



REPUBLIC OF KENYA



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**Aderbis v Alliance for a Green Revolution in Africa (Cause E1020 of 2021)
[2023] KEELRC 2530 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2530 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1020 OF 2021
NJ ABUODHA, J
OCTOBER 19, 2023**

BETWEEN

ARABA ADERBIS CLAIMANT

AND

ALLIANCE FOR A GREEN REVOLUTION IN AFRICA RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on 8th December, 2021, the claimant alleged inter-alia that:

The Employment Agreement

- a. The Respondent headhunted the Claimant whilst he was serving as the Regional Director for Africa for the International Center for Tropical Agriculture, a position he had held for over 3 and a half years.
- b. By the Agreement, the Respondent employed the Claimant as Managing Director, Alliance for a Green Revolution Forum (AGRF) in its Presidency Division. Some of the salient terms of the Agreement were that:
 - i. the Claimant's employment would commence on 4 May 2020 and would continue until terminated in accordance with the terms of the Agreement;
 - ii) The Claimant's employment would be for a term of 3 years, including a probation period of 6 months;
 - iii) the Claimant's gross salary would be USD 187,000 annually prorated in 12 equal monthly instalments and an additional USD 28,050 per annum as provident fund contribution, USD 40,890 as housing and utilities allowance including security, home and



mobile internet services, and medical insurance for the Claimant and his spouse;

- iv) The Claimant was also entitled to USD 16,900 per child per annum, annual leave accumulation of 2.5 days per month and an annual round trip economy air travel for the Claimant, his spouse and qualifying dependants which benefits are more particularly delineated in the Agreement;
- v) either party could terminate the Agreement during the probationary period by providing 1 month notice;
- vi) either party could terminate the Agreement after the probationary period by giving 3 months' notice;
- vii) the Agreement constituted the entire understanding between the parties;
- viii) the Respondent's whistle-blower policy was to provide a mechanism to ensure transparency and integrity in all the Respondent's operations and to provide a mechanism that protects individuals who report known or suspected illegal activities;
- ix) the Agreement would be governed and interpreted in all respects in accordance with Kenyan law; and
- x. the parties to the Agreement irrevocably submitted to the exclusive jurisdiction of the courts of Kenya to settle any disputes that could arise in connection with the Claimant's employment.

2. According to the claimant, he dutifully and satisfactorily performed his duties as the Managing Director of the AGRF and in accordance with the Agreement.
3. Despite having joined the Respondent in the midst of a global pandemic, the Claimant delivered an AGRF summit (a key event and KPI for the Claimant) in virtual format (which had not been done before) (the Summit). According to the claimant:
 - i. The Summit was the best attended in the Respondent's history and was done under budget for the first time in the Respondent's history.
 - ii. Prior to 2020, the highest number of delegates was 3,000. The Summit organised with the involvement of the Claimant achieved an attendance of 10,400 delegates with 43% female speakers. Notably, for the year 2021, the number of delegates dropped to around 7,500.
 - iii. The Summit also raised a surplus of circa USD 1.1M, another unprecedented achievement.
4. The outstanding and unprecedented outcome of the Summit would not have been possible if the Claimant was not diligent, a good communicator with good judgment and decision making skills.
5. Consequently, the Claimant's probationary period ended on 4 November 2020 without any performance related concerns being raised by the Respondent.



6. The Claimant was thus automatically confirmed, on the same terms, as a full-time employee of the Respondent on 5 November 2020 by operation of law because the probationary contract was neither terminated nor extended prior to that.
7. The Claimant continued to diligently discharge his duties without any adverse communication on his performance until 17 December 2020 when the Respondent closed its operations for the year.
8. The Claimant's performance for the year ended 2020 was rated as very good and exceptional by the Respondent's 360 evaluation matrix which was based on feedback from his peers and direct reports.
9. Despite the Respondent having closed office, Agnes Kalibata, the Claimant's then supervisor and the Respondent's President, sent the Claimant a WhatsApp message on 18 December 2020 requesting a call to discuss the Claimant's performance review. The Claimant agreed to Agnes Kalibata's request.
10. During the call, Agnes Kalibata informed the Claimant that she would 'extend' his probation period by 3 months until 4 March 2020 (ostensibly from 4 January 2021). Yet, the unlawful Report (defined in the next paragraph) indicated that the Claimant's probationary contract terminated on 4 November 2020.
11. The Respondent (through its Human Resources Director (the HR)) subsequently shared a purported probation assessment report (the Unlawful Report) with the Claimant with a request to counter-sign the Unlawful Report. The Claimant did not sign the Unlawful Report.
12. Agnes Kalibata indicated in the Unlawful Report that the Claimant's performance was 'below expectation'.
13. No reason was given for why the Unlawful Report which ought to have been completed prior to 4 November 2020 was shared after the Respondent had closed office and more than a month after the Claimant's probation had terminated.
14. The Unlawful Report was also not executed by the Claimant's supervisor and head of department as required by the Respondent's Human Resource Manual (the HR Manual).
15. On 15 January 2020, the Claimant met with Agnes Kalibata to discuss the contents of the Unlawful Report. Agnes Kalibata causally mentioned that she wanted to "shake the Claimant up" with the purported extension and suggested fortnightly calls to check in. However, she did not honour all the scheduled calls. She missed a number of the calls.
16. The Claimant thereafter received another email from the HR requesting him to sign the Unlawful Report. The Claimant again declined to sign the Unlawful Report and stated he would discuss the matter with Agnes Kalibata.
17. Agnes Kalibata emailed the Claimant on 25 February 2021 and requested a call to discuss a number of performance related issues. A scheduled call was made on 26 February 2021 where the Claimant was not given an opportunity to discuss the said issues and eventually had to email his responses to Agnes Kalibata.
18. Without any notice or hearing, the Respondent terminated the Claimant's employment during a call on 4 March 2021 where Agnes Kalibata stated that the Claimant had 'failed to deliver' and the relationship was "just not working out."
19. The Respondent did not specify the reasons for the termination and or the specific objectives the Claimant had failed to deliver on. The Claimant's termination was therefore both unlawful and unfair



as the Respondent neither had a fair reason to terminate the Claimant's employment nor did it follow a fair procedure as required under the Employment Act, 2007 because:

- a. If indeed the Claimant's performance was poor, the Claimant was not placed under a performance improvement plan as required by clause 4.2 of the Respondent's HR Manual;
 - b. The Respondent terminated the Claimant's employment without:
 - i. having a valid reason for termination as required by section 45 of the Employment Act, 2007 (the Act);
 - ii. issuing a notice inviting the Claimant to a disciplinary hearing;
 - iii. conducting a disciplinary hearing as required by section 41 and 45 of the Act; and
 - iv. issuing the Claimant with a letter stating the reasons for termination.
20. The Claimant's termination was conducted in a most callous of ways, violating his constitutional rights to; fair hearing; fair labour practices; fair administrative action and his inherent human right to dignity.
 21. The HR thereafter emailed the Claimant (on 4 March 2021) informing him that the Respondent wished to enter into a mutual separation agreement where the Claimant would receive cash compensation in lieu of 3 months' notice, relocation allowance and allowance for unclaimed leave days.
 22. The Respondent sent out a memo on 5 March 2021, informing partners of the AGRF that the Claimant had stepped down and an acting Managing Director had been appointed. The memo was signed by Agnes Kalibata.
 23. The HR emailed the Claimant on 8 March 2021 directing him to disengage work with the Respondent by close of business on 9 March 2021.
 24. On 9 March 2021, the Respondent issued the Claimant with a formal letter of termination of probation (the Letter). Yet, the Claimant was not on probation. The Letter stated that the Claimant would be paid cash in lieu of one month's notice and other benefits. The Letter was signed by Agnes Kalibata.
 25. On 10 March 2021, the Respondent circulated an internal staff memo stating that the Claimant's last working day was 10 March 2021.
 26. As a result of these procedural and substantive infractions on the law, the Respondent unfairly terminated the Claimant.
 27. Prior to his termination, the Claimant was a well-respected public policy and strategy specialist and a leading professional in the African agri-food sector. Prior to joining the Respondent, the Claimant was the Regional Director for Africa for the International Center for Tropical Agriculture. A position he held for 3 and a half years. A position he was headhunted from.
 28. Previously, the Claimant served as a Senior Manager, African Policy Engagement (External Consultant) for the CGIAR Research Program on Climate Change, Agriculture and Food Security (CCAFS).
 29. The Claimant had also served as Senior Technical Adviser on Environmental Policy to the Minister, Federal Ministry of Agriculture and Rural Development, Abuja, Nigeria for a period of 4 years.
 30. The Respondent is, however, on a sustained campaign to diminish and tarnish the Claimant's reputation. This was first done by the memo issued by the Respondent to partners of the AGRF



informing them that the Claimant had stepped down. This was obviously interpreted as irresponsible of the Claimant to step down on such short notice by the AGRF partners. Now, by the refusal to issue the Claimant with a Certificate of Service.

31. The respondent filed a response and counterclaim in which it averred among others that; -
- a. The Respondent admits paragraphs 9 and 10 but states that it has not waived any of its immunities as alleged by the Claimant. The Respondent is an organization gazetted under the *Privileges and Immunities Act* vide Legal Notice No. 24 dated 26th February 2016 pursuant to the Agreement dated 11th March 2008 between the Government of Kenya and the Respondent regarding the establishment of its headquarters in Kenya.
 - b. Pursuant to section 9(2) of the *Privileges and Immunities Act*, the Respondent enjoys the privileges and immunities specified in paragraph 1 of Part I of the Fourth schedule to the Act.
 - c. In response to paragraphs 16-18 of the Statement of Claim, the Respondent states that:
 - i. The Claimant was employed by the Respondent as its Managing Director for the Africa Green Revolution Forum (AGRF). His terms of engagement was on a probationary basis for an initial period of six (6) months between the months of 4th May 2020 and 4th November 2020 as per the terms stipulated in the Employment Agreement.
 - ii. AGRF is an alliance of partners that care about and commit to and drive inclusive agricultural transformation in Africa. The Respondent serves as the Secretariat of the AGRF.
 - iii. The AGRF organizes an annual Summit in Africa, which is the world's premier forum that pulls together stakeholders in the African agricultural landscape to take practical actions and share lessons that will move African agriculture forward. The Summit is attended by African Heads of State, ministers, farmer organizations, private agribusinesses, financial institutions, researchers, development partners, NGOs, and civil society.
 - iv. In 2019, Rwanda was competitively selected by the AGRF partners as a longterm home country of the AGRF until 2025. As the home country of the AGRF, the Government of Rwanda was formally appointed as:
 - a. The champion of the agricultural agenda in Africa;
 - b. Host of the annual AGRF Summit, to be held in September of all even years; and
 - c. Host of the AGRF Secretariat and to provide office space at no cost.
32. In further response to paragraph 18 of the Statement of Claim, the Respondent states that Clause 3 of the Claimant's Employment Contract provided that he was to be based in Kigali, Rwanda.
33. The Claimant's presence in Rwanda was crucial as the Managing Director of the AGRF' for the following reasons:
- i. The Government of Rwanda had provided office space for the AGRF Secretariat, and it was important to take up the space and host services provided to manage the relationship with the government of Rwanda.



- ii. The AGRF Partners had for various reasons selected Rwanda as the AGRF Secretariat's home country. AGRA was therefore bound to comply with this decision.
 - iii. The AGRF Summit was to be held at the Kigali International Conference Centre, and the Claimant was required to engage with events managers to guide them on the set up as well as attend the Summit as the lead representative of the AGRF.
34. The Claimant was required to partner and liaise with the Government of Rwanda on the annual AGRF summit in Rwanda as well as easily engage and supervise vendors during the organization of the AGRF Summit. The Respondent avers that the Claimant failed and/or refused to report to his duty station in Rwanda despite:
- i. The Respondent offering a shipping allowance to the Claimant which included the costs of the air tickets for the Claimant and his dependents and shipping costs for the Claimant and his dependent's household items.
 - ii. The Respondent providing all COVID-19 pandemic protection measures to its staff during travel, including the provision of masks.
 - iii. Several reminders from the Claimant's line manager requesting him to report to Rwanda, to attend meetings with some of the AGRF Partners and the Government of Rwanda.
 - iv. Senior officials from the Government of Rwanda raising concerns that the AGRF Secretariat had not utilised the office space it had provided to the Respondent. To manage the situation, the Respondent appointed officers and managers to represent the AGRF in physical meetings held in Kigali on the AGRF Summit.
35. The Claimant was employed by the Respondent when the COVID - 19 pandemic had already begun. By an email dated 18 March 2020 the Claimant accepted that he would be based in Kigali, Rwanda when he reported to work in May 2020. He also acknowledged in the same email that there were travel restrictions at that time due to the COVID-19 pandemic.
36. The Claimant months after his employment, informed his line manager that he was hesitant to travel to Kigali as he had a genetic condition, Protein C deficiency which posed a significant health risk during the course of the COVID-19 pandemic. He did not disclose this at the time of his employment.
37. The Claimant however failed to make a full and frank disclosure of his health condition which he alleged prevented him from travelling to Rwanda later on. The Respondent states that the Government of Rwanda had taken some of the strictest COVID-19 pandemic measures in the world to ensure that there were minimal infection rates in the country. The Claimant therefore did not have a valid or legitimate reason not to travel to Rwanda.
38. Had the Claimant made this disclosure at the interview stage which was after the Covid-19 pandemic had been declared, he would not have been offered employment as the Managing Director AGRF. The contract of employment was therefore vitiated by this non-disclosure and the Claimant was in breach of Article 41 of *the Constitution* of Kenya.
39. The Respondent denies the claim in paragraph 19 of the Statement of Claim and states that the Claimant did not perform his duties dutifully and to the Respondent's satisfaction. The Claimant poorly performed the following duties:



- i. The Claimant failed to incorporate comments that his line manager and the Board Chair of AGRA had made to him during a meeting on 5th February 2021. These comments were to be included in an update to the AGRF Partners.
 - ii. The Claimant failed to provide feedback to colleagues and was not open to sharing information.
 - iii. Failing to physically engage with officials from the Government of Rwanda, AGRF Partners and failing to attend the AGRF Summit at the Kigali International Conference Centre. These engagements and the AGRF Summit were carried out under strict COVID-19 protection measures. These engagements were a necessary job requirement for the Claimant as he was the leader, spokesman and face of the AGRF.
40. The Respondent denies the claims in paragraphs 20 - 24 of the Statement of Claim. The Claimant was not personally responsible for the success or otherwise of the AGRF Summit which was organized and coordinated by the Respondent's employees and Summit Secretariat.
 41. The Respondent denies the Claim in paragraph 25 of the Statement of Claim and states that the Claimant was furnished with the Progress Assessment Report at the end of the probationary period as stipulated under Clause 2.18 of AGRA's Human Resources Policies Manual. The Progress Assessment Report confirmed that his performance during probation was not satisfactory and identified areas where the Claimant required to improve. The Progress Assessment Report recommended an extension of the probationary period until 4th March 2021 as provided for in Clause 2.18 of the Human Resources Policies Manual.
 42. The Respondent denies the claim in paragraph 26 of the Statement of Claim and states that there was no automatic confirmation of employment as this was subject to Clause 2.18 of the Human Resources Policies Manual which contemplated a written confirmation of the employment after satisfactory completion of the probationary period and a recommendation by the new employee's supervisor in the Progress Assessment Report.
 43. The Claimant's supervisor did not recommend his employment as his performance was unsatisfactory. The Claimant had also failed and/or refused to report to Kigali Rwanda and this had strained the relationship between the Respondent and the Government Rwanda as the host country for AGRF.
 44. The Respondent denies paragraph 27 of the Statement of Claim and states that the Claimant was notified of his unsatisfactory performance as indicated in the Probation Assessment Report as well as in meetings between the Claimant and the Respondent's supervisor.
 45. The Respondent denies the claim in paragraph 28 and states that the 360 Evaluation Report was not the basis of assessing the Claimant's performance as this was merely feedback from his peers. The Respondent states that Clause 2.18 of the Human Resource Policy contemplates that the mode of assessment was to be chosen by his supervisor.
 46. In answer to paragraph 30 of the Statement of Claim the Respondent denies the claim and states that the Claimant was notified that his performance was unsatisfactory as indicated in the Probation Assessment Report. Under Clause 2.18 of the Human Resource Policies Manual, the employee's supervisor was required to fill a Probation Assessment Report at the end of the probationary period, recommending whether the employment could continue beyond the probationary period. The Respondent further states that the Probation Assessment Report recommended a further three (3) months extension and the Claimant was given an opportunity to improve his performance.



47. The Respondent denies the allegation in paragraph 36 of the Statement of Claim and states that the employee's supervisor duly filled the report and signed it. The Respondent's Human Resource Department practice and procedures required the Claimant to sign the Report before forwarding it to the Head of Department. The Claimant refused and declined to sign the Progress Assessment Report.
48. The Respondent denies the allegation in paragraph 38 of the Statement of Claim and states that on 19th January 2021, the Director of Human Resource wrote to the Claimant reminding him of his obligation to countersign the Performance Assessment Report. The Claimant in breach of his probationary contract, refused to sign the report thereby frustrating the forwarding of the report to the Head of Department. The Claimant is under the misguided and misconceived notion that he could assess himself as an employee to determine whether he was suitable to be confirmed as the Managing Director AGRF.
49. The Respondent states that prior to his termination, the Claimant's supervisor, the President of AGRA communicated to the Claimant as a follow up on the Progress Assessment Report and discussed performance related issues as was required under Clause 2.18 of the Human Resources Policies Manual.
50. The Respondent denies the allegation in paragraph 42 of the Statement of Claim and states that by an email dated 25th February' 2021, the Claimant's supervisor wrote to the Claimant identifying his shortcomings and gave him an opportunity to discuss the same at a meeting which was to take place the following day.
51. The Respondent denies the allegation in paragraphs 43 and 44 of the Statement of the Claim and states that after evaluation, the Claimant was made aware of his shortcomings and given an opportunity to improve.
52. As the Claimant did not improve, the Director of Human Resource was obligated to terminate the probation contract under Clause 11 of the Employment Agreement which provided that the agreement could be terminated during the probation period by giving one (1) month's written notice to that effect or in the alternative one (1) months' salary in lieu of such notice.
53. The Respondent denies the allegations in paragraph 46(b) (ii-iv) of the Statement of Claim and states that termination of a probationary contract is excluded from the application of provisions of Section 41 of the Employment Act. The Respondent further states that the termination was fair and lawful. The Performance Assessment is not to be conflated with a disciplinary hearing which is governed by Section 41 of the Employment Act. Section 42 (1) of the Employment Act excluded probationary contracts from the ambit of Section 41.
54. The Respondent denies the allegation in paragraph 49 of the Statement of Claim and states that following the end of the extended probationary period, the Claimant's performance had not improved. Consequently, he was invited to a meeting with his supervisor on 4th March 2021 where he was informed that his probationary contract would not be confirmed due to unsatisfactory performance. The Respondent was obligated to communicate the termination of the probationary contract to the AGRF partners.
55. In response to paragraph 51 of the Statement of Claim, the Respondent states that following the end of the extension of probationary contract on 4th March 2021, the Claimant was issued with a formal letter of termination dated 9th March 2021. The letter informed him that he had not improved and failed to meet the standards of the Respondent and that he would not be confirmed to the position of a



managing director. This decision was guided by Clause 2.18 of the AGRA Human Resources Policies Manual and Clause 11.1 of the Employment Agreement.

