



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. E452 OF 2020**

(Before Hon. Lady Justice Maureen Onyango)

**MARIA DEL ROCIO.....CLAIMANT**

VERSUS

**UNITED STATES INTERNATIONAL UNIVERSITY – AFRICA.....RESPONDENT**

**RULING**

Before me for determination is a Notice of Motion Application dated 28<sup>th</sup> August 2020 seeking the following orders THAT:

1. Spent
2. That the applicant herein be reinstated to her position of Assistant professor, Spanish in the General Education Program.
3. That the applicant be allowed to continue with her classes and maintain her position in the university until the hearing and conclusion of the main suit.
4. That the claimant be allowed to maintain her residence at the university until the hearing and conclusion of the main claim.
5. That costs for the Application be provided for.

The application is based on the following grounds:

1. The Applicant is an Assistant Professor, Spanish in the General Education Program at the Respondent educational institution.
2. The Applicant has been an employee of the respondent from 1<sup>st</sup> September 2018 and was employed a fixed contract renewable after 2 years.
3. That on 20<sup>th</sup> July a zoom meeting was held to communicate to the applicant the sudden decision to not renew her contract of employment and therefore terminating her employment.
4. That the applicant was also served with a letter dated 20<sup>th</sup> July informing her that the respondent will not be renewing her contract of employment from 1<sup>st</sup> September
5. That there was no prior communication or any indication that the respondent did not intend to renew the applicant's contract of employment.
6. That the applicant had submitted her request for renewal of contract on 13<sup>th</sup> January 2020 but did not receive any feedback from the respondent and upon following up on the issues for several months, she was requested to resubmit her application in July 2020.
7. That it is the university's practice to renew the contracts of their international professors and most professors have had their contracts renewed for years.

8. That based on the respondent's treatment of former cases regarding international professors, it was implied that the applicant's contract will be renewed.
9. That the process of renewal of the applicant's contract appeared to be normal and the usual procedure was being followed by the administration, until she received the communication that the respondent will not be renewing her contract which appears to be a decision from outside the university bureaucracy and a personalized attack on her.
10. That the applicant was appointed as the academic coordinator for the three (3) years inter-institutional research and student exchange program with University of Malaga, Spain, known as ERASMUS+KA107. The agreement was signed by the Vice Chancellor, Prof Zeleza on 18<sup>th</sup> December 2019. This agreement is still in place and it implies that the applicant to remain a staffer and Professor at the University to fulfil these duties.
11. That the respondent university had already provided the applicant with the Fall Semester 2020 timetable of classes which was a clear indication that her contract would be renewed.
12. That the applicant therefore did expect her contract to be renewed due to her pivotal role as the academic coordinator in running the aforementioned programme.
13. That the applicant has already been served with a notice to vacate and will be forced to vacate the University premises before 31<sup>st</sup> August 2020 when her contract expires.
14. That the applicant is a foreigner working in Kenya on a work visa which and she will be forced to leave the country if her contract is not renewed by the university and her position is not reinstated.
15. That the applicant will incur substantial and irreversible loss and damage if the respondent does not renew her contract of employment and her position is not reinstated.

The Application is supported by the affidavit of Maria Del Rocio Plana Freixasa, the applicant herein, sworn on 27<sup>th</sup> August 2020 in which she reiterated the grounds set out on the face of the Application.

The Applicant avers that upon joining the university faculty, she experienced irregularities with her employment contract, late payment of salaries and allowances and improper and discriminatory administration of housing facilities at the faculty compound. These irregularities and discriminatory practices prompted the applicant and other international faculty members also affected by the same issues to find avenues to address these issues. She played a great role as a leader in trying to bring to light their grievances to the Respondent's administration which in turn led her to be subjected to harassment, racism, xenophobia and discrimination and finally resulted to the sudden refusal by the Respondent to renew her contract. That despite her complaints the Respondent's administration ignored her and the issues were not addressed for a long time and finally only heard her complaints on 2<sup>nd</sup> July 2020.

The applicant avers that she had submitted her request for renewal of contract on 13<sup>th</sup> January 2020 but she did not receive any feedback from the respondent. Upon following up on the issues for a several months, she was requested to re-submit her application in July 2020. There was no prior communication and indication that the Respondent did not intend to renew her contract.

