



**Muchiri v Caritas Microfinance Bank Limited (Cause E422 of 2021)
[2024] KEELRC 2546 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2546 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E422 OF 2021
SC RUTTO, J
OCTOBER 18, 2024**

BETWEEN

TITUS ANTHONY THEURI MUCHIRI CLAIMANT

AND

CARITAS MICROFINANCE BANK LIMITED RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated 21st May 2021, the Claimant herein avers that he was employed by the Respondent as an Operations Manager with effect from 2nd January 2015 on a three year performance based contract renewable based on satisfactory results. He was successfully appraised during the probation period and he was confirmed in the position of Operations Manager on or about 17th October 2016.
2. After the end of three years, his contract of employment was extended for a period of one year from 1st January 2018 to 31st December 2018. On 21st February 2019, he was issued with an extension of contract letter for a period of two years effective 1st January 2019 to 31st December 2019.
3. According to the Claimant, he served the Respondent with diligence, dedication and commitment. He further avers that his performance was exemplary and as a result, on or about 2nd September 2019, he was appointed as the Acting Chief Executive Officer (CEO). To this end, he executed a contract on 6th September 2019.
4. From the record, things took a turn in the employment relationship when the Claimant was notified through a letter dated 30th November 2020, that his contract would not be renewed. It is the Claimant's contention that the Respondent's decision not to renew his contract was not grounded on valid and fair reason and the procedure was unfair.
5. It is against this backdrop that the Claimant is seeking the following reliefs:



- a. A declaration and finding that the Claimant was subjected to unfair labour practice by being held on acting capacity in the post of Chief Executive Office from November 2019 to January 2021 without being confirmed and or reasonably compensated;
 - b. A declaration and finding be and is hereby issued that the Claimant's relationship with the Respondent was that of Employer-Employee in the capacity of Operations Manager and Employer Employee in the capacity of CEO.
 - c. A declaration and finding be hereby issued that the Claimant had a reasonable/legitimate expectation to have his Contract of Employment renewed.
 - d. An Order directing the Respondent to pay the Claimant Kshs 6,750,000 or the equivalent full salary he would have been entitled to as Chief Executive Officer from November 2019 to December 2020.
 - e. An order declaring that the procedure in terminating the Claimant's role as an acting CEO was unlawful and unfair and award him damages equivalent to 12 months' pay for the role and designation of CEO.
 - f. A declaration that the Respondent practiced unfair labour practices in failing to renew the Claimant's contract and consequently the non-renewal amounted to unfair and illegal and unprocedural and illegal dismissal/termination of the Contract.
 - g. General Damages for (f) above equivalent to 12 months' pay that is Kshs 5,776,800 for unfair termination.
 - h. General damages for loss of reputation and Loss of career, mental stress and anguish.
 - i. Salary in lieu of Notice.
 - j. An order directing the Respondent to pay the Claimant any terminal benefits he would have been entitled to as per his role as Chief Executive Officer.
 - k. Certificate of Service.
 - l. Costs of the suit and Interest thereon at Court rates from the date of filing this suit until payment in full.
6. Opposing the Claim, the Respondent contends that the Claimant's appointment as CEO in an acting capacity was not necessarily as a result of his alleged exemplary performance. According to the Respondent, it was not obligated to have a valid and fair reason or any reason at all for not renewing the fixed-term contract and or was bound to follow a particular procedure. It is the Respondent's contention that in any event, it had valid reasons for not renewing the Claimant's contract of employment. Consequently, the Respondent has asked the Court to dismiss the Claimant's claim with costs.
7. During the trial which took place on 22nd February 2024 and 9th April 2024, both parties called oral evidence in support of their respective cases.

Claimant's Case

8. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement, supplementary witness statement as well as the list and bundle of documents filed alongside the Memorandum of Claim and the supplementary list and bundle of documents to constitute his evidence in chief.



