



REPUBLIC OF KENYA



KENYA LAW
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**Wambua v Lordship Africa Fund Management Ltd (Cause 549 of 2019)
[2023] KEELRC 2214 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2214 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 549 OF 2019
JK GAKERI, J
SEPTEMBER 27, 2023**

BETWEEN

PATRICK KIMANI WAMBUA CLAIMANT

AND

LORDSHIP AFRICA FUND MANAGEMENT LTD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 22nd August, 2019 alleging unfair termination of employment and failure by the Respondent to pay terminal dues.
2. It is the Claimant's case that he was employed by the Respondent in November 2016 as a Sales Executive in real estate at Kshs.100,000/= per month and served diligently until 11th December, 2018 when the Respondent terminated the employment by intimating that it would not renew the contract that had expired on 23rd October, 2018.
3. The Claimant alleges that the termination of employment was abrupt and amounted to unfair termination of employment.
4. The Claimant further avers that her dismissal was unprocedural and unfair.
5. The Claimant prays for;
 - a. A declaration that termination of employment amounted to unfair termination.
 - b. Kshs.1,916,000.00 comprising;
 - i. Notice pay Kshs.100,000.00
 - ii. House allowance Kshs.396,000.00
 - iii. Leave allowance Kshs.220,000.00



iv. Unfair termination Kshs.1,200,000.00

Total Kshs.1,916,000.00

- c. Costs of the suit.
- d. Interest on (b) and (c) above.
- e. Such further or other relief as the court may deem fit.

Respondent's case

- 6. The Respondent responded by a statement filed on 1st October, 2019 admitting that the Claimant was its employee under a 2 year contract effective 24th October, 2016 to 23rd October, 2018 at Kshs.100,000/= as at the date of termination.
- 7. It is the Respondent's case that it delayed in communicating its intention not to renew the employment contract as all decisions were made by one person who was out of the country and the Claimant continued rendering services awaiting the decision on the same terms and conditions.
- 8. That the decision not to renew the contract was made when the Chairman returned to Kenya on 11th December, 2018.
- 9. The Respondent maintains that the situation was simply a non-renewal of a contract of employment as opposed to a termination.
- 10. That the sum of Kshs.79,809/= paid to the Claimant on 24th December, 2018 comprised notice period and leave days less statutory deductions.

Claimant's evidence

- 11. On cross-examination, the Claimant testified that he was employed under a two (2) years contract which ended in October 2018. He testified that the contract had no clause on house allowance.
- 12. The witness testified that he was given a verbal notice of termination and did not receive the non-renewal notice. He denied having signed the document.
- 13. He admitted having signed the discharge voucher on 24th December, 2018 and understood that the Respondent had paid all dues payable to him.
- 14. On re-examination, the Claimant maintained that he neither received the notice of non-renewal nor was the signature on it his.
- 15. Strangely, the Claimant could not recall having proceeded on leave having worked for only 2 years.

Respondent's evidence

- 16. RWI, Jilna Patel confirmed that she joined the Respondent in 2021.
- 17. That the Respondent did not issue a renewal of contract but a non-renewal notice.
- 18. It was her testimony that email records revealed that the Claimant had only 2 leave days pending.
- 19. That housing allowance was part of the basic salary and the contract made no reference to housing allowance.



