REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1105 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

LUCY WOLDU..CLAIMANT

VERSUS

AFRICAN DEVELOPMENT SOLUTION (ADESCO).........................RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 2nd June 2016, the Claimant sued the Respondent alleging that her termination was illegal and unfair for among other things failure to pay house allowance, declaring her position redundant and downgrading her position. The Claimant prays for –

a. Unpaid house allowance being of basis salary calculated as follows (Kshs.689,444 x *x 10 months) Kshs.2,298,160.00*

b. Twelve month' salary being damages for unfair termination (Kshs.689,444 x 12).......................... Kshs.8,273,375

c. Unpaid acting allowance, the difference between Kshs.731,436 and 689,448 = (Kshs.41,980 x 8 months) Kshs.335,840.00

Total 10,907,375.00

d. Costs of this suit.

2. The Respondent filed its reply to the memorandum of claim on 12th July 2016. The Respondent denies that the suit arises out of unlawful and wrongful termination of the Claimant's employment and prays that the suit be dismissed with costs.

Claimant's Case

3. By an offer dated 7th April 2015, the Respondent employed the Claimant as its Director, Human Resources effective 25th April 2015, for two years expiring on 21st April 2017. Her gross salary as Kshs.689,448 per month. The offer letter stated that the gross salary included housing allowance food and water. It also provided for leave for 24 working days and three months' probation. Significantly the letter of offer was expressed to be subject to the staff regulations, policies, procedures and codes contained in the Human Resources Manual. The Claimant accepted the offer on 7th April 2015 in the presence of a witness.

4. The parties signed a formal agreement on diverse days. While the Claimant signed on 4th September 2015, the Chief Finance Officer of the Respondent Mr. Wasim Khan signed of 4th August 2015. The agreement was more detailed than the offer letter. For instance –

a. It provided that the contract was renewable subject to the employee's performance, human resource needs and availability of finances;

b. Provided for confirmation after probation and reduced the notice of termination during probation from one month to 14 days;

c. Reporting to the Executive Director;

d. Working hours 8 am to 5 pm

e.With regard to salary, the sum of Kshs.689,448 was retained but the contract omitted the clause that the gross salary included house, food and water allowances.

5. More significantly Clause 17.4 of the contract provided that-

> "This contract contains the entire understanding between the parties and supersedes all previous agreements and arrangements, (if any) relating to the employment of the employee (which shall be deemed to have been terminated by mutual consent)."

6. The Claimant avers that she worked diligently and within two weeks she was requested to take overall responsibility for the Operations Department and supervise one Charles Kyale, the Operations Director. The Respondent informed all staff that the Claimant would be responsible for the overall management of the operations department and this state of affairs remained for 7 months.

7. It is further averred that because of the additional responsibilities to the Claimant applied for a salary review in accordance with the Respondent's Human Resource Policy on acting allowance payable to employees who assumed additional responsibilities for more than one month.

8. The Claimant contends that on 3rd February 2016, the Acting Head of Finance and Operations informed her of the plan to down grade her position to that of the Human Resource Manager. That during the meeting on 4th February 2016 Degan Ali, the Executive Director of the Respondent informed her that the position of Human Resource Director would be downgraded to Human Resource Manager. That on 5th February 2016, in the presence of Evelyne Dzame, Degan Ali informed her that her position has been declared redundant and the meeting had been called to discuss her terminal dues.

9. The Claimant further avers that her termination was malicious and unfair, a ploy to deny her entitlements for having acted as Director of Operations for 7 months.

10. Finally the Claimant avers that she handed over to one Evelyne Dzame on 10th February 2016 and her last date of work was 12th February 2016.

Respondent's Case

11. The Respondent admits that the Claimant was its employee from 22nd April 2015 until 12th February 2016. It avers that the job description of the Human Resource Director was inclusive of overseeing all employees and ensuring that they carried out their obligations as per the standards set by the Respondent and the additional responsibilities added by the email from Wasim Khan dated 12th May 2015 were within the ambit of her job description.

12. It further avers that by an email dated 12th November 2015, the Executive Director informed all staff about the restructuring process that was underway and that the Claimant would be the Director of Human Resource and Operations. That the Claimant's request for a salary review from Kshs.689,445 to 799,259 for the new position was subsequently withdrawn through an email dated 9th December 2015 on the grounds of the financial position of the Respondent and the request would create a negative picture that the Claimant for seeking a pay rise when the Respondent was in the process of declaring staff redundant.

