



**Kamurasi v Absa Bank Kenya PLC & another (Employment and Labour Relations Cause E612 of 2021) [2023] KEELRC 3229 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3229 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E612 OF 2021  
BOM MANANI, J  
DECEMBER 7, 2023**

**BETWEEN**

**KENNETH MAWENU KAMURASI ..... CLAIMANT**

**AND**

**ABSA BANK KENYA PLC ..... 1<sup>ST</sup> RESPONDENT**

**ABSA GROUP LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant has sued the Respondents asserting that the two were his employers and that they wrongfully terminated his employment by failing to invoke the correct redundancy procedure to close the relation. Therefore, he prays for an order, *inter alia*, that he was constructively dismissed from employment.
2. The Respondents have disputed the claim. On its part and whilst admitting that the Claimant was its employee, the 1<sup>st</sup> Respondent asserts that the two had successive but distinct fixed term contracts of service which lapsed due to expiry of time. On the other hand, the 2<sup>nd</sup> Respondent contends that it had no employment relation with the Claimant.
3. As a result, the two Respondents contend that the suit by the Claimant is without merit. They pray that the cause be dismissed with costs to them.

**Claimant's Case**

4. The Claimant avers that he was offered employment by the 2<sup>nd</sup> Respondent on 30<sup>th</sup> December 2004 through its Ugandan subsidiary, Absa Bank Uganda Limited. He avers that he accepted the offer where-after his contract was confirmed on 19<sup>th</sup> September 2005 after he had successfully served the



probationary period. The Claimant's case is that by this contract, he served as an employee of both Absa Bank Uganda Limited and the 2<sup>nd</sup> Respondent.

5. The Claimant avers that owing to his outstanding performance, he was seconded by Absa Bank Uganda Limited, then known as Barclays Bank Uganda Limited, to Absa Bank Kenya PLC ( the 1<sup>st</sup> Respondent), then known as Barclays Bank of Kenya Limited. This arrangement, which was for two years, was reduced into writing through an instrument of assignment dated 9<sup>th</sup> July 2010.
6. The Claimant contends that subsequent to this assignment, he entered into a two year service agreement with the 1<sup>st</sup> Respondent to serve as its Chief Internal Auditor and Regional Director of East and West Africa for the 2<sup>nd</sup> Respondent. The Claimant avers that after the lapse of the first fixed term contract, the two (Claimant and 1<sup>st</sup> Respondent) entered into subsequent fixed term contracts of service with the last one running up to 31<sup>st</sup> August 2021.
7. It is the Claimant's case that although his engagement with the 1<sup>st</sup> Respondent was open ended, it was made to appear as if it was time bound. According to him, this was in order to overcome bottlenecks by the law in Kenya which allegedly restricts work permits for foreign nationals to two years.
8. To augment his assertion that his engagement with the 1<sup>st</sup> Respondent was open ended, the Claimant asserts that this Respondent allowed him to access long term facilities such as mortgages. According to him, such facilities are available only to indefinite term employees.
9. Despite contending that he was a fulltime employee of the 1<sup>st</sup> Respondent, the Claimant also asserts that he remained a permanent employee of Absa Bank Uganda Limited. He contends that Absa Bank Uganda Limited did not terminate its contract with him when he entered into the contract of 1<sup>st</sup> July 2012 with the 1<sup>st</sup> Respondent.
10. The Claimant contends that the assignment agreement between him and Absa Bank Uganda Limited did not state that his employment contract with the latter would lapse if he entered into a contract of service with the 1<sup>st</sup> Respondent. He further contends that Absa Bank Uganda Limited supported his loan application to the 1<sup>st</sup> Respondent in October 2014 in its (Absa Bank Uganda's) capacity as his employer notwithstanding that at that time, he had already entered into the fixed term contract of service with the 1<sup>st</sup> Respondent.
11. In addition to claiming permanent employment status with Absa Bank Uganda Limited and the 1<sup>st</sup> Respondent, the Claimant also claims to have been a permanent employee of the 2<sup>nd</sup> Respondent. In effect and by this assertion, the Claimant insinuates that at the time that is material to this action, he was in three simultaneous but distinct employment relations.
12. The Claimant avers that on 30<sup>th</sup> June 2021, he was informed by the Respondents' management that his position of Head of Audit – Africa Subsidiaries was to be declared redundant. It is the Claimant's case that the Respondents did not issue him with the requisite notice of intention to declare redundancy.
13. The Claimant contends that after the Respondents' communication of 30<sup>th</sup> June 2021, the 1<sup>st</sup> Respondent's officers purported to inform him that his contract was due to lapse on 31<sup>st</sup> August 2021 by effluxion of time. The Claimant avers that 1<sup>st</sup> Respondent's position was contrary to the position that had been expressed earlier that his position had been lost on account of redundancy.
14. The Claimant states that he informed the Respondents that he was entitled to be released through the applicable redundancy regulations. However, the 1<sup>st</sup> Respondent's officials allegedly told him that since he was serving as a contractor, he was not entitled to be released through redundancy as his contract was due to lapse through effluxion of time.



15. The Claimant does not agree with the 1<sup>st</sup> Respondent's position because of a number of reasons. First, he contends that he was a permanent employee of the Respondents. Therefore, he believes that he was entitled to be released from the relation in accordance with the applicable law on redundancy.
16. Second, he contends that he expected to be granted the same retrenchment package that had been extended to other employees who had been retrenched by the Respondents. According to him, this was not done.
17. Third, he contends that he expected that he would serve the Respondents until his retirement age. He asserts that at the time that his contract was terminated, he was already serving Absa Bank Uganda Limited, a subsidiary of the 2<sup>nd</sup> Respondent, on permanent and pensionable terms. Therefore and owing to the reciprocal relation between the three institutions, he believed that he was serving all of them on permanent and pensionable terms.
18. The Claimant contends that whilst in the 2<sup>nd</sup> Respondent's service, his last position was that of Head of Audit-ARO Internal Audit Function. He contends that it is this position that was declared redundant. Thus, he believes that the alleged redundancy process was triggered by the 2<sup>nd</sup> Respondent.
19. The Claimant contends that the 2<sup>nd</sup> Respondent is a majority shareholder in the 1<sup>st</sup> Respondent. As such, it (the 2<sup>nd</sup> Respondent) exercises considerable control over the 1<sup>st</sup> Respondent's decision making process. Due to this perceived control, the Claimant believes that the 2<sup>nd</sup> Respondent played a significant role in influencing the 1<sup>st</sup> Respondent's decision to terminate his contract.

