



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT NAIROBI**  
**CAUSE NUMBER E6546 OF2020**

**BETWEEN**

**BEN MURAGE NJOGU.....CLAIMANT**

**VERSUS**

**RAMANI WAREHOUSE LIMITED .....RESPONDENT**

**RULING**

1. The Claimant was employed by the Respondent as Chief Operations Officer, through a letter dated 13<sup>th</sup> March 2020. Employment took effect on 1<sup>st</sup> April 2020. His consolidated salary was Kshs. 500,000 monthly. There are 2 conflicting letters of employment both dated and signed by the Parties on 17<sup>th</sup> April 2017. They both state that the Claimant's monthly salary is Kshs. 500,000. The first letter states this amount is net salary; the second states the amount is subject to statutory deductions. The pay slips agree with the latter position, showing the Claimant's salary was Kshs. 381,650, after deductions.

2. Dispute arose after the Respondent's Managing Director R.K. Rugendo, issued the Claimant an undated letter, worded as follows: -

*“ On Friday 27<sup>th</sup> November 2020, I requested you to come and see me on Monday 20<sup>th</sup> November2020 and up to the time of writing, you have not shown up.*

*Due to ongoing pandemic, we are forced by circumstances beyond our control to retrench a few people till the situation comes back to normal.*

*You are one of them and therefore, requested to proceed on unpaid leave with effect from 2<sup>nd</sup> December 2020, till the situation normalises.*

*Should you during this break find alternative employment please feel free to accept it as we are not sure the situation will come back to normal.”*

3. This prompted the Claimant to file this Claim on 10<sup>th</sup> December 2020. He seeks in the Claim, among other orders, a declaration that the decision to send him on unpaid leave is unfair and amounts to unlawful termination of employment; compensation for constructive and/ or unlawful termination; and damages for constructive and/or unlawful termination.

4. He seeks protective measures in the interim, through his Application dated 10<sup>th</sup> December 2020, which is supported by his Affidavit, sworn on even date. The main order sought is that the Respondent is restrained from acting on, or continuing to act on the decision to send the Claimant on unpaid leave. The Application is subject of today's Ruling.

5. The Claimant explains that he was approached by Rugendo, back in August 2019, and requested to assist Rugendo with a business plan, on setting up of a plastic manufacturing business. He was later after doing the plan, asked to join as a permanent staff. He was employed as Chief Operations Officer, with effect from 1<sup>st</sup> April 2020, on a net salary of Kshs. 500,000. The Respondent nonetheless, illegally made deductions on Claimant's salary, resulting in a take-home of Kshs. 381,650.

6. Through a WhatsApp message of 1<sup>st</sup> December 2020, Rugendo informed the Claimant that he had been retrenched. There was no consultation of any form. The Claimant was advised to proceed on unpaid leave. The Claimant was thereafter denied access to the premises.

7. During his 8 months of employment, the Claimant avers that the Respondent hired over 20 Employees. The Claimant participated in their recruitment. None was retrenched and directed to proceed on unpaid leave.
8. The Respondent recruited 2 foreign nationals from India, paying for their travel, visa and cost of stay in Kenya.
9. The Claimant was in charge of all human resource matters. There was no discussion between him and Rugendo, on retrenchment of staff because of Covid-19. The Claimant states that the Respondent acted in contravention of Section 10[5] of the Employment Act 2007, and Articles 27, 41 and 47 of the Constitution of Kenya.
10. The Respondent opposes the Application, relying on the Affidavit of Daniel M. Kariuki, sworn on 23<sup>rd</sup> December 2020.
11. Kariuki describes himself as a Human Resources Professional, *“handling human resources on behalf of several companies, including the Respondent Company.”*
12. According to him, the letter of employment stating the Claimant’s salary of Kshs. 500,000 as net, is a forged document. The correct letter is the one which includes statutory deductions.
13. The offer of employment was made on 13<sup>th</sup> March 2020, the very day Covid-19 was detected in Kenya. Drastic measures were taken, resulting in a depressed economy. The Respondent continued to honour its obligations to Employees.
14. However, the Respondent was compelled, after deliberations, to place the Claimant on unpaid leave. The decision was unavoidable. Kariuki veers off from stating the facts in his Affidavit, to submitting on the law, stating that the Claimant has come to Court with unclean hands, and that *“he who seeks equity must do equity with clean hands.”*

