



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.58 OF 2015

MICHAEL KIIO

IRERI.....CLAIMANT

VERSUS

**EMBU WATER & SANITATION COMPANY
LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 11th December, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 10.04.2015 through Kinoti & Kibe Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant and the respondent did not execute a contract of employment for a term of 3 years upon the expiry of the claimant's first contract on 31.01.2012.
- b. A declaration that the respondent's letter dated 27.02.2015 purporting to reject renewal of the claimant's contract is null and void *ab initio*.
- c. An order of specific performance compelling the respondent to reinstate the claimant to his employment.
- d. An order directing the respondent to pay the claimant his salary and benefits from 1.03.2015 until the claimant's employment is lawfully terminated under Part VI of the Employment Act, 2007.
- e. In alternative to prayers (a) to (d) above, a declaration that the respondent's decision to renew the claimant's contract of employment contained in its letter dated 2.01.2015 was accepted by the claimant vide his letter dated 9.01.2015.
- f. In alternative to prayers (a) to (d) above, an order of specific performance be issued compelling the respondent to execute a contract of employment with the claimant envisaged in the respondent's letter dated 2.01.2015.
- g. A declaration that the impugned decisions, actions and omissions of the respondent contained in its letters dated 15.01.2015 and 27.02.2015 violated the claimant's right and fundamental freedoms enshrined in Articles 27, 28, 41, 47 and 50 of the Constitution.
- h. Interest on (d) and (f) above at court rates from the date of filing the suit.
- i. Any other or further relief as the Honourable Court may deem fit and just to grant.

The respondent filed the response to the memorandum of claim on 26.05.2015 through Njeru Ithiga & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The claimant filed the reply to the response on 03.07.2015.

By consent of the parties on 17.06.2015, it was ordered that pending the hearing and determination of the suit by the court, the respondent was restrained from interviewing, considering, recommending, appointing or replacing by any other person, apart from the claimant, the office of the technical manager in the respondent company. On 3.07.2015 parties agreed that the suit be determined on the basis of the pleadings, documents and the final submissions to be filed and orally highlighted. The parties' advocates highlighted the submissions on 25.11.2015.

By the letter dated 5.01.2009 the respondent's board appointed the claimant to the position of technical manager with effect from 1.02.2009. Clause 4 of the letter on performance measurers stated that in addition to the overall responsibilities performance contract would be agreed between the claimant and the respondent's managing director and the claimant's performance would be reviewed, appraised regularly and documented in management meetings. The clause further stated that the claimant's further terms of engagement would be detailed in the employment contract to be drawn between the claimant and the respondent's management. The letter stated that the claimant would be based at the respondent's head office, would be paid Kshs. 90,000.00, and would report to the managing director. The claimant accepted the appointment on 06.01.2009. In accordance with that letter of appointment, the parties subsequently concluded a detailed employment contract signed between the claimant and the respondent's managing director.

Clause 4.0 (a) of the detailed contract provided that the contract was for three years duration commencing from 1.02.2009 to 28.02.2008 and was renewable on satisfactory performance. The parties were in agreement that the contract was for 3 years renewable and the court finds that the lapsing date of 28.02.2008 stated in the letter was an error as the contract was for 3 years renewable. The court further finds that the 3 years contract was to lapse on or about 1.03.2012.

The respondent has at paragraph 3 of the response to the memorandum of claim admitted paragraphs 3, 4, 5, 6, 7, and 8 of the memorandum of claim. Thus, the respondent has admitted as follows:

- a. The claimant held the position of technical manager in the respondent's establishment, a position the claimant held from 1.02.2009 to 27.02.2015.
- b. By the letter dated 13.08.2014, the claimant expressed his interest for renewal of his employment contract pursuant to the "expression of interest for renewal six(6) months to expiry of the contract."
- c. By the letter dated 2.01.2015 signed by the managing director to the respondent, the respondent's board of directors vide a meeting held on 19.12.2014 had approved the renewal of the claimant's contract upon terms and conditions for a further term of one year but had nonetheless put the claimant's score at a considerably low score of 64% in the appraisal which score was lower than the minimum required score of 70% as set out in the respondent's human resources and procedures manual, 2012.
- d. The board in justifying the claimant's score attributed the score to none performance on the part of the claimant and raised several contributing factors or instances where it regarded the claimant as having not "virtually" performed.
- e. Further, and in response to the respondent's letter dated 2.01.2015, the claimant in his letter dated 9.01.2015 expressed his appreciation for the renewal and at the same time raised several observations and concerns as to the appraisals and gave recommendations on improvement of the working conditions which the claimant vehemently opined should be incorporated in the one year renewal contract that the claimant would be signing.
- f. The respondent vide the letter dated 15.01.2015 in response to the claimant's sentiments requested the claimant to prepare a draft performance contract broken down into six and one year periods ready for discussion, amendment and refining.