### **1<sup>st</sup> Respondent's Case**

20. The 1<sup>st</sup> Respondent does not deny that the Claimant was its employee. On the contrary, this Respondent confirms that the Claimant was indeed its employee but serving on distinct fixed term contracts which were entered into from time to time. The 1<sup>st</sup> Respondent denies that the Claimant was hired as an employee of the 2<sup>nd</sup> Respondent as asserted by the Claimant.
21. The 1<sup>st</sup> Respondent avers that the Claimant was initially an employee of Barclays Bank Uganda before he was seconded to it (the 1<sup>st</sup> Respondent) on a two year contract to serve as the 1<sup>st</sup> Respondent's Chief Internal Auditor. This relation commenced on 1<sup>st</sup> July 2010.
22. The 1<sup>st</sup> Respondent avers that subsequent to the secondment contract, it (the 1<sup>st</sup> Respondent) offered the Claimant employment and he accepted the offer. This resulted in the parties (Claimant and 1<sup>st</sup> Respondent) entering into a two year fixed term contract of service which commenced on 1<sup>st</sup> July 2012.
23. The 1<sup>st</sup> Respondent states that it did not make any promises to the Claimant that it would renew his contract upon its expiry. It is the 1<sup>st</sup> Respondent's case that any further contract between the parties was to be based on fresh negotiations between them. Further, the 1<sup>st</sup> Respondent denies that the Claimant was to report to the 2<sup>nd</sup> Respondent during the term of the contract or indeed thereafter.
24. Whilst admitting that the parties (Claimant and 1<sup>st</sup> Respondent) entered into subsequent fixed term contracts after closure of the contract of 1<sup>st</sup> July 2012, the 1<sup>st</sup> Respondent expressly denies that such subsequent contracts constituted renewals of the previous ones. It is the 1<sup>st</sup> Respondent's case that all subsequent contracts between the parties (1<sup>st</sup> Respondent and Claimant) were new and independent engagements, the Claimant having been paid service gratuity for the expired contracts.
25. The 1<sup>st</sup> Respondent admits that it granted the Claimant financial facilities during the term of his service. However, it avers that the facilities were based on distinct contracts between the parties and were premised on the fixed term relation between them. It is this Respondent's case that the mere fact



- that it offered the Claimant financial accommodation does not mean that he was serving on indefinite term basis.
26. The 1<sup>st</sup> Respondent denies that the employment relation between the parties (Claimant and 1<sup>st</sup> Respondent) was terminated by reason of redundancy. It is the 1<sup>st</sup> Respondent's position that the relation ended when the fixed term contract between the parties (Claimant and 1<sup>st</sup> Respondent) terminated at the close of August 2021.
  27. The 1<sup>st</sup> Respondent states that although the issue regarding whether the Claimant's contract was to lapse by reason of redundancy featured in the meeting of 30<sup>th</sup> June 2021, this matter was subsequently clarified in the meeting of 8<sup>th</sup> July 2021 and through subsequent correspondence between the Claimant and the 1<sup>st</sup> Respondent's management. The 1<sup>st</sup> Respondent avers that through these forums, the Claimant was advised that his employment was due to terminate on account of expiry of time and not redundancy. The 1<sup>st</sup> Respondent also intimates that by its letter of 2<sup>nd</sup> July 2021, it informed the Claimant that it was not going to issue him with a fresh contract after 31<sup>st</sup> August 2021.
  28. The 1<sup>st</sup> Respondent avers that in every contractual instrument between them (Claimant and 1<sup>st</sup> Respondent), it was expressly stated that the previous contracts were deemed extinguished and that the new contract reflected the whole contract between the parties. As such, there were no representations to the Claimant that would have informed his expectation that the parties would continue to engage upon the lapse of each contract.
  29. In response to the Claimant's assertion that he had been in the Respondents' employment for sixteen years, the 1<sup>st</sup> Respondent states that its engagement with him was premised on distinct fixed term contracts whose lifespan did not exceed two years. Therefore, it is not true that he (the Claimant) had served it (the 1<sup>st</sup> Respondent) for sixteen years.
  30. Further, the 1<sup>st</sup> Respondent denies that the Retrenchment and Reassignment Standard, 2021 that the Claimant has invoked applied to him. It is the 1<sup>st</sup> Respondent's case that this Standard applies to Absa Bank South Africa Limited, the employing entity for the Absa Bank employees in South Africa.
  31. It is the 1<sup>st</sup> Respondent's case that the Claimant was aware that he was serving on fixed term contracts. As such, there was no obligation on the parties to consult over his exit at the point of expiry of any of the contracts.
  32. According to the 1<sup>st</sup> Respondent, the Claimant was aware that his last contract was to lapse on 31<sup>st</sup> August 2021. The 1<sup>st</sup> Respondent contends that this fact was known to the Claimant at the commencement of the said contract as the matter was expressly provided for in the contractual instrument between them. Thus, his exit did not require further consultations between the parties.
  33. The 1<sup>st</sup> Respondent further contends that the Claimant's expectation that he would be paid retrenchment dues on his exits is misplaced since his case was not one of redundancy. Rather, his contract lapsed by effluxion of time.
  34. The 1<sup>st</sup> Respondent contends that on his exit, the Claimant's final dues were computed and paid to him. The 1<sup>st</sup> Respondent contends that the Claimant signed a discharge voucher acknowledging these payments in full and final settlement of his exit dues. The 1<sup>st</sup> Respondent avers that the Claimant discharged it (the 1<sup>st</sup> Respondent) from further claims on account of their employment relation.



## 2<sup>nd</sup> Respondent's Case

35. The 2<sup>nd</sup> Respondent denies that it had an employment relation with the Claimant. Thus, it denies that it terminated the Claimant's employment as he purports.
36. This Respondent contends that the three entities mentioned in the cause, that is to say, the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent and Absa Bank Uganda Limited, are distinct corporate persons with separate governance structures and operate in different geographical jurisdictions. As such, the Claimant's insinuation that the three were his joint employers is unfounded and mistaken.
37. It is the 2<sup>nd</sup> Respondent's case that the letters dated 30<sup>th</sup> December 2004 and 1<sup>st</sup> February 2005 by which the Claimant asserts that he was hired by it (the 2<sup>nd</sup> Respondent) were issued by Barclays Bank Uganda Limited and not the 2<sup>nd</sup> Respondent. Therefore, they cannot be the basis for the Claimant's claim to employment by it (the 2<sup>nd</sup> Respondent).
38. The 2<sup>nd</sup> Respondent contends that although the aforesaid contract was apparently between the Claimant and Barclays Bank Uganda Limited, the Claimant has not joined the aforesaid bank to the instant action. Therefore, his assertions in respect of this contract cannot be substantiated.
39. Further, the 2<sup>nd</sup> Respondent contends that the 2005 contract between the Claimant and Barclays Bank of Uganda and the subsequent assignment contract between the two were both entered into in the Republic of Uganda. As such, this court has no jurisdiction to interrogate them (the contracts). Only the court in Uganda, applying the laws of that Republic, has such jurisdiction.
40. The 2<sup>nd</sup> Respondent denies the Claimant's assertion that he was reporting to it. It is this Respondent's case that its mandate as a holding company does not include hiring of staff either for itself or its subsidiaries.
41. In response to the Claimant's contention that he was assigned duties that fell under its purview, the 2<sup>nd</sup> Respondent denies that this was the position. Nevertheless, it contends that the mere fact that the Claimant may have been assigned some functions which benefited the parent company did not establish an employment relation between them.
42. In response to other matters that have been raised by the Claimant, the 2<sup>nd</sup> Respondent has largely adopted the line of defense that is similar to that of the 1<sup>st</sup> Respondent. For instance, it (the 2<sup>nd</sup> Respondent) argues that: the Claimant was an employee of the 1<sup>st</sup> Respondent; the Claimant's contracts with the 1<sup>st</sup> Respondent were of a fixed and not indefinite term nature; and the Claimant's engagement with the 1<sup>st</sup> Respondent lapsed by reason of effluxion of time on 31<sup>st</sup> August 2021 and not redundancy.
43. The 2<sup>nd</sup> Respondent states that the Retrenchment and Reassignment Standard dated 24<sup>th</sup> June 2021 which the Claimant has invoked to advance his case does not apply to him. It is the 2<sup>nd</sup> Respondent's case that this Standard was specifically designed for employees of Absa Bank, South Africa and that the Claimant was not an employee of this company.
44. The 2<sup>nd</sup> Respondent contends that even if the Claimant had a contract of service with it, there is no evidence that such contract was processed in accordance with Kenyan law. Therefore, it (the contract) would in any event be void for want of compliance with the law.



