



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kabira v Kenya Conference Of Catholic Bishops (Cause 1203 of 2017)  
[2022] KEELRC 12804 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12804 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1203 OF 2017  
JK GAKERI, J  
OCTOBER 5, 2022**

**BETWEEN**

**DANIEL KABIRA ..... CLAIMANT**

**AND**

**KENYA CONFERENCE OF CATHOLIC BISHOPS ..... RESPONDENT**

**JUDGMENT**

1. The claimant initiated this suit by a memorandum of claim dated June 22, 2017 and filed on June 27, 2017 alleging amongst other issues unfair labour practices, unlawful suspension, unfair termination and unlawful deduction of salaries.
2. The claimant prays that:-
  - a. A declaration that the respondent's conduct amounts to unfair labour practices contrary to article 41 of the Constitution of Kenya, 2010.
  - b. An order directing the respondent to issue the claimant with a certificate of service.
  - c. Payment of relocation expenses/benefits of US \$10,500.
  - d. Payment of Kshs 1,760,000/= as housing allowance due from May 2016-December 2016.
  - e. Declaration that there was a legitimate expectation of extension of contract.
  - f. Declaration that the respondent breached terms of the contracts.
  - g. Special damages of Kshs 15,133,404.13/=.
  - h. Exemplary damages.
  - i. Costs of the suit.



- j. Interest on all of the above at court rates from the date of filing until payment in full.
- k. Any relief this honourable court may deem fit to grant in the circumstances.

**The Claimant's Case Is Pleaded As Follows:**

3. The claimant avers that he is a permanent resident of the United States of America working in Kenya as an expatriate. That he was appointed by the respondent on February 24, 2012 to the position of chief of party, operations of the Kenya Aids Response Programme (KARP) for a period of 3 years commencing on March 1, 2012 and ending on February 28, 2015.
4. That he was entitled to among other benefits, a salary of USD 13,650, housing allowance of Kshs 200,000/=, health insurance, relocation support of USD 10,500, life insurance and a return air ticket to the United States for home leave every year.
5. The claimant avers that as a chief of party, he was to provide overall managerial and technical leadership to facilitate the delivery of a comprehensive high-quality HIV/AIDS prevention, care and treatment. He was also to build a reputable architecture for the KARP grant by ensuring that the grant funds and resources were used properly and in strict compliance with the USA's Federal Government Codes and regulations.
6. The claimant avers that by a calculated series of actions and events, the respondent created a working environment designed to constructively dismiss him.
7. He avows that in 2014, the respondent entered into negotiations with the grantor/donor to create the position of a project director at the top management of the grant. This position, the claimant avers, was new, unaccounted for in the grant budget and was a clear violation of the terms of engagement between himself and the respondent.
8. The claimant also attests that he expressed reservations as to the justification of hiring a project director while the donor had previously informed the respondent that it had a heavy top management and eliminated the position of deputy chief of party rendering the DCOP redundant. In addition, the claimant maintains that the position was equivalent to that of a chief of party held by himself and would amount to a duplication of efforts and resources.
9. That despite his reservations, the respondent developed a job description for the position and later renamed it as director of program. He avers that the respondent had consciously attempted to exclude him from the process of developing the job description of the position.
10. The claimant avers that the creation of this new position was an intricate scheme designed to abolish the position he occupied and in turn force him to terminate his employment thereby replacing him with the director of program. In addition, he maintains that the developed job description took away and removed nearly all the functions and responsibilities of his position.
11. He avers that addition of a senior position like that is usually informed by an assessment of human effort required in a grant implementation or the program under-performance trends but in this case, no such assessment was conducted or under-performance noted that would justify the need for the position.
12. The claimant maintains that the position would not have any added value to the program and that it was a corrupted scheme to make him redundant as cop, replace him with the imposed DOP/DCOP and facilitate corruption and easy misappropriation of the grant funds safe guarded by him.



13. He avers that he therefore remained a chief of party in name only, devoid of any meaningful roles and responsibilities as envisioned in the contract of employment. As such, he contends that the position of director of program was a mere façade to conceal the Respondent's intention to terminate his employment.
14. In addition, he avers that the Centre for Disease Prevention and Control (CDC) funded grants worldwide had a similar organisation and human resource structures which do not feature the position of project director/director of program where there was a chief of party as the two do not co-exist.
15. In addition to the above, the claimant avers that in or around January 2015, he submitted a request for renewal of his contract as provided for in his first contract of employment. That the request for renewal was presented to the respondent's permanent council of bishops and was approved.
16. The claimant states that he was however, not issued with a contract of employment but rather was issued with an extension of contract which was to last until June 26, 2015 or until a new contract of employment was executed, whichever was to happen first.
17. By a contract made on June 22, 2015, he was re-appointed to the position of chief of party for a period of one year and ten months but the contract issued was backdated to begin at the end of the 1<sup>st</sup> contract thus covering up the extension as if there was none.
18. However, the claimant avers that despite the renewal, the working relationship was nothing but tumultuous in which the respondent lacked the most basic regard for employee welfare or for the contract of employment.
19. He avers that the respondent deliberately attempted to delay issuing him with a new contract of employment so that his existing one would expire and his employment would be terminated through expiration of time.
20. In addition, the claimant avers that *vide* a letter dated February 17, 2016, he was informed that part of his salary would be deducted as payment of tax to Kenya Revenue Authority. This was notwithstanding that the respondent was aware that he had been exempted by KRA from statutory deductions and had furnished the respondent with a letter of exemption from KRA and his US tax returns endorsed by the US Embassy in Kenya.
21. He explains that as a permanent resident of the US, he was subject to US federal, state and county/city taxes including taxation on his income. That in addition, his salary was derived from US government funds of which he contributes through payment of the above taxes.
22. The claimant therefore avers that the decision to deduct his salary was not communicated to him and that he found out about it in his payslip. That the letter supposed to inform him of these changes was delivered to him on August 19, 2016 but its date was backdated to February 16, 2016.
23. The claimant also avers that the respondent's animosity went further to the discriminatory act of capping his salary to block his eligibility for increment which resulted in him earning a constant salary while those of other staff members were increased.
24. Through a letter dated May 30, 2016, the claimant avers that the respondent enforced a further deduction of his salary being reimbursement of the housing allowance previously paid since October 2015 thus further reducing his salary to a point he was earning less than a third of his salary entitlement.