By the letter dated 27.02.2015, the respondent acknowledged that the claimant had served for six years as the technical manager but in view of his conditional acceptance letter dated 9.01.2015 in response to the respondent's letter of offer dated 2.01.2015, the respondent's board had considered the acceptance as a rejection and which was therefore not acceptable. As a result, the board of directors had decided not to renew the contract. The letter then informed the claimant as follows,

“1. Your contracts ends on 28th February, 2015.

2. Your gratuity will be paid as per contract signed.

3. You will be paid seventy one (71) days of your accumulated leave.

4. The payment of the above sums will depend on handing over of all the company assets (soft and hard), to the Managing Director of the company as shall be indicated by clearance certificate.

The above payments shall be considered a total discharge of all company obligations to you. Finally the company wishes you the best in your future Endeavour”

The letter was signed by the respondent's managing director.

The **1st issue** for determination is the date the claimant's lapsing contract was to end. The claimant's case is that the contract was ending on 31.01.2015 as stated in his letter for renewal dated 13.08.2014. The respondent at paragraph 5 of the response has pleaded that the contract was running from 01.02.2012 to 28.02.2015. In the letter dated 1.08.2011 requesting for renewal of the contract that was ending in 6 months' time, the claimant stated that his then contract was ending on 31.01.2012. The minutes EW3 of the board meeting held on 30.03.2012, the board resolved to renew the contract for a further 3 years period as recommended by the Finance and Administration Committee. The board's decision was conveyed to the claimant by the letter dated 2.04.2012. The letter stated that the contract was to commence on 1.02.2012. There is no further material to show that the contents of that letter dated 2.04.2012 were ever varied. The court finds that the contract was ending on or about 31.01.2015. To answer the **1st issue** for determination, the court returns that the last contract of service was ending on 31.01.2015 as pleaded and submitted for the claimant.

The **2nd issue** for determination is whether the claimant conditionally accepted the offer for renewal of the contract of employment. The claimant in his letter of acceptance dated 9.01.2015 and titled **“RE CONTRACT RENEWAL: MICHAEL KIIO IRERI”** clearly stated thus, **“Reference is made to your letter dated 2nd January 2015 on the above subject. I do hereby with a lot appreciation accept the renewal of the contract with the conditions therein.”** The claimant in the subsequent paragraphs proceeded to raise concerns regarding his performance in the previous contract and appraisal. He then made observations on the appraisal and further proposed improvements for the one year he was to sign. He concluded by thanking the respondent's managing director and board for giving him an opportunity to continue serving in the organization. The respondent's managing director, by the letter dated 15.01.2015, responded to the claimant's letter of 15.01.2015 acknowledging that he had received the claimant's said letter. The managing director further stated that he had noted the various concerns and those found reasonable and necessary in line with the respondent's goals and objectives would be included in the claimant's employment and performance contracts. The managing director further asked the claimant to prepare his draft performance contract broken down into six and one year periods ready for discussion, amendment and refining by the end of January 2015. That refined draft performance and employment contract, according to the managing director's letter, would be tabled to the board for approval with or without amendments. The managing director concluded the letter by stating thus,

“Please note that it will be my pleasure and privilege to provide you with all necessary support so that your performance and that of the entire Company can improve for the benefit of all EWASCO customers.”

The court has considered the material on record. It is clear that the claimant expressly accepted the renewal with all the conditions. The managing director acknowledged receipt of that acceptance which letter was not conditional as the claimant stated that he accepted the conditions; all the conditions for the renewal. The respondent has not identified the alleged conditions to show that the claimant had accepted conditionally. The letter of offer of renewal dated 2.01.2015 was elaborate that a contract would be prepared and signed. The letter also, over and above the renewal offer, made certain information known to the claimant. The court finds that while making the unconditional acceptance, the claimant was perfectly entitled to make observations and concerns in line of the parties’ design of things to conclude the formal contract that would obviously be negotiated; and further to make concerns and the observations in view of the information in the letter of 2.01.2015 going beyond the offer and the claimant’s observations and concerns accompanying his unconditional acceptance were in line with the renewal offer which had also gone beyond the offer. The managing director in his letter of 2.01.2015 clearly understood the matters as raised by the claimant, not as conditions to the renewal, but as concerns, if relevant, to be included in the employment contract that would thereafter get signed between the parties. The court has looked for but failed to find one or other matter the claimant set out as a precondition to the conclusion of the renewal of his employment. To answer the 2nd issue for determination, the court returns that the claimant unconditionally accepted the offer for renewal of the contract of employment.

