Tenwek Mission Hospital v Orwa (Cause E009 of 2022)
[2024] KEELRC 1599 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1599 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE E009 OF 2022

DN NDERITU, J

JUNE 26, 2024

BETWEEN

TENWEK MISSION HOSPITAL ..... CLAIMANT

AND

DR. IAN ARNOLD ORWA ..... RESPONDENT

JUDGMENT

I. Introduction

1. In a memorandum of claim dated 23rd March, 2022 filed through Bett & Co. Advocates, the claimant, a mission hospital based in Bomet County, prays for judgment against the respondent, a medical doctor, for -

    a. An order compelling the respondent to specifically perform his obligations under the executed bond-agreement dated 7th January, 2015.

    Alternatively

    b. Judgment be entered against the respondent in the sum of Kshs.7,444,800/= being the total salary paid during the training plus interest.

    c. Costs.

2. Alongside the statement of claim was filed a verifying affidavit sworn by Shem Cheruiyot, the chief executive officer of the claimant, and a bundle of copies of documents in support of the claim.

3. On 4th May, 2022 the respondent entered appearance through Magare Musundi & Co Advocates and filed a response to the memorandum of claim and counterclaim on 20th May, 2022. In the said response the respondent prays that the claimant's cause be dismissed with costs.

4. The respondent also made a counterclaim against the claimant, supported with a verifying affidavit sworn by the respondent, seeking that judgment be entered against the claimant for –

    a. A declaration that the Respondent is not bound to work for Tenwek Mission Hospital.

    b. A declaration that he has been discharged from the bond with PAACS either by lapse of time or frustration or fraud on the part of the claimant

    c. A permanent injunction restraining the claimant, its agents and or servants for demanding payment on basis of a fictitious bond.

    d. Costs of the suit.

5. Alongside the response to the memorandum of claim and the counter-claim, the respondent filed a list and bundle of copies of the listed documents in support of his defence and the counterclaim.

6. On 6th June, 2022 the claimant filed a reply to the response to the memorandum of claim and an answer to the counter-claim seeking that the counterclaim be dismissed with costs for lack of merits and that judgment be entered against the respondent as prayed in the memorandum of claim.

7. Further, the claimant filed witness statements by Dr. Russel Eli White (CW3), Mr. Benjamin Siele (CW1), Ms. Sarah Chepkemoi Rotich (CW2), and Dr. Stephen Louis Burgert (CW4). A further list of documents was also filed with a bundle of copies of the listed documents.

8. This cause initially proceeded for hearing before Makau J and the claimant's case was partially heard before the said Judge. However, on 26th October, 2022, Mr. Mwita for the claimant and Mr. Magare for the respondent agreed and consented that the matter be heard de novo before this court following the transfer of Makau J.

9. The cause came up for hearing in open court on 6th February, 2023, in the absence of counsel for the respondent, when Benjamin Siele (CW1) and Sarah Chepkemoi Rotich (CW2) testified for the claimant and the matter was adjourned to 6th February, 2023. Without any reasonable explanation or excuse, counsel for the respondent did not attend court notwithstanding that the date had been taken by consent.

10. However, by consent, the above two witnesses were recalled for cross-examination by counsel for the respondent on 20th March, 2023. On the same date two witnesses Dr. Russel Eli White (CW3) and Dr. Stephen Louis Buckgert (CW4) testified virtually from the United States and the claimant closed its case.

11. The defence came up for hearing on 24th April, 2023 when the respondent (RW1) testified and closed his case.

12. Counsel for both parties addressed the court and summed up their respective client's case by way of written submissions. Counsel for the claimant filed his written submissions on 7th May, 2023, while counsel for the respondent filed on 15th May, 2023.

II. The Claimant's Case

13. The claimant's case is expressed in the statement of claim, the reply to the response to the memorandum of claim and defence to the counterclaim, the oral and documentary evidence by the Claimant's witnesses (CW1, CW2, CW3, & CW4), and the written submissions by its Counsel. The same is summarized as hereunder.

14. In the memorandum of claim, the claimant pleaded that it is a mission hospital based on Christian faith and values, while the respondent is a duly qualified medical doctor. It is pleaded that besides offering medical services the claimant is a member of several professional bodies such as Pan African Academy of Christian Surgeons (PAACS), a body that promotes training and development of surgeons of Africa, and College of Surgeons of Eastern, Central, and Southern Africa (COSECSA), an international organization that oversees surgical training in Africa.