Claimant's submissions

20. Counsel for the Claimant identified four issues, whether the contract of employment was extended by conduct, whether the discharge voucher was binding, whether termination was unfair and entitlement to reliefs.
21. As to whether the Claimant's contract was extended after expiry, counsel submitted that although the Claimant was employed on a fixed term contract, the Respondent did not communicate non-renewal but continued to assign him duties and pay his salary from October 23rd 2018 to 11th December, 2018. Counsel submitted that the Respondent, by conduct extended the Claimant's contract.
22. Reliance was made on the decision in *Justin Beswick V Local Ocean Conservation (LOC) Kenya Ltd (2022) eKLR* to urge that renewal of a contract of employment may be implied from conduct of the parties.
23. The decisions in *Caroline Muthoni Njoroge V LVCT Health (2019) eKLR* and *Eunice Mwikali Munyao V Elys Chemical Industries Ltd (2017) eKLR* were also cited to buttress the submission.
24. As to whether the discharge voucher was vitiated, counsel submitted that it was vitiated by misrepresentation of facts by the Respondent as he continued rendering services.
25. Reliance was made on the sentiments of the court in *Sheila Kiplangat V Unilever Kenya Ltd (2022) eKLR*.
26. As to whether termination of employment was unfair, counsel relied on the provisions of Article 41(1) and 47(1) of *the Constitution* to urge the right to fair labour practices and administrative action.
27. Reliance was also made on the provisions of Section 41 and 45 of the *Employment Act* as were the sentiments of the court in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* and *Pamela Nelima Lutta V Mumias Sugar (2017) eKLR* among others to urge the requirements of a fair termination of employment.
28. Counsel urged that the Respondent had not proved that it had a valid reason to terminate the Claimant's employment nor did it accord him the right to be heard.
29. As regards the reliefs sought, counsel urged that the Claimant was entitled to all the reliefs on account of the unfair termination from employment.

Respondent's submissions

30. Counsel addressed two issues namely;
 - i. Whether the Claimant's termination was unfair.
 - ii. What remedies are available to the Claimant if any?
31. On termination, counsel submitted that the Claimant's contract lapsed and was not renewed a fact the Claimant admitted at the hearing and was paid all his terminal dues as per the contract and was not terminated unlawfully.
32. On remedies, counsel submitted that the Claimant was paid Kshs.79,809/= comprising notice pay, a 2 day leave and was thus not entitled to any other reliefs and the salary was consolidated.
33. The court was invited to dismiss the suit.



Findings and determination

34. It is common ground that the Claimant was employed by the Respondent on 24th October, 2016 under a 2 year fixed term contract scheduled to lapse on 23rd October, 2018. Extension was subject to prior written agreement between the parties and either party could terminate the agreement by one (1) month notice.
35. It is also not in dispute that the Claimant served the entire contractual term and continued serving at the behest of the Respondent until 11th December, 2018 when the Respondent gave him a verbal notice of termination of employment.
36. The Claimant denied having received the notice of non-renewal dated 11th December, 2018 and additionally denied that the signature on the letter was his.
37. The Respondent on the other hand adduced no evidence on how service of the letter was effected.
38. Relatedly, to the naked eye, the signature on the letter dated 11th December, 2018 and those on the copy of the cheque dated 20th December, 2018 and the clearance form dated 24th December, 2018 are different. The latter two are similar.
39. Finally, it is common ground the Claimant remained an employee of the Respondent from 24th October, 2018 to 11th December, 2018 after the 2 year fixed term contract had lapsed.
40. The Respondent neither gave a renewal nor a non-renewal notice on or before 23rd October, 2018.
41. The Claimant continued working as usual and was paid for the days worked in October, November and 11 days in December, 2018.
42. In the premises, the issues for determination are;
 - i. Whether the Claimant's employment contract lapsed or was terminated by the Respondent.
 - ii. Whether the clearance form signed by the Claimant on 24th December, 2018 waived the Claimant's right to pursue further claims against the Respondent.
 - iii. Whether the Claimant is entitled to the reliefs sought.
43. As to how the Claimant's employment came to an end, parties have adopted contrasting positions. While the Claimant alleges that the employment was impliedly extended by the Respondent's conduct, the Respondent submitted that the contract lapsed and was not renewed.
44. The law governing fixed term contracts is articulated in several Court of Appeal decisions such as *Francis Chire Chachi V Amatsi Water Services Company Ltd* (2012) eKLR, *Registered Trustees De La Salle Christian Brothers T/A St. Mary's Secondary School V Julius D. M. Bains* (2017) eKLR, *Registered Trustees of the Presbyterian Church of East Africa & another V Ruth Gathoni Ngotho-Kariuki* (2017) eKLR among others including *Transparency International-Kenya V Teresa Carlo Omondi* (2023) KECA 174.
45. In the latter case, the court expressed itself 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 a 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 appellants 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.”