The 3rd issue for determination is whether the respondent’s board could recall the offer of renewal of the contract. First, the court considers that once the offer of renewal was given to the claimant and the claimant accepted unconditionally as he did, the renewal contract was thereby concluded. The court finds that by reason of the acceptance, the offer lapsed and parties concluded the renewal contract so that there was no offer in place for the respondent to recall and cancel; the respondent, in the opinion of the court, could only terminate the employment contract in accordance with provisions of law and agreement between the parties. Secondly, once the board made the offer, it could not recall it except with the claimant’s acceptance because the procedure for making the offer and then the acceptance was part of the terms and conditions of employment between the parties and a party could not vary that procedure unilaterally. Thus, section 10(5) of the Employment Act, 2007 provides that if matters stipulated in a contract of employment are to change, the employer shall in consultation of the employee revise the contract to reflect the change and notify the employee of the change in writing. The procedure for renewal was prescribed in clause 2.2.3.1 of the respondent’s human resources policy and procedures manual of June, 2011. There was no provision for withdrawal of a renewal offer as the respondent purported to act and such invented action could not be introduced by the respondent unilaterally.

The court further upholds **Petro Oil Kenya Limited –Versus- Jubilee Insurance Company of Kenya Limited [2015]eKLR** (Mwera J.) that after completion of the contract, no material alteration can be made in its terms except by mutual consent of the parties and if such alterations affect a written instrument, the alteration would usually be made by an endorsement upon the policy document or may be contained in a separate document. Further, the consent to the alteration need not be in writing and a verbal consent is sufficient.

Accordingly, for the 3rd issue the court finds that the respondent’s board could not validly recall or withdraw the offer of renewal of the contract.

The 4th issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The claimant prayed for a declaration that the claimant and the respondent did not execute a contract of employment for a term of 3 years upon the expiry of the claimant's first contract on 31.01.2012. The material on record is clear that the claimant applied for renewal of that contract, the board deliberated, the board resolved to renew the contract and the renewal was conveyed by the respondent's letter dated 2.04.2012. The prayer will therefore fail as the correspondence and the board's resolutions show that the parties concluded the renewal contract after the expiry of the claimant's contract on 31.01.2012.
- b. The claimant prayed for a declaration that the respondent's letter dated 27.02.2015 purporting to reject renewal of the claimant's contract is null and void *ab initio*. The court has found that the board could not recall or withdraw the offer for renewal of the contract as the offer lapsed once it was accepted and there was therefore no offer to be recalled or withdrawn. The claimant is entitled to the declaration as prayed for.
- c. The claimant prayed for an order of specific performance compelling the respondent to reinstate the claimant to his employment. The position held by the claimant was preserved throughout the pendency of the suit. No reason has been advanced to oppose the reinstatement. The only reason for the termination of the claimant was the mistaken position by the respondent's board that the acceptance had been conditional and that there was an offer in existence that the board could recall or withdraw. In such circumstances, the court finds that the claimant is entitled to the reinstatement effective 28.02.2015. For that purpose the claimant will report to the respondent's managing director on Monday 15.12.2015 to resume duty and to continue in employment without loss of benefits and in accordance with terms as were applicable before termination on 28.02.2015 or better terms as will be agreed and to continue in employment unless the employment relationship between the parties lawfully terminates.
- d. The claimant prayed for an order directing the respondent to pay the claimant his salary and benefits from 1.03.2015 until the claimant's employment is lawfully terminated under Part VI of the Employment Act, 2007. The court finds that the claimant is entitled as prayed for. While making that finding the court uphold its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11**, where the court stated thus **"In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, '(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;'**. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to

pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”

- e. As the other prayers were made in alternative to the prayers already allowed by the court, the court will not delve into the alternative remedies. The court further finds that the claimant did not urge submissions to support the prayer on alleged contravention of rights and fundamental freedoms and compensation for the alleged contravention. The court considers that the respondent's actions in this case did not go beyond the breach of the contract of employment and the remedy of reinstatement and the attendant payments as found due will meet the ends of justice in this case. The two prayers will therefore fail. The claimant has succeeded in the suit and is entitled to costs of the suit.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. The declaration that the respondent's letter dated 27.02.2015 purporting to reject renewal of the claimant's contract is null and void *ab initio*.
- b. The order of specific performance is hereby issued compelling the reinstatement of the claimant by the respondent to his employment as the respondent's technical manager; and for that purpose the claimant will report to the respondent's managing director on Monday 15.12.2015 to resume duty and to continue in respondent's employment without loss of benefits and in accordance with terms as were applicable before termination on 28.02.2015 or better terms as will be agreed and to continue in employment unless the employment relationship between the parties lawfully terminates.
- c. The respondent to pay the claimant his salary and benefits from 1.03.2015 until the claimant's employment is lawfully terminated under Part VI of the Employment Act, 2007; and all due payment to be made by 01.01.2016 failing interest to be paid thereon at court rates from the date of this judgment till the date of full payment.
- d. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 11th December, 2015.

BYRAM ONGAYA

JUDGE



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