



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2262 OF 2015

RAJAB BARASA1ST CLAIMANT

JOHN MUTWIRI GICHURU2ND CLAIMANT

MARTIN MONO.....3RD CLAIMANT

VINCENT AKARAH4TH CLAIMANT

BETH MWENDWA SILAS.....5TH CLAIMANT

VERSUS

KENYA MEAT COMMISSION.....RESPONDENT

RULING

1. The ruling herein relates to two (2) applications, one filed on 17th December 2015 by the Claimants and application filed on 5th February 2016 by the Respondent. the Respondent amended their application and Notice of Motion and was filed on 26th February 2016. Both applications will be addressed simultaneously as they touch on similar issues and are interrelated. Parties filed their written submissions and did highlight in Court on 26th February 2016.

2. The Claimants through their Notice of Motion dated 17th December 2015 brought under the provisions of section 12 of the Employment and labour Relations Court Act, Rules 16, 27 and 31 of the Court Rules and seeking for orders that;

1. *Spent*
2. *Spent.*
3. *Spent.*
4. *Spent.*
5. *Pending the hearing and determination of this application, an injunction do issue restraining the respondent, its employees, servants and/or agents from harassing and intimidating the claimants.*
6. *Pending the hearing and determination of this suit, an injunction do issue restraining the Respondent from effecting the termination of the Claimants employment and the Respondent do pay the Claimants their salaries, benefits and allowances as and when they fall due.*
7. *Pending the hearing and determination of this suit, an injunction do issue restraining the respondent, its employees, servants and/or agents from selecting, recruiting and/or appointing any persons or individuals to the positions of Chief operations officer, Corporation Secretary, Plant engineer, Internal auditor, Chief Accountant, livestock manager and Human Resource*

- manager and/or any other positions which affect the claimant's employment.*
8. *Pending the hearing and determination of this suit, an injunction do issue restraining the respondent, its employees, servants and/or agents from continuing with the ongoing staff rationalisation program and effecting any redundancies to the exclusion of the claimants.*
 9. *Pending the hearing and determination of this suit, an injunction do issue restraining the respondent, its employees, servants and/or agents from harassing and intimidating the claimants.*
 10. *Pending the hearing and determination of this application, a mandatory injunction do issue compelling the Respondent to make provision for the Claimants in the Staff Rationalisation Program in the event that their positions are declared redundant.*
 11. *The costs of this application be borne by the respondent.*

3. The application is supported by the annexed affidavits of the Claimants and on the grounds that they were employed by the Respondent on renewable employment contracts in various positions and upon expiry of such contracts it was constructively deemed to have been renewed on the same terms. On 28th September 2015 the Respondent gave the Claimants 24 hours' notice to proceed on leave from 29th September 2015 so as to clear their pending leave days. The 5th Claimant had not accrued any leave enough leave days so as to be considered to have pending leave. Two Claimant have since resumed work upon completing their pending leave days have are harassed and intimidated by the Respondent as they have not been accorded a conducive working environment.

4. Other grounds are that while the Claimants were on leave, the Respondent placed an advertisement on 23rd October 2015 seeking to recruit individuals in several positions including the positions of Corporation Secretary, Livestock Manager and Plant Engineer which position were then held by the 3rd, 4th and 5th Claimants respectively. The Respondent then sent letters to the Claimant with backdated renewal of their contracts setting the termination dates to take effect between December 2015 and April 2016. Soon thereafter the Respondent sent letters to the Claimant terminating their contracts without giving reasons. This was in contravention of article 41 of the constitution, sections 41 and 45 of the Employment Act and contrary to Fair Administrative Action Act, 2015.

5. Other grounds in support of the application are that the Respondent is currently conducting a staff rationalisation program in which employees declared redundant will be offered a separation package and the termination of the claimant's contracts is therefore malicious and intended to deliberately deny them an opportunity to benefit from the separation package. The Claimants have been singled out from other employees of the Respondent whose contracts had not been renewed upon expiry but have not received termination letters which act is discriminatory. There is imminent risk of the Respondent recruiting other individuals to fill the positions held by the Claimant and the committee deliberating on the staff rationalisation program is due to submit its report on 18th December 2015 and separation packages offered to employees declared redundant. The conduct of the Respondent is in breach of article 27, 41 and 47 of the constitution and there exists a good case with great chances of success to warrant the grant of orders sought.

6. The Claimants rely on the Supporting Affidavit of the 5th Claimant, Beth Mwendwa Silas while others have given authority. Beth Mwendwa Silas avers that upon employment by the Respondent their employment was governed by their letters of appointment, contract, human resource policy, regulations and procedures manual and the guidelines on terms and conditions of service for state corporations. The Claimants were all on renewable contracts for a maximum renewable period of 3 years. The Respondent issued contracts for a shorter period and then gave termination notices;

1st Claimant contract expiring on 5th February 2016;

2nd Claimant contract expiring on 31st December 2015;

3rd Claimant contract expiring on 31st December 2015;

4th Claimant contract expiring on 31st April 2016; and

5th Claimant contract expiring on 31st December 2015.