13. It is further averred that the Respondent called the Claimant in February 2016 to inform her that her position had been declared redundant followed by the email dated 4th February 2016. That at the meeting held on 5th December 2016, the Claimant opted not to bring a representative. That she was informed of the reasons for the redundancy and not downsizing and an offer was made for the new position of Human Resource Manager and was issued with a redundancy notice on the same day through email.

14. The Respondent contends that it was not malicious, and due process was followed as laid down by the Employment Act in that –

i. The Respondent's Advocates on record informed the Labour Office about the redundancy vide letter dated 2nd February 2016.

ii. The Claimant was duly informed in writing and had been part of the same in preceding months.

iii. A formal meeting was held with the Claimant to share the reasons and subsequent notice.

iv. The Claimant's dues were computed and duly paid with one month's notice.

15. Finally, the Respondent avers that the Claimant was not entitled to house allowance since the offer letter provided for gross salary and that she did not take up any acting role in any position to merit acting allowance and is not entitled to damages for unfair termination as she was not unfairly terminated.

Claimant's Evidence

16. The Claimant's case was supported by the evidence of three witnesses including the Claimant and all adopted their written statements and were cross examined.

17. On cross examination, **the Claimant, CW1** confirmed that she had signed the offer letter as well as the contract with the Respondent.

That the Respondent could assign other duties as per the contract of employment. She confirmed that the additional responsibilities were not within the ambit of her duties. That Mr. Kondwani was acting as the Chief Finance Officer (CFO) after the substantive holder of the position left. That both Claimant and Charles Kyale were Directors though Charles Kyale's pay was higher. That Charles Kyale resigned after giving one month's notice. That she had recommended that expatriates who left be replaced by Kenyan nationals who were cheaper to cut costs. That she withdrew her request for consultancy not salary review.

18. The Claimant further confirmed that the Human Resource Policy of the Respondent had provision for acting allowance where an employee was acting in a higher grade not at the same level.

19. That the offer letter clearly stated that gross salary of Kshs.698,448 per month included house allowance, good and water. That a redundancy notice was sent to the Labour Officer in 2nd February 2016 and received on 3rd February 2016 and she was not a member of a trade union.

20. That she had worked for about one year and was paid all dues by the Respondent.

21. Finally she confirmed that she was not involved in the preparation of the restructuring plan since such a plan involves the entire organization including directors and is a protracted process and the Human Resource Department should be at the forefront.

22. CW2, Charles Kyale confirmed that the Operations Department had a wider spectrum of activities than the Human Resource Department and he was earning more than the Claimant though both were Directors. He also confirmed that when he did the exit interview, Lucy was her Supervisor, though his immediate Supervisor was the CFO. That he was not aware of any employee who had been declared redundant by the Respondent.

23. CW3 Ann Kajuju Ikiara confirmed that she joined the Respondent on 6th April 2017 and would have left on 5th April 2018 and came to know the Claimant later. She also confirmed that she had a case in Court against the Respondent and finally her salary included house allowance.

Respondent's Evidence

24. RW1 Degan Ali, the Executive Director of the Respondent confirmed that the additional responsibilities added to the Claimant were temporal and appointment to act in a position had to be in writing and authorised by the highest office. That the Claimant was not entitled to acting allowance. She also confirmed that under the Respondent's Human Resource Manual only international staff qualified for house allowance and the Claimant was hired as national staff. That both Kondwani and Zulekha who were paid acting allowance were acting in a higher position than their substantive positions.

25. She further confirmed that the Claimant was declared redundant due to the financial challenges the Respondent was going though. That from 2015 to 2019, the Respondent declared 29 positions redundant. That the Respondent's financial statements are audited by KPMG and Price Waterhouse Coopers and were also assessed by donors such as USAID.

26. She also confirmed that the Claimant was not consulted about her redundancy but should not have been surprised. That the Respondent did not file a copy of audited financial statements. That the contract signed by the Claimant on 4th September 2015 and Respondent 19th August 2015 was the last in time.

27. She confirmed that the Claimant was asked to supervise the Operations Department. That the Claimant volunteered to take up the role and had additional responsibilities and had the skill set. That the Claimant should have prepared a report or study on the financial challenges but did not. Yet she was not dismissed for dereliction of duty. There were no minutes of meetings on redundancies including how the decision to declare the Claimant's position redundant. The witness confessed that the meeting could only have been between the Executive Director and CFO.