**The Court Finds: -**

15. It is not contested that the Claimant was employed by the Respondent as Chief Operations Officer. His salary was Kshs. 500,000 monthly. It is disputed whether this was gross or net salary. The letter of employment with regard to the payable monthly salary is contested. It is even argued to have been forged by Kariuki. This aspect of the dispute can be addressed during the full trial. It is sufficient in considering the Application to note that the Claimant was employed by the Respondent as Chief Operations Officer, on a monthly salary of Kshs. 500,000, and was sent on unpaid leave with effect from 2<sup>nd</sup> December 2020, ostensibly on the ground that Covid-19 pestilence has adversely affected the Respondent’s business.
16. The Respondent told the Claimant in the letter sending him on unpaid leave that he would be recalled when the situation normalises; and that should the Claimant find alternative employment, he should feel free to take it, as the Respondent was not sure, if or when, the situation would normalise.
17. The Court is persuaded by the Claimant, that the decision taken by the Respondent, to send him on indefinite and unpaid leave, is founded on quicksand.
18. The Claimant was employed and confirmed in position, and continued to work for a period of 8 months, during the Covid-19 pestilence.
19. During the same period, the Respondent recruited over 20 Employees. Significantly, the Respondent brought 2 expatriates from India, namely Engineer Gopal Warudkar and Pravin Salunkhe, around the same time the Respondent was sending the Claimant home, on indefinite and unpaid leave.
20. This evidence was not challenged through the Affidavit of Kariuki.
21. Although the letter sending the Claimant home alludes to several Employees who would be sent home, it is only the Claimant who was in the end sent home. This evidence again is uncontested.
22. There would have to be some other reasons therefore, to justify sending the Claimant on unpaid leave. Covid-19 does not sell. It has not been shown to have affected the Claimant adversely. There is evidence showing that the Respondent has continued to employ, and import human resources from India. While it is appreciated that Covid-19 has impacted negatively on the global economy, not every business has been so affected. Some businesses have thrived in adversity. The Respondent has not shown that it is one of the businesses that have been adversely affected by Covid-19. It has not exhibited its financial statements, showing how its performance has been affected by Covid-19. It is not enough to make bare statements about business loss attributed to Covid-19. There is definitely no factual basis to link the decision of the Respondent, sending the Claimant on indefinite and unpaid leave, to Covid-19. It not explained why the Claimant was singled out.
23. An Employer must give an Employee clear and unequivocal instructions on the status of the Employee’s contract. It cannot be that an Employee is told to go home; would be recalled at an appropriate time; and that should the Employee find alternative employment, he is free to take it. The employment relationship must be made clear. This fluidity of the relationship advanced by the Respondent, does little in defining the Parties’ mutuality of obligations. What is the status of the contract made by the Parties on 17<sup>th</sup> April 2020? Is it subsisting or has it been terminated? What are the obligations of the Parties today?
24. The letter sending the Claimant home refers to retrenchment. Retrenchment is defined as non-volatile in nature, involving the full and final termination of services. By using the term, the Respondent appears to have intended termination of services. The possibility of recall after sending home, would suggest that the Claimant was being laid off, rather than retrenched. Layoff is volatile in nature, allowing for

recall of an Employee, once the layoff period ends. In this case the Respondent intended in its letter, that the Claimant would resume duty, once the Covid-19 imposed situation ended. But again the Respondent was not sure when or if this situation would end. The Claimant was not given any specific date of resumption. He was advised to feel free to take up alternative job. This uncertainty leads to what may be seen as a retrenchment situation. The Respondent intended to terminate the Claimant's contract, without following the legal procedure, or facing the legal consequences, of termination.

25. The Respondent must make up its mind, clarify whether the Claimant is still in employment; whether he has been retrenched or laid off; or whether his contract has otherwise been terminated. The Respondent must then accept the consequences of this clarification and decision.

26. The Court must protect the contract of 17<sup>th</sup> April 2020. That contract must not be allowed to remain in a state of flux.

***IT IS ORDERED: -***

***a. Pending hearing and determination of the Claim, the Respondent is restrained from acting on, or continuing to act on, the letter sending the Claimant on unpaid leave received by the Claimant on 1<sup>st</sup> December 2020.***

***b. The Claimant shall immediately report back to work.***

***c. Respondent shall pay to the Claimant withheld salary for the period of unpaid leave, at the rate paid before sending the Claimant on unpaid leave.***

***d. Parties are free to terminate the contract in accordance with the Employment Act.***

**DATED AND SIGNED AT CHAKA, NYERI COUNTY, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 8TH DAY OF APRIL 2021.**

**JAMES RIKA**

**JUDGE**