7. Ms Silas also avers that the Respondent is currently engaged in a staff rationalisation program and the committee is expected to submit a report on 18th December 2015. On 23rd October 2015 the Respondent advertised vacancies for new positions created as part of the rationalisation program and some positions performed by the Claimants are included. The Claimants believe their positions may have been declared redundant. Recruitment is ongoing and new staff expected to start soon.

8. Ms Silas also avers that they were instructed by the Respondent to proceed on leave to clear pending leave days on 28th September 2015 but no leave allowances were paid contrary to set policy. They were asked to handover their laptops failing which disciplinary action would be taken vide memo dated 14th October 2015. This was contrary to previous practice. There was malice in this case as while the Claimants remained on leave, their positions were advertised. Other employees whose contracts like the Claimants have been treated favourably with their contract being renewed. Before the contracts were terminated, the Claimants were never given a hearing.

9. The Claimants aver that they have been in acting capacities for 2 years contrary to policy that require such to be for 6 months. The due benefits and allowances have not been paid, the 3rd Claimant has remained unpaid in breach of his contract of employment. When the contract issued to the Claimants expired, they were deemed renewable by operation of the law and the renewal for a lesser period is unlawful. The termination of such contract is contrary to section 41 and 45 of the Employment Act with the singling out of the Claimants for termination being an act of discrimination and an unfair labour practice. Failing to confirm the Claimant into their positions was unlawful. There exists a *prima facie* case to warrant the grant of the orders sought as the Claimant shall suffer irreparably and by the grant of the orders sought, the Respondent shall not suffer any prejudice.

10. On 18th January 2016, the Respondent filed their Grounds of Objections and on 20th January 2016 filed a Replying Affidavit of Julie Nabwera in opposition to the application by the claimants.

11. The grounds of opposition are of the nature that the Claimants are no longer employees of the Respondent and when they remained employees, they were on fixed term contracts of 3 years which have since expired. The Claimants are therefore strangers to the respondent; they have no prima facie case and cannot stop the Respondent from employing new employees. It is not lawful for the Court to compel the Respondent to pay Claimants whose contracts have expired. The Claimants obtained ex parte orders without disclosure of material facts and cannot benefit in equity. The Respondent is undertaking a staff rationalisation and restricting program in the public interest and as a state corporation is accountable to public treasury. Upon the expiry of the claimants' contracts, they cannot seek the Court to compel the Respondent to keep them in employment or continue with paying salaries, benefits and allowances as this is untenable in law or equity. The positions previously held by the Claimants have since been filled, the suit is spent and overtaken by events and the grant of the orders sought is not tenable. The restructuring and rationalisation program by the Respondent is affecting unionisable employee and has nothing to do with employees who have since left their service of after contracts have expired

12. In reply, the Respondent filed the **Replying Affidavit of Julie Nabwera**, she avers that as the acting Company secretary of the Respondent she is conversant with the matter. The Claimants had contracts of employment with fixed terms for 3 years in accordance with Respondent policy that persons in managerial positions would only have 3 years contract. The 1st and 4th Claimants were in management and under 3 years contracts and by a board decision on 26th August 2013 a decision was taken to renew such contracts for one (1) year. The 2nd, 3rd and 5th Claimants were under one (1) year contracts based on their letters of appointments dated 25th September 2006; 25th September 2006; and 8th April 2011 respectively. The human resource policy of the Respondent at clause 3.2.3.1 relate to positions that cannot be filled on pensionable terms and clause 3.2.3.2 relates to contracts with fixed terms of 3 years.

13. Ms Nabwera also avers that upon the expiry of the 1st and 4th claimants' contract of employment, the Respondent renewed them for one (1) year. This was pursuant to a request by the claimants.

14. The staff rationalisation program only involves unionisable employees who are separate from the Claimants who have fixed term contracts. The program is done in the public interest to reposition the Respondent in the economy of the country. The Minister under whose docket the Respondent corporation lies on 6th may 2013 directed the Respondent to reduce number of its managers to not more than nine (9). The consultants turning round the Respondent in their report of July 2015 confirmed the need to reduce staff so as to make it a viable entity. The Respondent issued termination letters to the Claimants together with other employees not in court.

15. Ms Nabwera also avers that the Respondent advertised for positions that were available vide notice dated 23rd October 2015. The competitive recruitment process is now complete, potential candidates interviewed on 8th to 10th December 2015; and successful candidates will then be informed. The Principal Secretary in the line ministry where the Respondent lies on 23rd October 2015 directed that all employees with pending leave should clear as they were operating below capacity. All employees were informed but the Claimants refused to comply and the Respondent on 28th September 2015 directed them to proceed and clear such pending leave days. Laptops were to be surrender for work to continue. There was no malice in such procedures in the carrying out the recruitment process.

