



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT NAIROBI
CAUSE NUMBER 23 OF 2012

BETWEEN

MARGARET A. OCHIENG.....CLAIMANT

VERSUS

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION.....RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Ongicho instructed by Ongicho-Ongicho & Company, Advocates for the Claimant

Mr. Malonza instructed by Sisule Munyi Kilonzo & Associates, Advocates for the Respondent

ISSUE IN DISPUTE: NON-RENEWAL OF A FIXED TERM CONTRACT

AWARD

1. The Claimant was employed by the Respondent State Corporation on 23rd May 2000, as a Legal Officer. She was permanent and pensionable. She was confirmed to the position on 18th April 2001. On 17th December 2008, she was made the General Manager, Corporate Services and Legal Affairs. She was moved from permanent and pensionable terms, to a three year renewable contract. In a letter dated 19th December 2011, but received by the Claimant on 21st December 2011, the Respondent wrote to the Claimant, informing her that her contract, which ended on 16th December 2011, would not be renewed.
2. Margaret questions this decision, and filed the Statement of Claim on 11th January 2012. She seeks an Award against the Respondent for Orders-:

- a. A declaration that the letter dated 19th December 2011 is null and void;*
- b. A declaration that the second, three year contractual period is subsisting;*
- c. Reinstatement without loss of benefits;*

d. The Respondent to re-employ the Claimant on permanent and pensionable terms; and

In the alternative:-

i. The Respondent to pay to the Claimant outstanding salary from 1st December to 21st December 2011 at Kshs. 216,125; outstanding gratuity for the first three year contractual term at 31% of her basic pay at Kshs. 2,120,400; 12 months' salary in lieu of notice at Kshs. 3,702,840; 36 months' salary in damages being pay for the unexpired second three year contractual period at Kshs. 11,115,000; 109 days of un-utilized annual leave at Kshs. 1,121,791; medical insurance benefits at Kshs. 1,800,000; refund of deposit made for sale of an obsolete car KAP 736 A at Kshs. 10,000; progressive salary increment for 2008 -2011 at Kshs. 495,000; gratuity on salary increment arrears at Kshs. 153,450; severance gratuity from 2000 to 2008 at Kshs. 5,654,400; and pension per scheme.

ii. Interest on the monetary Award from the date of dismissal until payment at Court rates;

iii. Any other statutory entitlements;

iv. Certificate of service; and

v. Costs of the Claim.

3. The Respondent filed its Statement of Response on 7th February 2012. It is conceded the Claimant was employed as a Legal Officer. She was employed from August 2000, not May 2000. She was not promoted to the position of General Manager, Corporate Services and Legal Affairs; this was a new position created in 2008, to which the Claimant was competitively recruited, and employed under a three year fixed term contract, from 17th December 2008 to 16th December 2011. Renewal was not automatic. The Claimant was advised the Respondent's Board of Directors had resolved not to renew her contract after the initial one expired on 16th December 2011. She is not entitled to any of the prayers sought.

4. The Claimant filed an Application under certificate of urgency at the time of filing the Statement of Claim. She asked for interim orders staying the letter of the Respondent of 19th December 2011; restraining the Respondent from filling the position of General Manager, Corporate Services and Legal Affairs; and declaring that she remained an Employee of the Respondent after 16th December 2011. The Application was rejected in a Ruling dated 23rd November 2012, and the Respondent allowed to fill the vacancy.

5. On 30th July 2013, the respective Advocates agreed to dispose of the main Claim on the basis of their written submission, pleadings and affidavits on record, as is permitted under Rule 21 of the Industrial Court [Procedure] Rules 2010. The Advocates filed their submissions and returned to Court on 16th December 2013, when they underscored their Client's positions. The Court advised Award would be delivered on notice.

6. The Claimant submits that she worked through the ranks, and was employed as the General Manager, Corporate Services and Legal Affairs. Contracts were introduced at the workplace, and the Claimant applied for the new position. She was employed for a period of three years, beginning 17th December 2008.

7. Her contract was renewable. Clause 7 of the contract states, 'Should you wish to be reappointed in the same position, you will be required to make a written request at least six months before the expiry of this contract.' The Claimant made her request to the Respondent under this Clause on 6th June 2011. The word used is 'request' not 'apply' which according to the Claimant implied renewal was automatic upon request.

8. The Respondent did not reply to the Claimant's request. On 19th December 2011, she wrote to the Respondent seeking regularization of her renewed contract, and applying to redeem 109 pending annual leave days.

9. The Respondent replied the same day, a letter received by the Claimant on 21st December 2011, advising her, the Board of Directors had decided not to renew her contract, and to advertise the vacancy, encouraging her to apply for the vacancy once advertised.