9. It was the Claimant's evidence that he held the position of Acting CEO from August 2019 until January 2021. That during his tenure, the Respondent achieved the best financial results since its incorporation and broke even for the first time in August 2020 despite the COVID-19 pandemic and its harsh impact. That since then, the bank has been in a profitable financial position due to his stewardship.
10. That under Contract-4, he was entitled to an acting allowance of 10% of the basic pay of the CEO which at the time was Kshs 450,000/= and therefore, the acting allowance offered was not in tandem with the terms of Contract-4.
11. The Claimant further averred that on or about 8th August 2020, he forwarded an email to the Human Resource Committee inquiring on the status of his position as Acting CEO as he had increasingly become concerned that a year had lapsed since his appointment as Acting CEO and that there was no activity from the Respondent in confirming the position and or commencing recruitment of a CEO.
12. On 10th August 2020, he received a response to his inquiry via email on 10th August 2020 wherein he was informed that the Board was aware of his concerns and that it would be discussed in a Special Board meeting scheduled for 13th August 2020.
13. On 24th August 2020, he had lunch with the Respondent's Chairman wherein he emphasized and confirmed that he had indeed exceeded expectations as the Acting CEO. He further informed him that during the Special Board Meeting held on 13th August 2020, he had proposed to the Board to confirm him for the post of CEO.
14. On or about 25th August 2020, he was issued with a Notice that his 2-year contract of employment was set to expire on 31st December 2020 and was thus directed to express his intention to renew the same by 15th September 2020. He was further informed that a performance appraisal would be conducted by his supervisor who at the time was the Chairman of the Board.
15. He proceeded to issue his intention for renewal in writing and forwarded it to the Respondent on or about 10th September 2020. At the time, it was the practice of the Respondent that if they did not intend to renew a Contract, they would notify the person of this fact and anchor their decision on a poor appraisal report at least three months before the expiry of the contract to allow the employee to plan accordingly. According to the Claimant, based on the contents of the email dated 25th August 2020, and as the same was sent within the expected timeframe, he was of the firm belief that the notice was merely procedural and the Respondent only intended to find out from him if he was interested in renewing his Contract.
16. The Respondent acknowledged receipt of the aforesaid letter forwarding the two Balance Score Cards for his roles in the Bank i.e. Acting CEO and Head of Operations and stated that an appraisal would be conducted by the Chairman.
17. He filled in the Balance Score Cards and forwarded the same for the Chairman's review and appraisal and further inquired on when they could schedule the meeting for the appraisal. He did not receive any response from the Chairman and this forced him to send follow-up emails on 25th September 2020 and 1st October 2020.
18. On 1st October 2020, the Chairman forwarded his Balance Score Cards to the Board's ICT and Operations Committee who were scheduled to have a meeting the following day on 2nd October 2020.
19. He was in attendance at the meeting of 2nd October 2020 as he is a member of that Committee. However, when the issue of his appraisal was raised, he was requested to leave the meeting to enable



- them deliberate on the same. The Board clarified to him that they would only handle his appraisal for the Operation Manager's role and his appraisal for the CEO role would be handled by the Chairman. He was expected to be called back into the meeting for the discussion but that was the last encounter he had regarding the issue of his appraisal.
20. He continued to act as the CEO despite concerns being raised by the Central Bank of Kenya about the Respondent operating without a substantive CEO.
 21. In the meantime, the role of the CEO was advertised through a recruitment agency. Bearing in mind the promise made by the Chairman, he immediately and confidently forwarded his application on 19th October 2020.
 22. He was invited for an interview for the CEO position on 22nd October 2020. He attended the interview and came out feeling quite confident with his performance. He later received an email from the recruiting agency that he had been recommended for the position of CEO and that the Respondent was currently reviewing his profile.
 23. He however came to learn that the deadline for the applications for the CEO position had been extended to 2nd November 2020. In the Claimant's view, this was a calculated move to deny him the opportunity to be the CEO.
 24. On 13th November 2020, he received another email updating him on the status of his application for the CEO position. He was informed that he had been recommended for the position but one of the panelists was indisposed and was expected to resume official duties the following week.
 25. The Claimant further averred that on or about 2nd December 2020, he received a letter dated 30th November 2020 signed by the Chairman informing him that his Contract-3 would not be renewed primarily because of two fraud cases which had occurred around September 2019.
 26. According to the Claimant, he was shocked and perplexed after he read the contents of the letter as he was never invited and or attended any appraisal with the ICT and Operations Board Committee and further, he was never granted any opportunity to be heard in order to explain the nature of the fraud cases, how he became aware of the same and how he handled the cases prior to the Respondent rendering its decision of 30th November 2020.
 27. He was distraught and dismayed by the aforesaid letter and responded via email, requesting an opportunity to be heard. However, the Respondent only acknowledged receipt of the aforesaid letter but has never attended to the same to date.
 28. In his view, the Respondent's decision not to renew his contract was not grounded on valid and fair reasons and the procedure followed was unfair.
 29. It was the Claimant's contention that every other member of the staff is accorded a fair hearing when there is a disciplinary issue and thus it is baffling why the Respondent would handle his matter differently.
 30. The Claimant termed the reasons cited for the non-renewal of his contract as not genuine.
 31. He further averred that he is a senior actor in the Banking Industry and has suffered injury to his reputation. This has been exacerbated due to the pandemic as jobs are few and far between. That further, he has lost his stock and employability in the industry.