25. He states that the respondent also withdrew his housing allowance from his contractual benefits claiming that it was a restricted item under the donor's notice of award and without having consulted him about it.
26. Therefore, he maintains that the decision to withdraw the housing allowance and recover the previously paid amounts from his remaining period of contract was illegal and unlawful as housing allowance was provided as an entitlement under his 2<sup>nd</sup> contract of employment.
27. The claimant also avers that he was not given a reasonable opportunity to make representations on the issue before the decision was made and that the respondent, in unilaterally terminating the same was contrary to the law and his employment contract.
28. The claimant states that in addition to the above, the respondent unilaterally changed the currency of payment from US dollars to Kenya shillings, contrary to the express terms of the contract of employment. This in turn resulted in the claimant suffering loss and damages due to forex exchange losses. The delayed salary payment resulted in him incurring penalties on bank standing orders in turn damaging his creditworthy status in Kenya and in the US.
29. The claimant avers that the respondent blatantly refused to renew his medical insurance cover after its expiry in July 2016. The respondent also failed, neglected and refused to make any contribution to his retirement plan benefit as agreed and provided for as a term in his 1<sup>st</sup> contract.
30. He further avers that during the 2<sup>nd</sup> course of his contract, as per the respondent's scheme of service, he was entitled to a staff pension scheme which the respondent failed, neglected and refused to make contributions to as agreed upon by the terms of the 2<sup>nd</sup> contract. It made contributions for 11 months instead of 22 months.
31. The claimant avows that in an enormous display of hostility, around October 2016, three months to the expiry of his contract and in the midst of a donor conference aimed at showcasing the performance of KARP in which his presence was indispensable, the respondent sent him on compulsory leave for no justifiable reason.
32. He argues that the decision to send him for the indefinite compulsory leave amounted to an unlawful suspension and a violation of the principles of natural justice. This is because he was neither informed of the reasons of the suspension nor accorded an opportunity to respond to any accusations that would necessitate the suspension.
33. He further avers that he has never had any disciplinary issue with the respondent or any of his previous employers as he has always performed his duties with exceptional diligence.
34. The claimant avers that on October 11, 2016, the respondent held a meeting and agreed that the position of chief of party be scrapped and the functions be taken over by the DOP/DCOP as the head of KARP and principal investigator. As a result, he avers that out of 32 members of staff, his contract was the only one that was not renewed by the respondent.
35. He also avers that by an email dated November 17, 2016, he informed the respondent of his wish to relocate back to the US before the end of the year. He sought the respondent to cover the costs of relocation as per the agreed terms of his second contract but was informed that the same was untenable through a letter dated December 8, 2016.
36. The denial above aggravated his plight given that his belongings are stranded in Kenya and was continuously incurring unprecedented bills for his accommodation and storage of his personal belongings.



37. The claimant avers that he was discriminated against in the course of his employment by being denied an annual increase in salary which was granted to all other staff members. He also states that his annual salary was arbitrarily deducted by US\$26,611 in 2014 and US\$ 16,353 without lawful cause or justification and contrary to the terms of employment.
38. He further avers that as a term in his 1<sup>st</sup> contract, the respondent would provide him with a project car for his use. The respondent purported to arbitrarily deduct and recover from his salary the costs of use of the vehicle.
39. In conclusion, the claimant asserts that during his employment, the respondent in brazen display of malice and scant regard of his rights under the Constitution, the Employment Act and his employment contract breached the terms of his employment contract in a bid to frustrate him into quitting his job.

### **Respondent's Case**

40. The respondent is a consortium of the catholic bishops drawn from various dioceses within the Republic of Kenya. In 2011, the respondent received a grant titled Kenya AIDS Response Program (hereinafter referred to as "KARP") that was being funded by the United States President's Emergency Plan for AIDS relief through the Centres for Disease Control and Prevention (hereinafter referred to as "the CDC") for purposes of HIV prevention, care and treatment.
41. The grant created several positions including that of chief of party which was the claimant's initial role from February 24, 2012. The claimant was employed to the said position through a contract of employment that he signed on February 16, 2012 and was signed for and on behalf of the employer, the respondent on February 24, 2012. (See pages 14 to 17 of the claimant's list of authorities) 6. The second contract of employment was entered into by the parties on June 22, 2015 for the position of chief of party, operations for a period of one (1 year and 10 months) contingent upon funding by donor/partner commencing on March 1, 2015 and ending on December 31, 2016.
42. In response to the claimant's averments, the respondent denies that there was a creation of a hostile working environment or the creation of a position with the aim of constructively dismissing the claimant as alleged.
43. The respondent states that there existed the position of project director / director of program, which was created after a normal reorganization upon the resignation of the director, clinical services delivery. The position of director clinical services delivery was an existing position which was created in 2013 and later renamed to project director in 2015.
44. It maintains that the renaming did not only affect that position but also other positions within the organogram. The position of project director did not provide for duplication of roles as alleged by the claimant but was to deputize the chief of party. Specifically, the project director was to formulate, implement and evaluate appropriate KARP strategies and policies in line with its objectives. In addition, the duty station for the project director was in Kisumu while the chief of party was stationed in Nairobi.
45. The respondent avers that it is therefore misleading for the claimant to allege that the position of project director was the same as that of the chief of party, that it had duplication of effects and resources and that it consequently took away his functions as the chief of party. The two positions were distinct and separate hence there was no duplication of roles.
46. On renewal of the claimant's contract, the respondent avers that the claimant was well aware that renewal of his contract was contingent upon continued funding by the donor. Therefore, even though



- the respondent's permanent council of bishops had approved the renewal of contract, the same was subject to the concurrence of the donor.
47. The respondent therefore issued the claimant a letter dated May 28, 2015 for extension of contract and a letter of appointment dated June 15, 2015 which clearly stated that the appointment was for one-year contingent upon funding by the donor.
  48. The respondent further avers that in all instances where it needed to make any type of alteration to its employee's contracts in the grant as directed by the donor, it always ensured that the affected employees were informed in good time before implementing the changes.
  49. Regarding the claimant's expatriate status claim, the respondent avers that it only found this out a month after he accepted his terms of employment when he stated that he was exempted from payment of pay as you earn (PAYE).
  50. The respondent further avers that it considered the claimant a Kenyan citizen as no evidence was provided to the contrary. That his passport stated that he was a Kenyan citizen, his National Health, Insurance Fund (NHIF) card, his personal identification number (PIN), his National Social Security Fund (NSSF) and his identification No (ID) all stated that he was a Kenyan citizen.
  51. That further, as he did not provide any working permit that he should have acquired if at all he was an expatriate as was alleged. It averred that even though the claimant continually alleged that he was eligible for tax exemption, he did not provide the respondent with information or evidence from the Kenya Revenue Authority (hereinafter referred to as KRA) expressly exempting him from paying taxes.
  52. The respondent also states that the claimant was further given an opportunity to deal with the tax exemption issue between himself and the donor and inform the respondent of the donor's decision on the same.
  53. As a matter of caution, the respondent sought confirmation of the claimant's expatriate status as he had not provided any proof of the same to the respondent. In its response the centre for disease control stated that any individual seeking tax exemption must not be a host country national or a permanent resident of Kenya and sought to be provided with the claimant's passport photo page which indicates that he is a Kenyan citizen.
  54. The respondent adds that it also sent communication to the claimant seeking documentation evidencing his tax returns to the US government and a tax exemption certificate from KRA to enable the respondent admit his employment status which he did not provide.
  55. It is the respondent's case that it further wrote to the claimant's former employer catholic relief services, Kenya Program who confirmed on their letter dated February 7, 2013 to the respondent that when the claimant was in their employment in USA, they had contracted him as an international consultant in 2010. They later reviewed his terms of engagement and hired him as a regular Kenyan national staff from July 2011 to March 2, 2012.
  56. On the deduction of his salary, the respondent denies that the claimant was unaware of the decision to deduct his salary. It maintains that he was kept aware. In addition, it avers that it was inheriting the contract the claimant had with the former employer which resulted in the claimant enjoying benefits that exceeded CDC's budget. Consequently, the respondent received pressure from CDC who capped the claimant's salary stating that his salary was in excess of executive level 11 and that it was not allowable. The donor further directed that the claimant's excess be utilized in program activities.
  57. As regards the capping of the claimant's salary the respondent denies the same was discriminatory and states that the decision to cap was based on the donor's directions. That the claimant had reached the