28. It was confirmed that the email dated 4th February 2016 from Degan Ali, the Executive Director of the Respondent to the Claimant is an acknowledgment of an earlier meeting at 12.00 noon where the Claimant had been notified of the plan to declare her position redundant. The meeting on 5th February 2016 was to discuss the hand over and compute the Claimant's dues in the presence of witnesses.

29. The Witness also confirmed that the Labour Officer had been notified of the redundancy and the Human Resource Department was among the three listed in the letter though there were no minutes on how the Claimant's position was identified.

Claimant's Submissions

30. According to the Claimant the issues for determination are

i. Whether or not the termination of the Claimant's services was unfair;

ii. If the termination was unfair is the Claimant entitled to the reliefs sought;

iii. Who should bear the cost of this suit?

31. The Claimant submits that redundancy has been defined in Section 2 of the Employment Act as **"the loss of employment, occupation**

job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer where the services of the employee are superfluous and the practices commonly known as abolition of file, job or occupation and loss of employment."

32. The Claimant submits that redundancy rests in the subjective view of the employer which is the reason the law allows the Courts to look into the process and ensure that decisions are not made in a whimsical manner or with malice to get rid of an employee who the employer may not like claiming redundancy.

33. The Claimant relies on the provisions in Section 43(b) and 45 of the Employment Act and submits that the Court is tasked to look beyond the existence of a valid reason and fair process for termination but to also look into all circumstances surrounding the termination.

34. The Claimant submits that the evidence presented in Court were mere allegations that the Respondent was suffering financial problems as no financial statements were presented and submits that the employer did not prove that it had a valid reason for terminating the Claimant on an account of redundancy and relies on the decision in **Francis Kiplagat Kirui v Jade Petroleum Ltd (Jade Retail Ltd 2014) eKLR** the Court follows:-

> "Pursuant to Section 45(2)(b)(ii) of the Employment Act 2007, an employer has the obligation to demonstrate that redundancy as a reason for termination was fair and valid and related to its operations. The Respondent did not even attempt to prove that it was in financial challenges. It sought to rely on mere disposition without concrete evidence such as financial statement or audited accounts. The Court therefore reached the conclusion that the Respondent has failed to prove redundancy as a valid and fair reason to terminate the services of the Claimant. The termination was substantially unfair."

35. The Claimant further relied on the decision in **Kenya Airways Limited v Aviation & Allied Worker Union of Kenya & 3 Others [2014] eKLR** where the Court stated that –

> "Termination of employment is justified if there is substantive justification of declaring redundancy and there is procedural fairness in the consequent retrenchment."

36. The Claimant relies on Section 40(1)(b) of the Employment Act which provides **"Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer."**

37. The Claimant submits that she was never served with a notice as required by the law and relies on the Court of Appeal holding in **Thomas De La Rue Ltd v David Opondo Omutelema (2013) eKLR** where the Court stated that –

> **"**Section 40(1)(c) requires employer to demonstrate in selecting employees whose positions are to be declared redundant that the employer has taken into account employees seniority in time, skill ability and reliability."
>
> With regard to skill, ability and reliability, there are elements which the employer would have to demonstrate through an objective assessment of employee based on clearly defined standards.**"**

38. The Claimant submits that the Respondent did not act in accordance with justice and equity in terminating the employment of the Claimant as such the termination was unfair.

39. The Claimant urges the Court to find that her termination was unfair and award her the prayers sought in the memorandum of claim

Respondent's Submissions

40. According to the Respondent the issues for determination are

i. Whether the Claimant is entitled to House allowance;

ii. Whether the Claimant was entitled to acting allowance;

iii. Whether the Claimant was unfairly terminated.

41. The Respondent submits that the Claimant's employment is based on the terms set out in the letter of offer, the contract of employment and the Human Resource Manual of ADESO which indicated that the gross salary was inclusive of House allowance, food and water.

42. The Respondent submits that only international staff members were eligible to house allowance and the Claimant admitted in Court that she was a local staff and therefore was not entitled to claim house allowance of Kshs.2,298,160.00.

43. The Respondent submits that contracts are sacrosanct and parties are bound by the terms of their contract and that the function of the Court is to enforce a contract as agreed by the parties. Reliance was made on the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017) eKLR** where the Court stated as follows –

> "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound

by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

44. The Respondent submits that the Claimant's acceptance of the offer meant she was bound by the terms of the contract.

45. The Respondent submits that the employment contract stipulated that the Claimant was expected to perform any other duties assigned therefore the additional responsibility of overseeing the Operations Department was within the ambit of the job description and thus was not entitled to any acting allowance.

