



**Munyao v Africa Medical Research Foundation (AMREF Health Africa)
(Cause 197 of 2020) [2024] KEELRC 771 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 771 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 197 OF 2020
SC RUTTO, J
MARCH 20, 2024**

BETWEEN

TIMOTHY XERXES MUNYAO CLAIMANT

AND

**AFRICA MEDICAL RESEARCH FOUNDATION (AMREF HEALTH
AFRICA) RESPONDENT**

JUDGMENT

1. By way of a Memorandum of Claim which was further amended on 10th March 2021, the Claimant avers that he was employed by the Respondent on 23rd May 2008 and as at 22nd April 2020, he had worked for the Respondent for almost 12 years. The Claimant further states that he offered the Respondent excellent service and as such, he was consistently issued with renewable fixed-term contracts. He served the Respondent in different capacities with the last one being the position of Regional Finance and Special Projects Manager.
2. From the record, it is apparent that the employment relationship went south following the outbreak of the COVID-19 global pandemic. The Claimant avers that on 22nd April 2020, he received a call from his immediate supervisor, Mr. Jonathan Dutton who informed him that the Respondent had classified his contract as frustrated. On 22nd April 2020, the Claimant received an email containing his letter of termination from Ms. Kibathi, the Respondent's Human Resources Business Partner.
3. In the Claimant's perspective, the termination of his employment was opportunistic, malicious, unfair, invalid, unlawful and in breach of his constitutional, statutory and contractual employment rights.
4. It is against this background, that the Claimant seeks the following reliefs:
 - a. A declaration that the purported termination of the Claimant's employment constituted an unfair labour practice and an unfair and unlawful termination of the Claimant's employment.



- b. An order for the reinstatement of the Claimant in employment as the Respondent's Regional Finance and Special Projects Manager with absolutely no loss of income, benefits or seniority.
 - c. In alternative to prayer (b) above, maximum compensation of 12 months' salary inclusive of benefits for unlawful, illegal, malicious and unfair termination of employment.
 - d. A declaration that the Respondent's termination of the Claimant's employment constituted an unlawful redundancy.
 - e. In alternative to payer (b) above, payment of severance at the rate of 15 days pay for every completed year of service from May 2008.
 - f. In alternative to prayer (b) above, payment of the Claimant's unpaid terminal dues in the sum of USD 8,229.85.
 - g. General damages for unfair labour practices.
 - h. Costs of this suit.
5. The Respondent disputed the Claim through a Memorandum of Response and Counterclaim which was subsequently amended on 15th March 2021. The Respondent avers that the Claimant was employed on fixed-term contracts, each lasting a period of two years. According to the Respondent, each fixed-term contract constituted a fresh period of service. The Respondent has further denied the Claimant's assertions concerning his excellent performance.
 6. It is the Respondent's case that through no fault on its part or the Claimant's, both parties were rendered incapable of performing their obligations under the Agreement of Service. In the Respondent's view, the contract was frustrated thereby necessitating its action of terminating the said contract. Consequently, the Respondent prays that the Claimant's Further Amended Claim be dismissed with costs.
 7. The Respondent has further counterclaimed against the Claimant the sum of 177,104 USD being an amount it alleges the Claimant wrongfully earned for 16 months during which time he did not present himself on the system designated for the performance of his work. As such, the Respondent has asked the Court to allow the Counterclaim with costs.
 8. The Claimant did not take the Counterclaim lying down. Through his Reply to Defence and Defence to Counterclaim, the Claimant has disputed the Respondent's averments and contends that he logged onto and used the MS Navision system several times between January and the date of his termination. He prays that the Counterclaim be dismissed with costs.
 9. The matter initially proceeded before my brother Hon. Justice Nzioki wa Makau and following his recusal, the matter was transferred to this Court for further hearing and determination. During the trial, both parties called oral evidence.

Claimant's Case

10. The Claimant testified in support of his case and to start with, he adopted his witness statement and supplementary witness statement to constitute his evidence in chief. He proceeded to produce all the documents filed on his behalf, as exhibits before Court.
11. The Claimant stated that his duties and responsibilities as Finance and Special Projects Manager were set out in the Service Agreement and the Claimant's written job description dated 25th January 2019. His main roles were to lead and manage the technical supervision and to maintain day-to-day oversight