10. The Claimant had been employed on the first three year contract in a competitive process. All her performance appraisals for the period were favourable. She expected the contract would be renewed as she had fulfilled the condition precedent to such renewal. She made her request six months before expiry of the first contract.

11. The Respondent's Managing Director did not raise the issue of the Claimant's performance appraisal conducted in November 2010 and April 2011. These appraisals were nevertheless the focus of the Board Meeting that determined not to grant the Claimant renewal. The meeting took place in the absence of the Claimant. She had no chance to defend herself, and was therefore unfairly dismissed.

12. There was no reason why the Respondent did not reply to the Claimant's request before 16th December 2011, and notify her there would be no renewal. This amounted to unfair labour practice.

13. The Respondent did not raise any complaints against the Claimant during her ten years of employment. She had gradually been promoted from the position of Legal Officer 1 to the General Manager, Corporate Services and Legal Affairs, in a span of ten years.

14. The Claimant would not have accepted the promotion if she had been informed that her promotion would cost her permanent and pensionable status.

15. The Claimant was fully qualified for the position under the first contract. The Respondent maliciously and unfairly raised the bar in its advertisement announcing the vacancy for the position in the Daily Nation Newspaper of 22nd December 2011, requiring that the candidates must have a Masters Degree in Law from a recognized University. The Claimant's second three year term contract had already started running at the time of the malicious advertisement.

16. The Respondent's conduct gave rise to constructive renewal of the contract. The Claimant was not notified there would be no renewal; the expiring contract and the advertisement for vacancy pursuant to which the Claimant obtained the expiring contract, did not have a limit on the number of renewals which could be granted; and the Claimant legitimately expected there would be renewal, based on positive performance appraisals.

17. Furthermore it was the practice of the Respondent to grant renewal. A similar contract for General Manager Construction and Electromechanical Department, Engineer Benson Kioko had been so renewed.

18. Failure by the Respondent, to renew the Claimant's contract three days after the expiry of the first contract, amounted to unfair dismissal. The vacancy is still open, and the Claimant ready, able and willing to continue working.

19. The Claimant exhorts the Court to find persuasion in various judicial precedents among them:-

- *Dierks v. University of South Africa [1999] 4 BLLR 304 [LC]* on criteria for establishing whether employee reasonably expected renewal. Among these are: evaluation of all the surrounding circumstances; significance of contractual stipulations; practice or custom in regard to renewal; availability of the position; the purpose or reason for the concluded fixed term; inconsistent conduct; failure to give reasonable notice; and the nature of the employer's business.

20. The Respondent's position is that it employed the Claimant as a Legal Officer 1, effective from 4th August 2000. She was confirmed on permanent and pensionable terms on 18th April 2001. The turning point came in or around June 2008. The Respondent undertook job evaluation, and introduced new positions, among them, General Manager, Corporate Services and Legal Affairs. The terms of employment for this position were contractual, not permanent and pensionable.

21. The Claimant applied for the new position following an advertisement in the media made by the Respondent on 6th October 2008. She was recruited competitively, and employed under a three year renewable contract, with effect from 17th December 2008. This expired on 16th December 2011, and the Board of Directors of the Respondent determined not to renew the Claimant's contract.

22. She accepted the contract of 17th December 2008 voluntarily. She ceased to serve on permanent and pensionable terms. She became a fixed term contract employee. Clause 5 of the contract expressly gave the duration of three years.

23. She was aware expiry was on 16th December 2011. She wrote to the Respondent on 6th June 2011, seeking renewal. She stated in her letter that her contract "is due to expire on 16th December 2011." She again wrote separate letters to the Respondent on 23rd November 2011 and 19th December 2011, acknowledging the expiry date of 16th December 2011. In her Claim paragraph 2 [e] she pleads that her three year term expired on 16th December 2011. Neither the Respondent nor the Claimant invoked the premature termination Clause 25 in the contract. The Respondent's letter of 19th December 2011 did not terminate the contract; it only communicated non-renewal.

24. The contract was not automatically renewable. Renewal was subject to the discretion of the Board. Under Clause 24 of the contract, the Claimant's terms were also governed by the Respondent's Code of Regulations. This imposed a maximum period of three years, for appointments made by the Respondent on contract. The code was emphatic such contracts could only be renewed at the discretion of the Board. Both the contract and the code required the employee to make a request for renewal six months prior to the expiry of the subsisting contract; and two, required the Board to give its consideration whether to renew or not. The Claimant acknowledged renewal was not automatic. She is estopped from asserting otherwise.

25. If the Court upholds the position that the contract was automatically renewable, it would lead to absurdities. Fixed term contracts would become contracts renewable *ad infinitum*. It would defeat the meaning and purpose of fixed term contract. It would stifle the managerial prerogative of the Respondent to evaluate the Claimant at the end of the contract and impose new obligations on the Claimant for continued service.

