



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 197 OF 2020**

**TIMOTHY XERXES MUNYAO**

**CLAIMANT**

**v**

**AFRICA MEDICAL AND RESEARCH**

**FOUNDATION (AMREF HEALTH)**

**AFRICA**

**RESPONDENT**

**RULING**

1. Timothy Xerxes Munyao (applicant) was offered employment as Finance Manager through an agreement dated 26 May 2008 by Africa Medical & Research (Amref Health) Africa (Respondent). The contract was to last for 2 years.
2. Upon the expiry of the first contract, the parties mutually agreed to renewal severally, the last renewal being made on 29 August 2019.
3. Under the terms of this contract, the applicant was to serve for 2 years as Regional Finance & Special Projects Manager.
4. In December 2019, COVID19 was reported in China. The disease spread across the globe rapidly and it hit the borders of this country reportedly in March 2020. The government then declared a public health pandemic, which decision led to massive restrictions on economic activities, public gatherings and movement.
5. To deal with the pandemic within its staff, the Respondent consequently established a COVID19 crisis committee. The Committee recommended that apart from *essential services*, all the Respondent's staff work from home. The staff were accordingly advised on 15 March 2020.
6. On 17 March 2020, the Respondent reviewed the decision to work from home. The staff were placed in teams and allocated staggered working hours/days.
7. Because of the ever-evolving situation, the Respondent kept updating staff on any changes.
8. On 2 April 2020, the Respondent intimated to staff about the termination of internships and short term contracts for those in the Kenya Country Programme.
9. On 21 April 2020, the Respondent's Group Chief Executive Officer sent an email to all staff titled *Emergency staffing measures*.
10. Among the measures outlined in the email were that some staff would be placed on unpaid leave, salary reduction(s) in certain grades, hiring freeze, a thorough review of all expenditure, and deferring of expenditures.
11. On the same day, the applicant's immediate supervisor called him to notify him of the termination of his contract on account of *frustration*, and that he would receive the appropriate letter from the Human Resources Department.
12. The next day, the Human Resources Business Partner called the applicant to alert him he was emailing to him the termination letter.
13. The applicant was aggrieved and sought legal assistance causing the advocates to issue a formal demand on 1 May 2020 alleging unfair termination of employment.
14. Seeing no resolution in sight, the applicant moved the Court under a certificate of urgency on 15 May 2020 seeking orders

1. ...

2. ...

3. ...

4. ...

5. Pending the hearing and determination of this Suit, this Honourable Court do grant an order staying the Respondent's letter dated 22<sup>nd</sup> April 2020 and restraining the Respondent from enforcing the contents thereof in so far as they affect the Claimants employment status.

6. Pending the hearing and determination of this Suit, this Honourable Court do grant an order reinstating the Claimant in employment as the Respondent's Regional Finance and Special Projects Manager with absolutely no loss of income, benefits or seniority.

7. Pending the hearing and determination of this Suit, this Honourable Court do grant a temporary order of injunction restraining the Respondent from terminating the Claimant's employment or intimidating and/or harassing the Claimant.

8. The costs of this application be awarded to the Claimant.

15. When the application was placed before this Court, it declined to issue any *ex parte* orders, considering that the applicant's contract had already been terminated.

16. The application came up for *inter partes* hearing on 19 May 2020, and the Court gave directions on the filing and exchange of responses and submissions.

17. The Respondent filed its replying affidavit on 29 May 2020, the applicant filed his submissions on 17 June 2020 while the Respondent's submissions reached the Court on 19 June 2020.

18. The Court has considered the motion, affidavits and submissions and will not delve deeply into the facts save for what appears to be common.

19. The common facts include that the applicant was notified of the termination of his contract through a letter dated 22 April 2020 and the reason advanced was *frustration*; the applicant was not issued with the requisite notice in terms of the contract or statutory law (section 35(1) of the Employment Act, 2007), and that no form of individual consultations was held with the applicant.

20. The Respondent in trying to justify its decision asserted that the COVID19 pandemic had led to the *frustration* of the contract between it and the applicant, on the basis that the applicant was unable to execute his duties from home in the manner contemplated in the contract.

21. The applicant's contract was subject to the general law of employment and the contractual documents. The Employment Act, 2007 does not have protections such as written notice or a hearing for employees where the ground of separation is *frustration*.

22. The nearest protections in such a case may be those applicable in redundancy (the Court is not determining at this stage whether *frustration* and *redundancy* are the same).

23. The applicant is essentially alleging unfair termination of employment.

24. Among the primary reliefs, he has sought is reinstatement. Under section 49(3) of the Employment Act, 2007, reinstatement is a final remedy, after a determination has been made that a termination of employment was unfair. An order of reinstatement is akin to the specific performance of a *contract of service*. Such an order requires a demonstration of exceptional circumstances.

25. The Court has not made a determination that the decision of the Respondent was unfair, and therefore it would not be appropriate in the circumstances of this case to order reinstatement at an interlocutory stage.

26. In the circumstances and cognisant that reinstatement may not be ordered after 3 years, the Court declines to grant any of the orders sought, but in lieu, thereof will order as follows

(i) The Cause be heard on a priority basis.

(ii) The Claimant to file and serve an Amended Statement of Claim on or before 3 July 2020.

(iii) The Respondent to file/serve Response, witness statements and documents on or before 24 July 2020.

(iv) The Claimant to file any rejoinder on or before 7 August 2020.

(v) Agreed Issues to be filed on or before 28 August 2020.

(vi) Hearing date to be taken in the registry on a priority basis once normal operations commence.

(vii) Costs in the cause.

**Delivered through Microsoft teams/email, dated and signed in Nairobi on this 23<sup>rd</sup> day of June 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For applicant Mr. Omondi instructed by Coulson Harney LLP

For Respondent Ms. Ngige instructed by Mohammed Muigai LLP Advocates

Court Assistant Judy Maina