46. In the Registered Trustees of the Presbyterian Church of East Africa V Ruth Gathoni Ngotho (Supra), the court stated that;

“Bearing the foregoing in mind, we note that fixed term contract carries no rights obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the Respondent’s contract ought not to have been maintained . . .”

47. Finally, in Francis Chire Chachi V Amatsi Water Services Co. Ltd (Supra), the court stated as follows;

“ . . . Accordingly, the necessary timelines for the communication of the decision not to renew the contract need to be upheld.”

48. The court is in agreement with these sentiments.

49. In the instant case, the contract of employment provided that;

“ Any extension to this Agreement is subject to prior written agreement between the employee and the employer. This will be done one month before the contract expires.”

50. Be that as it may, after the contract lapsed, the Claimant continued discharging his duties as an employee of the Respondent which encouraged him by giving him tasks to perform as he had previously done and was paid.

51. There was no break in the continuity of his employment until the verbal notice on 11th December, 2018, one (1) month and 19 days later.

52. The Respondent’s defence was that all decisions of the Respondent were made by the Chairman who was away and had to be awaited for, information the Claimant had not been made aware of.

53. Impliedly, the Respondent was surmising that if the Respondent’s Chairman had stayed away longer, the Claimant would have remained in employment.

54. The Respondent offered the Claimant one (1) month’s salary to placate him for the late communication of the non-renewal.

55. In Justin Beswick V Local Ocean Conservation (LOC) Kenya Ltd (Supra) where the Claimant’s contract ended on 31st December, 2020 and no notice was issued and the Claimant continued rendering services for one month and 17 days ostensibly because the board had not met to make a decision or renewal or otherwise the learned judge held that the employee had a legitimate expectation that the employment contract would be renewed and was renewed by conduct of the Respondent.

56. The foregoing circumstances apply on all fours to the facts of the instant case.

57. In the instant case, the Respondent’s conduct of permitting the Claimant to continue rendering services and paying him long after the fixed term contract had lapsed meant that the parties had a contract of employment implied from their conduct effective 24th October, 2018.

58. As the Claimant continued working and the Respondent paid him the salary he used to receive under the expired contract, the Claimant had a reasonable expectation that the contract would be renewed.



59. For an expectation to qualify as legitimate for purposes of protection by the law, it must be provided that;
- i. The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification.
 - ii. The expectation must be reasonable.
 - iii. The representation must have been induced by the decision maker.
 - iv. The representation must be one which it was competent and lawful for the decision maker to make without which reliance cannot be legitimate.
60. The principle of legitimate expectation was also alluded to in *Republic V Kenya Revenue Authority Ex parte M-Kopa Kenya Ltd (2018) eKLR* where Odunga J. (as he then was) stated as follows;
- “A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. It is a basic principle of fairness that legitimate expectations ought not be thwarted. . .”
61. In the instant suit, the court is satisfied that the Respondent’s conduct was a clear message to the Claimant that he would retain a benefit of advantage by having his employment contract renewed.
62. For the foregoing reasons, it is the finding of the court that the Claimant’s contract of employment did not terminate by effluxion of time as it had been renewed by conduct of the parties.
63. It would appear to follow that the Respondent’s verbal notice of non-renewal of the Claimant’s contract of employment was an unfair termination of employment as neither the provisions of Sections 45, 43, 47(5) nor 41 of the *Employment Act*, 2007 had been complied with for the termination to pass the fairness test as enunciated in *Walter Ogal Anuro V Teachers Service Commission*.
64. The Respondent’s letter had no reason for termination and the Claimant was not accorded a hearing. In sum, termination of the Claimant’s employment was unfair for want of a substantive justification and procedural propriety.
65. As regards the clearance form, the Claimant admitted on cross-examination that he signed the document dated 24th December, 2018 also signed on behalf of the Respondent.
66. The last paragraph of the document read as follows;
- “I Patrick Kimani Wambua of ID Number 20055665 do hereby confirm that I have received my final dues via a cheque dated 20th of December, 2018 for the month of December from Lordship Africa Fund Management Ltd. I therefore absolve Lordship Africa Fund Management Ltd of all obligations towards me.”
- Name: Patrick Kimani
- Sign: Signed
- Date: 24.12.2018.
67. The court is in agreement with the Claimant’s submission that a discharge voucher binds the parties thereto unless vitiated.
68. In this case, both parties signed the clearance form.