46. The Respondent relied on the holding in **Kenya Airways Limited v Aviation & Allied Workers Union & 3 others (2014) eKLR** where it was held that the Court is limited to interpreting and enforcing the obligations which the parties to an employment relationship have agreed to and there is no legal obligation express or implied for the implication into the employment contract of the terms that the parties have not agreed to be binding condition for the mere reason that they are considered reasonable.

47. The Respondent submits it is a registered non-profit organization heavily dependent on donor funding and at the material time the Respondent was struggling financially due to shortage of donor funding hence many positions within the Respondent were rendered redundant.

48. The Respondent submits that owing to financial challenges, it could not maintain the position of Human Resource Director and the position was removed from the company's organogram therefore declaring the Claimant redundant.

49. Further, it submits that the Claimant was declared redundant in a manner that is fair and in consonance with the employment law and due regard to seniority in time, skill, ability and the reliability.

50. The Respondent maintains that the termination was fair and the Claimant has not led any evidence to show that the termination was unfair. Reliance was made on **Omar Ndaro Zuma v Modern Coast Express (2019) eKLR** where the Court held that –

> "The import of section 47(5) of the Employment Act is that an employee alleging unfair termination or wrongful dismissal must lay before the Court the actual circumstances leading to his exit from employment. It is not enough for an employee to simply say my employment was unfairly terminated, they must prove ingredients of unfair termination or wrongful dismissal."

51. The Respondent submits that proper procedure was followed in declaring the Claimant's position redundant since the Respondent notified the Ministry of Labour, Social Security and Services of its restructuring plan and a notice that some positions might be declared redundant. Thereafter a letter was sent to the Claimant informing her that her position had been declared redundant which the Claimant confirmed in Court during cross examination.

52. The Respondent submits that the termination was fair and the Claimant is not entitled to compensation and urges the Court to dismiss the Claimant's case.

Analysis and Determination

53. After careful consideration of the pleadings, evidence and submissions by Counsel, the issues for determination are:-

a. Whether the Claimant was declared redundant;

b. Whether the Claimant is entitled to acting allowance; Whether the Claimant is entitled to the reliefs sought.

54. As regards redundancy, Section 2 of the Employment Act defines redundancy to mean

> **"the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;**

55. Section 40 of the Employment Act, 2007 provides the legislative framework for separation through redundancy. This Section prohibits the termination of a contract of service by reason of redundancy unless the employer complies with several conditions –

a. If the employee to be declared redundant is a member of a union, the employer must notify the union and the Local Labour Officer of the reason and the extent of the redundancy at least one month before the date when the redundancy is to take effect,

b. If the employee is not a member of the Union, the employer must notify the employee personally in writing together with the Labour Officer,

c. In determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees,

d. Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union,

e. The employer must pay the employee any leave due in cash,

f. The employer must pay the employee at least one month's notice or one month's wages in lieu of notice and

g. The employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.

56. Section 45 of the Act is explicit that *"**no employer shall terminate the employment of an employee unfairly.**"* Redundancy is a termination and must pass the substantive and procedural fairness test.

57. In **Kenya Airway Ltd v Aviation & Allied Workers Union Kenya & 3 Others (supra)**, the Court of Appeal was emphatic that redundancies like other forms of termination had to pass the substantive and procedural fairness test.

58. As explained in **Aoraki Corporation Limited v Collin Keith McGavin CA 2 of 1997 [1998] 2 NZLR 278**–

> "…It is convenient in other termination cases, and essential in redundancy cases, to consider whether the dismissal was substantively justified. Thus, if dismissal is said to be for a cause it may be substantively unjustified in the sense of a cause not being shown or being subject to significant procedural irregularity as to cast doubt upon the outcome….

Redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer faces, their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However in some circumstances an absence of consultation where consultation would reasonably be expected may cast doubt on the genuineness of the alleged redundancy or its timing. So, too, may a failure to consider any redeployment possibilities."

59. In **Thomas De La Rue (K) Ltd v David Opondo Omutelema (supra)**, the Court of Appeal held that:-

> "It is quite clear to us that Sections 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."

60. On consultations before redundancy, in **Barclays Bank of Kenya Ltd v Gladys Muthoni & 20 Others [2018] eKLR** the Court of Appeal observed that –

> "In the end, we are persuaded that the dicta of Maraga and Murgor, JJ.A regarding consultations prior to declaration of redundancy resonate with our Constitution and international laws which have been domesticated by dint of Article 2 (6) of the Constitution."