16. The 1st Claimant was not in an acting capacity when his contract was terminated; on 24th June 2013 the 4th Claimant was appointed acting company secretary until a new one was recruited; and the 5th Claimant was to act as livestock manager until new recruitment; All gratuity due has been paid; and the 3rd Claimant has since been paid his dues. There is no case set out by the Claimant that warrant the orders sought as they are no longer employees of the Respondent and the ex parte orders were granted without disclosure of material facts. The application should be dismissed with costs.

17. The **second application** by the Respondent and dated **25th February 2016** as amended is brought through Notice of Motion under the provisions of section 1A, 1B & 3A of the Civil Procedure Act and order 40 rule 7, order 50 rule 15 of the Civil Procedure Rules. The application is seeking for orders that;

1. *Spent.*
2. *Spent.*
3. *Spent.*
4. *Spent.*
5. *That pending the hearing and determination of this suit, this Court be pleased to order the claimants' salaries, benefits and allowances be deposited in court;*
6. *Spent.*
7. *That pending hearing and determination of this suit, the Claimants herein be restrained from accessing, entering and/or being on the premises of the respondent, interfering, hampering and or meddling with the respondent's days to day operations;*
8. *The Claimants herein be restrained from accessing, entering and/or being on the premises of the respondent, interfering, hampering, and or meddling with the respondent's days to day operations;*
9. *Spent.*
10. *That pending the hearing and determination of this suit, the Claimants herein be restrained from disputing, disturbing or creating any form of annoyance or nuisance to any of the respondent's employees;*
11. *That the Claimants be restrained from disrupting, disturbing or creating any form of annoyance or nuisance to any of the respondent's employees;*
12. *The costs of this application be provided for.*

18. The application is supported by the annexed affidavit of Julie Nabwera and on the grounds that the Claimants were former employees of the Respondent under contracts that have since expired. The Respondent advertised for various management positions in the media on 23rd October 2015 which are to be filled competitively. Candidates were shortlisted and interviewed in December 2015 and successful applicants were informed well before the matter was filed in court. That process is complete and cannot

be stopped as the new employees commenced on 1st February 2016.

19. Ms Nabwera also avers that on 17th December 2015 the Court issued orders ex parte restraining the respondents from effecting the termination of the Claimants from employment and the payment of salaries, allowances and benefits. The Respondent was also restrained from selecting, recruiting or appointing any person to a position that will affect claimants' employment. The rationalisation program was also stopped. The Respondent allowed the Claimants to remain in office pending hearing but they had obtained such orders without disclosing to the Court material facts that the Respondent was already recruiting and their contracts had come to an end. The orders issued on 17th December 2015 were served upon the Respondent on 21st December 2015 after offers of employment had been sent out and due to the interim orders the successful candidates have not been able to report on duty. The Claimants reported back to work but created disturbance, havoc and being nuisances in general within the work place which is affecting the morale of employees and the daily operations. The Respondent has been put in a total state of paralysis to carry out its functions and unable to allow new employees to report on duty. The disturbances are creating grave detriment to Respondent staff performance.

20. Ms Nabwera also avers that in the interests of justice, the orders issued on 17th December 2015 should be set aside or reviewed and the orders sought by the Respondent confirmed pending hearing of the suit.

21. In reply, the Claimants filed their Grounds of Opposition and Replying **Affidavit Sworn by Beth Mwendwa Silas** on 24th February 2016 who avers that the Respondent is keen to frustrate the Claimants through their application and ex parte orders granted. Upon the expiry of contract, the Claimants remained in employment and therefore by operation of the law, such contracts were deemed as renewed. The Claimants disclosed all material facts when they filed application on 17th December 2015; they were sent on forced leave for the Respondent to advertise their positions; and the Claimants had no knowledge of internal memo circulated for the purpose of recruiting new staff to replace them. The Claimants became aware of the media notice which is attached to their application in support of their application seeking to stop the recruitment. No offers of employment have been attached to the Respondent application to justify the orders stopped and to challenge the stoppage of recruitment. Only notification letters are submitted.

22. Ms Silas also avers that when they obtained orders on 17th December 2015 they disclosed all material facts known to them at the time. They were aware the Respondent had issued notices through the media advertising for positions occupied by the 3rd, 4th and 5th Claimants hence the orders sought seeking to stop the recruitment. She reported to work together with the 3rd Claimant but the Respondent did not allocate them any duties, which caused them psychological torture and ridicule; the 2nd Claimant never went on leave; and the 1st and 5th Claimants did not report back from their forced leave. The Claimants have not created disturbances, havoc or been a nuisance within the work place. To the contrary the Respondent has been harassing those who reported to work by refusing to assign work and making it very difficult to work. The 3rd Claimant recorded a statement with the police following harassment by the managing commissioner who has made disparaging comments on the Claimants. The application herein is meant to stop the Claimants from reporting to work due to questions they have raised which include questioning the high salary of the managing commissioner which is above the government approved per structure for parastatals; the procurement of consultancy services for modernisation when this had not been in the budget; and refusal to pay recurrent expenditure from capital grants.