- maximum pay allowable under the grant and received clear instructions from the donor directing that the claimant's salary exceeded the amount allowable in the grant and was further directed to retain funds and direct them to patients who were the donor's main priority.
58. On housing allowance, the respondent avers that when negotiating his housing benefits, the claimant misled the respondent into believing that housing was a benefit that could reasonably be catered for by the donor.
  59. In addition, it is averred that on January 26, 2016, the respondent received communication from the donor disallowing housing allowance for the chief of party and further, the donor clarified that housing allowance had not been approved for previous years. It added that the donor also made a finding that the chief of party had been using a vehicle maintained by the grant for both personal and official use and for that reason disallowed costs charged to the program in relation to the vehicle.
  60. The decision to disallow the housing benefits was therefore the donors' and the same was communicated to the claimant *vide* letter dated May 30, 2016. It also clarifies that the deductions never went below the threshold of  $\frac{1}{3}$  as provided for by section 19(3) of the *Employment Act*, 2007.
  61. The respondent denied the claim that payment of his salary was made in Kenya shillings instead of the agreed US dollars and in turn suffered expenses due to forex change. It instead states that that the claimant was put in the respondent's payroll and after tax deductions; his salary was reverted to dollars.
  62. On medical cover, the respondent avers that the claimant continued receiving international medical cover which he fraudulently negotiated in his contract for a period of four years before it was discovered by the auditors that despite presenting quotations for the cover, he would present the payments under his name and would never pay for the cover as a benefit extended to him by the employer.
  63. That under normal practice an employer would pay premiums under their name and provide the list of beneficiaries to the insurer. The claimant would however receive payment and secretly pay a lower premium amount than the one that he received from the respondent.
  64. Regarding being sent on compulsory leave, the respondent clarifies that as per the terms of his employment, his notice period was three months and through a letter dated September 28, 2016, the general secretary notified the claimant of impending expiry of his contract as provided for in its human resources management policy.
  65. It advised that the claimant's 36 accumulated leave days be taken and that he returns back to work on the December 8, 2016 for handing over. The respondent maintains that during the said notice period, the claimant continued drawing a salary and any other benefits payable to him as an employee.
  66. On the pension scheme, the respondent avers that it was impossible to deduct the 5% pension scheme as the claimant was paid through cheques from March 2012 to January 2016. This was because the claimant had refused to provide his details to the respondent on grounds that he was an expatriate consequently making it difficult for the respondent to put him on the pay roll system.
  67. The respondent further avers that the position of the chief of party was scrapped upon instructions by the donor and not the respondent arriving at the decision solely. In addition, it maintains and avers that it was not within its ambit to increase salaries for employees paid under grants as that was solely within the discretion of the donor who decided whether to increase the salaries of the employees particulars of which all employees were aware of as the same was provided for in the respondent's modified scheme of service / progression plan.



68. The respondent concludes by denying that the claimant was treated in a discriminatory or unfair manner as alleged. It avers that the claimant was fully paid his terminal dues and that the respondent prepared the claimant's a certificate of service which he failed to collect.
69. Based on the above reasons, the respondent asserts that it did not in any way breach the provisions of any law, it followed to the latter the provisions and guidelines under the Constitution of Kenya, Employment Act and all other applicable laws.
70. As such, it avers, that the memorandum of claim is brought maliciously and in bad faith, that it is an abuse of the court process and should be struck out at the first instance.
71. In its counter-claim, the respondent avers that as a consequence of the claimant's misrepresentation in negotiating his contract, the claimant enjoyed benefits that he verily knew were not allowable under the grant including housing allowance totalling to Kshs 1,851,100.00.
72. In addition, it avers that the claimant further misrepresented himself as an expatriate and was exempted from payment of pay as you earn irregularly to the tune of Kshs 5,986,541.00. The said misrepresentation caused the respondent to suffer financial losses and the respondent counterclaims special damages.
73. The respondent further avows that the claimant received payment of pension as part of his salary directly through cheque for the period between March 2012 to January 2016 which he was required to forward to the Retirement Benefits Authority. It therefore seeks an account of the amount received by the claimant during the said period.
74. The respondent seeks the following:
- i. An order for dismissal of the claimant's claim.
  - ii. Special damages to the tune of Kshs 7,567,641.00
  - iii. An account on the pension and/or retirement benefits scheme payments advanced to the claimant under the 1<sup>st</sup> and 2<sup>nd</sup> contract of employment.
  - iv. General damages
  - v. Costs
  - vi. Interest on prayers (i), (iii) and (iv) above
  - vii. Any other reliefs this honourable court may deem fit to grant.

### **Evidence**

75. Both parties presented one witness each at the trial. The claimant's witness was Dr Daniel Kabira while the respondent's witness was Evans Ombuki. Both witnesses adopted their witness statements as evidence in chief and produced documents as exhibits to be relied upon by the court.