## Issues for Determination

45. After analyzing the pleadings and evidence on record, I consider the following to be the issues that require resolution in the cause:-
- a. Whether the court has jurisdiction to adjudicate on the alleged employment contract between the Claimant and the 2<sup>nd</sup> Respondent.
  - b. Whether the Claimant was an employee of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
  - c. What was the legal effect of the Claimant entering into the fixed term contract with the 1<sup>st</sup> Respondent on 1<sup>st</sup> July 2012?
  - d. Whether the employment relation between the Claimant and the 1<sup>st</sup> Respondent was of indefinite or fixed term.
  - e. Whether the 1<sup>st</sup> Respondent created legitimate expectation in the Claimant that his employment would run up to his retirement age.
  - f. Whether the Claimant's contract terminated as a result of redundancy or effluxion of time.
  - g. Whether the Claimant is entitled to retrenchment pay under the Retrenchment and Reassignment Standard published on 24<sup>th</sup> June 2021.
  - h. What was the legal effect of the discharge voucher that was executed between the Claimant and the 1<sup>st</sup> Respondent on subsequent claims between them?
  - i. What orders should the court issue in the cause?

## Analysis

46. In this section, I will consider the various issues that have been framed above. I will do so sequentially.

### **Jurisdiction of the Court to interrogate the Alleged Contract of Service between the Claimant and the 2<sup>nd</sup> Respondent**

47. The 2<sup>nd</sup> Respondent has challenged the competence of the instant proceedings. It (the 2<sup>nd</sup> Respondent) contends that the court lacks the requisite jurisdiction to entertain the suit between the parties (Claimant and 2<sup>nd</sup> Respondent).
1. According to this Respondent, the two parties (Claimant and 2<sup>nd</sup> Respondent) are both foreign nationals. At the same time, their purported contract was allegedly entered into in Uganda. Therefore, the right forum for litigating disputes arising from the alleged contract should be either Uganda or South Africa where the contract was purportedly made and the parties are either nationals or domiciled.
49. The 2<sup>nd</sup> Respondent relies on the private international law principles on choice of law to advance this argument. These include locus contractus, locus solutionis, domicile and nationality of the parties.
50. Ordinarily, disputes stemming from implementation of a contract should be resolved using the law of the State in which the contract was made (lex loci contractus). This is because at the time of contracting, the parties are presumed to have intended that the laws of the State in which the contract was made will be applied to resolve any disputes that may arise during its implementation.



51. However, it is also possible that parties to a contract that is entered into in one jurisdiction may intend that it (the contract) be performed in another jurisdiction. In such case, they may elect the law of the State in which the contract is to be performed as the law that will be applied to resolve disputes that may arise from the contract (*lex loci solutionis*).
52. In some instances, the court may consider an individual's nationality in deciding the law that is to be applied to resolve a civil dispute that involves him irrespective of his current residence (*lex patriae*). This is of particular importance in instances that involve personal law disputes such as divorce and inheritance.
53. Yet, the court may also consider one's domicile in deciding the choice of law to resolve an inter-jurisdictional civil dispute that is before it (*lex domicilii*). An individual's domicile must be his permanent domicile. It is acquired by birth, choice or operation of law.
54. The above principles are of importance when parties to an inter-jurisdictional contract have not chosen the forum and law for resolution of disputes that may arise from it. Where the parties have chosen the law and forum for resolution of the disputes, the court will give primacy to their choice (*Dorca Kemunto Wainaina v IPAS* [2018] eKLR).
55. The 2<sup>nd</sup> Respondent contends that since the Claimant's case is that the parties entered into the purported contract of service in Uganda where the Claimant is a national, he ought to have filed this suit in the Republic of Uganda. Alternately, he should have filed the case in the Republic of South Africa where the 2<sup>nd</sup> Respondent is domiciled. Thus, the choice of Kenya as the venue for resolution of their purported dispute was wrong.
56. On the other hand, the Claimant contends that after he entered into the alleged contract with the 2<sup>nd</sup> Respondent, he was deployed by the Global Mobility department of the 2<sup>nd</sup> Respondent to work in Kenya under the latter's Barclays Intra-Africa Policy. This deployment was allegedly executed through the assignment contract dated 15<sup>th</sup> July 2010. The Claimant avers that under this arrangement, he was to work for the 1<sup>st</sup> Respondent and also undertake some regional duties for the 2<sup>nd</sup> Respondent.
57. In effect and by this assertion, the Claimant contends that although the contract with the 2<sup>nd</sup> Respondent was entered into in Uganda, it was substantially performed in Kenya following his deployment to the country. As a matter of fact, the parties agree that following the Claimant's assignment on 15<sup>th</sup> July 2010, he relocated to Kenya where he worked for the 1<sup>st</sup> Respondent. Although the Respondents deny that the Claimant worked for the 2<sup>nd</sup> Respondent, it is his case that he did so.
58. There is no evidence that the Claimant and the 2<sup>nd</sup> Respondent entered into a formal contract of service. Therefore, there is no evidence that the two agreed, if at all, on the forum and law for resolving disputes that may arise from the alleged contract. It is therefore left to the court to determine the most suitable law and forum for resolution of purported disputes in respect of the alleged contract and in the process determine whether it can assume jurisdiction over the dispute.
59. As indicated earlier, the Claimant contends that although the purported contract was allegedly entered into in Uganda, he was posted to Nairobi Kenya to render services under it. Therefore, the *locus solutionis* for the contract was Kenya.
60. Applying the *lex loci solutionis* principle, I arrive at the conclusion that I have jurisdiction to adjudicate on the dispute between the two parties (Claimant and 2<sup>nd</sup> Respondent) for the reasons that: the alleged contract was performed in Kenya; the alleged breach happened in Kenya; and the Claimant was resident in Kenya at the time that the cause of action allegedly arose. Thus, the most suitable law for addressing