15. The claimant pleaded that by virtual of the afore-stated it offers training and development to qualified medical doctors who may wish to further their education and specialize in surgery. It is pleaded that on or about 20th December, 2013 the respondent qualified as a medical doctor from Kenyatta University earning a Bachelor of Medicine and Bachelor of Surgery decree.

16. After working in the field for several years, it is so pleaded, the respondent applied to join the claimant for specialized training with the claimant in its facility at Tenwek. The electronic letter of application dated 14th August, 2014 has been exhibited. Upon due consideration the application by the respondent was accepted and he was admitted for orthopedic surgery residency training program that was to run for five years.

17. As a prerequisite to joining the program, the respondent was to execute an agreement by way of a bond binding himself to resign from all other engagements and concentrate in the training. He was to receive a monthly stipend, which according to the claimant was a salary, for his upkeep while the training costs were allegedly paid for by the claimant. The said bond was executed on 7th January, 2015.

18. The respondent was paid Kshs.88,000/= as starting salary plus commuter allowance of Kshs.10,000/=. By 2019 the said salary had increased over the time to Kshs.172,300/= per month. During the entire period of training the claimant paid for the respondent's annual practicing licence. Upon completion of the training the respondent was awarded with a specialist completion certificate in the specialty of orthopedic surgery. The claimant filed and exhibited the supporting documents to the fore-going.

19. It is pleaded that upon completion of the training the respondent had two unambiguous options under clause (g) of the bond agreement. One, to serve the claimant for five years or, two, in the alternative, leave but refund to the claimant all the monies paid to him as salary over the training period with interest thereon at commercial bank rates. It is pleaded that upon completion of the training the respondent failed, refused, and or neglected to honour the bond agreement and instead walked away to seek employment elsewhere. It is pleaded that the claimant expended a sum of Kshs.7,444,800/= on the respondent during the entire period of training/employment and this is the amount that the claimant is pleading with the court to order the respondent to pay back with interest thereon at commercial rates.

20. CW1 is the human resources and administration manager with the claimant since 2022. He reiterated the contents of the memorandum of claim as elucidated above. He stated that the respondent breached the bonding agreement and bolted without repaying the claimed sum.

21. In cross-examination he admitted that he was not working with the claimant when the respondent trained there and that his evidence is based on records kept and maintained by the claimant. He stated that upon completion of the training the respondent was to serve with the claimant for a period of five years, equivalent to one year for each year of sponsorship. He stated that the monthly stipend was for all intents and purposes a salary paid to the respondent as he was a registered and licenced doctor and he served as such as he trained along. He stated that in case the respondent decided not to serve the claimant in a "designated hospital" he was supposed to refund the monies paid as per clause (g) of the bond agreement.

22. CW2 testified that between 2013 and 2022 she was an employee of the claimant as a payroll officer. She stated that she interacted with the respondent as he worked with the claimant around the same time. She availed in court the respondent's pay-slips for the period 2015 to 2019 indicating that the respondent was paid a total of Kshs.7,443,600/= for the period that he served with the claimant. She stated that the respondent had executed a bond to work for the claimant for five years upon completion of his training but he refused to be engaged by the respondent and also failed to refund the above sum of money.

23. In cross-examination, she stated that the respondent was for all intents and purposes an employee for the period that he trained as he served the claimant and that the so-called stipend was a salary. In the same breath, contradicting herself, she alleged that the respondent was a trainee and that the payment was a stipend for his upkeep.

24. CW3, the chief-surgeon of the claimant, started working with the claimant in 1998. He was the program director at the material time when the respondent was training with the claimant and he was the claimant's supervisor. He produced the documents filed by the claimant as exhibits 1 to 17.

25. He stated that it is the respondent who voluntarily applied to join the claimant as a trainee-surgeon and the bonding procedure was explained to him before he and the claimant executed the bond agreement on 7th January, 2015. He stated that the respondent was to be paid a stipend and was also housed by the claimant. He stated that the claimant was to serve in a designated hospital upon completion of his training and in this case the designated facility was Tenwek Mission Hospital, the claimant. He stated that it was further agreed that in case the respondent did not wish to take up employment with the claimant he was to refund the stipend with interest thereon at commercial rates. He stated that the claimant also paid for the annual practicing licence for the respondent for the entire period that he was on training. He stated that the respondent completed his training in December, 2019 and he was issued with a certificate by PAACCS.