### **Claimant's Submissions**

76. The claimant identifies three issues for determination, namely;
- i. Whether the employment contract between the claimant and the respondent was subject to a third-party instrument known as the notice of award issued by the Centre for Disease Prevention and Control (CDC);



- ii. Whether there was a breach of both employment contracts and if so, what terms were breached; and
  - iii. Whether the termination of the claimant's employment was unfair.
77. As regards the first issue, the claimant submitted that all contracts were to be governed in their entirety by and were subject to the respondent's human resource management policies, the respondent's finance and administration policies, the respondent's mission vision and core values, all other internal policies, the modified KARP scheme of service, in addition to the provisions of the *Employment Act, 2007*.
78. In light of the foregoing, the claimant submitted that the respondent's assertions that his contract was subject solely on the concurrence of the donor had been raised only as a smokescreen to cover the fact that the respondent avoided its contractual obligations and varied the terms of the contract without consulting the claimant.
79. In addition, the claimant further submitted that the donor was not a party to the two employment contracts and could therefore not suggest and influence the terms of his contract.
80. On the 2<sup>nd</sup> issue, the claimant submitted that the respondent wilfully breached clause 6 of the second employment contract as outlined hereunder which provided for (i) housing to a maximum Kshs 220,000/= (two hundred and twenty Kenya shillings) per month), (ii) medical insurance cover which would include dental and visual coverage in Kenya and USA (global health insurance) for the claimant and his dependents, (iii) relocation US\$10,500 allowance back to the USA, (iv) change of salary for US dollars to Kenya shillings and unlawful deduction of salary.
81. On the 3<sup>rd</sup> issue, the claimant submitted that his termination was irregular, unlawful, unfair, malicious and unprocedural because he was neither given the reason for termination or non-renewal. He placed reliance on the decision in *Teresa Carlo Omondi v Transparency International Kenya*, where the court, after considering the manner in which the outgoing contract was terminated found that non-renewal of the claimant's contract amounted to unfair termination.
82. The claimant also submitted that because he was neither subjected to any disciplinary procedure nor was he given a chance to be heard, his termination was unfair as provided for under sections 41 and 45 of the *Employment Act* and chapter 5 of the respondent's human resource management policy. In addition, he argued that his termination also violated article 41 (1) of the *Constitution* of Kenya, 2010 on his right to fair labour practice.
83. The decision in *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited*, [2013] eKLR, is relied upon in support of the submission.
84. In conclusion, the claimant submitted that the basis of compensation for his unfair termination is couched under the provisions of section 49(1)(a) and (c) of the *Employment Act*. He also relied on the decision in *Alphonse Maghanga Mwachanva v Operation 680 Limited* (2013) eKLR to buttress the claim.
85. The claimant maintained that his career relies heavily on his reputation and the termination without disclosure of reasons why have led to him not being able to secure employment and as a result his reputation and employability were ruined. Reliance is made on the decision in *Nagvi Syed Omar v Paramount Bank Limited & the Attorney General* [2015] eKLR to urge the court to allow the claim and the reliefs sought.



## Respondent's Submissions

86. The respondent submitted that the claimant's contract was terminated fairly, that the employer-employee relationship ended as a result of effluxion of time. It was further argued that granted that the contract was for a fixed term and renewal was subject to the employer's discretion, it was not necessary to provide reasons for termination of the contract. Reliance was placed on the decisions in *Kenneth Karisa Kasemo v Kenya Bureau of Standards* [2013] eKLR and *Amatsi Water Services Company Limited v Francis Shire Chachi* [2018] eKLR to reinforce the submission.
87. On whether the claimant is entitled to the damages sought, the respondent submitted that award of damages can only suffice if the claimant proves that there was breach of fundamental rights that was occasioned by the respondent which the respondent had failed to prove in this case.
88. The respondent submitted that it is trite law that general damages are not awarded for wrongful termination but are an exercise of the trial court's discretion which should be applied reasonably. Reference was made to the decisions in *George Onyango Akuti v G4S Security Services Ltd* [2013] eKLR and *Joseph Njogu Kamunge v Charles Muriuki Gachari* (20161 eKLR). Relatedly, the respondent argued that section 49 of the *Employment Act* does not have a provision for general damages in instances of unfair termination.
89. In conclusion, the respondent submitted that the claimant had failed to raise an arguable case or demonstrate before the court that his claim was merited. As such, the court is urged to dismiss the claim with costs and allow the counter claim.

## Determination

90. After careful consideration of the pleadings, evidence on record and submissions by the parties' advocates, the issues that commend themselves for determination are;
- i. Whether the claimant's employment contract with the respondent was subject to the donors directives through the notice of award by the Centre for Disease Prevention and Control (CDC).
  - ii. Whether termination of the claimant's contract of employment was unfair.
  - iii. Whether the respondent breached the terms of the contract of employment.
91. As to whether the contract of employment between the claimant and the respondent was subject to the CDC directives, the parties have adopted contrasting positions. While the claimant alleges that the employment contract was self-contained as evidenced by its clauses, the respondent urges that contract of employment and the conditions of the grant were entwined.
92. The claimant anchors his argument on clause 4 of the contract concluded on June 22, 2015 ending on December 31, 2016 (1 year and 10 months). The clause states *inter alia*.
- This contract shall at all times be governed in its entirety by and be subject to;
- i. Employers human resources management policies.
  - ii. Employers finance and administrative policies.
  - iii. Employers mission, vision and core values.
  - iv. All other internal policies of the employer



- v. *Employment Act*, 2007
  - vi. The modified KCCB/KARP scheme of service
  - vii. Transport and vehicle management policy of KCCB
  - viii. Programme partners compliance and these documents were to be read together wholly and mutually explanatory of each other.
93. It is the claimant's case that CDC was not party to the employment contract between the claimant and the respondent. That RWI confirmed on cross-examination that the donor could not suggest and influence terms of the claimant's employment contract.
  94. On the other hand, the respondent relies on clause 3 of the 1<sup>st</sup> contract which provided that the employer reserves the right to renew this contract at its discretion based on clause 2.6.12 of the employers human resources management policies and consultation with KARP donor (CDC) . . ." to demonstrate that the donor could suggest or influence terms of engagement. Reliance is also made on clause 4(iv) on the applicability of the modified KARP scheme of service and clause 4(vii) of the 2<sup>nd</sup> contract reproduced above.
  95. It is not in dispute that the CDC was and remained a partner of the respondent's KARP programme throughout its existence which would explain inclusion of programme partners compliance as part of the contract of employment between the claimant and the respondent dated June 22, 2015 which was one of the additions to the earlier contract.
  96. In his statement, the claimant states that he had previously worked as chief of party for AIDS Relief, Kenya, director Global Fund HIV/AIDS, TB and Malaria in Namibia, head of HIV/AIDS Unit and Global Fund Coordinator for the UNDP, as and served as an expatriate in other countries on health programmes on HIV/AIDS, reproductive maternal neonatal and child health in Asia, Latin, America and sub-saharan Africa in addition to working in the USA.
  97. The witness is emphatic that the respondent was the grantee of KARP under the United State's president's emergency plan for AIDS relief through the CDC effective March 2011 and his curriculum vitae had been used in the application for the grant and he was subsequently employed as chief of party/ programs at the respondent for 3 years. His duties were inter alia to provide overall management and technical leadership. It was the claimant's testimony that the recipient of the grant had to make an annual application for continuation of the grant.
  98. Further, it was his testimony that during the 2<sup>nd</sup> year of the programme, the CDC raised concerns that the grant had a top heavy management and directed that the position of deputy chief of party be collapsed with that of the director of clinical services to reduce the weight at the top.
  99. That in the following year, the CDC proposed the establishment of the position of project director as part of the top management and a job description was developed by the respondent in consultation with the CDC-Kenya, during the claimant's annual leave.
  100. Instructively, the claimant conducted a review of the job description and noted that the position of project director did not exist under the grant.
  101. That on resuming duty, the claimant developed a job description and changed the title to director of programmes to reflect similar grants funded by the CDC-Kenya which changes were accepted and led to a change in the respondent's organogram.