Respondent's Case

32. On its part, the Respondent called oral evidence through three witnesses being Father Simon Ng'ang'a, Mr. Patrick Kariuki and Ms. Everlyne Mutuku. Father Ngang'a was the first to go. He testified as RW1 and started by identifying himself as an ordained priest and a member of the Respondent's Board of Directors. RW1 proceeded to adopt his witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
33. RW1 stated that the Claimant's primary role as Operations Manager was to manage and coordinate all operational activities and to ensure quality service and effective operations support for all assigned internal and external customers.
34. That on 25th August 2020, the Respondent issued a notice to the Claimant informing him that his two-year contract as the Operations Manager was set to expire on 31st December 2020. The Claimant was required to express his intention for renewal in writing for consideration by the Respondent.
35. He is aware that upon expressing interest for renewal of his contract as the Operations Manager on 7th August 2020, the Claimant was requested to fill in a Balanced Scorecard/Appraisal Form to allow for him (RW1) carry out an appraisal.
36. He is further aware that upon deliberations, it was deemed fit that the Operations Manager's appraisal be conducted by the Respondent's ICT and Operations Board Committee in line with the company policy. On 2nd October 2020, the ICT and Operations Board Committee appraised the Claimant as the Operations Manager and reported its findings to the Board.
37. The appraisal of the Claimant as the Operations Manager was an agenda item during the committee meeting held on 2nd October 2021 and when the agenda item for the appraisal of the Claimant was reached, he was requested, in line with sound corporate practice standards, to leave the meeting as he had an interest in the matter and the Committee could not objectively discuss the issue in his presence.
38. Notwithstanding his absence, the Committee objectively conducted the appraisal of the Operation's Manager based on the performance appraisal tools of the Respondent and ranked the Claimant at 79% (Target partially met). For his contract to have been renewed, he was required to have met his target of 100%. The Board did not recommend renewal of his contract.
39. It was noted in the said meeting that although the Claimant had partially met his performance targets as per the appraisal conducted by the ICT and Operations Committee, two fraud cases which had occurred in September 2019 had not been revealed to the Board by the Claimant under whose docket the fraudulent transactions had happened.
40. RW1 further averred that the Respondent resolved not to renew/extend the Claimant's contract of employment as the Operations Manager, a decision it was entitled to take given the fact that his contract of employment was a fixed-term contract without a binding obligation for the employer to renew it.
41. He is also aware that the Respondent was not bound under law to renew or extend a fixed term contract and is further not bound to provide reasons for not renewing, even though it did in this case.
42. Following the decision not to renew the Claimant's fixed term contract of employment, on 2nd December 2020, the Respondent issued the Claimant with a notice of non-renewal of the contract that was due to expire on the 31st of December 2020.
43. Mr. Patrick Kariuki who testified as RW2, identified himself as the Chairman of the Respondent's Board of Directors. Similarly, he adopted his witness statement to constitute his evidence in chief.