23. Ms Silas avers that the Respondent is not in a state of paralysis as they are still procuring, slaughtering, processing and selling meat. Where the case is to the contrary, this cannot be imputed upon the Claimants who have reported on duty and not been assigned work. The application by the Respondent is not justified and there is no case why the salaries and allowances due should be deposited in court. The Claimants will be greatly prejudiced if the application filed by the Respondent is allowed and should be dismissed.

Submissions

24. The Claimant submit that the application has met the principles set for the grant of injunctions sought outlined in the case of **Giella versus Cassman Brown & Co. Ltd (1973) CA 358**, there must exist a prima facie case and where the orders sought are not granted the applicant stands to suffer injury that cannot adequately be compensated by damages and the balance of convenience favours the applicant. In this case there Claimants have established a prima facie case as the Respondent is in breach of a legal right which relate to the employment of the Claimants and thus engaging in unfair labour practices as held in the case of **Esther Mbinya Musau versus national Bank of Kenya ltd [2015] elk**.

25. The Claimants also submit that they were forced to take leave and while on such leave the Respondent advertised for their positions and proceeded to backdate renewal of contract with impending termination of contracts taking effect in December 2015 and April 2016. This terminal is unlawful as it was done with malice and with the intention to replace the claimant's positions with the Respondent. Such employment contracts had been automatically renewed by operation of the law as held in the case of **Ruth Gathoni Ngotho-Kariuki versus Presbyterian Church of East Africa and Presbyterian Foundation [2012] eklr** where the Court held that employment contract was constructively renewed where a contract lapsed and the employer failed to issue a renewal. Since the Respondent allowed the Claimants to continue in employment despite the expiry of their contracts such automatically operated as a sign of renewal. The evaluation of all the circumstances, the significance and contractual stipulation and practices of the parties, the failure to give reasonable notice was held to be circumstances to infer renewal of contract in the case of **South Africa Clothing & Textile Workers union & J Heynes versus Cadema Industries (Pty) Ltd, Case No.277 of 2005**. The practice of the Respondent was not to renew contracts for its employees; positions held by the Claimants are still available; and by the conduct of the Respondent was that the contracts were deemed to have been renewed.

26. The Claimants also submit that unlike in the case of **Margaret A Achieng versus National Water Conservation & Pipeline Corporation [2014] eklr**, the contracts of employment had lapsed on 16th December 2011 and on 19th December 2011 the Respondent communicated their decision on non-renewal and therefore there was no legitimate expectation of renewal. Such case is different from the circumstances of the Claimants whose contracts lapsed and there was no communication about renewal and the reference by the Respondent that they were temporary/casual staff is factually incorrect. Where the Claimants remained in employment, any termination should have been preceded by notice or hearing of the reasons for termination pursuant to section the 41 and 45 of the Employment Act and as held in the case of **Peter Maroko Omondi versus Pandya Memorial Hospital [2014] eklr**. In this case for the Respondent board to rely on directives of 26th August 2013 to renew contracts for one (1) year has no basis. The decision thus to change the contracts from 3 years to 1 year was inconsequential.

27. The Claimants also submit that the staff rationalisation program by the Respondent and their termination is calculated to deny them any separation package that they be entitled to if their positions are rendered redundant. The respondents must comply with fair labour practices under article 41 especially where they cite they are acting in the public interest as held in **Severine Luyali versus Foreign Affair & International Trade & 3 Others [2014] eklr**. And the requirement for public bodies to conform to both constitutional provisions and the law. In this case, where there is a staff rationalisation by the Respondent this is not only going to affect unionised employees but all employees.

28. The Claimants also submit that the Respondent singled out them out from other employees whose contracts had not been renewed upon expiry but have not received letters terminating their contracts. The termination therefore lacks justification and therefore discriminatory. The managerial positions of ICT manager and the Chief Security officer were not advertised yet they are in comparable to the claimant's positions. That the Claimants were maliciously targeted and sent on forced leave but the Acting chief security officer and acting supply chain offer were not sent on forced leave. On the 18 manager with leave days, only 7 were sent on forced leave. On the 130 employees of the Respondent whose contracts had expired only 7 contracts were terminated of which the Claimants were part of. Such was discriminatory practice as held in **Max Sasoud Roshankar & Another versus Sky Aero Limited [2015] eklr**. and is contrary to section 5 of the Employment Act.

29. Since the Claimants obtained interim orders on 17th December 2015, the Respondent has been harassing the Claimant. When the 2nd, 3rd and 5th Claimants reported back to work they were not assigned duties; the 3rd Claimant was accused of being abusive; and the due allowances and benefits have not been paid. The Claimants therefore submit that they will suffer irreparable harm that cannot be compensated by way of damages if the orders sought are not granted and the balance of convenience favours them.