102. It is not in contest that as the chief of party for the program, the claimant was core to the program and was the liaison between the respondent and the donor on management and technical issues and was a recipient of the notice of awards, which paid his salary and allowances such as the communication dated August 19, 2014 from Randolph Williams, grants management officer, CDC enclosing the budget for September 30, 2014 to September 29, 2015 for the period September 30, 2011 to September 29, 2016. Instructively, the budget had cappings for various votes including salaries and wages.
103. On “restriction and limitations”, the notification stated as follows;
- Administrative restriction: please redirect funds for item listed below.
- Salary: salary for Dr Daniel Kabira, chief of party – Dr Kabira salary is more than the amount that is allowable for this grant. Under US grant laws, salary in excess of executive level II salary is not allowable.
- Salary cap for this award is \$181,500 (see below undercost limitations). \$26,611 of Dr Kabira excess salary must be redirected to programme activities.”
104. The claimant was privy to this information which the respondent was supposed to act on as directed for a grant to be maintained and for his employment as well.
105. Similarly, the claimant was also a recipient of another notification of award from the CDC, USA dated September 21, 2016 grant No NV2GGH000128-05-04 for the period September 30, 2011 to March 31, 2017 enclosing the budget for the period September 30, 2015 to March 31, 2017.
106. This notification had a restriction too in relation to the claimant under administrative restriction release (note 3). The CDC demanded a change in the business official (BO) to avoid enforcement actions to ensure integrity of the award. Due to the audit findings related to the current business official . . .”
107. The terms and conditions of the award were categorical that the claimant’s contract should not be renewed after its expiration on December 31, 2016.
108. The foregoing notification identified the claimant as the grantee authorizing officer.
109. Relatedly, the claimant confirmed on cross-examination that the donor could suggest re-organization of the grant with agreement of the recipient and several re-organizations took place in the instant case at the instigation of the donor.
110. Needless to belabour, having been involved in many donor funded programmes in Asia and sub-saharan Africa previously, the claimant was aware that donor funded projects are implemented in accordance with prescriptions of the donor.
111. The foregoing demonstrates that the claimant’s contract of employment incorporated aspects of programme partner compliance and the claimant as a top official of the programme was aware that donor demands were binding for sustainability of the programme.
112. The claimant’s argument that the reduction of his salary by the respondent was a unilateral and illegal act was unconvincing since the donor communicated with him as well as the principal investigator. He was aware that the respondent was acting in accordance with the prescriptions of the CDC and was notified of the same in writing.
113. As to whether termination of the claimant’s employment was unfair, while the claimant submits that it was not only unfair, irregular, unlawful, malicious but unprocedural, the respondent’s version is that



it was fair. It is the respondent's case that the claimant's contract terminated by reason of effluxion of time as it was for a fixed term and the donor had indicated that claimant's employment should not be renewed. That the claimant proceeded on leave and all his dues were paid to the end of the contract. The claimant urges that it was unfair as no reason for the termination was given or for the non-renewal of the contract and was not accorded a fair hearing. The decision in *Teresa Carlo Omondi v Transparency International Kenya* (2017) eKLR is relied upon by the claimant to urge its case is distinguishable in that whereas in that case the claimant's employment was terminated in the instant case the letter under reference 'notice of end of contract' dated September 28, 2016, directed the claimant to proceed on leave effective October 21, 2016 for the 36 leave days he had accumulated.

114. On the face of it, it was a notice to the claimant that his employment contract would be lapsing in three (3) months time.
115. The claimant's fault the notice in that his consent to proceed on leave was not sought and did not attach the notice of award cited and he had a clean record. Instructively, the claimant had more than 3 weeks before leave commenced which was sufficient time to engage the respondent and prepare for the handover. Relatedly, the claimant led no evidence on what transpired after September 28, 2015. In the upshot, the claimant has failed to prove that the notice of end of contract was a notice of termination of employment.
116. It is common ground that the claimant was serving his second fixed term contract of one (1) year and 10 months effective March 1, 2015 and lapsing on December 31, 2016.
117. The principles governing fixed term contracts have been spelt out by the Court of Appeal and this court in several decisions. In *National Water Conservation & Pipeline Corporation v Jayne Kanini Mwanza* civil appeal No 178 of 2014, the Court of Appeal expressed itself as follows;

“The general principle, as we understand it is that a fixed term contract will terminate on the sunset date unless it is extended in terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise. The principle has been considered by several judges of the Industrial Court (now the Employment and Labour Relations Court) and they are generally in agreement. Indeed, this court was in agreement in the *Oshwal Academy (Nairobi) case* (supra) where it decided as follows;

“Termination of fixed term contracts has received judicial consideration by the industrial court in *Bernard Wanjohi Muriuki v Kirinyaga Water & Sanitation Co Ltd & another* (2012) eKLR, Rika J held as follows:

“In the view of the court, there is no obligation on the part of an employer to give reasons to an employee why a fixed term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed is the same thing as demanding from an employer to give reasons why potential employee should not be employed. The only reason that should be given is that the contract has come to an end and no more . . . Reasons beyond effluxion of time are not necessary in termination of fixed term contracts, unless there is a clause in the contract calling for additional justification for the termination.



118. The court further stated

“A general principle that a fixed term contract will continue if not terminated would be a contradiction to the very definition of a fixed term. There is a definite start date and end date. The contract would logically and automatically without more otherwise it would no longer be a fixed term contract . . .”

119. The court is guided by these sentiments.

120. In the instant case, clause 3 of the contract of employment dated June 22, 2015 provides as follows;

“The employer reserves the right to renew this contract at its discretion based on clause 2.6.12 of the employers human resources management policies. However, if the employee wishes to renew this contract, she shall give a one calendar month notice in writing to the employer.”

121. In a nutshell, the evidence on record shows that the claimant’s contract of employment terminated on account of effluxion of time.

122. The fact that the end of contract notice made reference to notice of award dated September 21, 2016 did not attribute any culpability on the part of the claimant. Similarly, he was neither suspended nor given a notice to show cause.