- the dispute between the two parties (Claimant and 2<sup>nd</sup> Respondent) is the law of Kenya. As well, the most suitable forum for adjudicating over the purported dispute is Kenya.
61. The 2<sup>nd</sup> Respondent has argued that the alleged contract is in any event invalid for want of compliance with sections 83 and 84 of the [Employment Act](#), 2007. These sections deal with foreign contracts of service.
62. The [Employment Act](#), 2007 does not define the term “foreign contract of service”. However, the repealed [Employment Act](#), Cap 226 defined the term as follows:-
- “.....foreign contract of service, that is to say, a contract for service made within Kenya and to be performed in all or in part outside Kenya, and every contract for service with a foreign state, except a contract for service entered into with or by or on behalf of the Government.”
63. From the above definition it is apparent that a foreign contract of service is an employment contract which is concluded in Kenya but which is to be performed outside Kenya either wholly or partially. This includes a contract of employment with a foreign state which is concluded in Kenya.
64. In a foreign contract of service, one or all of the parties must be Kenyan. This fact is affirmed in [Joao Soares v Tuegest Guerma & another](#) [2014] eKLR when the learned Judge observed as follows:-
- “ I have perused the agreement signed by the parties. As the Claimant submits, it was executed in Kenya by the Claimant who is a citizen of USA and the 2<sup>nd</sup> Respondent which is registered in Kenya. The contract was to perform services in Ethiopia. Under the [Employment Act](#) of Kenya, this would be referred to as a foreign contract of service which by definition is a contract made in Kenya to be performed outside Kenya. Such contract is governed by the provisions of Part X1 of the Act.”
65. The essence of regulating foreign contracts of service is to protect Kenyan citizens from exploitation by foreign employers. Hence the requirement that the contracts must be in the prescribed form and must be authenticated by an official from the local labour office.
66. The alleged contract between the Claimant and the 2<sup>nd</sup> Respondent does not fit this description. The alleged contract involved foreign nationals. It was allegedly entered into in Uganda but purported to have been performed in Kenya.
67. Under section 89 (3) of the [Employment Act](#), the alleged contract would, if it exists, constitute a contract that is made in a foreign country as opposed to a foreign contract of service under section 83 and 84 of [the Act](#). In order to be deemed as valid in Kenya, such contract must satisfy the requirements of section 89(3) aforesaid. The section provides as follows:-
- “Where a contract is made in a foreign country, the contract shall be attested by a judge or magistrate, and shall be authenticated by the official seal of the court to which the judge or magistrate is attached.”
68. My understanding of this provision is that individuals (including foreigners) in other jurisdictions can enter into contracts of service to be performed in Kenya. However, such contracts can only be enforceable in the country if they have been attested by a judicial officer under the court’s seal. For this to be possible, such contracts must necessarily be in writing.
69. The question for determination in the instant case is whether the Claimant has exhibited a contract between him and the 2<sup>nd</sup> Respondent which meets the threshold that has been set under section 89(3) of the [Employment Act](#). Whilst the Claimant contends that he had a contract of service with the 2<sup>nd</sup>



Respondent, he did not provide proof of this fact. He did not present a contract with a court seal to evidence the alleged contract.

70. In effect, the Claimant has not presented evidence to demonstrate that he has an existing contract of service with the 2<sup>nd</sup> Respondent. Absent this evidence, the court cannot confirm the alleged employment relation between these two parties. This is notwithstanding that the court is entitled to entertain the dispute between the two pursuant to the *lex loci solutionis* principle.

**Whether the Claimant was an employee of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.**

71. The evidence on record shows that Barclays Bank Uganda Limited seconded the Claimant to serve the 1<sup>st</sup> Respondent through a contract of assignment of services that was executed between the Claimant and Barclays Bank Uganda Limited on 15<sup>th</sup> July 2010. According to the instrument, the Claimant was to serve the 1<sup>st</sup> Respondent for a period of two years commencing 1<sup>st</sup> August 2010. At the close of the two year period, the Claimant was required to either: be repatriated back to Uganda; or be transferred to local terms and conditions of service without repatriation; or his assignment contract was to be extended on terms that were to be agreed between him and Barclays Bank Uganda Limited.
72. The record shows that towards the close of the assignment contract the Claimant applied to the 1<sup>st</sup> Respondent for the position of Regional Director East and West Africa and Chief Internal Auditor for Barclays Bank Kenya. This was by his letter to the 1<sup>st</sup> Respondent dated 18<sup>th</sup> November 2011.
73. Subsequent to this application, the parties (the Claimant and 1<sup>st</sup> Respondent) entered into a two year fixed term service contract dated 1<sup>st</sup> July 2012. Thereafter, they (the Claimant and 1<sup>st</sup> Respondent) entered into several other fixed term contracts of service with the last one terminating on 31<sup>st</sup> August 2021.
74. Through their expressions in the contracts, the parties (Claimant and 1<sup>st</sup> Respondent) exhibited their intention to enter into consecutive fixed term employment relations. This is evident from the recital to the contracts that were executed between July 2012 and June 2016 all of which state as follows:-
- “Barclays wishes to employ you and you have agreed to work for Barclays on the terms and conditions set out in this agreement.”
75. Although the contracts of 25<sup>th</sup> July 2018 and 13<sup>th</sup> August 2020 do not contain the above recital, they are accompanied by letters of offer dated 25<sup>th</sup> July 2018 and 13<sup>th</sup> August 2018 respectively both of which express a similar intent. From the letters, it is plain that the 1<sup>st</sup> Respondent was offering to employ the Claimant.
76. In the contracts, the name “Barclays” is indicated to mean and refer to Barclays Bank of Kenya Limited (currently Absa Bank Kenya Plc). There is no suggestion that the name referred to another entity.
77. Evidently, the aforesaid instruments established an employment relation between the Claimant and 1<sup>st</sup> Respondent. In none of the instruments is the 2<sup>nd</sup> Respondent expressly mentioned as a party to the arrangement.
78. The Claimant asserts that although he was employed by the 1<sup>st</sup> Respondent, he was serving as a regional official for the 2<sup>nd</sup> Respondent. Therefore, he was an employee of the 2<sup>nd</sup> Respondent.
79. The Claimant’s contention appears to be premised on the fact that the 1<sup>st</sup> Respondent appointed him to serve in various positions to wit the following: Chief Internal Auditor for Barclays Kenya and Regional Director for East and West Africa Cluster; Chief Internal Auditor, Kenya and Head of Audit, Africa Region; and Head of Audit-Africa Subsidiaries. According to the Claimant, these positions