The Claimants have attached a schedule of their employment history;

1st claimants' last contract renewed and backdated from 28th December 2013 to 20th February 2015;

2nd Claimant last contract renewed and backdated from 1st September 2014 to 26th August 2015;

3rd Claimant last contract renewed and backdated from 1st September 2014 to 26th August 2015;

4th Claimant last contract ended on 2nd September 2013 and was renewed for one (1) year; and

5th Claimant last contract was renewed and backdated from 1st September 2014 to 26th August 2015.

30. The Claimants objected to the renewal of their contract for periods less than 3 years and especially for 1 year as this was contrary to the respondent's human resource policy. Majority of the employees had expired contracts but only the Claimants were targeted with termination. The unlawful termination is not justified and is not procedural.

31. The Respondent on their part submit that the Claimants had fixed term employment contracts of service. When the Respondent re-opened in 2007 the policy was that persons holding managerial positions would be on 3 years contract only but due to challenges this was actualised by the board on 26th August 2013 where it resolved that all manager would have their contracts renewed for 1 year pending performance appraisal. Each contract had a termination clause.

32. The Respondent also submit that due to poor performance of the business, it was resolved that there should be a restructuring. The line Minister directed a reduction of managers to not more than 9 persons. The Claimant got notices of intended termination within 3 months as stipulated in their contracts. The Respondent advertised for available positions and also issued a directive that all management positions would be competitively filled. The Claimants were aware of the recruitment process. Potential candidates were interviewed and successful candidates have been informed. The Claimants are therefore strangers to the Respondent as their contracts have lapsed and the Respondent has the option to elect not to renew as held in the case of **Margaret A Achieng versus National Water Conservation & Pipeline Corporation [2014] ekr**. Employment contract with fixed terms are not automatically renewable even where there exists a clause allowing for such renewal. In this case, the Claimant had the option to apply for renewal and the respondents had the option not to renew. Contrary to what the Claimants have submitted, to allow an automatic renewal would be to hold the contracts *ad infinitum* and this would lead to absurdities. The Respondent is not obligated to renew the expired contracts as held in the case of **Bernard Wanjohi Muriuku versus Kirinyaga Water & Sanitation Co. Limited & Another [2012] ekr**. The expectation held by the Claimants that the contracts would be renewed has no basis as there was no express, clear and unambiguous promise given by the Respondent for such an issue to arise. To hold such would be to deny the Respondent the right to make a decision on the matter of renewal of expired term contracts.

33. The Respondent also submit that the line Minister directed that all employees with pending leave days should take them as the Respondent was operating below capacity. In this case, the Claimants are asking the Court for an order for reinstatement as the orders sought are couched in the nature that the termination should be declared unlawful and unprocedural and that the Respondent should not hire new

employees in their place/positions. An employee cannot be reinstated at the interlocutory stage as held in the case of **Joab Mehta Oudia versus Coffee Development Board of Trustee [2014] eKLR**. To reinstate an employee at the interlocutory stage would be to lead the Court inside the employment place, exercising the management prerogative on behalf of the employer as held in the case of **Alfred Nyungu Komungui versus the Bomas of Kenya**. There is no justification for reinstatement stay of termination or orders stopping the Respondent from filling positions that were held by the Claimants. Such orders can only be made upon full hearing of the matter and upon merit order and direct as appropriate. Provisional reinstatement is not an order the Court can make. For such an order to be made, an applicant must demonstrate that exceptional circumstances exist and the Court in the case of **Alfred Nyungu Komungui** held that such exceptional grounds that a Court can consider and reinstate an employee provisionally may include pregnancy, race, gender, or religious discrimination. Such are rare case that may justify a reinstatement.

34. The Respondent also submit that the interim orders sought by the Claimants are not due as they have not satisfied the conditions set out in the case of **Giella versus Cassman Brown [1973] EA** and **American Cyanamid Co. Ltd [1975] All ER**. There must be a *prima facie* with a probability of success; the applicant will suffer irreparable injury which would not be compensated by an award of damages; and when in doubt the Court can decide on the balance of convenience. In this case, the Claimants have failed to establish a *prima facie* case and where such exists, there is no prove that an award of damages cannot be an adequate compensation. There is a claim which is seeking for damages and thus where there is a good case, a reinstatement not being due in the interim, the damages sought may be awarded. The Claimants do not stand to suffer any irreparable damage or loss that cannot be compensated by an award of damage and therefore the orders sought are not justified. The Claimants have had fixed term contract, such contracts have expired and the Respondent has not renewed them. There exists no relationship between the parties to justify the orders sought pending hearing of the suit herein.

35. The balance of convenience in this case favours the Respondent. The Claimants are seeking for orders stopping the Respondent from effecting the termination of employment and that their salaries and allowances should be paid, which cannot suffice as upon lapse of a contract, the Respondent cannot pay 'ghost workers' as there is no contract of employment. This is not equitable or lawful. Where the contract of employment lapsed, the Respondent cannot be forced into a new employment contract with the Claimants. Courts do not re-write contracts for parties as held in the case of **James Heather-Hayes versus African Medical and Research Foundation (AMREF) [2014] eKLR**.