44. RW2 stated that on 2nd September 2019, the Claimant was appointed to the position of CEO in an acting capacity to temporarily fill a vacancy created by the expiry of the contract of the then CEO.
45. The Claimant undertook to perform the responsibilities of the position in an acting capacity and was entitled to an allowance of 10% of the basic salary of the CEO.
46. On 8th August 2020, the Claimant wrote to him (RW2) inquiring about the status of his role as acting CEO.
47. Vide an email dated 10th August 2020, he informed the Claimant that the Board was aware of his inquiry and would make the same an agenda in a Board meeting that was to be held on the 13th of August 2020.
48. On or around October 2020, the Respondent commenced the recruitment process of a substantive CEO. The recruitment agency, after conducting interviews, first recommended four names including the Claimant's name to the Respondent's Human Resource Board Committee. The Respondent further requested for five more names from the recruitment agency to have a wider pool of candidates from which four names of the best candidates were recommended and second interviews conducted by the Respondent's Human Resource Board Committee.
49. The Respondent upon conducting the second interview recommended two best candidates: Wilson Mwangi Kamau and David Mukaru for the final Board interview. David Mukaru emerged the best candidate and was recommended for appointment as the Bank CEO on 15th February 2021.
50. RW2 further averred that as is the practice, he would hold lunch meetings once in a while with whoever occupies the position of the CEO of the Bank for briefing on the on-goings of the Bank. In this case, he remembers that on the 24th August 2020, he did have a lunch meeting with the Claimant who was acting as the CEO of the bank.
51. During the meeting, their discussion was mainly on the performance of the bank. There was no promise of any position as the policy of the bank, particularly on senior positions, is to recruit competitively by advertising the position.
52. According to him, it has been the practice that those already working with the bank and who feel qualified for the position would be free to apply. In this case, the Claimant did apply to the recruitment agency as required and was not shortlisted for the final Board interview.
53. RW2 was categorical that he did not promise the Claimant that the Respondent would employ him as a substantive CEO or offer him another senior position. In his view, the Respondent did not create any legitimate expectation that the Claimant would be retained as the substantive CEO.
54. Ms. Everlyne Mutuku who testified as RW3, identified herself as the Respondent's Head of Department, Human Resource and Administration. Equally, she proceeded to adopt her witness statement to constitute her evidence in chief.
55. It was RW3's evidence that when the Claimant was the Acting CEO, he received Kshs. 37,000/= as the acting allowance, which is equivalent to 10% of the basic salary of the CEO's position, being Kshs.370,000/= as per the Human Resource Policy.
56. It was her testimony that the Claimant cannot purport that he was entitled to the salary of the CEO while at the same time not disputing the fact that he was in an acting capacity and had not substantively filled that position.



57. She is aware that the Claimant's contract was a fixed-term contract whose renewal was based on performance.
58. That before the contract ended, the Claimant was subjected to an appraisal by the ICT and Operations Board committee. The results of the appraisal were that the Claimant attained 79%.
59. According to RW3, the renewal of the Claimant's contract, relying on satisfactory results, could not be done as he had partially met the expectations. She averred that the Claimant did not meet the expected target, and the Respondent was justified in not renewing the contract.
60. She is aware that the Claimant was previously served with a warning letter by the Respondent for an act of omission when he was an Operations Manager.
61. That further, the Claimant was aware that his employment contract was about to end. This knowledge is based on the fact that the Claimant wrote a letter dated 7th September 2020 to the Chairman of the Board of Directors of the Respondent expressing his interest in renewing his employment contract.
62. On the issue of the alleged Claimant's reputational damage, RW3 stated that it was indicated in the letter not to renew the contract that he was not an active participant in the commissioning of the fraud cases.
63. That the Respondent placed responsibility on him for failing to report two fraud cases that had happened in September 2019. The information was material for a conclusive appraisal, and his failure to inform the Board or the ICT and Operations Committee affected the quality of the appraisal.
64. RW3 further stated that the Respondent indicated that the decision not to renew the Claimant's contract was based on the fact that he failed to reveal two fraud cases. That having written the said letter, the Claimant's claim that he had a reasonable expectation for his contract of employment to be extended cannot stand.
65. RW3 further averred that the letter appointing the Claimant as Acting CEO was not definite as to the length of time he could act. That the COVID-19 pandemic provided exceptional circumstances that made it reasonable for the duration to be extended as it was impossible to get a substantive CEO owing to the prevailing economic and social environment between March 2020 to October 2020 when the pandemic was at its peak.
66. This position was communicated to the Central Bank of Kenya on 14th September 2020 and that the position had been advertised. The Claimant signed the Letter on behalf of the Chairperson of the Respondent's Board of Directors.