56. The Respondent denies the allegation of reputational damage as pleaded in paragraphs 54 - 57 of the Statement of Claim and states that the communication made by the Respondent to AGRA partners informing them that the Claimant had stepped down did not allege any impropriety and there was no reference to any aspect of his professional integrity.
57. The Respondent denies the allegations in paragraphs 60 of the Statement of Claim and states that it has not in any way hampered the Claimant to seek employment anywhere in the world as he claims to be an expert in a select field.
58. The Respondent reiterates paragraphs 1- 75 of the Statement of Response herein and pleads in counterclaim as hereunder.
- a. The Claimant applied for the position of a Managing Director for Alliance for a Green Revolution Forum (AGRF) to be based in Kigali, Rwanda. He was offered employment on a probationary basis employed on a probationary basis for an initial period of six (6) months between the months of 4th May 2020 and 4th November 2020 as per the terms stipulated in the Employment Agreement dated 30th March 2020.
 - b. Prior to execution of the Employment Agreement, the Claimant and the Respondent exchanged correspondences regarding the location of his workstation amidst the COVID-19 pandemic. By an email dated 18th March 2020, the Claimant accepted that he would be based in Kigali Rwanda and he subsequently executed the Employment Agreement on 16th April 2020.
 - c. The Respondent avers that the Claimant failed and/or refused to report to his duty station in Rwanda despite being offered a shipping repatriation allowance of USS 28,050.00 which included the costs of the air tickets for the Claimant and his dependents and shipping costs for the Claimant and his dependent's household items.
 - d. The Claimant ought to refund this amount to the Respondent as he never reported to Kigali, Rwanda despite several reminders from the Claimant's line manager requesting him to report to Rwanda, to attend meetings with some of the AGRF Partners and the Government of Rwanda.
 - e. The Claimant was also provided with a mobile handset valued at USD 340.00 for use while working for the Respondent. Clause 8.7 of the HR Manual provides that one of the employee exit procedures is to return any property including cellular phones and sim card provided to the employee. The Claimant in breach of this clause has failed and/or neglected to return the mobile handset to date. The Respondent therefore prays for refund of the amount of USD 340.00.
 - f. The Respondent's claim against the Claimant in the counterclaim is for a refund of USD 28.390.00 together with costs and interests at court rate.

Particulars

- i. Refund of repatriation allowance paid to Claimant – USD 28,050.00
 - ii. Refund of the mobile handset - USD 340.00
- Total Usd 28, 390.00.



59. In response to the counterclaim the claimant averred that;
- a. In response to paragraph 80, the Claimant reiterates that he was headhunted by the Respondent and that his probationary contract lapsed on 4 November 2020. There was no agreement between the parties during the probationary period to extend it.
 - b. The Claimant admits that by an email dated 18 March 2020, he agreed to be based in Kigali, Rwanda or such other location that the Respondent would be located. This was at the onset of the COVID -19 pandemic which had only been reported in Kenya on 13 March 2020. Little was known about COVID-19 then.
 - c. In response to paragraph 82, the Claimant denies that he refused to report to Kigali, Rwanda. The Respondent's office had not been set up, Rwanda shut down its borders on 20 March 2020 and people were directed to work from home, the Respondent's staff were working from home and more importantly scientists discovered that people with protein C deficiency, among others, were at a higher risk of dying from COVID-19 related complications.
 - d. The Respondent's protein C deficiency was rather innocuous prior to COVID-19 but become deadly during the COVID -19 pandemic. It was at this point that this information became material.
 - e. The Claimant was issued a repatriation allowance based on the fact that he is a Nigerian National and the legal basis for his residency in Kenya was due his prior employment.
 - f. The Claimant denies that the Respondent issued him with a mobile handset as alleged in paragraph 84 and puts that Respondent to strict proof.
60. This matter partly proceeded before Hon. Lady Justice Mbaru who heard the claimant's testimony. The claimant stated that he joined the respondent as Managing Director (MD) on 4th May, 2020. According to him, he was head hunted. The contract was subject to laws of Kenya but based in Kigali – Rwanda where the respondent had an office. At the time he was employed there was Covid-19 pandemic and he had a condition which placed him at a high risk therefore he had to work from home and the respondent agreed.
61. It was his testimony that he was a member of the respondent's Executive and that he organised AGRF summit and invited audience including head's of state and engaged globally. According to him he was successful and a 360 degree feedback was done by colleagues and his performance on leadership was rated exceptional. On 4th November, 2020 after the ending six months, he checked and he had no caution on his probation but was told to be patient. On 12th December 2020 the respondent called and on 18th the chair asked him to line a call and she told him that his performance was below expectation but declined to give reasons. On 21st December he got an email on his performance signed on 17th December, 2020 which informed him that his probation had been extended to 21st March, 2021.
62. It was his evidence that the office closed in July, 2020 due to covid-19 and in January, 2021 when he came to the office to ask why his performance was negative, his supervisor told him that he was too comfortable and that he needed to consult.
63. On 21st January, 2021, he wrote to his supervisor on the 360 feedback and pleaded with her to review her assessment in the light of it but she ignored the request and slowed his work.
64. The claimant further stated that he requested the human resource to expedite the hiring of his staff at Kigali as he needed them transferred to Kigali. The government of Rwanda however shut down the country on 1st January, 2021 and twice in July, 2021. People were not allowed to work from the office



and large gatherings were prohibited. He however did his best noting the global terms and Rwanda's president noted that they had done the summit well under leadership. It was his evidence that he was not involved in the extension of his probation contract on 4th March, 2021. His supervisor called him on a zoom call and said that the call was to tell him he would not be confirmed and that she would not bother giving him reasons. She told him it was for the Human Resource to handle that. She thereafter logged out of the call.

65. On 5th March, 2021 the respondent wrote to its partners informing them that the respondent was stepping down as the Managing Director. According to the claimant this was false since he had not done so. He had previously been asked to sign and agree on the extension of his probation.
66. The claimant further testified that he had not been paid the stated terminal dues and that when he was employed, he brought with him a five year Insurance plan and was about to lose the same. He further stated that he quit his job to join the respondent and did very well hence did not understand the reason for respondent's negative appraisal. The claimant maintained that he became an employee on 5th November, 2020 and that his probation was not extended and further that the question of his performance was never brought to his attention. Regarding appeal he stated that he was to write one to the respondent's president who was his supervisor. He also wrote to the respondent's board but got no feedback. Mediation did not work and the only option left to him was the court case.
67. In cross-examination he stated that he read the respondent's Human Resource Manual and policy and that he understood the same. He denied knowledge that the respondent enjoyed certain immunities and further stated that the respondent waived its immunity over his case and his contract of employment. According to him his contract was governed by the Laws of Kenya and all the disputes were to be governed by Kenyan Laws. Concerning the location of his contract, it was his evidence that his employment was to be in Kigali or where the respondent had an office. The contract however had a designated place as Kigali, Rwanda. The duty station was stated as Kigali, Rwanda.
68. Regarding the manner of recruitment, he stated that he was head hunted and was therefore never interviewed. He was called and deployed and further that he was notified where to be on 8th January, 2020 which was in Kigali, Rwanda. According to him he reported to Kigali virtually on 4th May, 2020 but remained physically at work in Nairobi.
69. It was further the claimant's testimony that he was paid relocation allowance and meant to move out but could not.
70. Regarding his work the claimant stated that the respondent was the front runner in Africa and that in 2019, Rwanda was the aid and host country. The secretariat was based in Kigali, Rwanda as a host country was to provide office space. This was done in January, 2021 and that his probation ended on 4th November, 2020. The claimant reiterated that his contract started on 4th May, 2020 and between 4th May and November, 2020 he was working virtually from Nairobi.
71. It was the claimant's further evidence that he had a condition and took over the job while based in Nairobi because he needed to protect his life. He however admitted that he never communicated on his medical condition when he was hired. According to him, he had vitamin deficiency but had no report filed over the same. His employer never asked for it. He however conceded that there was an obligation to disclose.
72. The Claimant further stated that an employee had an obligation to submit medical certificate he however stated that the clause did not apply to his case. It was his evidence that his condition stopped him from travelling to Kigali and that he called Human Resource about it. It was his evidence that the



Vitamin C deficiency he suffered from was incompatible with Covid-19. The claimant further stated that he was never interviewed therefore never disclosed his medical history.