61. Relatedly, **Article 13 of Recommendation No. L66 of the ILO Convention No. 158 – Termination of Employment** provide for consultation before redundancy can be effected. The consultations must be meaningful if the right to fair labour practices enshrined in Article 41 of the Constitution of Kenya is to be realized. The employer is required to engage the trade union if the employees are members or the employees directly.

62. On the selection criteria the Court of Appeal in **Thomas De La Rue (K) Ltd v David Opondo Omutelema (supra)** observed that –

> "In determining the employees to be declared redundant,
>
> Section 40(c) requires the employer to consider seniority in time, skill, ability, reliability of the employees."

63. A similar observation was made by A. K. Murgor JA in **Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 Others (supra).**

> "… the selection process is required to be based on seniority, skill and experience, reliability and ability of the employee."

64. As to the burden of proof –

> "There is a heavy burden placed upon the employer to justify any termination of employment."

(See **Barclays Bank of Kenya Ltd v Gladys Muthoni & 20 Others (supra).**

65. The Respondent alleges that the Executive Director's email dated 12th November 2015 informed all and sundry that the Respondent was in the midst of a restructuring. The email message makes reference to the offices being done away with but makes no reference to any plan, proposed actions or time frame and nothing about the Claimant's position.

66. The Claimant was notified of the redundancy of her position on 3rd February 2016. The redundancy notice was hand delivered to the Claimant on 5th February 2016 after the meeting convened by the Executive Director to discuss the Claimant's terminal dues and hand over process, after her dues had been computed and hand over hand been concluded. The meeting of 5th February 2016 sealed the Claimant's fate as an employee of the Respondent. Her dues amounting to Kshs.1,079,982.18 were paid towards the end of the month. No previous communication had been made to the Claimant on the possibility that she would be declared redundant. Her apparent protest to the use of the word redundancy was rebuffed by the Executive Director.

67. The notice of redundancy informed the Claimant that her position had been declared redundant and a as result her employment had been terminated effective 5th February 2016. The notice was explicit that the redundancy was in no way a reflection for her performance.

68. The notice stated that the Respondent had been facing financial difficulties and had been " *unable to continue making payments regularly for its overheads expenditures and had been employing several measures to reduce costs including budget cuts, merging and restructuring of some positions and regrettably some positions had been made redundant*."

69. Needless to emphasize the notice contemplated by Section 40 of the Employment Act is required to set out ***"the reasons for and extent of the intended redundancy"*** and must be sent to the employee personally, if not a member of a trade union, as was the case here and the Labour Officer not less than a month, prior to the date of the intended termination on account of redundancy.

70. Although the notice makes reference to financial difficulties and inability to make regular payments, the Respondent led no evidence to demonstrate that it was restructuring the Nairobi Office. There is no evidence on record to show that the Respondent was experiencing financial challenges or that the Nairobi Office had surplus staff and how many would be affected.

71. Similarly, whereas the notice to the Claimant was served on 5th February 2016, the Labour Officer was notified on 3rd February 2016 two days before the effective date. It would appear that the notices were an afterthought in a desperate attempt to sanitise a flawed process. In a similar vein, paragraph 9.5 of the Respondent's Human Resources Manual, 2011 provide for a one (1) month's notice in cases of redundancy.

72. It is the finding of the Court that the redundancy notice to the Claimant and the Labour Officer did not meet the requirements of Section 40(b) of the Employment Act and was therefore invalid. Relatedly, there is no evidence on record to show that pre-redundancy consultations took place between the parties as mandated by the law. The meetings on 4th and 5th February 2015 were of a consultative nature since the decision had already been made.

73. Although the Respondent testified that the Claimant should have originated the restructuring plan, it adduced no evidence to show that it had made the necessary policy decision to set the process in motion. The Claimant could not initiate a redundancy plan or restructuring of the Respondent.

74. Finally, the Respondent adduced no evidence to demonstrate that it had a redundancy criteria for affected staff in compliance with Section 40(c) of the Act. The Respondent led no evidence on how the Claimant was selected.

75. In sum, since the Respondent led no evidence to justify and prove the alleged redundancy and did not comply with the provisions of Section 40 of the Employment Act which demands mandatory compliance. The alleged redundancy was substantively and procedurally flawed and thus unlawful. It is the finding of the Court that the termination of the Claimant's employment on account of redundancy was unfair due to noncompliance with the procedural requirements and failure to justify and prove the redundancy.

Acting Allowance

76. The Employment Act has no explicit provisions on acting allowance. It is common knowledge that allowances other than those stipulated by the Employment Act, if any, be they remunerative or not are provided for by the Human Resource Policy Procedures Manual.