Submissions

67. On his part, the Claimant submitted that a prolonged period of appointment of an employee in an acting capacity without being given the substantive appointment or relieved of their role amounts to discrimination and unfair labour practices on the part of the employer.
68. While appreciating that there are no clear legal provisions as to the maximum period during which an employee can occupy a position in an acting capacity, the Claimant argued that Courts have held that such a period ought to be a reasonable one to avoid an instance whereby an individual does not hold a legitimate expectation to be officially confirmed for that position.
69. It was the Claimant's position that his performance as Acting CEO resulted in the Respondent's achieving phenomenal results as it broke even under his leadership. According to the Claimant, he had demonstrated that he occupied the position of the Acting CEO and undertook his duties as required



from 1st September 2019 to 31st December 2020 which period was inordinately long to be in an acting capacity. In his view, this was unlawful and a clear act of unfair labour practices. In support of the Claimant's position, the Court was invited to consider the determination in the case of *Oyatsi v Judicial Service Commission* (2022) eKLR and *Edah Cheronno Maiywa v University of Nairobi Enterprises & Services Limited* (2020) eKLR.

70. The Claimant maintained that he was subjected to unfair labour practices by being held in an acting capacity for 16 months in contravention of the Respondent's policy and without any communication from the Board of the Respondent on the extension while the Respondent enjoyed his exemplary services.
71. The Claimant further submitted that whereas the jurisprudence emerging from the Courts in recent times is that there is no legitimate expectation of renewal of fixed term contract, he argued that it has been held that there may be instances with unique circumstances where an employee may have a legally enforceable expectation for the renewal of the contract despite having a clear end date. To buttress this position, the Claimant placed reliance on the authorities in *Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union* (2021) eKLR and *Dierks v University of South Africa* (1991) 4 BLLR (LC).
72. The Claimant invited the Court to consider the circumstances surrounding the matter herein, the conduct of the Respondent and the long-standing consistent practice or custom of the Respondent of renewing or extending his contract and find that the same would have surely led him to believe that his contract would be renewed.
73. The Claimant further submitted that the Respondent's reason for not renewing his contract on the basis of his performance was unfair and disingenuous. It was his position that the contract was renewable subject to his satisfactory performance and the Respondent acted in complete disregard of its employment protocols having failed to schedule and conduct a proper appraisal meeting between him and his supervisor who was the Chairman and evaluate his performance on the roles of Acting CEO and Operations Manager.
74. The Claimant further posited that he was never given a chance to explain the nature of the fraud cases, how he became aware of the same and how he handled the cases prior to the Respondent rendering its decision of 30th November 2020.
75. On this issue, the Claimant submitted that he was condemned unheard and a decision was made based on a baseless accusation because the Respondent did not tender any evidence to demonstrate that he was aware of the fraud cases but decided not to bring them forward.
76. On the Respondent's part, the Court was urged to take judicial notice of the fact that the COVID-19 pandemic and its effects swept across all sectors of the economy, including the banking sector. In the Respondent's view, these effects provided exceptional circumstances that made it reasonable to extend the duration of the Claimant's appointment, which was coming to an end. The Respondent further submitted that it was impossible to appoint a substantive CEO owing to the prevailing economic and social environment between March 2020 and October 2020, when the COVID-19 pandemic was at its peak. The Respondent maintained that the Claimant's acting capacity was not inordinately long.
77. The Respondent further submitted that the Claimant was not treated unfairly during his employment. In the Respondent's view, the period in which the Claimant was in an acting capacity does not amount to discrimination or unfair labour practice.