69. The salient question is whether the Claimant waived his right to pursue further claims against the Respondent.
70. In *Coastal Bottlers Ltd V Kimathi Mithika* (2018) eKLR, the Court of Appeal stated;
- “Whether or not a settlement agreement or discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue in our view should address its mind firstly on the import of such a discharge/agreement and secondly whether the same was voluntarily executed by the concerned parties.”
71. Once a discharge voucher or settlement agreement is executed by the parties, it becomes a binding contract between them. It was so held in *Trinity Investments Ltd V Lion of Kenya Ins Co. Ltd* (2015) eKLR.
72. In the instant case, it is common ground that Claimant signed the clearance form voluntarily on the date he received payment.
73. The form is emphatic that the Claimant had received final terminal dues and absolves the Respondent from “all obligations towards him.”
74. In the court’s view, the form is specific to the obligations the Respondent owed the Claimant germane to terminal dues. It makes no reference to further claims the Claimant may have had against the Respondent, typical of discharge vouchers and settlement agreements.
75. The Claimant counsel’s submission that the discharge voucher was vitiated had no supportive evidence and was unpersuasive. The Claimant neither pleaded nor proved misrepresentation by the Respondent, duress, undue influence, mistake or other vitiating element.
76. The court is persuaded and finds that the Claimant was bound by the clearance form and absolved the Respondent from existing contractual obligations as opposed to actions the Claimant may have had against the Respondent.
77. Puzzlingly, the Respondent did not submit on the issue.
78. In sum, it is the finding of the court that the Claimant did not waive his right to pursue further claims against the Respondent on termination as evidenced by the instant suit.
79. However, none of the obligations in relation to final dues are enforceable.

Reliefs

80. Having found that termination of the Claimant’s employment was unfair and the Claimant absolved the Respondent from all obligations under the contract of employment and having further admitted that he was paid one (1) month’s salary and leave days, the court proceeds as follows;
- i. Having found that termination of the Claimant’s employment by the Respondent was unfair, a declaration to that effect is merited.
 - ii. Notice pay
81. The Claimant admitted having been paid one (1) month’s salary by the Respondent.
The claim is unsustainable and it is declined.



iii. House allowance

82. Having found that the Claimant absolved the Respondent from “all obligations towards” him, created by the contract of employment, the claim for house allowance is unsustainable and is disallowed.

iv. Leave days

83. Although the Claimant denied that he was paid for the earned but untaken leave days, the payslip for December 2018 reveal that he was paid Kshs.9,524.00 for leave days and admitted having received the sum of Kshs.79,809.00 and signed for it.

84. Finally, having signed the clearance form, the Claimant absolved the Respondent from its obligations. The prayer is declined

v. Unfair termination Kshs.1,200,000.00

85. Having found that termination of the Claimant’s employment was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007.

86. Consistent with the provisions of Section 49(4) of the Act, the court have taken into consideration the following;

- i. The Claimant was an employee of the Respondent for about 2 years and 2 months, a fairly short time.
- ii. The Claimant did not appeal the Respondent’s decision to terminate his employment.
- iii. The Claimant did not contribute to the termination of employment.
- iv. The Claimant did not express his wish to remain in the Respondent’s employment.

87. In the circumstances, the court is satisfied that the equivalent of 3 months gross is fair, Kshs.300,000/=.

88. In conclusion, judgement is entered in favour of the Claimant against the Respondent as follows;

- a. Declaration that termination of the Claimant’s employment was unfair.
- b. Equivalent of three (3) months salary, Kshs.300,000/=.
- c. Costs of this suit.
- d. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2023

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