She submits that the renewal process of her contract appeared to be normal and the usual procedure was followed by the administration, until she received communication of the Respondent's decision. The Applicant avers that the respondent's decision appeared to be one from outside the university bureaucracy and a personalized attack on her.

The Applicant prays that the Respondent reinstates her to her position of Assistant professor, Spanish in the General Education Program and that she be allowed to continue her classes pending hearing and determination of the main suit.

In response to the Application, the Respondent filed a Replying Affidavit sworn on 16<sup>th</sup> September 2020 by Night Nzovu, the Director-Administration of the Respondent. The Respondent argues that the Applicant's contract was for a fixed term of two (2) years which period ended on 30<sup>th</sup> August 2020. That the contract stated Respondent would not be under any obligation to hire her for a further period. That nothing in the contract gave the impression that it would be renewed upon expiry.

Regarding the Applicant's allegations on issues such as late payment of salaries were experienced, the Respondent countered that it had always ensured that salaries to all its employees were paid on time. That it has never engaged in any deliberate late payments either salaries or allowances.

On the issue of improper and discriminatory practices by members of its Human Resource Department, the Respondent submits that it has endeavoured to hold fairness and it applies the best practices in all human resource issues. The Applicant's complaints were addressed and determined at its various levels. Indeed, an *ad hoc* committee was appointed to investigate the complaints as provided for under its Human Resource Policies and Procedures Manual. The committee found that the allegations of xenophobic treatment, racism or discrimination could not be substantiated which findings were duly communicated to the Applicant vide its letter 5<sup>th</sup> July 2020.

In response to the Applicant's allegations of malice and failure to renew the contract, the Respondent states that it has honoured its contractual obligations. It avers that the contract did not make provision for a termination notice due to the fixed nature of the term. That it went an extra mile to give the Applicant a non-renewal notice as a matter of courtesy and to enable her to make arrangements as to her stay or departure from the country. That in any case, the Respondent did not give any assurance to the Applicant of the renewal of her

employment as alleged.

The Respondent adds that the Applicant is not justified to claim legitimate expectation in reference to renewal of her employment contract. It further states that the labour laws do not contemplate automatic renewal of her employment contract which did not carry any expectancy of renewal upon expiry. It further argues that from the application, it is apparent that the only reason why the Applicant is pushing for renewal of the contract is so as to have a basis for legitimizing her stay in the country using the Respondent.

In conclusion, the Respondent relies on the cardinal rule “*he/she who alleges must prove*” and argues that the Applicant has failed to prove both that her contract was subject to renewal and that there was any basis for said renewal. It therefore seeks for the dismissal of the application herein as it raises no cause of action against the Respondent and that it does not meet the required threshold to warrant the grant of reliefs sought.

### **Applicants Submissions**

In support of the argument for legitimate expectation, the Applicant relied on the case of **Teresa Carlo Omondi v Transparency International (2017) eKLR**, which stated that legitimate expectation is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between employers and employees. She submitted that the Respondent’s actions were sufficed to make her have a legitimate expectation for the renewal of her contract.

On unfair termination, the Applicant submitted that the wrongful non-renewal of her contract amounted to unfair dismissal and termination of her employment. She relied on the South African case of **South African Clothing and Textile Workers Union & Another v Cadema Industries (Pty) Ltd (2008) 8 BLLR 79(LC)** where the labour court found that the employer’s decision not to renew a fixed term contract is unfair especially where there had been repeated renewals over a 4-year period. The Respondent further relied on the case of **King Sabata Dalindyebo Municipality v CCMA & Others Case No. P437/03 2005, Labour Court Port Elizabeth, South Africa** where the court held that non-renewal of fixed term contracts constituted unfair dismissal. The court ordered that some of the affected employees be reinstated and others be compensated for the unfair termination.

Further reliance was placed in **Nursing Council of Kenya v County Government of Nairobi & 5 Others [2016] eKLR** where it was emphasized that termination was unfair if the employer fails to prove a valid and fair reason related to the employee’s conduct, capacity or compatibility. In this case, the Applicant submitted that she was not provided with valid reasons for non-renewal of her contract other than financial constraints caused by the COVID 19 pandemic. She stated that this was not a credible reason as she was the only one whose contract was not renewed in the international faculty and she felt that she was therefore obviously and maliciously singled out.