26. He stated that the claimant offered to the respondent a job to remain at Tenwek Mission Hospital as his designated hospital but the respondent refused to sign an offer letter dated 1st August, 2019 notwithstanding all the good efforts that he made to convince the respondent to take up the employment in line with the terms and conditions of the bond-agreement. He stated that the respondent left the claimant and went to work at Kaimosi Hospital which is not a claimant's designated hospital as it is not a member of PAACS or COSESCA.

27. Contradicting CW2, he stated that the stipend paid to the respondent was not a salary as he was not an employee but a trainee. He alleged that the respondent offered no services to the claimant. Further, he stated that the respondent was under his supervision and at no point in time was the respondent subjected to an involuntary or forced HIV test.

28. In cross-examination, the witness insisted that the respondent was not practicing medicine with the claimant and was not an employee thereat but he was a trainee-surgeon and he was so trained for five years and upon completion and issuance of the certificate he became a consultant surgeon. He stated that upon completion the respondent refused to take up employment with the claimant as he insisted on going to work in Kakamega to be close to his family. He stated that Kaimosi Hospital where the respondent took up employment is not an affiliate hospital to the claimant and or a designated hospital for the purposes of the bond-agreement.

29. CW4 was a medical superintendent with the claimant from October, 2009 to December, 2021 and he signed the bond-agreement alongside CW3 for the claimant and witnessed the respondent execute his part. He stated that upon completion of his training in December, 2019 the respondent negated on

the bond-agreement and opted to look for employment elsewhere instead of working in a claimant's designated institution for five years as agreed. He stated that the claimant was in dire need of claimant's services as an orthopedic surgeon.

30. In cross-examination, the witness asserted that the respondent was not an employee of the claimant during the material time, 2015 to 2019, but he was a resident/trainee and that any work he performed was under supervision of an instructor and in any event that was the practical part of his training and the same did not amount to employment or to the respondent offering any services to the claimant.

31. Further, the witness asserted that a designated hospital wherein the respondent was to serve upon completion of his training was at the discretion of the claimant and that by seeking employment elsewhere the respondent breached the terms of the bond-agreement.

32. It is on the basis of the foregoing evidence that the claimant prays that judgment be entered against the respondent as prayed. The submissions by its counsel shall be considered in a succeeding part of this judgment alongside those by counsel for the respondent.

III. The Respondent's Case

33. The respondent's case is expressed in the response to the memorandum of claim and the counterclaim, the oral and documentary evidence adduced through the respondent, RW1, and the written submissions filed by his counsel. The respondent's case is summarized as hereunder.

34. In the filed response to the memorandum of claim the respondent denies all the allegations levelled against him by the claimant and more so that he is liable to refund the sum of money claimed by the claimant.

35. It is pleaded that the respondent applied for training to PAACS, based in Fayetteville North Carolina USA, but since the said organization operates no hospitals in Kenya it coordinates with local hospitals for the training and as such that is how he was located at the respondent's mission hospital at Tenwek for the training.

36. It is pleaded that there was no requirement for the respondent to work for the claimant upon completion of the training for the alleged five years or any other period of time or at all. It is stated that the claimant was only a locale for the training and that his salary in the form of the monthly stipend and the training costs were paid by PAACS through the claimant.

37. The respondent denied executing a bond-agreement binding him to work for the claimant as alleged and that the respondent was only one of the many mission hospitals that the respondent may have opted to serve after completion of the training depending on an agreement between him and the director of PAACS. It is vehemently denied that the claimant sponsored the respondent for the training and he pleads that he was sponsored by PAACS Orthopedic Surgery Programme not by the claimant as alleged.

38. It is pleaded that after he completed the training the respondent was mutually sent by PAACS to Jumuia Friends Hospital, Kaimosi.

39. It is pleaded that the claimant proposed to subject the respondent to a compulsory HIV test before employment and conditioned his employment to him joining the African Gospel Church which conditions the respondent found intrusive, restrictive, undesirable, discriminative, unconstitutional, and unlawful. He pleads that such conditions had not been disclosed to him as at the time when he commenced his training.

40. It is pleaded that the stipend paid to the respondent was a salary as the respondent allegedly offered medical services in the hospital during the training. It is pleaded that the said salary was paid by PAACS and not by the claimant and as such even if a refund was to be made, which is however denied, the same should not be payable to the claimant.