- required him to report to officers that were serving the 2<sup>nd</sup> Respondent. Therefore, he was an employee of the 2<sup>nd</sup> Respondent.
80. Despite this contention, the Claimant did not produce evidence to suggest that the 1<sup>st</sup> Respondent entered into the various employment contracts on behalf of the 2<sup>nd</sup> Respondent and not in its own right. There was no evidence to suggest that the 2<sup>nd</sup> Respondent had constituted the 1<sup>st</sup> Respondent into its employment agency with respect to the Claimant's employment.
81. The *Employment Act* defines the term "employee" as a person employed for wages or a salary and includes an apprentice and indentured learner. On the other hand, the term "employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
82. In essence, for one to be deemed to be serving as an employee of the other, there must be evidence that the individual is rendering services to the purported employer in return for a wage that is paid by the employer. In the instant case, there was no evidence that the 2<sup>nd</sup> Respondent was paying remuneration to the Claimant.
83. On the contrary, the Claimant confirmed in cross examination that his remuneration was settled by the 1<sup>st</sup> Respondent. Although the Claimant averred that the 2<sup>nd</sup> Respondent was meeting his remuneration by paying the 1<sup>st</sup> Respondent transfer pricing, no cogent evidence was tendered to support this contention.
84. Further, the fact that the 2<sup>nd</sup> Respondent may have paid the Claimant some bonuses did not constitute payment of remuneration. Unlike a wage and salary which is a mandatory requirement in an employment relation under Part IV of the *Employment Act*, bonuses are discretionary payments which cannot be used to discern the presence of an employment relation. Indeed, the 2<sup>nd</sup> Respondent's witness affirmed this fact during his oral testimony.
85. Similarly, in order for one to be deemed as an employer, there must be evidence that he has hired the employee either directly or through an agent, foreman, manager or such other person. In the instant case, there was no evidence that the 1<sup>st</sup> Respondent stood in the position of agent, foreman or manager of the 2<sup>nd</sup> Respondent in relation to the alleged employment relation between the Claimant and the 2<sup>nd</sup> Respondent.
86. There is also the question of absence of a formal contract between the Claimant and the 2<sup>nd</sup> Respondent in terms of section 89 (3) of the *Employment Act*. It is not in dispute that the Claimant and 2<sup>nd</sup> Respondent are both foreign nationals. Thus, any contract of service between them which is to be implemented in Kenya, either wholly or in part, ought to have met the threshold under section 89 (3) of the *Employment Act*.
87. No such contract was produced by the Claimant to evidence satisfaction of these requirements. Absent evidence of a formal contract that is in compliance with the above provision of statute, the Claimant cannot sustain the narrative that he had a contract of service with the 2<sup>nd</sup> Respondent.
88. The 2<sup>nd</sup> Respondent has also flagged the issue of work permits. It is the 2<sup>nd</sup> Respondent's case that if the Claimant was its employee, it would have been obligated by law to procure work permits for him. According to the 2<sup>nd</sup> Respondent, the fact that the Claimant has not demonstrated that it (the 2<sup>nd</sup> Respondent) procured such permits for him goes to confirm that the two did not have an employment relation.



89. As was indicated earlier in this decision, the alleged contract between the Claimant and the 2<sup>nd</sup> Respondent was purportedly performed in Kenya where the Claimant had been deployed. Under the Kenyan law, the Claimant, being a foreigner, would require a work permit to work for the 2<sup>nd</sup> Respondent, if the two had an employment contract to be executed in the country.
90. Section 45 (2) of the [Kenya Citizenship and Immigration Act](#), 2011 provides as follows:-
- “It shall be the duty of every employer to apply for and obtain a work permit or a pass conferring upon a foreign national the right to engage in employment before granting him employment and it shall be presumed that the employer knew at the time of the employment that such person was among those referred to in subsection (1).”
91. Evidently, under this provision of statute, the employer has a legal duty to procure work permit for a foreign employee. Therefore and as the 2<sup>nd</sup> Respondent suggests, presence of a work permit is critical evidence of employment for a foreign national in Kenya.
92. The evidence on record shows that the Claimant confirmed that the 1<sup>st</sup> Respondent procured work permits for him in order for the Claimant to be able to work for this Respondent in Kenya. Curiously and despite the 2<sup>nd</sup> Respondent raising the issue of absence of work permits for the Claimant in respect of their purported employment relation both in its defense and evidence, the Claimant made no comment on the matter. He made no suggestion that the 2<sup>nd</sup> Respondent had procured a work permit for him to work for it (the 2<sup>nd</sup> Respondent) either in Kenya or South Africa or indeed anywhere else.
93. Absent this evidence, the court cannot arrive at the conclusion that there existed an employment relation between the Claimant and the 2<sup>nd</sup> Respondent, valid or otherwise. To hold that there was an employment contract between the two (Claimant and 2<sup>nd</sup> Respondent) without the backing of a work permit would be tantamount to sanctioning an illegality which the court is bound not to ([Kenya Airways Limited v Satwant Singh Flora](#) [2013] eKLR).
94. Importantly, the issue of the employment status of individuals serving the two Respondents is not new. It has been considered in other proceedings.
95. In [Gladys Muthoni Mwangi & 20 Others v Barclays Bank of Kenya Limited & Another](#) [2016] eKLR, the Petitioners were all employed by Barclays Bank of Kenya Limited (the bank). Although they had signed contracts of employment with the bank, they ended up with duties at Barclays Africa Group Limited. The trial court expressed the view that although they (the Petitioners) were rendering services to Barclays Africa Group Limited, they essentially were employees of the bank since they had executed their respective employment contracts with it (the bank).
96. This position was affirmed by the Court of Appeal in [Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others](#) [2018] eKLR. The court observed as follows on the employment status of the Petitioners:-
- “.....there can be no argument, as borne out by the record, that the contracts of employment were signed between BBK and the respondents. Indeed, the respondents had worked for BBK for years before BAGL happened on the scene. We have perused the judgment of the trial court and we do not get the impression that the court was under a misapprehension that BAGL was the employer.”
97. It is noteworthy that the Respondents in the instant case were the Respondents in the aforesaid decision. Whilst the Petitioners in the aforesaid case are distinct from the Claimant in the instant case



and had distinct contracts of employment from that of the Claimant, it is apparent that the nature of their relation has some similarities.

98. Like in the aforesaid decision where the contracts of service were executed between the Petitioners and Barclay Bank Kenya, the fixed term contracts in the instant case were executed between the Claimant and Barclay Bank Kenya (now Absa Bank Kenya Plc). Yet, just like the Petitioners in the aforesaid case, the Claimant in the instant case ended up with some assignments that went beyond serving Barclays Bank Kenya.
99. Despite the fact that the Petitioners in the aforesaid case were rendering services to Barclays Africa Group Limited, the Court of Appeal was of the view that they remained employees of Barclays Bank of Kenya. It was the court's view that the services that the Petitioners rendered to Barclays Africa Group Limited in the absence of express contracts of employment between them and Barclays Africa Group Limited were, at best, rendered on the basis of their deployment by Barclays Bank of Kenya to Barclays Africa Group Limited which did not result in an employment relation between them (the Petitioners) and Barclays Africa Group Limited.
100. In his oral testimony before court, the 2<sup>nd</sup> Respondent's witness appeared to lean towards the above position. Whilst acknowledging that the Claimant undertook some regional functions, the witness stated that such functions were executed under the auspices of the Claimant's contract with the 1<sup>st</sup> Respondent. The witness stated that sometimes, employees of the 2<sup>nd</sup> Respondent's subsidiaries perform functions that end up benefitting the Group Company. However, this does not derogate from their employment status with the subsidiaries.
101. Having regard to the evidence before me, I reach a similar conclusion as that arrived at by the Court of Appeal in the *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* (*supra*) case. It is apparent that the fixed term contracts that were executed between the Claimant and the 1<sup>st</sup> Respondent between July 2012 and August 2020 established an employment relation between him (the Claimant) and the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent.