77. Evidence on record as confirmed by CW1, CW2, and RW1 show that within a short time after joining the Respondent, the Claimant was requested to mediate a performance appraisal disagreement between the Chief Finance Officer, Mr. Wasim Khan and his Supervisee, the Director of Operations, Mr. Charles Kyale who had disputed the marks awarded by the Supervisor. The Claimant resolved the issue amicably. Shortly thereafter, the Chief Finance Officer sent an email to all staff dated 12th May 2015 informing all and sundry that the Claimant would with immediate effect be responsible for the overall management of the Operations Department until further notice while Charles Kyale would continue with his role as direct Supervisor for the team. The email further read that *"I am available to support Lucy (Claimant) in her additional responsibilities and also looking forward to the same level of support from all of you that was extended to me."*

78. Whereas the Claimant alleges that this email elevated her to an acting position, the Respondent contends that it was part of her duties as defined in the contract of employment. The Claimant argues that since she was appointed as the Human Resource Director, the additional roles expanded her spectrum of responsibilities beyond human resource and ought to be remunerated for. That in any case the Operations Department had more sub-departments than human resource such as ICT, logistics and supply chain management.

79. The Claimant relied on paragraph 4.1 of the employment contract on her appointment as a Human Resource Director reporting to the Executive Director, as well 7.5 paragraphs 7 and of the Respondent's Human Resource Policy 2011. Whereas the former addresses compensation generally, the latter is on acting allowance specifically. Reliance was also made on the case of one Mr. Kondwani and one Zulekha who were paid acting allowance. Mr. Kondwani had acted as the Chief Finance Officer and was paid for his role while Zulekha had acted as Finance Manager.

80. The Respondent on the other hand relied on Clause 5.2 and 5.3 of the employment contract and the duties of the Human Resource Director as itemised by the Claimant on page 60 of Claimant's bundle of documents. Clause 5.3 states that –

> "The employee shall be expected to perform such other duties as shall be assigned to them by the employer through management. Clause 5.3 requires employees to comply with all lawful instructions issued by the employer. Further reliance was made on Clauses 7.5 of the Human Resources Manual 2011 on acting allowance."

81. According to the Respondent, since the Claimant was a Director and the email from Wasim Khan stated that she would be responsible for the overall management of the Operations Department which was a directorate headed by a Director, she would have been acting at the same level and not in a higher office as defined by Clause 7.5 of the Human Resource Manual, 2011.

82. Relatedly, the requirements of the clause had not been complied with in totality. Clause 8.10 on various allowances was also relied upon in urging the Court to find that the Claimant was in an acting capacity.

83. To determine whether the Claimant is entitled to the acting allowance claimed, the Court must determine the related issue as to whether the Claimant was actually in an acting capacity. Simply defined acting means – "***Holding an interim position; serving temporarily*" (Black's Law Dictionary, 10th Edition)**

84. In this case, the email dated 12th May 2015 placed the Claimant as the one responsible for the overall management of the Operations Department. Although the email adverted to additional responsibilities, it was silent on the actual responsibilities. Instructively, the Claimant led no evidence of what she actually did in that capacity bearing in mind that the substantive Director of Operations Mr. Charles Kyale was still in office and supervising his staff. It is unclear whether the overall management meant performing the duties of the Executive Director of the Respondent organisation.

85. Clause 7.5 of the Human Resource Manual 2011 provides that –

> "Whenever an employee officially, at the request of Adeso, assumes duties of a higher-positioned officer during his/her absence for a period exceeding one month, s/he will be compensated via an increased salary for the period exceeding that one month, which will be based on an increase of the present salary by two maturity steps. In those cases where the maximum of the maturity steps has been reached, the increase will equal two times the interval between those highest maturity steps. An acting allowance must always be approved beforehand by HRA, as will be relevant, in consultation with HR, in writing, stating position assumed, period, increased salary amount. An officer can only be requested to assume duties of an immediately senior position, but not higher. An employee can act in a position for up to one year."

86. The upshot of Clause 7.5 above is that it does not contemplate the character of acting in this case. Clause 7 relied upon by the Claimant is unhelpful because it addresses compensation generally as provided by law. The Court is of the view that the email dated 12th May 2015 from Wasim Khan, the Chief Finance Officer of the Respondent to the Claimant was in the context of Clause 7.5 of the Human Resource Manual not a letter appointing the Claimant to assume duties of an immediately higher position. The email neither made reference to the scope of the responsibilities to be assumed by the Claimant nor were they defined in any other document. These would have been the deliverables on her part for future reference, though she became the Supervisor to Mr. Charles Kyale, the Director of Operations. It is difficult to envision how a Director was supervising another.