123. Finally, the claimant did not raise any issue after the notice of end of contract was given.

124. The contention that the claimant was at the time preparing for a donor conference to show case KARP’s performance and his attendance was indispensable, was not supported by evidence and is of no moment.

125. As regards the reliefs sought, the court proceeds as follows;

**i. A declaration that the respondent’s conduct amounts to unfair labour practices contrary to article 41 of the Constitution of Kenya, 2010.**

126. Having found that the respondent issued a notice of end of contract and directed the claimant to proceed on leave on October 21, 2016 in readiness of expiration of the contract of employment as opposed to termination of employment, a declaration is not merited.

**ii. Certificate Of Service**

127. The respondent to issue a certificate of service by dint of section 51 of the [Employment Act](#).

**iii. Relocation Expenses**

128. Clause 6(iii) of the contract of employment dated June 22, 2015 provided that the employer (respondent) would provide support through the provision of insurance, packing and shipping of household goods and personal effects of the employee and accompanying family members.

129. Under the earlier contract, the maximum sum was US\$10,500, the amount the claimant is claiming. It is not in dispute that the claimant had declared two (2) dependents but led no evidence of their relocation to Kenya.

130. Be that as it may, the respondent had contractually bound itself to provide support in the claimant’s relocation. Having failed to honour its contractual bargain, the claimant is entitled relocation support. Since the maximum amount agreed in 2012 of US\$10,500 covered the claimant with his dependants



who did not relocate to Kenya and the second contract of employment has no specific sum of money, the claimant is awarded US\$5,250.

**iv. Payment of House allowance of Kshs 1,760,000/= due from May 2016 to December 2016.**

131. While clause 6(i) of the contract of employment dated February 24, 2012 provided for a house allowance of Kshs.200,000/= per month, the subsequent contract raised the sum to Kshs.220,000/= per month and the same was paid until the issue was raised by the CDC in the notice of award dated May 16, 2016 sent to the claimant and the respondent.
132. Under section 31 of the *Employment Act*, 2007, it is the duty of the employer to provide housing or pay a housing allowance. However, the employer is not required to pay housing allowance if the salary payable is consolidated. In the instant case, the claimant's monthly salary was consolidated and the respondent was under no legal obligation to pay housing allowance and none was due after it was queried by the CDC since the programme had no provision for it.
133. Although the arrangement had provided the claimant with additional disposable income which he expended as he wished, it was not merited in law and its discontinuance is in the courts view unenforceable. It is the finding of the court that the claimant has not demonstrated entitlement to the house allowance from May to December 2016.

The prayer is declined.

**v. Declaration that there was a legitimate expectation of extension of contract.**

134. As Rika J observes in *Teresa Carlo Omondi V Transparency International – Kenya* (Supra)

“There is no legislation in Kenya on the principle of legitimate expectation in renewal of fixed term contracts. In resolving disputes on the subject, the court has to rely largely on decided cases . . .”
135. Needless to emphasize, most decisions of the Employment and Labour Relations Court espouse the principle that fixed term contracts carry no expectation of renewal. This position is exemplified by decisions in *George Onyango v The Board of Directors of Numerical Machining Ltd* (2014) eKLR, *Rajab Barasa & 4 others v Kenya Meat Commission* (2016) eKLR and *Ruth Gathoni Ngotho Kariuki v Presbyterian Church of East Africa & another* (2012) eKLR.
136. The latter decision where the claimant succeeded in the first instance was overturned by the Court of Appeal in *The Registered Trustees Presbyterian Church of East Africa & another V Ruth Gathoni Ngotho* (2018) eKLR.
137. In *Kenya Revenue Authority v Universal Corporation Ltd* (2020) eKLR, the Court of Appeal expressed itself as follows on legitimate expectation

“ . . . a legitimate expectation arises where there is demonstration that; a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/she/it would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the public authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fell within the class of person(s)



who were entitled to rely upon the representation(s) made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriments . . .”

138. Similar sentiments were expressed in *Republic v Kenya Revenue Authority ex parte Shake Distributors* HCMISC civil appeal No 359 of 2012.

139. Similarly, according to De Smith, Woolf and Jowell in *Judicial Review of Administrative Action* 6<sup>th</sup> Edition, Sweet & Maxwell page 609

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires a predictability and certainty in government dealings with the public.”

(See also *Republic v Attorney General & another Ex parte Waswa & 2 others* (2005) eKLR).

140. The court is guided by these sentiments and opinion.

141. As adverted to elsewhere in this judgement, clause 3 of the contract of employment dated June 22, 2015 was emphatic that the employer reserves the right to renew the contract at its discretion and if the claimant was desirous of renewing the contract, he was required to give one calendar month written notice.

142. Although the claimant applied for renewal of the first contract, he did not do so for the second contract and led no evidence of anyone having made a promise or representation or demonstrated a custom or practice that the contract of employment would be renewed.

143. The court is in agreement with the sentiments of Rika J. in *Teresa Carlo Omondi v Transparency International Kenya* (supra) that;

“The burden of proof, in legitimate expectation claims is always on the employee. It must be shown through regular practice, or through an express promise, leads the employee to legitimately expect there would be renewal. The expectation becomes legally protected and ought not to be ignored by the employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation desire or hope. It is a principle based on a right founded on the larger principles of reasonableness and fair dealing between employers and employees. The employee must demonstrate some rational and objective reason for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract and promise of renewal are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation.”

144. In the instant case, the claimant testified that after the appointment of the director of programs, the respondent started sidelining him particularly on communication about the program and was rarely copied, an issue he raised with the respondent but to no avail. Relatedly, the director of programs attended meetings and forums relating to KARP including KCCB/KARP board meetings.



145. Similarly, it was the claimant's testimony that in February 2016, the respondent started deducting taxes and withdrew house allowance in May 2016 and commenced deductions, payment of salary in Kenya shillings as opposed to USdollars.
146. The witness further testified that he was discriminated as he was denied annual salary increment.
147. Taken in its entirety, the claimant's testimony fails to demonstrate that the claimant had a legitimate expectation of renewal of the contract of employment. The declaration sought is unmerited.

**vi. Declaration that the respondent breached terms of the contracts**

148. Under this head, the claimant lists house allowance, medical insurance cover, relocation, change of salary from US dollars to Kenya shillings and unlawful deductions of salary. House allowance
149. As adverted to elsewhere in this judgement, although the respondent had bound itself to pay a housing allowance to the claimant of Kshs 200,000/= and Kshs 220,000/= per month under the 1<sup>st</sup> and 2<sup>nd</sup> contract of employment respectively, this was an additional payment as it was already paying the claimant a consolidated salary and stoppage of payment was communicated to him, a fact the claimant was aware of.
150. However, recovery of the house allowance already paid to the claimant breached the terms of the contract of employment as the payment was lawful and is thus recoverable by the claimant Kshs 1,851,100/=. Medical insurance cover
151. On medical cover, clause 6 (ii) of the contract of employment dated June 22, 2015 provided that the claimant's health insurance included dental and vision coverage in Kenya and USA (Global Health Insurance) for the employee and his dependants. The parties had not agreed on any specific sum.  
  