**What was the legal effect of the Claimant entering into the fixed term contract with the 1<sup>st</sup> Respondent in July 2012?**

102. The record shows that the assignment contract between the Claimant and Barclays Bank Uganda was intended to have been for two years commencing 1<sup>st</sup> August 2010. After the lapse of this period, the Claimant was to have had three options available to him. These were:-
  - a. Repatriation to the home country; or
  - b. Transfer to local terms and conditions without repatriation benefits; or
  - c. Extension of the assignment on terms and conditions to be agreed.
103. According to the evidence on record, before the assignment contract ran its full term, the Claimant applied to the 1<sup>st</sup> Respondent for the position of Chief Internal Auditor and Regional Director East and West Africa. On 26<sup>th</sup> July 2012, the parties (Claimant and 1<sup>st</sup> Respondent) executed a service agreement. By that agreement, the 1<sup>st</sup> Respondent engaged the services of the Claimant as Chief Internal Auditor and Regional Director East and West Africa for a period of two years with effect from 1<sup>st</sup> July 2012. It is noteworthy that this new contract between the Claimant and the 1<sup>st</sup> Respondent came into force one month before the expiry date for the assignment contract between him and Barclays Bank Uganda.



104. By entering into the new contract with the 1<sup>st</sup> Respondent, the Claimant signified his intention not to be bound by his obligations under the subsisting employment and assignment contracts between him and Barclays Bank Uganda. In effect, he tacitly repudiated the contracts he had with Barclays Bank Uganda.
105. By this conduct, the Claimant extinguished the aforesaid contracts. In *Fair Work Commission in Gelagotis v Esso Australia Pty Ltd* (2018), the court described the test for repudiation of a contract of employment in the following terms:-
- “The test for repudiation is whether the conduct of the employee is such as to convey to a reasonable person, in the position of the employer, renunciation either of the contract as a whole or of a fundamental obligation under it. The issue turns upon objective acts and omissions and not on uncommunicated intention.”
106. In my judgment, the Claimant’s decision to sign the new fixed term contract with the 1<sup>st</sup> Respondent before the assignment agreement came to a close amounted to renunciation of both his employment and assignment contracts with Barclays Bank Uganda Limited. Therefore and by this act, the Claimant extinguished the two contracts between him and Barclays Bank Uganda Limited.
107. The Claimant’s engagement with the 1<sup>st</sup> Respondent after 1<sup>st</sup> July 2012 was anchored on the fixed term contract between them which became operational as from 1<sup>st</sup> July 2012. Their (Claimant and 1<sup>st</sup> Respondent) relation was no longer anchored on the purported extension of the assignment contract between the Claimant and Barclays Bank Uganda Limited as suggested by counsel for the Claimant.
108. For the record, the assignment contract was between the Claimant and Barclays Bank Uganda. Therefore, its extension could only have been done by these two. The suggestion by counsel that the fixed term contracts between the Claimant and the 1<sup>st</sup> Respondent were extensions of the assignment contract overlooks this reality.

**Whether the employment relation between the Claimant and the 1<sup>st</sup> Respondent was of indefinite or fixed term**

109. Several months before the two year assignment contract between the Claimant and Absa Bank Uganda Limited could have come to a close through effluxion of time, the Claimant lodged an application with the 1<sup>st</sup> Respondent for appointment to the position of Regional Director East and West Africa and Chief Internal Auditor for Barclays Bank Kenya. The record shows that the 1<sup>st</sup> Respondent offered the Claimant the said position under a two year contract. The parties eventually executed a contract of service dated 26<sup>th</sup> July 2012. In the schedule to the contract, it is indicated that the contract was for a fixed term of two years and had an automatic expiry date (30<sup>th</sup> June 2014).
110. The record shows that after the contract of July 2012 came to a close, the parties entered into similar time bound contracts. All the contracts had automatic expiry dates.
111. There is no indication in the instruments that the contracts were intended to have been for an indefinite term. On the contrary, they were all for a fixed duration that was agreed at the start of every contract.
112. The Claimant asserts that the contracts were meant to have been of an indefinite term. He contends that the only reason why the parties opted for drawing fixed term instruments was in order to circumvent the law on work permits for foreign nationals.
113. According to the Claimant, the law only allows for work permits that do not exceed two years. Thus, the parties had to enter into two year contracts in order to meet this legal requirement.



114. By this, the Claimant suggests that they entered into an arrangement that was intended to defeat an express provision of statute. That their contract was substantively long-term. That the fixed term contracts that they entered into were a façade that was meant to assist them go around the law.
115. The Claimant now asks the court to go behind the contracts and find that their true intention was to establish a long-term relation between the parties. By this, the Claimant asks the court to lend its hand to what he suggests would otherwise have been an irregular arrangement.
116. If the court approves of what the Claimant proposes, that would amount to affixing a stamp of approval on a scheme that was purportedly designed to circumvent the law. If the court were to do so, it will have permitted itself to be used as an instrument for evading the letter and spirit of the law.
117. The Claimant has argued that because the 1<sup>st</sup> Respondent’s virtual portal described him as a permanent employee, the court should find that he was in permanent employment. In addition, he has argued that because the 1<sup>st</sup> Respondent afforded him long-term financial facilities, the court should find that he was a permanent employee of the 1<sup>st</sup> Respondent.
118. The court cannot rely on entries in the 1<sup>st</sup> Respondent’s virtual portal to find that the Claimant and 1<sup>st</sup> Respondent had an indefinite employment relation. Those entries are extraneous to the fixed term employment contracts that the parties signed.
119. The primary documents that evidence the relation between the parties (Claimant and 1<sup>st</sup> Respondent) are the fixed term contracts. The court is not entitled to go outside these instruments to give meaning to the employment relation between the parties unless the contracts are ambiguous.
120. The suggestion by the Claimant that he was only able to access long-term facilities from the 1<sup>st</sup> Respondent because of his permanent employment status is equally misleading. A perusal of the schedules to all the fixed term contracts between the parties (Claimant and 1<sup>st</sup> Respondent) demonstrates that the 1<sup>st</sup> Respondent granted the Claimant what it described as “Banking Products” at discounted rates in accordance with its policies. There is no indication that these products were tied to the nature of his employment.
121. Consequently and on the basis of the evidence that is on record, I reach the conclusion that the contracts of service that were entered into between the Claimant and the 1<sup>st</sup> Respondent were of a fixed term nature. The parties did not have an indefinite employment relation.

