



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CASUSE NO. 1901 OF 2013

SAMUEL CHACHA MWITA CLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE RESPONDENT

RULING

Muhochi & Co. Advocates – for claimant

Ng’etich & Associates Advocates – for respondent

1. On 27th November 2013, the claimant filed a Notice of Motion brought under section 12(3) (i) of the Industrial Court Act and Rule 16 of the Industrial Court Procedure Rules seeking for restraining orders against the respondent from denying him access to his workstation or instruments of work from 1st December 2013 and that the respondent be restrained from terminating the claimant pending the hearing of his application and suit. This application is supported by the affidavit of the claimant. The respondent on 24th December 2013 filed their Replying Affidavit sworn by Margaret Rigoro the Senior Legal officer of the respondent. At the hearing of the application on 30th January 2014, both parties made submissions in support of their case.

2. The application is on the grounds that the claimant has been in the employ of the respondent for over 22 years since 1986 to 2013 and is now at risk of being terminated without any due process or notice, there has been dialogue with regard to the claimant’s contractual status without a clear indication and or decision by the respondent and thus the claimant is apprehensive that the respondent intends to terminate his services as from 1st December 2013 to his detriment with regard to payment of his emoluments and outstanding wages. The claimant had been released by the respondent to travel to the United States of America from 4th to 8th December 2013 and apprehensive that in his absence his access to and from his work station shall be suspended and thereby be terminated.

3. In the supporting affidavit, the claimant states that he is employed by the respondent as the Senior Medical Illustrator as a trained Lab Technician and a Graphic Designer. The claimant was recruited by the Ministry of Health and seconded to the claimant where he served from 1986 to 2001 and in 2002 he resigned and was recalled in 2006 to undertake private consultancy with the respondent. He was retained on a 3 years contract which has been renewed twice in 2009 for 1 year and in 2010 for 3 years.

4. On 25th June 2012 civil servants salaries were reviewed but the claimant’s salary was not. On 27th May 2013 as under the claimant’s contract stipulation, he requested for the extension of his contract that was due to expire on 31st November 2013 and on 7th July 2013 the respondent replied noting that the board

had resolved to competitively advertise the position where the claimant was to also apply. That this was a strange development that had not been brought to the attention of the claimant. The claimant thus lodged an appeal but the respondent rejected the request to renew the contract. The claimant made another appeal on 4th November 2013 but there has been no response. It thus became apparent that the respondent board decision to subject the claimant position to advertise for competitive recruitment was to be initiated within 3 months before the expiry of his contract. That the role the claimant performs with the respondent is unique and critical and necessary in advancing medical research and the same cannot be abolished. The claimant has however continued to serve diligently but the respondent and remained silent with regard to the advertisement for the position or renewal of the contract and the fear is that the claimant will be locked out of work upon the expiry of his contract. The claimant is apprehensive that he will be served with a notice of non-renewal of his contract while they have not commenced the process of competitive recruitment of the position. The respondent in this case is unjust, unfair, malicious, and discriminated against the claimant.

5. In reply, the respondent stated that when the claimant was seconded to them he was placed under permanent and pensionable terms of employment and was to retire on attainment of the prescribed age, however the claimant resigned on 26th February 2001 which was accepted and final dues paid. On 19th October 2006 the claimant requested the respondent to be placed under contract and since this was allowed by the respondent regulations, and due to the then age of the claimant being 45 years, he was placed under a 3 years contract from 1st December 2006 to November 2009. Upon expiry, gratuity was paid. The claimant requested for a renewal which was granted for 1 year and the new contract expired on 30th November 2010 and gratuity was paid. On 20th August 2010 the claimant requested a renewal which was granted with a condition that it would be the last extension and the contract commenced on 1st December 2010 to 30th November 2013. The contract was for 3 years with a clause providing for a request for renewal by the claimant where the respondent was to make a decision. On 27th May 2013, the claimant made a request for renewal of his contract and on 24th June 2013 the respondent advised the claimant to apply for the position once the same is advertised.

6. That the decision to decline to renew the contract was within the law and the rights of the respondent who has the discretion to renew or not to renew the contract. The contract had provided the remuneration payable to the claimant and as such was paid as under his contract of service. The requirement by the respondent that the claimant's position be competitively be filled is within the knowledge of the claimant where the claimant is free to apply and the claimant cannot direct the respondent on how to employ their staff which is a right vested in them. The claimant cannot direct the respondent on the necessity of his services which should be left to the respondent.

7. In this case, there was a contract of employment which was fixed and the same has expired and not renewed. The gratuity payable to the claimant upon the expiry of his contract has not been issued due to the court orders herein. The claimant has not demonstrated sufficient standing to warrant the remedies being sought. The respondent will invite interested applicant to apply for the job. The claim and application are thus frivolous and an abuse of the court process as the application is only meant to earn the claimant with employment without competition.

8. The respondent relied on the case of *Kyangavo versus Kenya Commercial bank Ltd & Another*, Civil case No. 428 of 2001 [2004] 1 KLR 126 where the court held that contracts are made by parties and the court cannot vary the terms and can only interpret the same. Where there is a negotiated contract that has lapsed, the court cannot vary it for extension. In the case of *Muhia & Others versus Kenya Power and Lighting Company Limited*, Case No. 620 of 2004 [2006] 1 KLR 498 the court held that a contract of services is governed by its terms. Where breach is not proved the court can award but the terms cannot be varied.

Determination of the issues

9. 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;

10. 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.

11. 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 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.