She submitted that there is no legislation in Kenya on the principle of legitimate expectation in renewal of fixed term contracts and the courts have been relying on precedent to resolve such disputes. That in the case of **Teresa Carlo Omondi v Transparency International-Kenya (supra)** the court relied on Section 186(1)(b) of South Africa’s Labour Relations Act No. 66 of 1995 which states that a dismissal includes:

“b. an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.”

The court further stated that wrongful non-renewal of the claimant’s contract is to be treated as unfair dismissal for which a remedy is to be obtained under Section 49 of the Employment Act.

On the issue of reinstatement to her position as Assistant Professor, the Claimant made reference to Section 49 of the Employment Act on the remedies for wrongful dismissal and unfair termination. She submitted that she worked diligently for the Respondent and had no disciplinary issues with the Respondent’s administration. That she was a valuable employee who mobilized resources and secured partnerships for the respondent and therefore there was no justifiable reason why her contract was not renewed. Emphasis on this was based on the case of **Nursing Council of Kenya v County Government of Nairobi (supra)**.

The applicant in conclusion submitted that she had proved her competence and value as an employee and that it was only right for the Respondent to reinstate her to her position. She prayed that the Application herein be allowed and the orders granted.

### **Respondent’s Submissions**

The respondent in its submissions raised a number of issues. The respondent submitted that the contract was a fixed term contract, which had expressly provided that it was under no obligation to hire the applicant for a further term. That, the Respondent was not obligated to renew the contract.

It relied on the case of **Margaret A. Ochieng v Nairobi Water Conservation and Pipeline Corporation [2014] eKLR**, where the Learned Judge stated:

“Courts have upheld the principle that fixed-term contracts carry no expectation of renewal, in a catena of judicial authorities. This court has done so in **Industrial Court Petition No. 35 of 2012 between George Onyango v The Board of Directors Numerical Machining Complex Limited & others, (2014) eKLR** and in the **Industrial Court Cause No. 1541 of 2010 between Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & others**. The general principle is that fixed term contracts carry no expectation of renewal.....”

It submitted that its decision not to renew the applicant’s contract was not premised on any ill or improper motive as claimed by her. That the issue of unfair termination does not arise since her contract was self-terminating and required no intervention by either party. Furthermore,

the Employment Act under Section 45(2)(c) is clear that employment is only terminated when an employer fails to prove that it was in accordance with fair procedure. The plea for reinstatement was therefore not deserved.

The Respondent further relied on the legitimate expectation, the Respondent relied on **Kenya Revenue Authority & 2 Others v Darasa Investments Limited [2018] eKLR** where the Court relied on the definition in **Halsbury's Laws of England**. It stated: –

“Also in 4<sup>th</sup> Edition, Vol. 1 (1) at page 151, paragraph 81 of **HALSBURY'S LAWS OF ENGLAND**, legitimate expectation is outlined as follows: -

"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice".

The Respondent therefore submitted that no representation was made to the Applicant that a renewal was certain for her to have that expectation. It submitted that the representation must leave no doubt that there is an intention by the concerned party to act or not act in a particular manner and be sufficient as to make an ordinary man/woman to rely on it. That the applicant's claim did not pass the reasonability test and that the respondent had gone out of its way to remind her that her contract was about to lapse and that it would not be renewed.

In **Petition No. 35 of 2012 George Onyango v The Board of**

**Directors of Numerical Machining Limited & Others** where the Court held:

“The Petitioner nonetheless has no reason to consider himself as the Managing Director to-date. His contract was for a fixed term of three years, which lapsed on 9<sup>th</sup> November 2012. He should have expected the contract to lapse on 9<sup>th</sup> November 2012, in equal measure to his expectation that he would be granted a renewal. Legitimate expectation went both ways. There was nothing in the expired contract to suggest that the Petitioner would in any event continue holding over after 9<sup>th</sup> November 2012, even if the Board, whatever its legitimacy, failed to answer his requests for renewal. The terms that were frustrated were the exit terms, and in particular, the renewal clause. It is not possible that he would go on being the Managing Director by default. The Court would be making him a beneficiary of the violations he has ably brought to the fore, by upholding his submission that he is still the legitimate Managing Director of the Company. Even without the letter communicating non-renewal, the Petitioner was aware of the expiry date of his fixed term contract. There was reasonable chance he would not have a second term. The illegal Board did not make a decision to terminate the contract of employment; they decided not to renew a lapsed contract. To direct the 1<sup>st</sup> Respondent is restrained from interfering with the Petitioner's role as the Managing Director would result in the Court renewing the Petitioner's contract, or giving him the benefit of holding over.”