Strangely, the claimant's undated consolidated witness statement makes no reference to unpaid medical insurance cover.
152. Whereas the claimant asserts that he is entitled to medical cover for August to December 2016 of US \$3,000 on the premise that insurance cover was not renewed in July 2016, the respondent urges that the claimant fraudulently negotiated an international medical cover for self and dependants on the basis that the dependents lived abroad in the USA until the auditors discovered that the claimant made claims in his name and did not pay for the cover. That the claimant would after receiving the money pay a lower premium than the amount received from the respondent who sought to recover the monies from the claimant. It is unclear how much was recovered, if any and when.
153. Email communication on record between the claimant and RWI, Mr Evans Ombuki, the head of finance, administration and compliance reveal that due to grant restrictions on utilization of funds and a change in policy on insurance, the claimant was not covered by August 18<sup>th</sup> 2016.
154. The respondent's human resource had sought the claimant's details for medical cover under the regular KCCB medical cover. It is unclear whether the claimant furnished the information. What is however clear from the email is that the claimant's insurance premium exceeded the budgetary allocation.
155. Finally, the claimant led no evidence that he took insurance cover at his own expense or paid medical bills in the interim period for purposes of recompense by the respondent.
156. In the circumstances, the claimant suffered no loss and in the courts view not entitled to claim the sum of Kshs 3,672,000.00. Unlawfully deducted taxes Kshs 5,986,541/=



157. The claimant submitted that deduction of tax from his salary had been discussed with the respondent and he had sought and was granted tax exemption by the Kenya Revenue Authority by letter dated January 8, 2014 having been renewed from the previous employer (catholic relief services). That the tax exemption letter was valid and the memorandum of understanding between the US government and Kenya was active at the time. Similarly, the respondent's tax advisor was of the view that letter was not doubtful.
158. The claimant further submitted that in February 2016, the respondent imposed tax on his income derived from the grant. That an invitation by the Kenya Revenue Authority for a meeting slated for April 12, 2016 to resolve the issue of taxation failed to materialise owing to the respondent's non-attendance. The issue remained unresolved.
159. The respondent on the other hand submitted that clause 5 of the contract of employment provided for tax deductions from the claimant's salary as required by section 3 of the *Income Tax Act*.
160. It is the respondent's case that the claimant was employed as a Kenyan citizen, passport No. C as his identification document and the respondent had confirmed with the CDC that tax exemptions were generally available to non-citizens of the host country.
161. The respondent further submits that the letter produced by the claimant as an exemption certificate does not prove that indeed the claimant had been exempted from income tax.
162. It is common ground that the claimant applied for income tax exemption from the Kenya Revenue Authority by letter dated December 20, 2013, addressed to the Domestic Tax Commissioner.
163. Puzzlingly, although the claimant stated that he had maintained the Kenyan citizenship, he added that he was working in Kenya as an expatriate citing his contract of employment with the KCCB.
164. This letter appear to have been the basis on which the letter by the Kenya Revenue Authority (KRA) dated December 3, 2014 was written.
165. The letter under reference request for exemption Dr Daniel Kabira states *inter alia*

Reference is made to your letter dated November 11, 2014 (not attached).

Your request for tax exemption status on employment income under the contract of Kenya Conference of Catholic Bishops (Kenya Aids Programs) as Chief of Party Programs has been reviewed to replace Catholic Relief Services with Kenya Episcopal Conference.

This is to inform you that since Kenya Episcopal Conference has been incorporated and approved by the Ministry of Finance, as one of the implementing partners/grantees to be involved in implementing of various health activities in Kenya funded by CDC, the organization may implement section 3.3 of MOU between the government of the United States and the government of Kenya and treat Dr Daniel N. Kabira the same way as other employees from other partnerships.

Signed

F.M Nyakango

For Commissioner Domestic Taxes

166. Worthy of note, the letter is addressed to the claimant as opposed to the respondent or any other employer.



167. As observed elsewhere, the respondent’s auditor flagged the letter of exemption and attempts for clarification from the Kenya Revenue Authority fell through.
168. Intriguingly, an email from one, James Ojee of Kenya Revenue Authority to the claimant dated April 8, 2016 at 4.10 pm states as follows;
- “Our letter dated January 8, 2014 has not been revoked . . .” The claimant did not attach a copy of the letter referred to as the one attached is dated December 3, 2014. The letter being referred to by Mr Ojee appear to have been the substantive communication the claimant received from the Kenya Revenue Authority. By letter dated February 25, 2016, the claimant sought Mr Ojee’s intervention to resolve the tax issues.
169. A document purportedly written on February 15, 2016 by one, Eric Wabuyabo, KCCB Internal Auditor on the status of the tax exemption of the claimant lacks authentication and is no probative value.
170. It is not in dispute that clause 5 of the claimant’s contract of employment effective March 1, 2015 to December 31, 2016 provided that taxation on the contract would be guided by the KRA Ref (1013/1 on the same and the staff identity for tax letter of March 1, 2013 of Dr. Kabira. In addition, the clause empowered the employer to deduct any money due from the employee to the employer and or any legitimate deductions as and when applicable.
171. Similarly, as early as February 17, 2016, KCCB had written to the claimant on outstanding issues including payment of tax as the purported letter of exemption was not an explicit exemption certificate having been rejected by the donor and the auditor.
172. The letter informed the claimant that his salary would be included in the KCCB Payroll and subjected to statutory deductions.
173. It is noteworthy that the alleged tax exemption certificate is not a certificate properly so called but a response by the Kenya Revenue Authority to the claimant’s letter dated November 11, 2014, but more poignantly, the letter does not grant the claimant any exemption from payment of income tax. It merely notifies the claimant that the employer may implement section 3.3 of the memorandum of understanding. The operative word is “may” which denotes permissiveness as opposed to mandatory.
174. Paragraph 3.3(3) of the memorandum of understanding provided for taxation-exempt status of HHS/ CDC funding provided as follows;
- Taxation on personal income derived from HHS/CDC funding by employees of HHS/ CDC or the partners/grantees who
- a. are not host country nationals or permanent residents and
  - b. are solely present for purposes of performing duties under this MOU . . .”
175. Significantly, the memorandum of understanding was effective from December 11, 2008, the date of execution to December 31, 2013 or such later date as the parties agree upon in writing”. The memorandum of understanding appear to have lapsed on December 31, 2013 and the claimant furnished no evidence that the memorandum of understanding was effective thereafter.
176. A reading of section 3.3(3) of the memorandum of understanding between CDC/HHS USA and the government of Kenya would appear to exclude the claimant from exemption from personal tax. But more importantly, the respondent had the option not to implement paragraph 3.3 of the



memorandum of understanding and opted not to do so in February, 2016 by notice to that effect to the claimant.