73. The claimant stated that he was in risk of Covid-19 and that he communicated to the respondent's human resource and Chief Operating Officer and the President of the respondent. The claimant conceded that his assignment was based in Kigali but due to Covid-19, he was unable to relocate to Kigali in January, 2021. He stated that he needed a vaccine before he could relocate. Concerning the 360 review, he stated that this was internal and for the purposes of probation and that under the policy, he was to be assessed while under probation and that his contract was subject to review at the end of the probation.
74. In further cross-examination by Mr. Issa he stated that the respondent's Director of Human Resource signed three documents to the contract and Job Description. He filled the salary and human resource documents but not the Job Description. Regarding his duties as Managing Director, he stated he performed his duties well and delivered his role despite the Covid-19 pandemic.
75. In re-examination he stated that his duty station was to be in Kigali or any other place in 2020 due to Covid-19 and due to Covid-19 and his health, he would work from Nairobi. He maintained that with the agreement of the respondent he worked virtually from Nairobi. It was further his evidence that the Chief Operating Officer was aware of his presence in Nairobi and that he was to move to Kigali once he got vaccinated. He did not get any show cause letter for not reporting to Kigali and that he was not dismissed for not reporting to Kigali.
76. Regarding probation he stated that his probation could be extended on or before 4th November, 2020 and if at any time the respondent found his services were not suitable he could be terminated. After probation period the respondent could not terminate his service. The claimant further stated. That as the respondent's MD, he was aware of the performance appraisal and that confirmation was to be done after successful completion of probation and appraisal. Regarding 360 valuation, it was his evidence that this was anonymous and not supposed to be signed by his line manager. It was sent to him by HR and was not part of his probation process.
77. Regarding targets, it was his evidence that Human Resource was to play a participative role and that all staff on probation set objectives and that he agreed on his objectives verbally with his supervisor. It was his evidence that it was the respondent's responsibility to set the objectives. The claimant further stated that the letter dated 4th May, 2020 gave him a timeline on when to report and work. Concerning probation he stated that he never met with his line manager after his probation to discuss his performance. He however stated that he received an email on 25th February, 2021 from his line manager. The email outlined the allegations. It concerned plans for Kigali and that the office space had been made available but empty for two months. The Rwandese Government was putting pressure for the office to be equipped. This became a reputational challenge. He subsequently spoke with one Agnes on 26th and 5th March, 2021 and did a summary response. He denied having any meeting with Agnes where she told him that he will not be confirmed.
78. The claimant confirmed that at page 80 of the respondent's bundle of documents was the progress report on newly recruited staff on probation which was to expire on 4th November, 2020. He stated concerning him that his was a review done by his line manager. It had a summary and recommendation that more time was needed for assessment and that his probation be extended to 4th March, 2021. He did not sign for the document and that he refused to sign the same. According to the claimant, he wrote an email to the respondent stating that the issue of his probation ought to have been addressed in December, 2020. It was his view that he did the most successful AGRF and that the respondent's President was aware of his good performance. On 4th March, 2021, he was informed that he would



not be confirmed and that his final day at work would be on 5th March, 2021. A separation agreement was consequently sent to him. He did not sign the same. The respondent stated that he would be paid for the six months and that signs the agreement indicating he would no longer be working for the respondent as MD. The claimant complained that he was not given a hearing before the termination. He denied he was on probation at the time he was terminated. According to him probation ended in November, 2020 and any conversation thereafter was as a full time employee. The claimant further complained that the President of the respondent informed partners that he was stepping down while that was not the case. This communication was never shared with him and that he only got to know of it from one of the partners who shared it with him. This, according to the claimant injured his reputation. Further, five months after his termination the respondent said he could not be invited to the forum as a speaker. The organizer wrote to him and said the respondent had requested for alternative speakers. The event he was to attend was a side event to AGRF. The respondent therefore had no right to propose another person to speak at the side event.

79. The respondent witness Mr. Yamfora Chunyata stated that he worked for the respondent as a Director for Human Resource and that he had held the position for four years seven months. He was there when the claimant was hired. He recorded a witness statement on 10th March, 2022 which he produced as his evidence in chief. He also relied on the documents filed with the claim. He explained that the relationship between AGRA and AGRF was that AGRF was a platform created by AGRA. It was part of AGRF and the claimant was hired as the Managing Director of AGRF based in Kigali Rwanda in a facility donated by the Rwandese Government. The Forum was held annually in Rwanda and that the location of the MD was Kigali Rwanda. It was his evidence that at the time of termination the claimant was on probation and had not reported to Kigali.
80. In cross-examination he stated that he was well versed with Human Resource Policies of the respondent. It was his evidence that the respondent sent to the claimant an email dated 8th January, 2020 sharing his job description. The claimant was offered the role and he accepted it. He further stated that the claimant was head hunted for the position and the contract of employment was signed after negotiations between the parties. The contract was to governed by the laws of Kenya and subject to the respondent's Human Resource Policy and Manual. It was his evidence that the respondent followed the HR Policy and Manual when terminating the claimant's service.
81. The claimant was to be on probation for six months. The probation was not extended or terminated before 4th November, 2020. The claimant expressed concern over the extension of the probation. According the witness, the claimant refused to sign the extension. The claimant was required to sign the probationary assessment report and submit to his immediate supervisor. It was his evidence that the probation contract was to expire on 4th November, 2020 and that the contract was to be read side by side with the Human Resource Policy and Manual. According to the manual, the supervisor was to complete a 3 or six month progress report on whether the employee should continue beyond probation.
82. Regarding PIP, it was his evidence that the claimant was not subjected to PIP because he was on probation. The manual permitted managers to take appropriate action within the policy to deal poor performance at the earliest opportunity. There was however no evidence to show such action was taken against the claimant.
83. Regarding appraisal, he stated that the feedback over the claimant found at pages 49-73 of the claimant's bundle of documents was not the only report. The claimant's rating was 4.6 and that 4.3 was average and 5 was exceptional. 4.3 was close to poor. The interpretation of scores at 4 equalled very good. He stated that the claimant's line manager never requested for the information under



clause 4.5(c). It was further Mr. Chinyatu's evidence that in cases of involuntary termination such as on account of misconduct or poor performance, the respondent was to invoke the respondent's disciplinary procedure. Clause 10.2(f) provided that there was to be no dismissal without a disciplinary process. He further stated that the claimant was not invited for a disciplinary hearing and was not furnished with notice. The claimant was not confirmed and that his termination was to effect from 9th April, 2021. The letter stated that the claimant was stepping down from his duties. The letter did not inform the claimant about the right of appeal however Mr.Chinyatu stated that the clause on right of appeal did not apply to the claimant. He further stated that the claimant's refusal to report to Rwanda and his medical condition had not been cited in the termination letter. He confirmed that the respondent could assign the claimant to work in Rwanda or any other position it could assign and that the respondent has an office in Nairobi and that at page 259 of the claimant's bundle of documents was directions to staff to work from home. He further confirmed that the claimant refused to travel to Rwanda due to Covid-19. Regarding the AGRF Summit 2020, he stated that the same was held virtually and the claimant received accolades for good work.