36. The Respondent also submit that the recruitment process has come to an end and contracts of employment have been issued and signed between the Respondent and newly recruited persons and the orders sought restraining the Respondent from such recruitment and hiring new staff has since been overtaken by events. There is no substantive claim for stopping the respondeny from recruiting new employees and to therefore grant such stay in the interim is meant to hold the Respondent at ransom as held in **The Siskina (1977) 3 All ER**. The Respondent has also relied on the case of **Festus Kyalo Muthiani versus Kenyatta national Hospital (2013) eKLR** and the finding that the hiring of new officers was within the prerogative of the employer and the Court would be interfering unreasonably with the exercise of that power by restraining the recruitment process. That the application by the Claimants should be dismissed with costs.

Determination

What is the current status of the claimant?

Whether orders sought vide application dated 17th December 2015 can issue in the interim; and

Whether orders sought vide application dated 5th February 2016 and amended and dated 25th February 2016 should issue.

37. Before delving into the issues set out above, it important to revisit the meaning and context of an employment contract of service unlike the case of any other commercial contract. Such is crucial here as

one relates to a work environment regulated by the Employment Act or the Labour Relations Act for unionised employees while the other contracts may be regulated under the law of contract, sale of good or as the case may be. For this purpose, an employment relationship is secured under an employment contract of service which is defined under section 2 of the Employment Act and a similar section under the Labour Relations Act as follows;

“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 learner ship but does not include a foreign contract of service to which Part XI of this Act applies;

38. The Employment Act has given great emphasis to a contract of service as with it parties have the freedom to agree on the terms and condition to regulate their relationship. Indeed where an employment contract of service exists, the Court can only give meaning to its terms and conditions noting that under section 10 of the Employment Act, parties to a written contract of employment are required to put into writing the terms conditions that govern their employment relations. Therefore, this Court in the case of **Chacha Mwita versus KEMRI & Others, Cause No.1901 of 2013** held that;

... fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract.

39. Where the intention of the parties is to have the contract for a fixed term, upon expiry, either party can opt out or invite the other to a new contract as the previous one has ended. The relationship must be renewed under a new contract. Otherwise, there would be no need for a fixed term contract. This is not a departure from the Employment Act as the law recognises the freedom of the parties to enter into fixed term contract, seasonal contacts or in some cases piece-work contract. Where the intention of the parties is to rely on any other document in terms of how the employment relationship is to be governed, such must be set out under the written or fixed terms contract. To hold otherwise would be to defeat the very purpose of such a contract. Indeed this was the court’s view in the case both parties herein have relied upon, **Margaret A Achieng versus National Water Conservation Corporation** the rationale being that the purpose of a fixed-term contract is not to renewable it automatically. Such a contract (fixed-term) does not carry the expectation for renewal. The exceptions to this general rule are few and limited based on each case and its circumstances where strictly an employer should not act in a manner so as to avoid a legal obligations.

40. The Claimants admit at paragraph 4 of the Supporting Affidavit of Ms Silas dated 17th December 2015 that;

The 1st claimant’s contract was renewed and expires on 5th February 2016;

2nd Claimant contract was renewed and expires on 31st December 2015;

3rd Claimant contract was renewed and expires on 31st December 2015;

4th Claimants contract was renewed and expires on 31st April 2016; and

The 5th claimant’s contract was renewed and expires on 31st December 2015.

41. The renewal of the contracts were vide letters dated 4th November 2015 issued to all Claimants. Of

interest is the content therein. In the case of the 1st claimant, Rajab Barasa, his letter stated;

Renewal of employment Contract

Reference is made to a letter dated 4th October 2014 on renewal of your employment contract from 27th December to 20th February 2015.

I am pleased to inform you that the Board has decided to renew the above referenced contract with effect from 21st February 2015 to 5th February 2016. [Emphasis added].

42. The letter therefore dated 4th November 2015 does not take into account the interim period. Under what terms were the Claimants serving from the last contract to the notice for renewal? In the case of the 1st claimant, his previous contract lapsed on 20th February 2015. The next was renewed on 4th November 2015 covering one (1) year and backdated to 21st February 2015 to 5th February 2016. What then was his employment status from 21st February to 4th November 2015?

43. In the case of Rajab Barasa and indeed all the claimants, they have not appraised the Court on what terms of employment existed within this period. At paragraph 19 of Ms Silas Affidavit she avers that upon the expiry of their employment contract, they were deemed renewed by operation of the law and on the same terms as the previous contracts. Quite to the contrary, the claimants, upon the lapse of their contracts, such did not automatically become renewed.

44. Where the Claimants remained in the employment of the respondents for periods of over two (2) months and had no written contracts of employment regulating their work relations, the previous contracts having lapsed and were not renewed, their employment status with the Respondent automatically changed. Where the Claimants continued to undertake jobs and roles that they had previous done but had not written contract, the Employment Act applied to them under a different regime up and until they were issued with the letter dated 4th November 2015. The Claimants have not addressed this lapse as what they are keen on is to have their contracts renewed for another fixed term of 3 years.