26. The Respondent urges this Court not to depart from its earlier finding in the *Industrial Court Cause Number 1541 of 2010 between Bernard Wanjohi Muriuki v. Kirinyaga Water and Sanitation Company Limited & Another*, that a clause in the outgoing contract asking the employee to request for renewal, did not oblige the employer to renew. The Respondent also asks the Court to adopt the principle in the India Supreme Court Case of *J.P. Bansal v. the State of Rajasthan & Another, Appeal [Civil] 5982 of 2001*, which is that legitimate expectation arises out of the existence of a repeated or regular practice, leading the person benefiting from the promise or practice to believe he would continue to so benefit. The Claimant had no legitimate expectation of renewal.

27. The contract did not stipulate the period within which the Respondent ought to have responded to the request for renewal. Communication was made by the Board to the Claimant on 19th December 2011 that the contract would not be renewed. The Respondent was unable to communicate earlier than 16th December 2011, as 17th and 18th December 2011 was the weekend preceding 19th December 2011.

28. The reason for non-renewal was immaterial. It was not a condition, express or implied, in the contract of employment. There was no obligation to give reason in the expiring contract.

29. The Claimant was paid salary for the days worked from 1st December 2011 to 16th December 2011 at Kshs. 116,622; gratuity at Kshs. 1,484,280; and cash in lieu of leave at Kshs. 95,224. No other obligations could arise under the expired contract.

30. In response to the specific remedies craved, the Respondent states that notice pay is not payable as the contract expired through the passage of the agreed period; medical benefit was contingent upon continuity of service; no evidence was given on refund of deposit for obsolete motor vehicle; no gratuity payment would be due from 2000 to 2008 as the Claimant was on permanent and pensionable terms; grant of anticipatory salaries for a non-existent 2nd three year contract would be an unfair and unreasonable remedy; and pension is not claimable as the Claimant resigned from the Respondent's Superannuation Scheme, upon accepting the contractual terms and conditions of employment. If there is any pension to be paid, it should be pursued against the relevant Scheme, not the Respondent.

31. The Respondent submits that the Claimant was not unfairly dismissed, or her contract otherwise terminated by the Respondent; the contract expired upon the lapse of the contractual period. The Respondent discharged all its obligations to the Claimant under the expired contract, and cannot be called upon to bear further obligations under the expired contract or the alleged 2nd three year contract. The Respondent calls for dismissal of the Claim with cost to the Respondent.

The Court Finds and Awards:-

32. The Claimant is a Lawyer and was employed by the Respondent State Company to serve as its Legal Officer 1, starting from the 4th August 2000. Her contract of employment was indeterminate, which is to say she was employed on permanent and pensionable terms.

33. There is no dispute that in June 2008, the Respondent undertook a job evaluation exercise, resulting in the introduction of new positions, among them, the position of General Manager, Corporate Services and Legal Affairs. Applications for the new position were invited. The Claimant among other candidates applied, and was taken in from 17th December 2008, to serve for a period of three years.

34. She was required to request for renewal six months before the expiry of three years, in case she desired to have the contract renewed. She wrote on 6th June 2011, requesting for renewal. There was no response from the Respondent until after the contract had already lapsed. The contract expired on 16th December 2011, and communication was made to the Claimant on 19th December 2011, and received by the Claimant on 21st December 2011, advising her there would be no renewal.

35. Was renewal automatic? The Court agrees with the submissions of the Respondent that it was not the intention of the Parties that there would be an automatic renewal. Such an intention would not make sense, and would negate the Respondent's policy shift in 2008, from permanent and pensionable terms to fixed-term contracts, with regard to certain positions. The Respondent would just have re-designated the position held by the Claimant prior to 2008, and asked her to go on serving on permanent and pensionable terms.

36. Automatic renewal would undermine the very purpose of the fixed-term contract, and revert to indeterminate contracts of employment. The Respondent changed its policy, to suit its operations, and the Claimant did not protest at the time the policy shifted in 2008. She instead embraced the change, applied for the new position and executed a contract for a period of three years. She went on to serve the period, and was at all times aware of the expiry date. She wrote to the Respondent on several occasions, acknowledging that her three years would expire or expired on 16th December 2011.

37. Both the Claimant's primary Contract and the Respondent's Code of Regulations which were part of the Contract of Employment are clear that the Claimant should have made her request six months before the expiry of the outgoing contract, but this was not the only requirement for renewal to materialize; the Board would have to sit, and exercising its discretion, determine whether to grant renewal.

38. Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities. This Court has done so *in Industrial Court Petition No. 35 of 2012 between George Onyango v. The Board of Directors Numerical Machining Complex Limited & Ors, [2014] e-KLR* and *in the Industrial Court Cause No. 1541 of 2010 between Bernard Wanjohi Muriuki v. Kirinyaga Water and Sanitation Company limited & Ors.* The general principle is that fixed-term contracts carry no expectation of renewal.

37. Exceptions to this general principle are limited. The expiring contract may contain a clause giving expectancy of renewal as discussed by Hon. Justice Byram Ongaya *in Industrial Court Case between Ruth Gathoni Ngotho- Kariuki v. the Presbytery Church of East Africa & Anor, [2012] e-KLR.* In this case the Employer was obliged to give the Employee notice, 3 months before the expiry of her fixed-term contract, indicating whether her contract would be renewed or not. It was the Employer, unlike the present dispute, who would express the intention on the renewal. The Employer failed to do so, and the Court found that the Employee was justified in legitimately expecting there would be renewal. This Court similarly expressed the view in the case of *Bernard Wanjohi Muriuki* that an outgoing contract may impose the expectancy of renewal.

38. in the *United Nations Appeals Tribunal [Tribunal D' Appel Des Nations Unies] UNAT, Case No. 2010 -125 between Frenchon v. The Secretary- General of the United Nations,* the Tribunal found that the decision of an Employer not to renew a fixed-term contract may be challenged on limited grounds. These include where the actions of the Employer give rise to legitimate expectation on the part of the Employee, that there would be renewal; and two, where the decision not to renew is based on improper motives or there are countervailing circumstances.

39. Frenchon was employed by the International Criminal Tribunal for Rwanda [ICTR] in Arusha Tanzania, on a fixed term contract. She sustained service-incurred injuries, before her contract lapsed, and was compelled to take extended sick leave. The Employer let her fixed term run out, and refused to renew her contract, based on her incapacity brought about by the injuries. The Tribunal held that -:

- The fixed term contract was ended as a result of the service- incurred injuries;
- The Employee's fixed term contract was in fact, improperly terminated, and it was disingenuous for the Employer to argue that the contract was allowed to run until the end of the term and was not renewed on medical grounds; and
- The decision not to renew the Employee's fixed term contract was due to her service-incurred injuries and was informed by improper motive.

The non-renewal in this case amounted to a separation initiated by the Respondent on account of the Employee's service-incurred injuries, and the Employer was found to have been intent on avoiding legal obligations.

40. The Claimant's case does not fall within any of these limited exceptions. There was no action by the Respondent that could be interpreted as creating any degree of legitimate expectation on the part of the Claimant that there would be renewal. The outgoing contract did not impose on the Respondent any obligation to respond to the Claimant's request for renewal before the expiry of the contract. The Response was made on 19th December 2011, which was within the discretion of the Respondent, and not in breach of the outgoing contract. It cannot also be seen as unfair to the Claimant, particularly as she was informed she was at liberty to apply for renewal alongside other candidates once the invitations were made.

41. The Claimant did not show that the Respondent was driven by any ill motive in refusing to grant the Claimant automatic renewal. There were no countervailing circumstances, and the Respondent did not terminate any contract; it only declined to grant the Claimant automatic renewal. The requirement that applicants for the new position should have Masters Degree in Law, was not shown to be aimed at the Claimant. She had worked for the Respondent for ten years, and should have understood the need for continuous academic self- improvement, and the ever changing demand for highly skilled labour, in a competitive market economy. State Companies are reforming and demanding for higher academic and

professional qualifications of their staff and potential staff. These are not individualized requirements, but policy issues. There was no ill- motive on the part of the Respondent. The Claimant was left to serve her full term, and was paid her dues under the expired contract.

42. The Court is persuaded the Claim has no merit. The fixed-term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011. The Respondent has no obligation to pay her notice pay as there was no premature termination of the fixed- term contract. Medical benefit expired with the outgoing contract as did other allowances. No evidence or explanation was given to the Court on the claim for refund of deposit of the money, with regard to the obsolete Motor Vehicle KAP 736 A. The Claimant was in a permanent and pensionable position from 2000 to 2008, and would not be entitled to any gratuity over the period. No entitlement to gratuity payment is captured in her initial letter of employment. The claim for 36 months' salary for the non renewed contract of three years is unwarranted. No contract was concluded between the Parties, the Respondent has not reneged on any such contract, and the Claimant could only claim such amounts of money on rendering fair labour. A grant of 36 months' salary for no work rendered, would be unjust enrichment, and would not amount to fair remuneration. The claim for pension if any should be directed at the relevant Pension Scheme. ***In all, the Court finds the Claim to have no merit and is hereby dismissed with no order on the costs.***

Dated and delivered at Nairobi this 18th day of March 2014

James Rika

Judge