84. Mr. Chinyatu further stated that the claimant refused to comply with exit procedures; no exit interview was conducted and that the claimant refused to sign the separation letter. Concerning the bridging insurance, he stated that the respondent did not refuse to facilitate the same but that the claimant had not cleared for that to be done and further that the claimant had not been paid the amounts stated. The counterclaim was about the relocation allowance to Rwanda.
85. Concerning PIP he stated that this only applied to confirmed employees and not those on probation and that the claimant's appraisal was to be done after probation. He further stated that the claimant's line manager was the Respondent's President and that he was the one who recommended that the claimant's probation be extended. He stated that the feedback report was not an appraisal document and that the document was not developed by the claimant's line manager. There was no evidence he asked for it. The claimant was the one who shared the document. Concerning payment of claimant's terminal dues he stated that the claimant did not sign the letter of non-confirmation hence his dues could not be processed and further that the claimant had not cleared.
86. Concerning the notice to partners, he stated that this was not a termination letter but an alert and further that the claimant could be entitled to pay in lieu of notice and concerning the genetic condition, it was his evidence that the claimant never brought this up during the negotiation of the contract.
87. Regarding relocation allowance, it was his evidence that this was payable once an employee relocated but in the claimant's case it was paid prior to relocation which is why the respondent was counterclaiming for it because the claimant never moved to Rwanda despite being paid.

Determination

88. Having summarised the pleadings and evidence and having reviewed submission by counsel, the Court identifies three issues for determination. First is the issue of jurisdiction of the Court to entertain this suit; second if the issue of jurisdiction is resolved in favour of sustaining the suit, was the claimant's service terminated for valid reason and following a fair procedure? And if not, what would be the appropriate remedy.
89. The issue of jurisdiction is paramount and whenever raised, the Court must deal with that in limine since without jurisdiction, as was stated in the Lilian "S" case, the Court must down its tools. The respondent has contended that the Court lacked jurisdiction by virtue of section 11(1) of *Privileges and*



Immunities Act read together with Legal Notice No. 24 of 24th February, 2019 in which the respondent was conferred immunity status by the Cabinet Secretary for Foreign Affairs. Section 11(1) provides :

11. Technical assistance, etc., agencies

- (1) Where the Government of Kenya has, whether before or after the commencement of this Act, entered into any agreement with an external agency under which, in return for assistance or co-operation in works executed in, or services rendered to, Kenya by that agency, the Government has agreed that such agency or persons in its service should enjoy immunities or privileges, the Minister may, by order—
- a) declare that such agency is one to which this section applies;
 - (b) provide that, to such extent as may be specified in the order, such agency shall have the immunities and privileges set out in Part I of the Fourth Schedule to this Act;
 - (c) confer upon such classes of officers and servants of such agency as may be specified in the order, to such extent as may be so specified, the immunities and privileges set out in Part III of the Fourth Schedule, and for the purposes of any such order references in the said Fourth Schedule to the organization shall be construed as references to the external agency named in the order.

90. According to Counsel for the respondent, Legal Notice No. 24 specified that the respondent enjoys the privileges and immunities set out in paragraph 1 and 3 of part 1 of the 4th schedule of the Privileges and Immunities Act which provides for immunity from suits and legal process and exemption from rates, taxes, other than taxes on the importation of goods, as is accorded to a mission respectively. The respondent disagreed with the argument by the claimant that immunity cannot be invoked in the present proceedings as it acted as a limitation of his right to have his claim determined before this honourable as enshrined under article 50(1) of the Constitution of Kenya. According to Counsel, access to justice and right to have any dispute decided in a fair and public hearing before a Court of law are not among the fundamental rights and freedoms that cannot be limited. In support of the submission Counsel relied on the Supreme Court case of Karen Njeri Kandie vs. Alassine Ba & Another [2017]eKLR.
91. Mr. Issa further submitted that the claimant seemed to have misconstrued the Court of Appeal's decisions staying the determination of the issue of jurisdiction from suits and requiring the suits to proceed to full hearing before the trial court can adjudge on the issue whether the immunity enjoyed by an organization acts as a procedural bar, as a decision granting jurisdiction to the Court. According to Counsel the Court of Appeal in the case of Alliance for Green Revolution in Africa & Anor vs. Emime Ndiokubwayo [2020]eKLR stated that the issue of immunity could not be determined vide a preliminary objection and the suit should proceed to full hearing for the Court to determine the existence and extent of the pleaded immunity. According to Mr. Issa the proper authorities to be considered in resolving the issue of jurisdiction are Karen Njeri Kandie vs. Alassine Ba & Another and African Development Bank vs. Beatrice Agnes Achola, Rosemary Ambalo Acholla [2015]eKLR.
92. As already submitted by the respondent's Counsel the Claimant has maintained that the respondent voluntarily and irrevocably submitted to the honourable court's jurisdiction by filing and serving an unconditional memorandum of appearance and filing a statement of response on merits and counterclaim. Further, the respondent contractually waived its immunity under clause 18 of the



contract of employment between itself and the claimant. In this regard, counsel for the Claimant Mr. Mailu relied on the cases of *Kanti & Co. Ltd vs. South British Insurance Co. Ltd* [1981]eKLR and *Evergreen Marine (Singapore), PTE Limited & Gulf Badar Group (Kenya) Ltd vs. Petra Development Services Ltd* [2016]. In the *Evergreen* case the Court of Appeal held that the defendant by entering an unconditional appearance submitted to the jurisdiction of the High Court. This was the same position in the case of *Nancy McNally vs. ICIPE & Another* [2019] eKLR.