12. 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. See the case of *SA Rugby (Pty) Ltd v CCMA & Others* (2006) 27 ILJ 1041 (LC) at 1044 par 6). This decision is comparable to the common law position where fixed-term contracts expire automatically upon arrival of the stated date. See *Brassey Employment and Labour Law vol 3 A8: 9*;

At common law, an employment contract for a fixed-term terminates automatically upon the expiry of the period unless the parties agree, expressly or tacitly, to renew it.

13. This was the holding in *Kenya Plantation & Agricultural Workers union versus Kenya Cuttings Ltd*, Cause No. 282 of 2010. This was in a case where employee 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.

14. In this case, the claimant had a contract document reference KEMRI REF No. 20374 which was stated to be;

... AGREEMENT made the 29th day of September 2010 between the Kenya Medical Research Institute on the one part and Mr Samuel Chacha Muita ...

1. ...

2. ...

3. *This agreement is subject to the conditions set forth in the schedule hereto annexed and other*

regulations in force from time to time applicable to permanent and pensionable officers of the Institute service shall be read and constructed as part of this agreement.

15. This agreement was signed between the claimant and respondent representatives. Annexed to this agreement was the Schedule to Agreement: Terms of Engagement and at clause 2 spelt out the conditions precedent to *further employment*.

2. at some time, not more than six months and not less than three months before the date on which his continuous service under this Agreement terminates, the person engaged shall give notice in writing to the institute whether he desires to remain in its employment, and if he so desires the Institute shall thereupon decide whether it will offer him further employment in which case the re-engagement shall be on such terms as may be mutually agreed.

...

Determination of engagement

9. (i) the institute may at any time determine the engagement of the persons engaged by giving him one month's notice in writing, or pay him one month's salary in lieu of notice

(ii) the person engaged may, at any time after the expiry of six months from the commencement of this term of engagement, determine his engagement by giving to the Institute one month's notice in writing, or by paying the institute one month's salary.

16. In this case, At the time of engagement under this contract, these were the terms agreed upon by the parties herein with regard *further employment* and *determination of engagement*. Both parties largely agree to these terms based on the annexures to the affidavits. What is contested by the claimant is that he was not given notice of termination before the end of his contract of employment and that three (3) months before the expiry of his contract, his position was supposed to be filled competitively but this was not done and the claimant was apprehensive that he would be terminated. On the other hand, the respondent contention is that the contract under which the claimant was engaged was clear without any ambiguity, it had a time limitation that was to end as stated and the role to advertise and competitively fill the position was at the discretion of the respondent.

18. 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. Under section 10(3) the law is outlined thus;

(b) [in a written contract] the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;

(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

[emphasis added]

19. Therefore, where it is apparent that parties are keen to enter into a fixed-term contract, that contract must state the length of notice which the employee is obliged to give and entitled to receive before the fixed-term contract is terminated. Either party have a responsibility. Equally in the case of a fixed-term contract, the intention is not to have an indefinite period of the employment and thus the parties **MUST** state the end date to the employment relationship. In this case, the claimant had a fixed term contract that

was to end on 30th November 2013 and as outlined under clause 2 as stated above, the claimant had to indicate his interest to renewal before 6 months before the expiry date. There was also a provision that either party could terminate this contract with notice of 1 month or payment in lieu of such notice. The claimant gave his notice of intention to renew which was refused by the respondent.

20. The subject contract could therefore terminate upon the expiry of its fixed date or upon either party giving the other 1 month notice. I take it due to the long service of the claimant with the respondent; he had served under other previous arrangements with them. Was there therefore a legitimate expectation on the part of the claimant that his employment with the respondent was not to be terminated? Is this expectation justified?

21. The claimant has stated in his affidavit that he was aware that his position, upon expiry was to be filled competitively. This was communicated to him and there were memos and or minutes to this effect. He was well aware in advance of this information from the respondent. This was aside from the terms of his fixed-term contract. The claimant's contract has expired and the same is not renewed. The application before court is premised on the grounds that the claimant should not be terminated without due process where notice has not been issued to him and thus the respondent should be restrained from effecting such termination pending the hearing and determination of this application and the suit/claim herein. I find no justification for this demand by the claimant that warrants this court to restrain the respondent not to terminate. This is a fixed-term contract, it has expired and the same is not renewed as of 1st December 2013. This is what was envisaged by the parties to this contract 3 years before. Where there was a legitimate expectation that there would be new considerations favourable to the claimant, the parties had the time and resources to make amendments to the contract but this was not done before the fixed-term expired. This must be construed as such.

22. The Employment Act does provide a remedy to an employee who have entered into fixed-term employment contracts as referred to in section 10(3) c) of the Employment Act in terms whereof an employee, who reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it, can claim a dismissal occasioned thereby. In such a case the "act" of the employer which is the failure or refusal to renew the fixed term employment contract on the same or similar terms, or to renew it at all is the proximate cause of the dismissal. Where an employer terminates a fixed-term contract before the due date, there must be a reasonable and justifiable cause as stipulated by the law.

I will therefore dismiss the application dated 27th November 2013.

23. I must add, parties come before this court for a good cause. Cases of labour relations are filed before the Industrial Court. There is therefore not good reason to mimic, demean or ridicule any party properly before this court whether such a party has a good case or otherwise. I take great exception to averments made in the Replying Affidavit of Magaret Rigoro at paragraph 36. This is a Senior Legal officer of the respondent, a person well versed in the law and best placed to avoid language that is otherwise demeaning and not respectful of this court. This should stop in no uncertain terms. Ms Ngetich is hereby advised by this court to guide this deponent in future against such language.

Each party will bear their own costs.

Delivered and Dated at Nairobi this 3rd day of February 2014

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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