87. Significantly, the email makes no reference to remuneration and as mentioned above, the substantive Director of the Department in question was still in office.

88. Payment of acting allowance to Mr. Kondwani and Zulekha is distinguishable on account that the two were acting in higher positions than their substantive appointments and thus fell within the ambit of Clause 7.5 of the Respondent's Human Resources Manual, 2011.

89. The Claimant admitted on cross examination that she had no experience in accounting and finance relating to USAID funded projects and further that she did not deal with procurement directly. From the evidence on record, it is unclear what the *"overall management of the Operations Department"* meant and how it was executed.

90. Finally, the Claimant led no evidence of having enquired about her specific duties or remuneration from Mr. Wasim Khan or the Executive Director or any other person before termination on 5th February 2015. The only request for salary review came after the Executive Director's email of 12th November 2016 by which the Claimant was to transition to the Director of Human Resource and Operations which appear to have been abandoned.

91. The Claimant has on a balance of probabilities failed to prove that she was appointed and performed duties of any position in an acting capacity.

92. In view of the foregoing, the Court finds and holds that the Claimant was not appointed to act in any position in the Respondent's organisation and is thus not entitled to the acting allowance claimed.

House Allowance

93. In simple legal parlance, a contract is a legally binding agreement made between two or more parties. A contract imposes upon the parties thereto legally enforceable rights and obligations. These rights and obligations remain enforceable until the contract is discharged in any of the various ways recognised by law.

94. It is trite law that *"what has been created by agreement may be extinguished by agreement"* encapsulated by the maxim eodem modo quo oritur, eodem modo dissolvitur.

95. If parties who have an existing agreement enter into a subsequent agreement on the same subject with or without any modification, the previous agreement is discharged as each party agrees to release its rights under the contract and the mutual promises constitute consideration. This is often referred to as bilateral charge of contract.

96. In the instant case, it is common ground that the Claimant accepted the offer on 7th April 2015 and signed the contract on 4th September 2015. The subsequent contract is different in certain respects, for instance, whereas the first contract had 12 clauses, the subsequent contract had 17 and had a renewal clause as well as an express clause on confirmation after probation.

97. Significantly, whereas Clause 5.5 of the first contract provided that the gross salary of Kshs.689,448 per month included house allowance, food and water, Clause 8.1 of the subsequent contract omitted the sub-clause on house allowance, food and water. It provided that –

> "The employee will be paid a gross salary of Kshs.689,448 payable monthly in arrears on the last working day of each month. 50% of the employee's salary will be paid in her USD account and the remaining 50% in the Kenya shillings account."

98. Finally Clause 17.4 of the contract provided that –

> "This contract contains the entire understanding between the parties and supersedes all previous agreements and arrangements (if any) relating to the employment of the employee (which shall be deemed to have been terminated by mutual consent).

99. In light of the foregoing principles, it requires no gainsaying that the contract entered into on 4th September 2015 when the Claimant signed it discharged the contract concluded on 7th April 2015 and became the primary document of the relationship between the parties.

100. Having determined that there was only one contract between the parties, I now turn to the issue as to whether the Claimant was entitled to house allowance.

101. Section 31 of the Employment Act gives an employer three options as regards house allowance namely:

- Provide reasonable housing accommodation for each employee or;
- Pay house allowance in addition to the salary or wages or;
- Pay a consolidated salary.

102. Since housing is a statutory right, the employer must demonstrate that it has implemented one of the foregoing options failing which the employer will be held liable to pay house allowance for the entire duration of employment.

103. In **Kenya Union of Sugar Plantation & Allied Workers v Butali Sugar Mills Ltd [2021] eKLR**, Radido J. stated that –

> "The requirement to provide housing or an allowance to cover rent, in the view of the Court, is a general entitlement to all employees without distinction on type and nature of the contract, save for the exceptions on consolidation and agreement in a collective bargaining agreement as contemplated by section 31(2) of the Employment Act, 2007, or in any other law.

In other words, the employer's statutory obligation to provide housing or pay house allowance does not arise where an employment contract expressly provides for a consolidated salary including an element to cover for rent or where agreement is reached in a collective bargaining agreement."