It is the Respondent's submission that the Applicant is not justified to claim legitimate expectation in reference to the renewal of her contract given that the labour laws do not contemplate automatic renewal and her contract did not carry the expectation.

Regarding the Applicant's allegations that she was subjected to discrimination, racism and xenophobia, harassment and psychological torture, the Respondent submitted that it endeavoured to solve all her complaints and was not aware of any that were not resolved. It submitted that while relying on Section 109 of the Evidence Act, the Applicant had failed to prove a prima facie case in the matter.

The Respondent urged this court to dismiss the Application due to lack of cause of action. It prayed that the Applicant be ordered to pay the costs of the motion.

### **Analysis and Determination**

I have carefully considered the application, the responses and the submissions filed by the parties. The issues for determination before this Court are:

1. Whether the Applicant has met the threshold for the grant of the orders sought.
2. Whether the Applicant should be reinstated in her position pending hearing and determination of the main cause.

In dealing with an interim application seeking mandatory orders like is the case in the application before me for determination, the court has to be careful not to delve into the substantive issues that will fall for determination in the main suit. The threshold for the court to consider was set out in the case of **Giella v Cassman Brown** which although determining an interim injunction, is also relevant for interim mandatory orders.

The court therefore has to consider if there is a prima facie case established by the Applicant.

If this is established the Court would then go further to consider whether there would be irreparable loss that cannot be remedied by way of damages should the orders not be granted. If the court is in doubt, the court would consider the balance of convenience.

In the instant suit, both parties are agreed that the claimant's contract which was for two years, lapsed on 30<sup>th</sup> August 2020. It is also common ground that the Applicant was served with a letter dated 20<sup>th</sup> July 2020 informing her that her contract will not be renewed upon expiry.

It is however, the averment of the Applicant that the Respondent had established the practice of renewing such contracts which gave her legitimate expectation of renewal.

Prima facie case was defined by Bosire JA in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** to mean

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

#### **Has the Applicant established a prima facie case?**

I do not think so. She has pleaded that her contract lapsed. Her only reason for seeking the orders in the application are that there was legitimate expectation from the conduct of the Respondent who failed to respond to her application for renewal of contract dated 13<sup>th</sup> January 2020. Also that she had been appointed academic coordinator for the three (3) years Inter-Institutional Research and Student Exchange Program with the University of Malaga, Spain, known as ERASMUS+KA107 in an agreement signed by the Respondent's Vice Chancellor on 18<sup>th</sup> December 2019, which agreement was still in place. She also avers that she was issued with the full semester 2020 timetable of classes, an indication of intention to renew her contract.

It is further the Applicant's averment that she is a foreigner and her work visa will not be renewed unless her contract is renewed. That failing renewal she will be forced to leave the county.

All these averments have been denied by the Respondent who states that there was no promise or other indication that it intended to renew the Claimant's contract, which in any event it has no obligation to do.

These are all matters that can only be decided after hearing evidence from the parties.

Having found that the claimant has not established a prima facie case, the court does not have to consider the second limb of the threshold being whether or not the claimant will suffer loss that cannot be remedied by damages, which even if I did, I would find in the negative as this court has powers to reinstate and to award compensation.

On the limb of balance of convenience, it is trite that reinstatement is not granted freely. Under Section 49(4), reinstatement is only granted in exceptional circumstances, after the court has established unfair termination of employment, which the Claimant has not.

It is for the foregoing reasons that I must decline the prayers of the claimant. The upshot is that the application is dismissed. Costs shall abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF APRIL 2021**

**MAUREEN ONYANGO**

**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.

**MAUREEN ONYANGO**

**JUDGE**