41. It is pleaded that upon completion of the training the respondent was free to take up or reject employment offer from the claimant or indeed any employer and that he found his current employer more suitable yet the claimant wanted to force him into entering into an employment contract that was not suitable. It is pleaded that since the respondent worked for the claimant for the five years when he was in training, even if there was a bond requiring him to work as such, which is however vehemently denied, he had discharged the same by the time he left as such. The respondent denies ever executing a bond-agreement with the claimant and, in any event, it is denied that there is a default clause in the agreement dated 7th January, 2015.

42. It is pleaded that the claimant is fraudulent in its claim for among other reasons that - the training and the stipend was paid by PAACS, it is attempting to impose a non-existent contract on the respondent, the respondent was paid for services rendered, the respondent served the claimant for five years and as such the claimant wanted to subject him to forced labour, and that the claimant has no locus in making the claim as it did not make the alleged payments.

43. Further, it is pleaded that the court lacks jurisdiction by virtual of the subject matter not being an employment and labour relations matter. It is pleaded that even if the court had jurisdiction, the claim is time-barred under Section 90 of the *Employment Act* (the Act).

44. By way of a counterclaim the respondent prays for a declaration that he is not bound to work for the claimant and that the agreement between him and PAACS has been discharged, frustrated, and or lapsed, and that a permanent injunction be issued prohibiting the claimant, it's agents, servants, and or others howsoever, from ever making claims or demanding payment of the claimed sum of money or any other sum or at all.

45. In his testimony in court on 24th April, 2023, the respondent stated that he is an orthopedic surgeon now working at Jumuia Friends Hospital Kaimosi.

46. He stated that he applied for training with PAACS and that he was sent to the respondent as the locale for the training which he undertook for five years from January, 2015 to December, 2019 and in the process served the claimant for the five years. He stated that it was neither an express nor an implied term of the bond that he was to remain with and work for the claimant after the training and as such he joined his designated hospital, Jumuia Friends Hospital Kaimosi where he is currently working.

47. He stated that the stipend was payable to him so long as he remained in the training programme and he remained therein till completion. He stated that the training fees and the stipend was catered for by PAACS through the claimant.

48. In cross-examination he clarified that the stipend was a salary and also money for upkeep. He stated that during the training he offered services to the claimant, firstly as a general medical practitioner and subsequently as a surgeon after two years of training until he completed his training and left as a consultant orthopedic surgeon. He stated that his current employer was a designated hospital and that he was sent to serve there by the then director of the programme one Amanda J. Mcoy vide a letter dated 9th September, 2021. He stated that his five years of bonded service with his current employer shall end sometimes in 2025.

49. However, he admitted that he signed the bond-agreement and that the same was binding to the extent explained in his forestated evidence. He admitted that his current employer, Jumuia Friends Hospital Kaimosi, is not a member of PAACS or COCESCA but he added that a facility did not require to be a member of the said organizations for it to be a designated hospital for him to work there.

50. For all the foregoing reasons, the respondent asks the court to dismiss the claim with costs and enter judgment in his favour in terms of the counterclaim with costs.

51. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV. Submissions By Counsel

52. On the one hand, counsel for the claimant identified the following issues for determination –

    a. Whether a parties are bound by their own terms of contract and consequently, whether the respondent was granted conditional training at the claimant hospital;

    b. Whether the training alluded in (a) above was premised on a Bond Agreement executed by the parties herein, and in extension, whether there was a valid bond executed between the parties;

    c. If the answer to (b) above is in the affirmative; what then were the terms and conditions of the Bond.

    d. Whether the respondent breached his obligation under the Bond;

    e. Whether the Respondent's counter-claim is merited

    f. What are the remedies available to the parties.

    g. Who should bear the costs of this suit and of the counter-claim.

53. In regard to issue (a) it is submitted that the evidence confirms that the parties herein voluntarily executed the bond-agreement dated 7th January, 2015. It is submitted that the parties are therefore bound by the terms of that agreement and counsel has cited several authorities in affirming that position including - National Bank of Kenya V Pipe Plastic Samkolit (K) Ltd (2002) eKLR, South Nyanza Sugar Co. Ltd V Leonard O. Arera (2020) eKLR, Amalgamated Union of Kenya Metal Workers V Jaykay Mechanical Engineering Company Limited (2019) eKLR, and Philmark Systems Co. Ltd V Andermore Enterprises (2018) eKLR. The court is thus urged to find and hold that the entire terms of the said agreement are binding on both parties and to apply the said terms in determining this cause.

