencing and renewed from 11th September, 2017

49. Effort to give reason to the context in the termination of the claimant's employment with the respondent is in the Replying Affidavit of Assumpta Reuben and who avers at paragraph 9 that;

9. It is clear that the HR Committee had set the pass mark for renewal of the employment contract at 70%. I confirm that from the minutes of the respondent's Board meeting, the claimant did not attain the pass mark set by the HR Committee and only scored 68.8%.

50. As noted above, the records leading to the alleged appraisal of the claimant and the alleged Board score of his performance at 68.8% against a 70% score is not attached. The evidence by the claimant that he had been assessed by his supervisor and got a score of 85.6% against the score of 65% is not challenged by the respondent. I take it to be correct that the last score of the claimant's performance before the renewal of his contract was at 85.6% in accordance with the uncontroverted evidence in his Supporting Affidavit.

51. In any event, where an employer bases the termination of employment on work performance, even where the right to terminate an employment contract exists as a term and condition of employment, the statutory protection given to an employee to prevent a case of malice, bad faith and malpractice is section 41 of the Employment Act, 2007. The procedures envisaged in the law are mandatory. Such cannot be made optional by an employer seeking to end an employment contract on the simple basis that the contract of service has a clause on termination. Such termination must have a basis. To allow a termination clause to override the clear provisions of the law would end up negating the very essence of article 41 of the constitution on the right to fair labour practices. With regard to the respondent, any termination of employment without taking into account the HR policy at clauses 8.4.2 as set out above

would go contrary to practice, policy and laid down/out procedures. Even in a case where there is a score of below 65% which is not the case for the claimant, the motions of a notice in writing, a repeat of the same on three (3) such appraisals, before a sanction can issue must be put into motion. The notice of the respondent of 17th August, 2017 go contrary to the set HR Policy, fair practice and in direct contravention of the mandatory provisions of section 41 of the Employment Act, 2007. Such is an unfair labour practice and cannot stand the test of Article 41 of the Constitution, 2010.

52. In the case of **Alex Wainaina versus Kenya Airways Limited, Cause No.430 of 2016**, in addressing the question of work performance as a ground for terminating employment it was held that;

*It is trite; the burden of proof in employment termination cases rests on the employer. Where the claimant is stated to be of poor performance, the grounds being that he failed in the performance of his duties, then as set out in **Jane Mkala case**, cited above, it does not stop at the allegations but effort must be shown and demonstrated as to how such poor performance was identified and addressed. Where the claimant remained of good performance since his employment in 2008 to October, 2015 he cannot have so suddenly and quickly changed without the notice of his controlling supervisor and CEO and Board to a point that on 8th January, 2016 the board found the sudden urgency to invite him to an otherwise disciplinary hearing and leading to his contract termination. See **Abdi Halake Garamboda versus Fidelity Security Services Limited [2015] eKLR**.*

53. The rationale in addressing poor work performance is to ensure that the employer takes the duty to address such poor work performance procedurally before the same can be used as a ground for the termination of employment. Efforts taken to have the employer address poor work performance must be demonstrated.

54. For poor work performance to become a matter for termination of employment, the employee must be issued with notice and a hearing conducted for the employee to show cause as to why he should not be terminated in his employment due to poor work performance. This is my reading of the provisions of section 41 of the Employment Act, 2007. To read it otherwise and apply a term of the contract negating the law would be unlawful and unconstitutional.

55. In **Kenya petroleum oil workers union v Kenya petroleum refineries Ltd [2013] eKLR** held as follows;

It is necessary for the Court to very briefly discuss what poor performance within the employment relationship connotes. This is because it is very easy to discern what a poor performance in a drama play is but not in the workplace. Many employers confuse poor performance with negligence, incapacity or misconduct.

Poor performance does not relate to an employee's behaviour in the work place. Behaviour is addressed under misconduct in employment disciplinary process while poor performance examines whether the job which an employee is expected to perform is performed properly (ability).

Performance is therefore gauged on the basis of sufficient job output, acceptable quality, compliance with employer operating procedures, sufficient employee effort and ability to perform the job at the expected level.

56. It is therefore imperative to note that the Claimants work performance was appraised by the Managing Director and he was rated 85% against the score of 65% and based on the HR Policy. The claimant also initiated the renewal of his contract of employment and by letter dated 12th July, 2017 he was issued with letter confirming his employment which as to commence on 11th September, 2017. While the claimant was thus waiting to commence his renewed contract, on 17th August, 2017 his on-going employment with the respondent was terminated. There is no reason assigned to the termination of his employment though summary action.