45. However, such contracts were not always renewed for 3 years. In the case of the 2nd claimant, John Mutwiri Gichuru, he had a fixed term contract for one (1) year from 1st September 2006 and ending 31st August 2007. It was renewed for 1 year ending 31st August 2008. It was then renewed for 3 years ending 31st August 2013. It was then renewed for 1 year ending 31st August 2014; and vide letter dated 4th November 2015 the contract covering the period 1st September 2014 to 27th February 2015 was for 6 months and the last period ending 31st December 2015 covered a duration of 10 months only.

46. A similar analysis can be done with all the Claimants. At each time they were under a fixed terms contract save for the duration referenced in the letters dated 4th November 2015 with back date. Under such contract, and the new renewal of the employment contract of service vide the letter dated 4th November 2015, a key element of the claim set out by the Claimants was lost. Upon the issuance of the letter, a new employment relationship commenced.

In all the notices to renew the employment contract of service for the claimants, there is a running clause;

... You must notify the Commission of willingness to renew your contract three (3) months before the end of the contract.

47. However there is no equivalent obligation placed upon the Respondent to give notice for renewal or non-renewal. Did the Claimants apply for renewal of their contract upon expiry and before letter dated 4th November 2015? The previous contracts lapsed on 20th February 2015; 27th February 2015; 26th August 2015; 31st April 2015; and 4th February 2015 for the 1st to the 5th Claimants respectively. What I find is the letter dated 30th November 2015 by the Respondent giving notice on the non-renewal of the

contracts held by the Claimants and subsisting at the time. Such notices were to take effect upon the lapse of the contracts of employment as at;

5th February 2016 for the 1st claimant;

31st December 2015 for the 2nd claimant;

31st December 2015 for the 3rd claimant;

31st April 2016 for the 4th claimant; and

31st December 2015 for the 5th claimant.

48. Going back to the issues for determination, as at 17th December 2015 when the Claimants filed their application in court, the employment relationship was still on course. It was regulated under the renewed contract albeit backdated. During the pendency of such contracts of employment, the Claimants were or are entitled to all due salaries, benefits and allowances as they have a fixed-term contract. Such salaries, benefits and allowances are due and owing where not paid.

49. The policy at the Respondent regulating employment does not override the written contract of employment as such a policy only serves to give meaning to the written contract of employment or where a given issue/matter is not adequately addressed in such contracts. Such policy cannot supersede the terms and conditions agreed upon by the parties in an employment relationship. The Court reading of clause 3 of the Respondent Human Resource Policy in its entirety does not negate what the written contracts of employment address read together with the applicable law – the Employment Act. Where contract were to be renewed for intermittent periods and as noted above in the case of the 2nd claimant, under clause 3.2.3 of the Human Resource Policy, the Respondent has the leeway to issue contract ranging from short term contract or contracts for 3 years or a contract by application of the Kenya Meat Commission Act or contract for 12 months or on causal and secondment basis. That is how wide the clause entails.

50. Looking at the Memorandum of Claim, the orders sought in the main are a declaration that the termination of the Claimants employment is invalid and unlawful; declaration that the renewal of contract to shorter periods is unlawful; a declaration that the employment contracts be deemed to have automatically been renewed upon expiry; a declaration that the 1st, 4th and 5th Claimant be deemed to have been confirmed in the position they were acting for 6 months; a conditional reinstatement; and in the alternative terminal dues be paid. Other alternative remedies sought is that the Respondent should make provision for the Claimants in the staff rationalisation program in the event their positions are declared redundant and where such involvement is not made compensation be paid together with other terminal dues. These prayers as set out though seeking for a declaration that the contracts of employment should be deemed to have automatically been renewed, the law with regard to an employee who serves for a period of over two months without any contract is clear. Such having not been addressed in the prayers, and based on the analysis above with regard to fixed-term contracts, the orders sought in the interim shall not issue.

51. The above assessment and analysis is made in the context of the cited cases particularly the principles governing the grant of injunctive orders set out in the case of **Giella versus Cassman Brown**, and more particularly in the case of **Mrao Limited versus The First American Bank of Kenya [2003] KLR** where the Court of Appeal sets out what should constitute a *prima facie* case. That upon the material presented to the court, it can be deduced that there exists a right which has been infringed.

52. The Court in the case of **Esther Mbinya Musau versus National Bank of Kenya Limited** did set out the parameters within which interlocutory orders in employment and labour relations matters are to be considered. The facts of each case must be put into account but the applicant must establish that there exists a right which has been infringed and where there is no restraining order, the substance of the right will abet. In this case therefore, looking at the prayers set out in the main, I find no prejudice that the

Claimants shall suffer pending the hearing of the claim which addresses all matters in dispute.