177. Finally, section 3 of the *Income Tax Act* provides as follows;

Subject to, and in accordance with this Act, a tax known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident which accrued in or was derived from Kenya.

178. For the above stated reasons, it is the finding of the court that the claimant has failed to establish on a balance of probability that he was exempted from payment of income tax. Further, it is the finding of the court that the amount deducted from the claimant's salary as income tax is irrecoverable from the respondent. Forex exchange losses Kshs 215,750/=

179. The claimant's consolidated witness statement makes no reference to the foregoing losses and how they were incurred.

180. In his oral testimony, the claimant confirmed on cross-examination that his salary was paid in Kenya shillings at a rate he was unaware of and he did not write to the respondent on the issue of payment of salary in Kenya shillings as opposed to US dollars.

181. In a similar vein, the claimant's bank statement from Equity Bank from November 15, 2013 through to November 18, 2016 have no evidence of any deposit in Kenya shillings.

182. In the absence of documentary evidence of comparative analysis of the exchange rate used by the respondent vis-à-vis the prevailing market exchange rate, it is the finding of the court that the claimant has failed to establish how the alleged loss occurred.

This prayer is unsustainable and is disallowed.

Storage costs January 2017 to August 2018 Kshs 2,800,000/=

183. In his submissions dated June 27, 2022, the claimant prays for a refund of Kshs 2,520,000/= as storage costs charge 'strictly proved' and appearing on pages 146 to 150 of his list of documents. The respondent did not submit on the issue of storage costs.

184. By an email dated November 17, 2016, the claimant intimated to the respondent his intention to relocate to the USA before the end of 2016 and sought facilitation as agreed. However, facilitation was denied by letter dated December 8, 2016 on the ground that the claimant stayed in the USA with his family. It is unclear to the court what the letter meant.

185. On cross-examination, the claimant confirmed that storage of personal items costed him Kshs 2,800,000/= for a duration of 20 months after he left employment and has attached receipts allegedly issued by Kates Apartments Ltd as rent for apartment No 002 for the month of January 2017, February 2017, March 2017, April 2017 and May 2017 at Kshs 140,000/= per month, a total of Kshs 700,000/=.

186. A part from copies of the 5 receipts received from Kates Apartments Ltd, the claimant furnished no evidence of a lease agreement between himself and the Kates Apartment Ltd.

187. Be that as it may, the respondent did not contradict these payments.

188. Being a species of special damages, storage costs had to be pleaded and strictly proved by the claimant as explained in *Hahn v Signh* (1985) KLR 716 and *Coast Bus Services Ltd v Murunga & others* Nairobi CA No 192 of 1992 among other decisions.

189. As matters stand, the claimant has only furnished evidence of payment of Kshs 700,000/= for the months of January – May 2017. The alleged Kshs 2,800,000/= is unproven.



190. More pertinently, it is puzzling why the claimant would continue paying storage charges for one (1) year and 7 months awaiting relocation facilitation by the respondent yet the suit herein was filed on June 27, 2017.
191. In the original memorandum of claim, the amount claimed as storage charges was Kshs 700,000/=.
192. If it is true that the claimant continued paying storage charges up to August 2018, the same, in the courts view would be irrecoverable as the claimant had not acted reasonably to mitigate his loss. The principle of mitigation of loss is an integral part of the law of contract and employment law. However, in this case, any cost of storage incurred after May 2017 has not been proved and is declined.
193. In the upshot, the claimant is awarded Kshs 700,000/= as storage costs. Cost of vehicle use recovered from salary Kshs 165,760/=
194. Neither the claimant nor the respondent submitted on this prayer as a distinct claim.
195. In his consolidated witness statement, the claimant states that his first contract with the respondent provided that the respondent would provide a project car for the claimant's use but thereafter recovered the cost of use of the motor vehicle from the claimant's salary.
196. Clause 6 (x) of the contract of employment made on February 24, 2012 provided that a project car would be assigned to the claimant for office and related uses. However, the second contract made on June 22, 2015 had no such benefit. More significantly, from the claimant's evidence, it is unclear whether the deduction was made during the currency of the first or second contract. Similarly, the claimant led no evidence to demonstrate the deduction actually took place from his salary.

The prayer is declined.

Penalties paid to US authorities and legal fees

197. Neither the claimant nor the respondent submitted on this prayer specifically nor does the claimant's consolidated witness statement make reference to how the expense was incurred.
198. On cross-examination, the claimant confirmed that the penalties were paid to US authorities as legal fees to prevent the sale of his property. He further confirmed that the same were not part of the contract of employment but a by-product.
199. The document attached by the claimant from Hooper Hathaway, PC dated April 6, 2017 does not set out the particular of the services rendered to the claimant. Similarly, the receipt dated October 31, 2016 relates to summer tax payment as opposed to legal services as alleged by the claimant.
200. As regards the alleged legal services, the claimant has not attached evidence of payment. Intriguingly, the services were rendered more than 3 months after the claimant had left employment. The prayers herein are unproven and are disallowed.
201. From the foregoing analysis, it is clear that the respondent breached certain terms of the contract of employment and a declaration to that effect is merited.

## **vii. Exemplary damages**

202. The claimant led neither evidence nor proved that his rights had been violated by the respondent in such a manner as to entitle him to exemplary damages a category of damages which is intended to punish the respondent for its conduct.

The prayer is declined.



## Counter-Claim

203. Neither the written statement nor the oral evidence led in court make reference to the respondent's counter-claim. The respondent did not demonstrate its entitlement to the Kshs 1,851,100/= and Kshs 5,986,541/= as claimed in the Amended memorandum of claim and counter-claim.
204. The respondent adduced no documentary evidence of the loss or damage suffered as alleged in the counter-claim or account. The allegations remain unproven and the counter-claim is dismissed with no orders as to costs.
205. In conclusion, judgement is entered for the claimant against the respondent in the following terms;
- a. A declaration that the respondent breached terms of the contract of employment.
  - b. Relocation expenses of USD 5,250
  - c. Kshs 1,851,100/= deducted from the claimant's salary
  - d. Storage charges of Kshs 700,000/=
  - e. Costs of this suit.
  - f. Interest at court rates from the date hereof till payment in full.
  - g. Certificate of service to issue.
206. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF OCTOBER 2022**

**DR. JACOB GAKERI**

**JUDGE**

### Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