78. It was the Respondent's further submission that the Claimant was not treated differently from any of its employees. That instead, the decision not to confirm him or renew his contract was specific to his individual circumstances.
79. It was further submitted that the contract between the Claimant and the Respondent was a fixed term contract which had a fixed ending period and in which the Respondent did not have any much obligation to give reasons to justify its decision not to renew. In support of this position, reliance was placed on the case of *Anne Theuri v Kadet Limited (2013) eKLR* and *Margaret A. Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR*.
80. Placing reliance on the case of *Transparency International-Kenya v Omondi (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR) (17 February 2023)*, the Respondent further submitted that the doctrine of legitimate expectation does not arise in the renewal of a fixed-term contract, and its non-renewal cannot constitute unfair termination or dismissal.
81. In the Respondent's view, the Claimant's argument that the Respondent's custom of renewing or extending his contract amounted to legitimate expectation was unfounded.
82. The Respondent stated in further submission that the obligations in a fixed-term contract cease with the contract's expiry and thereafter, the Claimant can only demand what is due under the said contract.

Analysis and Determination

83. Arising from the pleadings, the evidence on record as well as the rival submissions, the following issues stand out for determination:
 - a. Whether the non-renewal of the Claimant's contract of employment amounted to unfair termination;
 - b. Whether non-renewal of the Claimant's contract of employment went against his legitimate expectation;
 - c. Whether the Claimant was subjected to unfair labour practices; and
 - d. Whether the Claimant is entitled to the remedies sought.

Whether non-renewal of the Claimant's contract of employment amounted to unfair termination

84. It is common ground that at the time of the separation, the Claimant was serving on a fixed-term contract of two years with effect from 21st February 2019.
85. The record bears that vide a letter dated 30th November 2020, the Claimant was notified that the Respondent's Board of Directors had resolved not to renew his contract which was coming to an end on 31st December 2020. It is that non-renewal of his contract of employment that the Claimant has termed as unfair.
86. The Court of Appeal and this Court have held in numerous decisions that fixed-term contracts ordinarily carry no obligation or expectation of renewal. Case in point is *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho- Kariuki [2017] eKLR* in which the learned Judges of Appeal expressed themselves as follows: -

“(29) Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry.”



87. In the instant case, the Claimant's last contract of employment was very explicit that its duration was fixed for two years. Therefore, the contract of employment had a start date and an end date. As such, renewal or non-renewal was an option that could be exercised by either party at the end of the fixed term period. In this case, the Respondent opted not to renew the contract. Therefore, the contract stood terminated on its end date being 31st December 2020.
88. In failing to renew the Claimant's contract of employment, the Respondent notified him that he had partially met expectations and that he had failed to report two fraud cases that had occurred in September 2019. The Claimant has contended that he was not involved in the appraisal by the Respondent's ICT and Operations Board Committee. The Claimant has further argued that the Respondent never gave him a chance to explain the nature of the fraud cases cited, how he became aware of the same and how he handled the cases prior to its decision of 30th November 2020.
89. It is worth mentioning that being a fixed-term contract, the Respondent was not bound to give any reasons for the non-renewal of the Claimant's contract. If I may say, in as much as the reasons given by the Respondent influenced its decision not to renew the Claimant's contract of employment, the same were irrelevant since the Claimant's fixed term contract was coming to an end anyway.
90. On this issue, I will follow the determination of the Court in the case of *Trocaire v Catherine Wambui Karuno* [supra] where it was held that:
- “Once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period. This much was appreciated by this Court in *Oshwal Academy (Nairobi) & another vs. Indu Vishwanath* [2015] eKLR which quoted with approval Rika, J.'s sentiment in *Bernard Wanjohi Muriuki vs. Kirinyaga Water And Sanitation Company Limited & another* [2012] eKLR:-
- “In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”
91. The foregoing position notwithstanding, the Court notes that the Claimant was not given an opportunity to participate in his appraisal by the Respondent's ICT and Operations Board Committee. Further to that, there is no evidence that the Claimant was accorded an opportunity to answer the allegation that he failed to report the two fraud cases that had occurred in September 2019.
92. It is this Court's view that the Respondent having elected to include the reasons that influenced its decision not to renew the Claimant's contract of employment in its letter dated 30th November 2020, it was only fair and prudent that it accords him an opportunity to participate in the appraisal process by the Board's ICT and Operations Committee and to respond to the allegations that he failed to report the two fraud cases that had occurred in September 2019.
93. I say so having taken into account the fact that the letter dated 30th November 2020 notifying the Claimant of the non-renewal of his contract of employment constitutes a permanent record thus impacting his future career. To this extent, the Respondent did not act fairly towards the Claimant. Be