54. On issue (b) it is submitted that the training of the respondent only commenced once the bond-agreement was executed and as such the relationship between the parties was governed by the terms of the said agreement and the respondent is estopped from claiming otherwise. In driving the point home on the position of a bond-agreement, counsel has asked the court to be persuaded by the decision in Tea Research Foundation of Kenya V Pastrio Njiru Njeru (2017) eKLR.

55. In regard to issue (c) the court is urged to apply the terms of the bond-agreement as the same is binding on the parties and it was voluntarily executed and intended by the parties to apply and govern their relationship.

56. On issue (d) it is submitted that the respondent clearly and obviously breached the terms of the bond-agreement as he was required to serve the claimant for a period of a total of five years, which equals

one year of service for each year of training, upon completion of the training. In the alternative or in default, the respondent was expected to refund all monies expended in his training. It is submitted that the evidence on record is that once the respondent completed his training in December, 2019 he took off and abandoned the claimant without complying with the express terms of the agreement. Instead, the respondent joined a hospital that he, in any event, confirmed that it is not a member of PACCS or COSESCA and as such not a designated hospital for the purposes of the bond-agreement. In that regard, the court is urged to be persuaded by the holding in Nazarene University V Henry Kinya (2019) eKLR, Martha Wangari Kariuki V Muli Musyoka & Another (2021) eKLR, Patrick Wambasi Mutoro V Moi University (2018) eKLR, Registered Trustees of the Presbyterian Church of East Africa & Another V Ruth Gathoni Ngotho-Kariuki (2017) eKLR, and University of Nairobi V Leonard Lisanza Muaka (2020) eKLR, among several other decisions.

57. It is submitted that the claimant is entitled to recover the money from the claimant based on the clear and unambiguous terms of the binding bond-agreement and the court is urged to find and hold so.

58. In regard to the counterclaim, issue (e), it is submitted that in view of the binding agreement alluded to above, the counterclaim has no merits at all and it is urged that the same be dismissed with costs and that judgment be entered as prayed in the memorandum of claim with costs to the claimant – issues (f) and (g). It is submitted that the claimant legitimately expected the respondent to obey and comply with the binding terms in the bond-agreement.

59. On the other hand, counsel for the respondent identified three issues for determination –

    i. Whether there was breach of the bonding agreement

    ii. Whether Tenwek Mission Hospital benefited from the respondent's services.

    iii. Whether the respondent is entitled to the counterclaim.

60. On issue (i) it is submitted that the then director of the programme Amanda J. Mcoy duly authorized the respondent to join Jumuia Friends Hospital Kaimosi as a designated hospital and as such he did not breach or violate the bond-agreement as alleged by the claimant. It is submitted that the agreement did not bind the respondent to only work for the claimant and not for any other facility and as such it is misleading and hypocritical for the claimant to allege so. In that regard the court is urged not to rewrite the contract between the parties by taking the misleading interpretation assigned by the claimant but instead apply the reasoning in National Bank of Kenya Ltd V Pipe plastic Samkoit (K) Ltd & Another (Supra).

61. On issue (ii) it is submitted that in the letter of appointment dated 1st May, 2015 the claimant engaged the services of the respondent as a general doctor as he trained and that he indeed offered the services for five years as he trained along. It is submitted that in the circumstances there is no reason or logic upon which the court may order for refund of the stipend paid as the same was in actual sense a salary for services rendered. Counsel has relied on the definition of employment under Section 2 of the Act arguing that the respondent was for all intents and purposes an employee of the claimant during the period of five years as he trained along and that it is on that basis that he was paid the stipend which doubled-up as a salary. It is further submitted that under Article 41 of *the Constitution* the claimant was entitled to reasonable working conditions including the salary paid.

62. It is submitted that in the circumstances the cause ought to be dismissed with costs and judgment entered in favour of the respondent in terms of the counterclaim with costs.

V. Issues For Determination

63. Upon thorough and careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from both sides, and the submissions by counsel for both parties, the court identifies the following issues for determination –

    a. Does this court possess the jurisdiction to hear and determine the subject matter of this cause?

    b. Is the claim time-barred by law?

    c. Does the claimant enjoy locus to file this claim in court?

    d. Is the claimant entitled to the reliefs sought in the claim?

    e. Is the respondent entitled to the reliefs sought in the counterclaim?

    f. Who meets the costs of the cause and counter-claim?

