



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1409 OF 2015

HENRY MUEMA KIMANTHI CLAIMANT

VERSUS

NAIROBI CITY WATER AND

SEWARAGE COMPANY LIMITED.....RESPONDENT

RULING

1. The Claimant filed application herein and obtained interim orders on 13th august 2015. Both parties agreed to a hearing date for 14th December 2015 but on the due date only the Claimant was present. Noting that the Respondent was represented by counsel on 13th December and opted to be absent at the hearing, the Claimant was heard in his submissions.

2. On 13th august 2015 the Claimant filed his application through Notice of Motion seeking for orders that an injunction do issue restraining orders against the Respondent from harassing and or intimidating, harassing and discriminating against the Claimant and stopping his salary dn loan obligations or evicting him from the company house or retiring him on any other date other than 4th june 2019 pending the hearing of the application and the main claim. The application is supported by the annexed affidavit of the claimant.

3. The application is based on the grounds that the Claimant was initially employed by the City Council of Nairobi on 5th May 1979 on permanent and pensionable terms. In 2005 the Respondent Company was formed and all employees in the water department of the Nairobi City Council were transferred to the respondent. In 2001 the Claimant underwent training and was promoted as Investigations and Supervisor where he worked until 2014.

4. Other grounds in support of the application are that on 5th June 2014 the Claimant entered into a contract with the Respondent for 5 years ending on 4th June 2019 and at a salary of kshs.135, 420.60 per month. On 15th January 2015 the Claimant was issued with a retirement letter after serving the Respondent for over 34 years. It was indicated that he should proceed on retirement on 28th August 2015 which is premature, unlawful and illegal as he is due to retire on 4th June 2019 in accordance with the contract of employment.

5. The Claimant also sets other grounds that he has loans pegged on his employment and payable by check off system and which payments the Respondent has maliciously stopped thereby exposing the

Claimant to embarrassment despite his retirement date not being due. The Claimant is threatened with eviction from the company house where his family resides and which he occupies by virtue of his employment. The premature retirement of the Claimant is illegal and unfair and unless the orders sought are granted, he will suffer loss which cannot be compensated by way of damages.

6. In his affidavit, the Claimant avers that upon employment by the Nairobi City Council, he was transferred to the Respondent Company in 2005 and remained there until 2014 when he was issued with a contract of 5 years ending 4th June 2019. He was however issued with a premature retirement letter due in August 2015 in disregard of the contract ending 4th June 2019 which is illegal and unfair as by virtue of the employment contract he has taken loans, is resident in the company house unless the Respondent is stopped from undertaking the illegal action, he will suffer loss. That the Respondent has not been remitting his Sacco contribution causing him loss. The orders sought should issue with costs.

7. In reply the Respondent filed a Replying Affidavit sworn by Rose Kariuki-Mwaura the Human Resource Manager and avers that the Respondent was founded in 2003 under the Water Act No.8 of 2002, a governmental agency and wholly owned subsidiary of the then City Council of Nairobi (CCN). As the successor CCN, the Nairobi City County took ownership of the Respondent pursuant to section 33 of the 6th schedule of the constitution of Kenya, and the Respondent thus remains a public company owned by the Nairobi City County and therefore subject to Public Service Regulations.

8. In 2004, by agreement between the Nairobi City County and the Respondent on transfer of operational assets, staff and operational liabilities, and the Water Act, 2002, the Nairobi City County transferred the operational assets, staff and the operational liabilities to the Respondent. These transactions were recognised by Legal Notice No.101 of 12th August 2005 and through the Minister for Water and Irrigation, the national Government directed the transfer of all rights, powers, liabilities, funds, assets and other property from the Director of Water, the Government or its statutory corporations and vested in the newly created Water Services Boards and Water Services Providers. Under these operational changes, the Claimant was transferred from the Nairobi City County to the Respondent under a deployment by secondment on 22nd April 2010 and under the terms prevailing under the Nairobi City County. The Claimant accepted his secondment vide letter dated 22nd September 2005. Such acceptance made the Claimant subject to the rules and regulations of the Respondent as a government agency which was subject to Public Service Regulations set out under the Respondent's Staff manual.

9. Ms Kariuki-Mwaura also avers that in 2009 the permanent secretary to the cabinet and head of public service issued a circular dated 20th March 2009 by which the government raised the mandatory retirement age for all public servants from 55 years to 60 years effective from 1st April 2009. This also related to the Respondent employees vide communication to all staff at various stages and by manual dated 14th March 2013.

10. Ms Kariuki-Mwaura further avers that by letter of appointment dated 5th June 2014 the Respondent offered the Claimant employment on a 5 years renewable contract on various terms and conditions to which the Claimant accepted on 14th July 2014. The Claimant accepted to be the Security Officer at a management position; termination period was by notice of 3 months; commencement was 14th July 2014 and the Claimant was to familiarise himself with the Human Resource manual. By virtue of the human resource manual, the retirement age was 60 years to which the Claimant was aware and the circular issued to this effect is designated as subsidiary legislation having been issued by a government officer with executive authority. Such authority cannot be overridden by contractual provisions between the Claimant and the Respondent as they cannot contract outside the law. The Claimant cannot claim that he is prematurely being retired as the mandatory retirement age is 60 years and an extension would be a violation of subsidiary legislation. The Respondent has issued 3 months' notice before such retirement and thus in compliance with the contract. All salaries have been paid when due; there is no prima facie case to warrant the orders sought and the application should be dismissed with costs.