93. In an earlier case involving the respondent being *Alliance for Green Revolution in Africa & Anor vs. Emime Ndiokubwayo* cited earlier, the Court of Appeal stated that the issue of jurisdiction in that particular case could not be determined through a preliminary objection. The issue before the trial Court was whether a contract of employment entered into in 2014 was affected by the Legal Notice No. 24 referred to above, which came into force in 2019. The contract in issue in that case just like the one before me, had a clause 18 which provided that the parties to the agreement irrevocably submitted to the exclusive jurisdiction of the courts of Kenya to settle any disputes that could arise in connection with the Claimant's employment. The effect of the Court of Appeals decision in *Alliance for Green Revolution in Africa & Anor vs. Emime Ndiokubwayo* is that whether immunity conferred by *Privileges and Immunities Act* applied is a matter of inquiry and cannot be disposed of by way of a preliminary objection. That is to say there are cases where a Court can on the evidence presented reach a conclusion that immunity does not apply. In other words such immunity can be waived either expressly or by conduct of the beneficiary, in this case the respondent.
94. Articles of Vienna Convention on Diplomatic Relation having Force of Law in Kenya which are found at the First Schedule to the [Privileges and Immunities Act](#) provide as follows at article 32:

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state.
 2. The waiver must always be express.
 3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
 4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.
95. The above provision by parity of reasoning implies that since a counterclaim is a cross-suit, where a diplomatic agent defends itself in a claim and raises a counterclaim, the person against whom it is counterclaimed has a right to put up a defence, cross-claim or plead set off or any other defence to the counterclaim. Any other different interpretation would yield an unconscionable result where a person enjoying diplomatic immunity has a right to sue by way of counterclaim but plead immunity if the defendant files a cross-suit or pleads set-off, accord or satisfaction or any other defence available to him. Furthermore the foregoing provisions of article 32 of the Vienna Convention presents that diplomatic immunity is not absolute. In the case of *Tandex Trading Corporation Ltd vs. Central Bank of Nigeria* [1971]1 All ER 881. Shaw L.J stated as follows:

“...there has been put before the court a wealth of material comprising decisions of foreign courts and writings of international jurists which tend to show that over the last half



century there has been a shift from the concept of absolute immunity to a narrower principle which excludes ordinary mercantile transactions from the ambit of sovereign immunity notwithstanding the sovereign state of a party to those transactions...so long as sovereign institutions confine themselves to what may in general terms be described as the basic functions of government a total personal or individual immunity from suits was unobjectionable...”

96. The respondent was aware that it had been granted immunity through Legal Notice No. 24 of 2019 when it entered into a contract of employment with the claimant which contained a clause that the parties will submit to the exclusive jurisdiction of the courts of Kenya to settle any disputes that could arise in connection with the Claimant's employment. It would therefore be unjust for the respondent to raise the issue of immunity when the claimant has exercised the self-same right both parties agreed to in the contract of employment. The respondent by conduct is deemed to have waived its right to immunity conferred by the legal notice and therefore cannot rely on the same at this point. Before leaving this point in the issue, it would be important to note that immunity granted to international organizations is upon application, donated hence discretionary and not stricto sensu on the same plane as sovereign immunity, which is inherent and granted to states by virtue of being part of the community of nations intended to be protected by articles of the Vienna Convention.
97. In the case of *Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd* [2007] eKLR, Maraga, J. (as he then was) stated:
- “A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”
98. The Court therefore finds and holds that it has jurisdiction to hear and determine the matter.
99. Having found as above, the second issue is whether the claimants service was terminated for valid reason and following fair procedure? According to the claimant and which has not been denied by the respondent, by an agreement dated 30th March, 2020 he was hired by the respondent in the Presidency Division. His appointment was to take effect from 4th May, 2020 and was valid for 3 years. The employment was subject to a probation period of 6 months. The contract further provided that the terms set therein, were in addition to the general terms governing employment with AGRA as set out in its HR manual, email policy and other policies as at present or as amended from time to time. The contract also provided that AGRA's disciplinary policy and procedure set out in the HR Manual was applicable to the claimant's employment.
100. According to the claimant he dutifully performed his work as the MD of the respondent and in accordance with the agreement despite having joined in the midst of global Covid-19 pandemic. He delivered an AGRF summit in virtual format which had not been done before. The attendance was according to him the best in respondent's history achieving some 10,400 delegates. In his view the unprecedented outcome of the summit would not have been possible if he was not diligent, a good communicator with good judgment and decision making skills. His probation ended on 4th November, 2020 without any performance related concerns being raised by the respondent. In the claimant's view and understanding of the Kenyan law, he was automatically confirmed on the same terms as a fulltime employee of the respondent on 5th November, 2020 because the probationary contract was neither terminated nor extended prior to that. He continued to discharge his duties without any



adverse communication on his performance until 17th December, 2020 when the respondent closed its operations for the year.

101. The claimant further contended that his performance at the close of 2020 was rated as very good and exceptional by the respondents 360 evaluation matrix which was based on the feedback from peers and direct reports. This evaluation according to the claimant was as per the respondent's Human Resource Manual. However, despite the fact that the respondent had closed office in December, Agnes Kalibata, his then supervisor and the respondent's president sent him a WhatsApp message on 18th December, 2020 requesting a call to discuss his performance review. During the call Ms. Kalibata informed him that she would extend his probation period by 3 months until 4th March, 2020 ostensibly from 4th January, 2021. According to the claimant the probation expired on 4th November, 2020 and was therefore surprised that a review thereof was being conducted in December. He was subsequently forwarded by the HR Director a probation report with a request that he countersigns the same but he declined to do so. According to the report, the claimant's performance was indicated as below expectation. It was however not clear to him where Ms. Kalibata received the information leading to the conclusion over his performance.
102. The claimant subsequently wrote to Ms. Kalibata on 20th January, 2020 and requested her to peruse the report of the lawful evaluation (360 feedback) that had assessed his performance as very good and exceptional as contrasted with the unlawful report where his performance was stated as below expectation. Ms. Kalibata did not respond to his email. She instead emailed back on 25th February, 2021 asking for a call to discuss a number of performance related issues. This took place on 26th February, 2021 where he hoped to comprehensively address the issues but Ms. Kalibata did not give him an opportunity so he ended up emailing his thoughts to her on 5th March, 2021. These were never responded to. Instead the HR was directed by Ms. Kalibata to provide him with guidelines for his exit from the respondent.
103. The respondent through its witness Mr. Yamfwa Chinyata did not dispute most of the claimant's account of events as above except that the claimant's contract provided that he was to be based in Kigali, Rwanda and that his presence there was crucial as the respondent's MD for the reason among others that the Government of Rwanda had provided office space for the AGRF Secretariat and it was important to take up the space and host services provided to manage the relationship with the Government of Rwanda and that AGRF partners had for various reasons selected Rwanda as the AGRF Secretariat's home country and AGRA was bound to comply with the decision and further that AGRF annual summit was to be held at Kigali International Conference Centre and the claimant was required to engage with the event managers to guide them on the set up as well as attend the summit as the lead representative of AGRF.
104. According to the respondent, the claimant failed or refused to report to his duty station in Rwanda despite the fact that the respondent paid him USD 28,050 which included cost of air ticket for the claimant and his dependants and shipping costs for his household and those of his dependants. The respondent further provided all Covid-19 pandemic protection measures to its staff during travel, including the provision of masks. There were further several reminders from claimant's line manager requesting him to report to Rwanda to attend meetings with AGRF partners and officials of the Government of Rwanda.
105. Mr. Chinyata further contended that the claimant did not perform his duties dutifully as alleged. He failed to incorporate comments that his line manager and the Board Chair of AGRA had made to him during the meeting of 5th February, 2021. The claimant further failed to provide feedback to colleagues and was not open to sharing information.