104. In **Grain Pro Kenya Inc. Ltd v Andrew Waithaka Karagu [2019] eKLR**, Court of Appeal expressed itself as follows on the contractual document and house allowance: *"We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer the employee has no part in its preparation or even a place to sign for it. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause "other benefits as required by law" in the contract to award house allowance. We would have applied Section 31(2)(a) of the Employment Act to exclude it."*

105. In the instant case the contract between the parties expressly excluded previous agreements or arrangements and did not provide for that the Claimant's salary was inclusive of house allowance. The contract had no provision for any allowances. However paragraph 8.10 of the Respondent's Human Resources Manual provided for other allowances and provided *inter alia* that –

> "… Allowances and additional arrangements may include: house allowance, relocation allowance, hardship allowance, filed

allowance, home leave tickets, etc. for international staff. Whilst these benefits make the total remuneration package they are not automatic and are provided independently from basic salary and will only be applicable to employees under certain contracts as will be outlined in the conditions of employment …"

106. The Human Resources Manual 2011 is silent on whether the salary is consolidated or not. Paragraph 8.10 of the Manual is explicit that the contract of employment is the basic document on the salary and allowances due to an employee. Finally, paragraph 7 entitled compensation provides that –

"It is the policy of Adeso to ensure that all employees are compensated fairly and equitably for work done and in accordance with the terms and conditions of the employment law and regulations of the country under which the contract of employment applies …"

107. Compliance with employment law entails compliance with the relevant articles of the Constitution, the Employment Act, 2007 and other relevant statutes, regulations and judicial pronouncements. Section 37 of the Employment Act is emphatic on the right to housing for an employee and because the Respondent did not house the Claimant or pay a consolidated salary, it was required to pay the Claimant a house allowance and the Court so finds.

108. On reliefs, the Claimant prays for

a. Unpaid housing allowance being of her basic salary an amount which is calculated as follows: (Kshs.689,448 x) x 10 months = Kshs.2,298,160.

109. Having found that the Claimant's salary did not include house allowance and the Respondent did not provide housing, the Claimant is entitled to house allowance. However, it is unclear how the Claimant determined that house allowance was of the Claimant's salary. Courts have previously held that 15% of the monthly salary is reasonable percentage to compute house allowance.

110. In **Anna Yonemura v Luwa Kenya Trust [2014] eKLR** and **KUDHEIHA Workers v B.O.G. Maseno School for the Deaf [2013] eKLR**, the Court used 15%. The Court of Appeal cited the two case with approval in **Grain Pro Kenya Inc. Ltd v Andrew Waithaka Karagu (supra)** and stated as follows:

"To us 15% is reasonable percentage that an employee spends from part of salary to pay house rent."

111. The Court is bound by this decision and applies 15% to compute house allowance in the instant case as follows –

(689,448 x) x 9.5 months = Kshs.982,463.40. The Claimant is awarded **Kshs.982,463.40** as house allowance.

b. Twelve months' salary being damages for unfair termination (Kshs.689,448 x 12) = Kshs.8,273,375.00.

112. Having found that the redundancy was unlawful, the Claimant becomes entitled to the remedy of compensation provided by Section 49(1)(c) of the Employment Act, the equivalent of a number of months' gross salary or wages not exceeding 12 months. The level of compensation is determined on the basis of the parameters provided by Section 49(4) of the Act.

113. The Court has taken into account the following:

i. The Claimant had a two year contract renewable at the option of the employer subject to performance and availability of funds.

ii. The Claimant served for 9½ months, wished to continue and was blemish free. She was offered the position of Human Resource Manager but was unenthusiastic about it. More importantly, the Executive Director insisted that the new positon would only be filled upon ensuring that that Human Resource Director's positon no longer existed. Minute 4 of the meeting held on 5th February 2016 states *"This was disingenuously the Executive Director because the position had already been declared redundant."*

iii. The Respondent concealed its decision to declare the Claimant redundant until 2 days before the effective date of 5th February 2016, coupled with the haste with which the process was conducted and concluded without any consultation.

114. Taking into account these circumstances in totality the equivalent of 3 months' salary is fair – **Kshs.2,068,344**.

c. Unpaid acting allowance being the difference between Kshs.731,436 and Kshs.689,448 = (41,980 x 8) = Kshs.335,840.00.

115. Having found that the Claimant was neither appointed nor acted in any position and was therefore not entitled to acting allowance, the claim is **declined.**

116. In the final analysis, judgment is entered for the Claimant for Kshs.3,050,807.40 with costs.

117. Interest at Court rates from the date of judgment till payment in full.

118. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF DECEMBER, 2021

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 15th March 2020 and subsequent directions of 21st 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