57. what then was the material used by the respondent board in the alleged assessment of the claimant and score of 68.8%? I read malice and outright unfair labour practice on the face of the respondent issuing the letter dated 17th august, 2017. This is in essence a letter and notice of summary dismissal.

58. What was the urgency, necessity and reason for such summary action? I find the decision thus tainted with illegality and fundamentally grounded on unfairness. It cannot stand the test of the law in the interim or in the end as held in the case of **Agnes Ongadi versus Kenya Electricity Transmission Company Limited [2016] eKLR**. Where a decision taken is shrouded with illegality, to place the same and await full hearing would not change the same as ultimately the illegality is apparent and cannot be sanctioned. The purported termination of employment being a summary dismissal without basis is invalid.

59. The discretion of an employer to terminate employment at will is long gone. Even where the contract of employment makes provision for termination of employment on notice, unless there is demonstration that such is by mutual consent or there is a good reason leading to the same, such notice for termination must be within the law. The reasons given must be interrogated as to their genuineness, validity and reasonableness. Where there is a whim of illegality, the court must stop all else and deal.

60. Workplace procedures, human resource policies must also not be used to justify a termination of employment which is otherwise a sham. Where the respondent board of directors met and assessed the claimant in his work performance and failed to document such a crucial process and then used the same to terminate his employment, such maladministration is apparent. To allow the decision by the respondents dated 17th August, 2017 to stand for one moment is to sanction an illegality. Such is to reward impunity.

61. In addressing a similar matter and the question of what constitute unfair termination of employment, the Court of Appeal in **International Planned Parenthood Federation versus Pamela Ebot Arrey Effiom [2016] eKLR** held that;

Section 43 of the Employment Act deals with proof of reason for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45. The reason for termination of contract is the matter that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

62. Similarly, the Court of Appeal in **Kenfreight (E.A.) Limited versus Benson K.Nguti [2016] eKLR** held as follows;

Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken. Looking at the pleadings, the correspondence between the parties and the evidence on record, no reason at all was given to the respondent why his services were terminated. He was not informed of his transgressions. Neither was he given an opportunity to explain himself

63. I have no doubt in my mind that the procedures undertaken by the respondent and leading to the termination of the claimant's employment were all choreographed to lead to one end, termination of employment through whichever means possible. Well aware that the HR policy has no provision for extension of contract, such decision was allegedly taken and then rescinded. I find no justification for such changes. The shroud must be lifted by the court.

64. In the main, I have had chance to go through the memorandum of Claim, the orders sought in the application are similar save for the alternative claim for compensation and damages for unfair termination. Noting the contexts of letter dated 17th August, 2017 as set out above, the claimant's contract ending 11th September, 2017 and the specific recommendation for renewal from his supervisor and

managing director for another term of 5 years which I find to be in accordance with the objective standard under clauses 4.3.2 and 4.8.2 of the HR Policy and commencing on equal date and on 11th September, 2017 the Claimant is reinstated back to his position with the respondent as Director – Commercial Services. This is in taking into account the respondent is in essential service; the claimant work performance had been appraised pursuant to the HR Policy and which HR policy should not be negated by going contrary to its terms or in disregard of the clear provisions of the law.

65. With these findings and the claim is addressed.

66. The claimant had a legitimate expectation to serve the full term of his on-going contract ending 11th September, 2017 and the term of contract extension for the *initial* 6 months not being a matter in his request for renewal of contract or a matter addressed as such in the HR Policy or being a matter given reason or grounds by the respondent, there is hereby a renewal for a term not exceeding five (5) years. Such should not be denied of the claimant.

Accordingly, The application by the Claimant and dated 30th august, 2017 is hereby allowed in its entirety with the following orders;

- a) The letter dated 17th august, 2017 by the respondent to the claimant is hereby quashed the same being null and void;**
- b) The claimant shall resume his duties with the respondent as Director –Commercial Services on 13th November, 2017 at 2.00pm [1400 hours] for allocation of office and duties by his line supervisor and the Managing Director of the respondent;**
- c) Such reinstatement is with all back salaries, benefits and allowances**
- d) Costs of the suit.**

In the alternative

- a) The respondent shall pay for the full contract ending 11th September, 2017 and for the full contract term commencing 11th September, 2017 pursuant to Clause 4.3.2 of the Human Resource Policy and Procedural Manual**
- b) Such payments shall be within 30 days from the date hereof;**
- c) Costs of the suit.**

Delivered in open court at Nairobi this 13th day of November, 2017.

M. MBARU

JUDGE

In the presence of:

Court Assistants:

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