106. The Claimant complained that he was not involved in the evaluation where the conclusion was reached that his performance was not satisfactory hence the need to extend the probation. Clause 2.18 of the respondent's Human Resource Policy Manual provides in material part:

“at the end of the initial 3 months' period for NRS or the 6 month period for IRS, the new employee's supervisor is required to complete a three/six month progress report form recommending whether the staff member's employment with AGRA should continue beyond the probationary period... where necessary the probationary period may be extended”

Further Clause 4.1 on performance management provides in material part that:

“Performance management shall be an ongoing process of communication between a supervisor and an employee that occurs throughout the year, in support of accomplishing the strategic objectives of the organization.”

107. At clause 4.3 of the manual, it is stated that the performance management policy and procedure applies to all categories of employees working for and within AGRA. Further, the claimant's contract of employment expressly incorporated the respondent's HR Policy Manual without any qualifications. The respondent's witness Mr. Chinyata, gave as one of reasons that led to the conclusion that the claimant performed poorly, as the failure and or refusal by the claimant to report to Rwanda. The claimant did not deny this allegation but stated that he feared for his health because he had a medical condition that made him fear travelling to Rwanda amid Covid-19 pandemic.

108. The Court takes judicial notice that Covid-19 at the onset created pandemonium across the world. So little was known about it yet so many people were rapidly getting infected and dying. One can therefore understand the panic that may have operated in the claimant's mind. His behaviour may sound irrational post the pandemic but was understandable when Covid-19 first hit the world with a storm. The claimant conceded that his duty station was Kigali Rwanda where he was supposed to be but for Covid-19 and his alleged medical condition he worked virtually from home in Kenya. But this is beside the point. The respondent purported to extend the claimant's probation contract on grounds of poor performance based on assessment by his line Manager Ms. Agnes Kalibata.

109. The Court has perused the record and bundle of documents filed by the respondent and has not been able to find a single correspondence between the claimant and the respondent regarding his failure to report to Rwanda and a demand that he should. Further the performance appraisal dated 17th December, 2020 found at page 80 of the respondent's documents makes no reference to failure by the claimant to report to Kigali Rwanda. At page 81 Ms. Kalibata says as follows (in paraphrase)

“...Debisi has been at AGRA 7 months and I would like to extend his probation. I want to be able to understand Debisi's drive towards working at AGRA and AGRF successfully. I also want to understand his ability to work with team members at AGRA, his ability to manage teams on behalf of the institution. Most of all I need to understand his ability to uphold the values of AGRF for all partners involved.”

110. The Court takes the reasonable view that failure to report to Rwanda was such a significant issue that the respondent did not expect it to glean from statements by witness or documents filed. If the respondent considered it a grave omission, then nothing prevented the respondent from unequivocally communicating to the claimant about it. Further, as observed earlier, the claimant's contract was stated as subject to the respondent's Human Resource Policy Manual. The Manual as noted above at Clause



4.1 on performance, stated that it was an ongoing process of communication between a supervisor and an employee that occurred throughout the year, in support of accomplishing the strategic objectives of the organization. Further under Clause 4.3 the manual stated that performance management policy and procedure applied to all categories of employees working for and within AGRA. The Court has not been shown any document or correspondence prior to 17th December, 2020 (date of the probation appraisal), where any attempt was made to discuss with the claimant his performance prior to the appraisal yet he was expected to sign the appraisal that considered his performance poor and warranted and an extension.

111. The Claimant’s contract stated that it was subject to Laws of Kenya. Sections 41, 43 read together with section 47(5) of the *Employment Act* provide for the legal framework under which termination of Employment ought to occur. Section 41 requires that the employee be informed of the reasons for which the termination or dismissal is being considered and calling upon such employee to make representation either by self or in presence a colleague of choice or where applicable, a shop-floor union official. Section 43 places the burden of proof of reasons for termination or dismissal on the employer with a warning that failure to do so will lead to a conclusion that the termination was unfair with attendant consequences. Section 47(5) assigns mutually exclusive burden of proof between the employer and employee where there is a claim for unfair termination. That is to as, an employee is required to prove that the termination was unfair while the employer is required to prove the reasons for the termination.

112. The import of sections 41, 43 and 47 cited above is about substantive and procedural fairness. Substantive fairness asks the Court to conduct the merit review of a decision of an employer, to establish if it was reasonable and proportionate in the circumstances to dismiss or terminate and further whether in carrying out the process of dismissal or termination, a fair procedure was followed. This latter evaluation is the process review. These two aspects of review, fall within the rules of natural justice. In the case of Onyango Oloo vs. Attorney General [1986-1989] EA 456 it was held that:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...”

Further the Supreme Court of India in the case of Indru Ramchand Bharvani & others v Union of India & others, 1988 SCR Supl (1) 544 stated that:

a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable”.

113. From the foregoing the Court finds and holds that the termination of the claimant’s contract lacked valid reasons or if there were, the respondent failed to prove the same as required of it under section 43 read together with section 47(5) of the *Employment Act* and further in terminating the claimant’s service, the respondent never followed a fair procedure as contemplated under section 41 of the Act. The termination was therefore unfair within the meaning of section 45 of the *Employment Act*.

114. Having so found as above, the Court now proceeds to determine the appropriate remedies in the circumstances. It was not contested that the claimant was hired in May, 2020 and was terminated on or about 4th March, 2021. That meant he had worked for the respondent for about 10 months. His contract if confirmed could have been for three years renewable based on performance and availability of the position among other considerations. Besides the contract upon confirmation had a termination clause which required either party to give three months’ termination notice or pay in lieu. The Court further notes that the respondent headhunted the claimant. This must be as result of his



skillsets which the respondent felt it badly needed for effective delivery of its mandate in the claimant's area of speciality. In the circumstances an award of eight months' salary for unfair termination will be reasonable. The respondent never contested the claimant's claim for leave days, the same will therefore be awarded as prayed. The claim for compensation for breach of constitutional rights will be rejected since the claimant did not demonstrate in what way the termination of his service violated his constitutional rights. Contracts of employment are terminable and when that occurs does not necessarily constitute breach of a constitutional right.

115. In conclusion the Court enters Judgment in favour of the claimant against the respondent and orders as follows:

a. The respondent shall pay the claimant:-

- i. One month's salary in lieu of notice - USD.15,583
- ii. Eight month's salary for unfair termination 124,664
- iii. Accrued leave days 13,124
Total 153,371
- iv) Less: relocation paid for Rwanda 28,050
Amount due to claimant 125,321
- v) The respondent shall issue the claimant with a certificate of service.

This award shall attract interest at court rates from the date of judgment until paid in full but shall be liable to taxes and other statutory deductions if applicable.

It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023.DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2023

ABUODHA J.N

JUDGE

