



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 345 OF 2020 (E320 OF 2020)

SARAH WANGUI KARANJA.....CLAIMANT

v

AMREF HEALTH AFRICA IN KENYA.....RESPONDENT

RULING

1. On 2 October 2013, Sarah Wangui Karanja (applicant) and African Medical and Research Foundation (Respondent) entered into a *service agreement* under which the applicant was to serve as a Research Officer for 2 years. Upon expiry of the *service agreement*, it was renewed severally, the last renewal was signed on 18 October 2019.

2. On 21 April 2020, the Respondent's Line Manager called to inform her that her contract would be terminated. The applicant received another call on 24 April 2020 from the Human Resource Business Partner intimating that the contract would be terminated by 30 April 2020 and that she should prepare to clear with the Respondent.

3. The applicant was thereafter called to a meeting on 28 April 2020 and explanations made for the decision to terminate the contract.

4. The formal letter giving notice of termination was sent to the applicant on 29 May 2020 and it indicated that the effective date of separation would be 31 July 2020.

5. On 21 July 2020, the applicant moved the Court stating the issue in dispute as Malicious, illegal, unlawful and unfair termination and discrimination in respect of terms and conditions of employment and termination of employment.

6. Filed together with the Memorandum of Claim was a motion under a certificate of urgency seeking orders

1. ...

2. ...

3.

4. Pending the hearing and determination of this suit, this Honourable Court do grant an order staying the Respondent's letter dated 29 May 2020 and restraining the Respondent from enforcing the contents thereof in so far as they affect the Claimant's employment status.

5. Pending the hearing and determination of this suit, the 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.

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

7. When the application was placed before the Duty Judge on 22 July 2020, the Court directed that it be served for *inter partes* hearing and/or giving of directions on 28 July 2020.

8. When the parties appeared before the Court on 28 July 2020, the Respondent was given 7 days to file a response to the application ahead of *inter partes* hearing on 7 August 2020. At the same time, the Judge issued an *interim stay order of termination* till *inter-partes* hearing.

9. On 7 August 2020, the applicant indicated that she was not ready to proceed because she required time to file a further affidavit.
10. Consequently, the Court allowed the filing of a further affidavit and submissions.
11. The applicant filed a further affidavit and submissions dated 21 August 2020 while the Respondent filed its submissions dated 11 September 2020.
12. In seeking the orders already stated hereinabove, the applicant disputed the truth of the reasons given for the termination of her contract (inability to raise funding to sustain her role/lack of sufficient funding for the Ethics and Scientific Review Committee /cost centre) and contended that the Respondent's direct programme budget had grown by 44% by April 2020.
13. Advancing the argument, the applicant asserted that the Respondent had received offers for funding from other organisations and that its performance had been excellent since the onset of COVID19.
14. Further, the applicant decried that she was not subjected to due process before the termination of her contract as envisaged by the obtaining legal and contractual framework.
15. While objecting to the grant of the orders sought by the applicant, the Respondent deposed that it was a charitable organisation dependent on donor funding and that by April 2020, it had been unable to raise sufficient funding to sustain the applicant's role and that the applicant was given due 2-months' notice.
16. It was further deposed that when funds were secured, attempts were made to offer the applicant a different role around 9 June 2020 and while communication channels were still open, the applicant moved the Court. This, it was stated was a sign of bad faith.
17. In the view of the Respondent, allowing the orders sought by the applicant would be tantamount to granting an order of reinstatement before a hearing on the merits.
18. The Court has considered the Motion, affidavits and submissions.
19. Although the applicant submitted that an order of stay of the letter of termination dated 29 May 2020 would not restore the contract the Court finds the argument disingenuous.
20. To the contrary, it is correct as submitted by the Respondent that the effect of an order staying the letter of termination of employment sought by the applicant would amount to restoration and/or maintenance of the contract when the employer had already shown an indication otherwise.
21. The order would mean the restoration of the contract and therefore reinstatement at an interlocutory phase of the proceedings.
22. Under section 49(3) of the Employment Act, 2007, reinstatement and more so in ordinary employment is a final remedy entailing *specific performance* of a contract of service. It is granted after a determination that termination of employment was unfair.
23. And in granting reinstatement, the Court must be satisfied that an order of *specific performance* is merited and that there are exceptional circumstances.
24. In the case at hand, the Court has not made a finding that the termination of the applicant's contract was unfair nor have the parties placed material before it to demonstrate exceptional circumstances.
25. Further, it has not been demonstrated that damages or compensation, which is one of the 3 primary remedies where a Court finds unfair termination of employment would not remedy any breach of contract on the part of the Respondent.
26. From the foregoing, the Court finds no merit in the motion and orders it dismissed with costs in the cause.
27. To facilitate the expeditious and proportionate hearing and determination of the Cause, the Courts orders that
 - (a) The Respondent files and serves its Response, witness statements and documents on or before 20 October 2020.
 - (b) The applicant is at liberty to file and serve Reply to the Response within 7 days of service.
 - (c) Agreed Issues to be filed within 30 days of service by the applicant of its Reply.

Delivered through Microsoft teams, dated and signed in Nairobi on this 2nd day of October 2020.

Radido Stephen

Judge

Appearances

For applicant Mr. Ndungu instructed by Coulson Harney LLP

For Respondent Ms. Ngige instructed by Mohammed Muigai LLP

Court Assistant Lindsey