**Whether the 1<sup>st</sup> Respondent created legitimate expectation in the Claimant that his employment would run up to his retirement age**

122. As has been demonstrated above, the contracts between the Claimant and the 1<sup>st</sup> Respondent were time bound. In addition, they had what the parties described as the “automatic expiry date”. None of the contracts contained a clause that sanctioned their renewal. In effect, the 1<sup>st</sup> Respondent did not make any promise to the Claimant that his employment would be renewed.
123. The evidence on record shows that after the expiry of each individual contract, the parties would enter into a fresh contract without reference to the preceding one except to the extent that the new contract cancelled all previous agreements and representations regarding the employment relation between them, whether oral or written. Quite clearly, the 1<sup>st</sup> Respondent made no promises to the Claimant that upon the lapse of his current engagement, the parties (Claimant and 1<sup>st</sup> Respondent) would enter into further contracts.



124. At the same time, the contract(s) which the parties (Claimant and 1<sup>st</sup> Respondent) entered into upon the lapse of the preceding ones were expressed to have been new and distinct from the previous ones. They were not renewals of the expiring contracts. This is because not one of the several contracts under consideration contained a renewal clause. Therefore, there is no basis upon which the court can hold that the Claimant was entitled to expect that any of the contracts would be renewed.
125. Legitimate expectation only arises when an individual has made a promise to another that he will grant him a particular benefit. Alternately, such expectation would arise where an individual has, by his conduct and practice made the other to believe that he will be entitled to some benefit on account of the established practice (*Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO* [2019] eKLR).
126. In the instant case, there is no evidence that the 1<sup>st</sup> Respondent made promises to the Claimant that it would renew his fixed term contracts. Similarly, there is no evidence that the 1<sup>st</sup> Respondent had established a practice of renewal of the Claimant's contracts. All the fixed term contracts that were concluded between the parties were new and based on fresh negotiations and terms. Therefore, the Claimant cannot invoke the principle of legitimate expectation to press his claim.

#### **Whether the Claimant's contract terminated as a result of redundancy or effluxion of time**

127. The evidence on record shows that between 1<sup>st</sup> July 2012 and 31<sup>st</sup> August 2021, the Claimant was engaged by the 1<sup>st</sup> Respondent on fixed term contracts of service. The last of the contracts closed on 31<sup>st</sup> August 2021.
128. The record shows that on 30<sup>th</sup> June 2021, there was an email exchange between the Claimant, officials of the 1<sup>st</sup> Respondent and related companies. In the email, it is apparent that the Claimant was informed that his position was likely to be lost on account of redundancy.
129. The record shows that the Claimant made inquiries regarding whether he was eligible for release from employment in accordance with the applicable redundancy law. In response, he was told that since he was serving on a fixed term contract, he would not be eligible for redundancy pay. He was advised that his contract was due to lapse in August 2021 and that he was free to either relocate to Uganda or apply for other positions within the 1<sup>st</sup> Respondent's organization.
130. The record shows that the Claimant expressed his reservations about the position that was expressed by the 1<sup>st</sup> Respondent on the subject. According to him, because he had served the group for over sixteen years, he was entitled to gratuity pay. Besides, since he was a permanent employee of Barclays Bank Uganda at the time that he was deployed to serve the 1<sup>st</sup> Respondent, he was allegedly entitled to be considered as a permanent employee. Therefore, he was entitled to redundancy pay.
131. The record shows that on 2<sup>nd</sup> July 2021, the Claimant held a physical meeting with the 1<sup>st</sup> Respondent's officials when he was informed that his fixed term contract would not be renewed once it lapsed at the close of August 2021. He was issued with a letter of even date expressing the same position.
132. There is no evidence that by close of 31<sup>st</sup> August 2021, the 1<sup>st</sup> Respondent had issued the Claimant with a redundancy notice. There is no evidence that the 1<sup>st</sup> Respondent terminated the Claimant's contract before 31<sup>st</sup> August 2021. There is no evidence that the 1<sup>st</sup> Respondent prevented the Claimant from executing his tasks until 31<sup>st</sup> August 2021. On the contrary, the 1<sup>st</sup> Respondent's witness in her written witness statement confirms that the Claimant worked until the close of August 2021 when his contract lapsed by operation of time.



133. On 27<sup>th</sup> July 2021, the 1<sup>st</sup> Respondent's officials wrote to the Claimant informing him that as his assignment contract approached its closure, he localized by executing a fixed term contract with the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent expressed the view that the effect of the localization was to extinguish the Claimant's employment contract with Absa Uganda.
134. The 1<sup>st</sup> Respondent further reminded the Claimant that his fixed term contract was due to lapse on 31<sup>st</sup> August 2021 and that it would not be renewed. Thus, the 1<sup>st</sup> Respondent expressed the view that the Claimant's contract was to lapse due to expiry of time and not redundancy.
135. On 2<sup>nd</sup> September 2021, the Claimant signed a document to acknowledge receipt of his terminal dues from the 1<sup>st</sup> Respondent. By this, the outstanding matters arising from the employment relation between the parties (except for this litigation) came to a close, the contract between them having already lapsed on 31<sup>st</sup> August 2021 by effluxion of time as opposed to redundancy.
136. The Claimant's counsel appears to suggest that because the two events (effluxion of time and redundancy) appear to have coincided, the Claimant ought to have been released on account of redundancy as opposed to effluxion of time. He suggests that it was perhaps wrong for the 1<sup>st</sup> Respondent to have stuck to the idea of letting the contract lapse on account of effluxion of time. He suggests further that the decision to terminate the Claimant on account of effluxion of time was a scheme to evade the duty to release him from employment under the applicable redundancy laws.
137. To my mind, if a contract has an appointed date for its closure, it will close on that date. It does not matter that it (the contract) is afflicted by other adverse events just before the closure date. If the closure date falls due before the other adverse events disable the contract, it shall be deemed to have lapsed by reason of expiry of time (*Amatsi Water Services Company Limited v Francis Shire Chachi* [2018] eKLR). Therefore, the rendition in *Thomas Odol Ojwang v Kenol Kobil Limited* [2015] eKLR, which counsel relies on to argue that the Claimant ought to have been accorded due process is of no application to the instant case.
138. Counsel for the Claimant has also suggested that the Claimant was entitled to be given reasons for termination of his contract. He argues that the Respondents deprived the Claimant of his right to due process by failing to furnish him with reasons for termination of his engagement.
139. This argument is incorrect. Except where the employer had led the employee to believe that the contract would be renewed, an employee whose contract comes to an end by effluxion of time is not entitled to be given any other justification for termination except that the contract has closed by reason of lapse of time (*Keen Kleeners Limited v Kenya Plantation and Agricultural workers' Union* (Civil Appeal 101 of 2019) [2021] KECA 352 (KLR) (17 December 2021) (Judgment)).
140. A perusal of the court file demonstrates that the 1<sup>st</sup> Respondent wrote to the Claimant on 2<sup>nd</sup> July 2021 informing him that his contract was due to lapse by effluxion of time on 31<sup>st</sup> August 2021. By this letter, the 1<sup>st</sup> Respondent discharged its obligation to the Claimant.