VI. Jurisdiction

64. Vide an electronic application completed on 14th August, 2014 and revised on 6th September, 2014 the respondent applied to join PAACS Kenya Orthopedic Residency. The application also bears the logos of the claimant but for all intents and purposes the application is addressed to PAACS. Clause 5 of the said application provided as follows –

> 5. Residents who are approved for sponsorship through PAACS will receive a monthly educational stipend (which will serve as their salary). This mount (which varies by program site) will be disclosed to you once it is decided where a training opportunity exists. After completion of their orthopaedic surgery training, the sponsored resident will be asked to serve as a surgeon in an underserved area of Africa for a period of one year of service for each year of sponsorship. The resident and PAASC will work together to identify a suitable hospital where time of repayment owed by the resident to PAACS will work together to identify a suitable hospital where time of repayment owed by the resident to PAACS will be served. (Emphasis added).

65. By way of a letter dated 3rd November, 2014 the respondent was admitted into the PAACS training programme and he was assigned to the claimant to commence the training in January, 2015.

66. Subsequently, the claimant and the respondent entered into an educational bond-agreement dated 7th January, 2015.

67. In my considered view, and I hold so, the relationship created through the above instruments was between PAACS and the respondent. The court finds and holds that the relationship so created is within the purview of Section 2 of the Act that defines a contract of employment as –

> " 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;

68. As at the time of applying and joining the training programme, the respondent was an employee of the Government of the Republic of Kenya working at the Provincial General Hospital Kakamega (PGH) from where he resigned so as such to join the programme. This logically explains why PAACS had

to pay a salary to the respondent, through the claimant, as he trained and worked at the claimant's hospital. The agreement is also clear that it is PAACS that was to agree with the respondent on where he was to serve once he completed the training. The claimant had no role in that regard.

69. The above letter is also clear that it is PAACS who sponsored the respondent and not the claimant. The claimant was only the locale for the training. It is clear that the PAACS channeled its sponsorship through the claimant in terms and conditions that are not subject of this litigation.

70. The conduct, terms, and conditions of service during the training were outlined in a "letter of employment" dated 7th January, 2015 which inexplicably was executed at the behest of the claimant.

71. All the above confirm that indeed the subject matter of this cause is an employment relationship and this court is properly seized of the jurisdiction to entertain, hear, and determine the same based on the provisions of Article 162(2) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*.

VII. Limitation

72. Having held that the court has the requisite jurisdiction over the subject matter, the next issue to consider is whether the claim herein was filed within the limited time under Section 90 of the Act which provides that –

> 90. Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

73. The evidence on record is that the respondent completed his training in December, 2019. Based on the above provisions of the law any claim against the respondent was to be filed within three years of that date running from January, 2020 through to December, 2022. The memorandum of claim herein was filed in court on 24th March, 2022 which is well within the time of limitation. Mutatis mutandis the counterclaim filed on 20th May, 2022 was filed within time.

VIII. Locus

74. The court has alluded in an earlier part of this judgment that the claimant herein was the locale for the training of the respondent through which PAACS channeled the resources therefor and even paid a salary through the claimant. In my considered view, and I so hold, the role of the claimant herein was merely facilitative. The claimant did not expend any monies towards the training of the respondent but it was a locale or terminus for the training through the funds and resources availed by PAACS.

75. I find and hold as above for the following reasons. One, the respondent applied to PAACS to be admitted into the programme and not to the claimant. It is only after the successful application that the claimant came into the picture as the facility for the training. In fact, the programme director of PAACS signed the letter of respondent's admission into the training as such informing the respondent that the claimant was the chosen facility for his training. Two, paragraph (g) of the bond-agreement specifically provided that "Should the Resident elect not to serve the full term of the bond for whatever reason, the amount equivalent to the total salary package received during the term of the training shall be refunded to the program" (emphasis added). In my considered view the term program here does not refer to the claimant and as such it cannot lay claim on the money. As noted above PAACS was funding and managing the training.