53. Another issue raised in the application is that the Claimants were forced to take their leave. Taking of annual leave is a legal requirement under the provisions of section 18 of the Employment Act. The employer is required to ensure that in every 12 months an employee takes their annual leave and this should not extend to beyond 18 months. The purpose is to ensure that each employee takes a paid break and the rationale is that rest cannot be postponed. To fail to give an employee a rest or break is to start eating on their energy which leads into burnout and reduction in productivity. Therefore, taking of annual leave is not punishment and in any case the duty is upon the employer to ensure each employee takes their annual leave when due. There is therefore nothing like 'forced leave' where an employee has earned such leave.

54. This also applies to matters set out under the Memo of 14th October 2015 on the requirement that the Claimant should handover their laptop to the Respondent. At any given time while in employment, whatever property is held by an employee and belongs to the employer, ownership does not shift with the employment. Such remains the property of the employer at all times. It can and should be returned upon demand or direction to surrender the same. The rationale for such direction or demand can then be addressed as ownership is with the employer and not with the employee. In this case therefore, where the Claimants were proceeding on leave, whatever property of the Respondent was in their possession including the laptop and was required for continued work at the respondent, such should have willingly been returned or returned upon directions of the Respondent. Such I find to be a reasonable requirement. In any event the Claimant were proceeding on leave and work at the Respondent did not stop. Other employees remained at work and any property of the Respondent facilitating such work, should have been made available.

55. The Claimants have also raised another serious subject – discrimination against them by the Respondent. Such are matters where pleaded, this Court must stop and address. However such cannot be conclusively addressed at the interlocutory level, such require the call of evidence and upon hearing both parties, the Court must direct and address as appropriate. Such will not be gone into in the interim.

56. The orders sought with regard to the Staff rationalisation programme I find to be speculative. The ongoing processes and or staff rationalisation may lead to some employees being terminated. Such can only be determined by the Respondent as the employer and in due recognition of the applicable statutory requirements. As such, to delve into the subject of staff rationalisation would be to engage in an academic exercise at this stage. However, I must note that where indeed the Respondent has commenced such a process in an effort to directly or indirectly discriminate against the Claimant while in their employment, such is a serious matter that the line minister must address in the context of section 5 of the Employment Act. See **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited, Cause No.60 of 2013** on discrimination at the workplace and factors that a Court has to consider in the case of **Collins osoro Lukhale versus AAA Growers Ltd, Cause No.100 of 2012**.

57. On these basis, it would not serve justice to provisionally reinstate the Claimants back to their employment. Save that each Claimant should be allowed to serve the full term of their contracts with all due salaries and where an allowance or benefit is due under the contract, such is due. Such should suffice pending the hearing of the main suit.

58. The 1st, 2nd, 3rd and 5th claimants' contracts of employment have since lapsed during the pendency of this suit. Such have not been renewed. However the 4th Claimant contract of employment still subsists and he is entailed to remain and serve his full term contract with all due salaries and allowances and benefits where due. Where the 4th Claimant has earned leave days, upon directions by the employer, such should be taken as of right.

60. On the second application, noting the analysis and findings with regard to the first application by the Claimants dated 17th December 2015, the Respondent in seeking to deposit the salaries, benefits and allowances in Court I find to have no justification. Where any salary, allowance or allowance is due to an

employee under a fixed-term contract of employment, section 18 of the Employment Act apply. Subsection 18(5) provides;

(5) Upon the termination of a contract of service—

(a) by effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of the allowances due to him as have not been paid;

61. The Respondent should therefore pay all the due salaries and benefits owing to each Claimant as at the date of lapse of the contract. Where there are any dues owing, such should not be deposited with the court. The records of such payments should however be retained by the Respondent in accordance with section 73 and 74 of the Employment Act.

62. With the lapse of each contract of employment for each claimant, access to the Respondent premises has to be upon invitation or prior authority. Where the Claimants reasonably require access at the Respondent premises, such should be reasonably considered just like any other member of the public seeking service with the Respondent and therefore reasonable access that is permissible within timelines where other members of the public have access should be allowed. Where such access once allowed lead to acts contrary to the policy or interferences with the work performance of Respondent employees, such must be administratively addressed but where there is direct meddling hampering of work, being a nuisance and creating disturbance, these are criminal acts that must be firmly addressed appropriately.

In conclusion;

- a. **the application dated 17th December 2015 is hereby declined save that the subsisting contract of the 4th Claimant shall be served in full with all due allowances, benefits and allowances where due paid to him directly;**
- b. **The application dated 25th February 2016 as amended is hereby allowed save that all dues salaries, benefits and allowances due to the Claimants under their fixed-term contracts shall not be deposited in Court and shall be paid directly to them as due;**
- c. **The Respondent shall allow the Claimants reasonable access to their premises and for the 4th Claimant full and open access pending due performance of his contract of employment;**
- d. **The access allowed above shall be immediately withdrawn where in the assessment of the Respondent the Claimants engage in prohibited acts or criminal conduct;**
- e. **Costs herein shall be in the cause.**

ORDERS ACCORDINGLY.

Read in open Court at Nairobi this 17th day of March 2016.

M. Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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