**Whether the Claimant is entitled to retrenchment pay under the Retrenchment and Reassignment Standard published on 24<sup>th</sup> June 2021.**

141. The Claimant contends that he was entitled to be compensated in accordance with the Retrenchment and Reassignment Standard that came into force in June 2021. The introductory part of the Standard reads as follows:-

“Retrenchment and Reassignment Standard, hereafter referred to as “the Standard” specifies the required provisions/controls as per the requirements indicated under Purpose



and section 189 and section 189A of the Labour Relations Act 66 of 1995 as amended (“LRA”).”

142. The statute that the Standard alludes to is the Labour Relations Act No. 66 of 1995 of the Republic of South Africa. Sections 189 and 189 A of the Act deal with the issue of termination of employment contracts for operational reasons. The sections prescribe the standards which an employer who proposes to terminate a contract of service for operational reasons must meet. These standards largely mirror those that are prescribed under section 40 of the Employment Act of Kenya, 2007. For instance, such employer is required to engage the affected employees in consultations. In addition, he is required to actively try to get alternatives to the proposed redundancy.
143. Evidently, the Retrenchment and Reassignment Standard that the Claimant alludes to was issued pursuant to the aforesaid South African legislation and applies to contracts of service in the Republic of South Africa. The instrument has no application to Kenya. That this is the position is self-evident from the instrument when it provides as follows:-
- “This Standard applies to Absa South Africa and all its subsidiaries, if applicable (including any consolidated entity acquired via a debt-for-equity swap or created through a joint venture); and Group entities outside of South Africa will be required to document their own standards aligned to their country’s legislative framework.”
144. It is not contended by the Claimant that the 1<sup>st</sup> Respondent is a subsidiary of Absa South Africa. As a matter of fact, he (the Claimant) confirms that the 1<sup>st</sup> Respondent is a subsidiary of Absa Group Limited (formerly Barclays Africa Group Limited), not Absa South Africa (see paragraphs 2 and 3 of his Memorandum of Claim).
145. The Standard clearly states that group entities outside South Africa are to develop their own standards in accordance with the laws of the country in which they are situate. Therefore, the 1<sup>st</sup> Respondent was expected to develop its own retrenchment guidelines to give meaning to section 40 of the Employment Act.
146. There is no evidence that the 1<sup>st</sup> Respondent adopted the guidelines proposed in the Retrenchment and Reassignment Standard developed for South Africa. Therefore, the court finds that the Retrenchment and Reassignment Standard of 24<sup>th</sup> June 2021 which the Claimant has invoked is inapplicable to his case.
147. But even if the Standard was applicable to Kenya, it would still have had no application to the Claimant’s case. The Standard provides guidelines for management of retrenchments on account of redundancy declarations. As correctly submitted by the 1<sup>st</sup> Respondent, the Claimant’s contract did not terminate for reasons of redundancy but effluxion of time. Therefore, the Standard would not have applied to his case.

**What was the legal effect of the discharge voucher that was executed between the parties on subsequent claims?**

148. The evidence on record shows that the Claimant executed a discharge voucher on 2<sup>nd</sup> September 2021 acknowledging receipt of Ksh. 5,114,359.50 as his final dues. At the bottom of the instrument, it states as follows:-

“Please signify your agreement to the above calculation as the full and final settlement and discharge of all dues owed to you by the bank and an acknowledgement that you have no



further or additional claim against the bank in respect to your employment by dating signing and returning to People Function (HR) the enclosed copy of this calculation.”

149. The Claimant signed the instrument. However, he inscribed the following comments on it:-  
“Please note that I have a pending legal claim against ABK. I am therefore acknowledging the receipt of this information pending determination of the claim.”
150. The record shows that at the time of signing the discharge voucher on 2<sup>nd</sup> September 2021, the Claimant had lodged the instant claim contesting the decision to end the employment relation between the parties. From the record, the Memorandum of Claim was lodged on 29<sup>th</sup> July 2021.
151. The Claimant’s comments on the discharge voucher were in reference to this claim. The comments indicate that the Claimant did not accept that by signing the voucher, he agreed to close the dispute between the parties. Therefore, it is not correct to suggest that by signing the voucher, the Claimant discharged the 1<sup>st</sup> Respondent or indeed all the Respondents from liability, assuming that he has a valid claim against them.
152. It is correct as argued by the 2<sup>nd</sup> Respondent that a discharge voucher can constitute a bar to further litigation in respect of a matter. However, there is no absolute rule that once an individual has executed a discharge instrument, he is thereby precluded from litigating over the subject.
153. Whether a discharge voucher constitutes a bar to further litigation in respect of a matter is an issue of fact and law which turns on the design and content of the instrument. Where a party to the instrument has expressly stated that by signing it, he does not waive his rights to pursue the matter further, the voucher cannot be said to have closed the matter.
154. The Claimant’s comments on the voucher in question were a clear indication of his desire to pursue this dispute further. Therefore, his signing of the voucher did not close the dispute between the parties.

### **Determination**

155. Upon careful evaluation of the evidence on record, I reach the following conclusions and findings:-
- a. The court has jurisdiction to determine the dispute between the Claimant and the 2<sup>nd</sup> Respondent.
  - b. There was no contract of service between the Claimant and the 2<sup>nd</sup> Respondent.
  - c. The fixed term contracts that were executed between the Claimant and the 1<sup>st</sup> Respondent between July 2012 and August 2020 established an employment relation between the Claimant and the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent.
  - d. The contracts of service between the Claimant and the 1<sup>st</sup> Respondent were of a fixed term nature. The parties did not have an indefinite employment relation.
  - e. The 1<sup>st</sup> Respondent did not make any promises to the Claimant that it would renew his fixed term contracts of service. Similarly, the 1<sup>st</sup> Respondent did not establish a practice of renewal of the Claimant’s contracts. All the fixed term contracts of service that were concluded between the parties (Claimant and 1<sup>st</sup> Respondent) were new and based on fresh negotiations. Therefore, the Claimant is not entitled to invoke the principle of legitimate expectation to press his claim.



- f. By entering into the contract dated 26<sup>th</sup> July 2012 with the 1<sup>st</sup> Respondent, the Claimant implicitly extinguished the employment and assignment contracts between him and Barclays Bank Uganda Limited.
- g. The Claimant's contract of service lapsed on 31<sup>st</sup> August 2021 by effluxion of time as opposed to redundancy.
- h. The Retrenchment and Reassignment Standard of 24<sup>th</sup> June 2021 that the Claimant has invoked is inapplicable to his case.
- i. Execution by the Claimant of the discharge voucher did not, in the circumstances of this case, close the dispute between the parties.
- j. The Claimant has failed to establish his claim against the Respondents.
- k. As a result, the suit is dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED ON THE 7<sup>TH</sup> DAY OF DECEMBER, 2023**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M. MANANI**

**JUDGE**