11. To these averments by the Respondent, the Claimant filed a Supplementary Affidavit on 11th

November 2015 and stated that the Respondent as a private company is governed by its memorandum and articles of association and not the public service regulations. There is a contract that was signed by both mutual consent of both parties and the cited public regulations do not apply therein. The terms of the contract cannot be varied at the disadvantage of one party and at the instance of the Respondent who has signed the contract. There is a contract of employment subsisting and has not been terminated by mutual consent and the Respondent is in breach by failing to comply with its terms.

Submissions

12. In submissions, the Claimant stated that he has a contract of employment issued on 4th June 2014 as per the Respondent human resource policy which permit contract employment and also pursuant to the provisions of section 7 of the Employment Act. The contract issued is for 5 years and the Claimant has only served for one (1) year and it expires on 5th June 2019. The contract has no retirement age and the Respondent is not an entity regulated by the civil service or public service regulations so as to restrict the contract of employment to the age of 60 years for the claimant.

13. The Claimant also submitted that it is unlawful for the Respondent to purport to terminate his contract of employment before the due date as this is in breach and no retirement age was set by the parties. An injunction should therefore issue restraining the Respondent from terminating the contract as the Claimant has a good case with high chances of success and based on an existing contract which has not expired and on a balance of continece and noting he has since obtained loans and will be injured in a manner that cannot be compensated by damages.

14. The Claimant has relied on the cases of – **Abraham Gumba versus Kenya Medical Supplies Authority, cause no. 1073 of 2012; Wilfred Samson Mutua versus KWS Cause No.890 of 2012; and Hezekiel Oira versus KBC & Another Cause no.299 of 2011.**

Determination

15. Annexure “HMK 7(a)” is the letter of appointment issued to the Claimant by the Respondent and signed by the Managing Director of which the Claimant accepted on 14th June 2014, and there is a witness to this effect of acceptance. This letter is issued by the Respondent to the effect that;

LETTER OF APPOINTMENT

The Management of Nairobi City Water and Sewage Company has decided to offer you employment on a five years renewable employment contract on the following terms and conditions. ...

16. Therefore, the letter of contract/employment was issued at the instance of the respondent. Its term period is granted at five (5) years running from the date of issue, the 4th June 2014 thus terminable by effluxion of time and not age as this was not set out in the contract.

17. The Employment Act at section 2 defines a contract to mean;

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;

[Emphasis added].

18. This definition is replicated by the Labour Relations Act at section 2 and the Labour Institutions Act has gone a step further on this definition and outlined a contract to mean;

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service made within Kenya and to be performed in full or in part outside Kenya, and any contract for service with a foreign state, except a contract for service entered with, by or on behalf of the government.

19. Under these provisions of the law, parties entering into an employment relationship can enter into a written contract that is permanent, fixed term, periodic or seasonal contract based on the need, purpose or the interests of both parties or the persons involved. Once there is a written contract, the Court will seek to give meaning to such a written contract based on its terms in determining any issue/s that may arise especially any dispute. The Court as guided by the provisions of section 10 of the Employment Act will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract.

20. In the case of **Kenya Plantation & Agricultural Workers union versus Kenya Cuttings Ltd, Cause No. 282 of 2010**, where employees who were engaged under seasonal contracts wanted to be engaged as permanent employees on the basis that they had been under seasonal contracts for long, however the Court stated;

Once there is a written contract, the Court will seek to give meaning to such a written contract in determining any issue that may arise especially any dispute. The Court as guided by the provisions of section 10 of the Employment Act will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract.

21. Also in the case of **Chacha Mwita versus KEMRI, Cause No.1901 of 2013** the Court held that;

... Where there is a written contract between parties, this Court is to construe it in the terms and conditions outlined as between the parties unless there is an illegality or a matter subject to interpretation. Where there is a fixed-term contract, parties are to outline the exact terms as required under section 10 of the Employment Act.

22. In this case, the respondents reply is that despite the contract of employment issued to the Claimant on 4th June 2014, they are bound by the civil service regulations requiring employees to retire at age 60. That the Public Service Regulations are binding upon the Respondent and there is a human resource policy that regulate the retirement age at 60 years. However, the Contract issued to the Claimant was at the instance of the respondent, it is binding upon the parties and with it, it confers rights and benefits upon the Claimant that cannot be negated by a Public Service Regulation of human resource policy that are contrary to written law that allow contracts of employment pursuant to section 7 and 10 of the Employment Act. Also, once the contract of employment was issued to the claimant, it became binding and can only be terminated in pursuant to the law as under section 35 read together with sections 43 and 44. Otherwise to terminate the contract at the instance of a regulation or policy outside the law, the same would amount to an unfair labour practice.

23. Without going into the merits of the main claim, I find the Claimant has set out a prima facie case that meet the basic principles for the grant of an injunction against the respondent. On the basis of the contract of employment issued to the Claimant and based on its fixed term period, the orders sought should issue. The question of discrimination against the Claimant alleged in the Notice of Motion is a matter that calls for specific evidence and cannot be canvassed via affidavit. Such will not be addressed in the interim.

Therefore, application dated 13th august 2015 is allowed;

- a. **The Respondent is hereby restrained through its agents and or servants from terminating the Claimant from his employment of affecting his monthly dues, benefits and rights in employment especially housing by the Respondent until the hearing and determination of**

- the main suit herein;**
- b. The Claimant shall remain in the employment of the Respondent based on the existing employment contract commencing 4th june 2014; and**
 - c. The Respondent shall meet the costs of this application.**

Orders accordingly.

Delivered in open court at Nairobi and dated this 20th day of January 2016.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

.....

.....