that as it may and noting the fact that the nature of the contract of employment herein was timebound, that is as far as I am willing to go on that issue. I will say no more.

94. All in all, the Court returns that the Claimant's contract of employment was not unfairly terminated through non-renewal of his fixed term contract, rather the same ended through effluxion of time. Consequently, a claim of unfair termination does not lie.

The question of legitimate expectation

95. It is the Claimant's case that he had a reasonable and or legitimate expectation to have his contract of employment renewed. As to what amounts to legitimate expectation, the Supreme Court of Kenya had this to say in *Petition No 14 of 2014 Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR: -

“(265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”

96. In this case, the Claimant knew all along that the contract of employment was fixed, and at the end of each contract period, it could be renewed or not renewed. If I may say, the mere fact that renewal of the Claimant's contract of employment was based on his performance, does not in my view confer a reasonable legitimate expectation on his part. If anything, it ousts any legitimate expectation the Claimant may have harboured.
97. In addition to the foregoing, the fact that the Claimant was advised through the email dated 25th August 2020 by RW3 to express his intention to renew his contract further confirms that renewal of his contract of employment was not automatic and was subject to consideration by the Respondent's Board of Directors and his performance.
98. On this issue, I am fortified by the determination of the Court of Appeal in the case of *Transparency International Kenya vs Teresa Carlo Omondi* (2023), in which it was held as follows: -

“We dare say that an automatically renewable fixed-term contract is a contradiction in terms, as it would subject the parties to an indeterminate employment contract. The respondent was under fixed-term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant's issuance of a fixed-term contract. The contract terminated automatically when the termination date arrived. Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and it cannot create a legal right under the doctrine of legitimate expectation... In the instant case, there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation.”

99. Applying the aforementioned binding authority to the case herein, I have not discerned any factor in the Claimant's contract of employment and circumstances attendant to this case that can be construed as conferring legitimate expectation on his part that the contract of employment would be renewed beyond 31st December 2020.



Unfair labour practice?

- 100. The Claimant has contended that he was made to act as the Respondent’s CEO for a prolonged period of time hence amounting to unfair labour practice. It is not in dispute that the Claimant was appointed to serve as CEO in an acting capacity with effect from 1st September 2019 up to 31st December 2020.
- 101. Notably, the letter appointing the Claimant to serve in an acting capacity did not provide specific timelines and if anything, indicated that his acting appointment would be terminated if the post is filled whilst he was acting.
- 102. According to the Respondent, failure to appoint a substantive CEO was occasioned by the then prevailing economic and social environment between March 2020 and October 2020, when the COVID-19 pandemic was at its peak. During cross-examination, the Claimant admitted that he was acting as the Respondent’s CEO during the COVID-19 pandemic.
- 103. As has been held in numerous decisions by the Courts, having an employee serve in an acting capacity for prolonged periods of time amounts to unfair labour practices.
- 104. In this case, I have considered the acting period by the Claimant as well as the prevailing circumstances and it is this Court’s view that the period was not prolonged. As such, the Court returns that the Claimant was not subjected to an unfair labour practice.

Final Orders

- 105. In the final analysis, it is the Court’s finding that the Claimant was not unfairly terminated from employment on account of non-renewal of his contract of employment and was not subjected to unfair labour practices. Therefore, the declaratory and monetary reliefs do not lie.
- 106. Accordingly, the Claim is dismissed in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2024

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STELLA RUTTO
JUDGE

In the presence of:
For the Claimant Ms. Kwoba instructed by Ms. Mabango
For the Respondent Mr. Kipkurui
Court Assistant Millicent Kibet
Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