76. Curiously, the legal status of PAACS in Kenya has not been disclosed in these proceedings. The question that lingers is whether PAACS is a legal or juridical person capable of suing and being sued and why it was not made a party in these proceedings. In my view, and I so hold, the claimant has no legal basis whatsoever in filing this cause claiming for money that it did not pay in the first place. The evidence on record, as stated above, is that the respondent was trained and facilitated by PAACS during the entire training and the claimant provided the locale for the training and the applicable funds were channeled through it by PAACS. Clearly and evidently, the claimant's role was merely facilitative.

77. Three, therefore, the salary paid is not refundable to the claimant as the respondent offered his services and trained as required by PAACS in the letter of acceptance. The letter is clear that the payment was a salary ostensibly paid for services rendered. There is no legal basis upon which the court may order refund of a salary paid for services already rendered. To buttress this holding, it is for the purposes of offering medical services that PAACS and the claimant routinely obtained an annual practicing certificate for the respondent so that he continued offering medical services for the entire period of the training.

78. The court is fully cognizant of the fact that it cannot and should no rewrite a contract between parties. However, and equally so, the court has a duty to interpret the contract in a purposive manner that gives effect to the same and complies with the law. In my considered view, I find and hold that the clause in the contract for refund of salary paid for services rendered is illegal and unenforceable in law. To be clear, the salary paid for the services rendered is and should be different and distinct from the cost of training or fees thereof. However, whether it is a claim for refund of the salary, which the court has found to be untenable, or a claim for refund of the training costs, the court finds and holds that the claimant has no legal locus standi in making such claims as the respondent applied for the training in a programme run and operated by a third party called PAACS which is not party in this cause.

79. Other than the salary paid to the respondent for services rendered during his training, there is no tabulation on the actual cost of the training. Logically, this may inform that the respondent was trained in exchange of him offering his services at the agreed salary. In any event, the respondent was already a qualified general medical practitioner by the time he joined the training programme.

80. The court has said enough in demonstrating that the claim by the claimant herein lacks merits on several fronts. One, the claimant has no locus in laying the claim as the respondent made his application to PAACS and the claimant came in only as the locale or terminus for his training. Two, the respondent was paid a salary for services rendered, ostensibly because he worked and offered services as he trained. It shall be unfair, unjust, and illegal for the court to order for refund of the monies so paid as salary. Three, even if any claim for a refund was to be made it is PAACS that ought to have made such a claim as it admitted and undertook to sponsor the respondent in the said training. Four, the actual cost of the training has not been disclosed and as such the claim is misplaced and vague.

81. Five, and most importantly, once the respondent completed his training and obtained his certificate from PAACS the claimant offered to him a job through a letter of offer dated 1st August, 2019. However, the respondent declined the offer and moved on to work for his current employer. If the respondent was as a matter of fact an employee of the claimant as alleged then there was no need for a letter of offer. He should simply have been upgraded and promoted to a position befitting his new status as a consultant orthopedic surgeon. This is further testimony to the fact that at no time was the respondent an employee of the claimant but he was on the payroll of PAACS with the claimant as the pay-point and locale for the training. The evidence on record is that PAACS did not own any training facilities in Kenya and used hospitals owned by other entities such as the claimant for their trainings.

82. What appears to have happened is that the claimant wanted to force the respondent to work for it upon completion of the training and once he declined the offer the claimant was bitter and decided to take up the matter without involving PAACS, the sponsor. In my considered view, what the claimant attempted to do was to force the respondent to work for it in restraint of trade which is illegal – See Geilla V Casman Brown.

83. For all the above reasons, the claimant's cause shall fail and it is so found and held.

IX. Counterclaim

84. In my view, the counterclaim by the respondent is of itself a defence rather than a counterclaim in the conventional and normative sense. As noted in the introductory part of this judgment, the respondent is seeking to have the claimant perpetually barred from making the claims made against him in this cause. The court has found in the foregoing part of this judgment that the claimant's cause is not merited and dismissed the same. Consequently, the court shall allow the counterclaim.

X. Disposal

84. The court issues the following orders: -

a) The claimant's cause is hereby dismissed.

b) The counter-claim by the respondent is hereby allowed in the following terms –

i. A declaration be and is hereby issued that the respondent is not and was never bound to work for the claimant.

ii. A declaration be and is hereby issued that the respondent owes no monies to the claimant and the claimant is hereby restrained by itself, agents, servants, and or others howsoever from making any demands on the same.

d) The respondent is awarded the costs of the cause but there is no order on costs for the counterclaim.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 26TH DAY OF JUNE, 2024

.....

DAVID NDERITU

JUDGE