- of the work of the Respondent's Finance Managers in Kenya and in its field offices in Africa and to provide financial technical oversight on the Respondent's special projects.
12. It was the Claimant's evidence that following the Government's directives issued to contain the spread of the COVID-19 pandemic, the Respondent through its Group Chief Executive Officer, Dr. Githinji Gitahi and its Human Resources Business Partner Ms. Joyce Kibathi, sent various email updates to its staff on 16th, 17th, 22nd and 29th March 2020 regarding measures that the Respondent had implemented (or intended to implement) to inter alia protect its staff and curb the spread of COVID-19.
 13. The Claimant further averred that through the email updates, the Respondent directed all the staff, excluding those providing essential services to work from home. The Respondent further stopped all work-related cross-border travel until further notice; presented a staggered work schedule to its staff; presented a remote working policy; implemented staggered work schedules by setting up working groups; and confirmed to the staff that it was implementing plans to ensure that it had the cash resources to continue operations.
 14. On or about 2nd April 2020, the Respondent through its Country Director, Dr. Meshack Ndirangu, issued an email announcing the implementation of staffing measures to support its business continuity. In his email, Dr. Ndirangu proposed the following potential outcomes for the Respondent's employees;
 - a. termination of internship & short-term contracts;
 - b. unpaid leave;
 - c. taking a defined proportion of leave before the end of June 2020, and salary reductions for the period of April through August 2020 for staff on grades C and higher.
 15. According to the Claimant, the Respondent did not express any intention to implement any other measures that would affect the employment of its staff save for the staffing measures referred to above.
 16. He was therefore surprised when on 21st April 2020, he received a call from his immediate supervisor Mr. Jonathan Dutton, who informed him that the Respondent had classified his contract as "frustrated". He later received a termination letter from Ms. Kibathi on 22nd April 2020.
 17. The Claimant further averred that his termination was inter alia opportunistic, malicious and unfair as he had been carrying out his contractual duties on a day to day basis while complying with the policies/ measures/directives implemented internally by the Respondent and the Government.
 18. Further, neither his supervisors nor the Respondent's other officers had raised any issue or concern regarding his ability to perform his duties.
 19. That as at 22nd April 2020, he had various ongoing tasks, including supporting year-end closure and external audits, supporting Finance Managers to coordinate and facilitate the annual external audit overseeing ERP data clean-up in Malawi and West Africa, training the West Africa Finance Manager on the use of the ERP, participating in Control Self-Assessment (CSA) and reviewing meetings for South Sudan and West Africa through zoom.
 20. Further, he had projected tasks and duties for the ensuing weeks and months and there was no foreseeable break in his workflow. He averred that he was required to inter alia, support and review proposal budgets before submission to donors as per country requests, ensure reviewed proposals were adequately costed, support countries to perform data clean up in the ERP as per request, assess functionality of the rolled-out ERP system in all countries and follow up on the implementation of external and internal audit recommendations and offer technical support to country finance managers.



21. The Claimant further averred that the COVID-19 pandemic had led to an increase in the amount of work that he had to carry out.
22. He further contended that no link was drawn between the COVID-19 pandemic (and the containment measures) and the performance of any one of his duties and responsibilities; his monthly contractual remuneration; the Respondent's Finance function, within which he worked; and its financial position and financial obligations.
23. He maintained that the COVID-19 pandemic did not have any adverse effect on the ability of the Respondent's Finance function to perform its normal tasks, duties and responsibilities.
24. That whilst it was initially feared that some of the Respondent's donors would withdraw or reduce future donations, donors such as Global Fund actually became supportive and offered additional funding opportunities to ensure gains made in fighting TB, malaria and HIV were not lost.
25. The Claimant further stated that whilst "frustration" was referred to in the Termination Letter as a "reason" for the purported termination, no details were given of the alleged frustration.
26. That further, no process was followed prior to the purported termination which he contends was not based on any known provision of the Service Agreement, the Employee Manual or Kenyan employment law and practice.
27. He had a legitimate expectation that he would serve the Respondent for the full term of the Service Agreement ending 30th September 2021.
28. The Claimant further stated that after his termination, the Respondent specified the reasons and considerations that it relied on in terminating his employment.
29. According to the Claimant, the said reasons were not valid in that his Service Agreement expressly states that his place of employment was Kenya. He had a designated office and workstation in the Respondent's office in Kenya. Further, none of the duties and responsibilities in his job description required him to physically supervise financial implementation and oversight of projects.
30. He further contended that the Respondent did not specify even one single task, duty or responsibility, which he had been rendered incapable of carrying out since the advent of the COVID-19 pandemic in Kenya. His duties did not require him to give face-to-face practical assistance/leadership to the finance staff in all of its country and field offices.
31. A very large part of the support and assistance that he had offered to finance managers in the Respondent's offices had been so offered remotely through various media including telephone calls, emails and virtual meetings.
32. The Claimant further stated that in the year 2020, he undertook 2 work trips outside Kenya while in 2019, he undertook 17 such work trips. He averred that travelling in order to support and assist finance managers was an ordinary occurrence and such travel was not indispensable.
33. He further stated that he oversaw the rollout and implementation of the Respondent's ERP system in its country offices during the course of the year 2019 and was finalized in December 2019.
34. As of 22nd April 2020, he had no outstanding or planned trips/travels for the purpose of overseeing the rollout of the Respondent's ERP system. He is not aware of a plan by the Respondent to roll out a new ERP system or other system in the near future.



35. The cumulative period that he spent outside Kenya on work trips/travels in the year 2019 was 17 work weeks out of 52 work weeks.
36. That despite his trips/travels out of Kenya due to special circumstances, he only spent 32% of the work weeks in the year 2019 outside Kenya.
37. He deems it unfortunate that his work trips in the year 2019, most of which he undertook at the Respondent's request in order to deal with special circumstances, were cited as a basis for his termination after his termination.
38. According to the Claimant, a large number of the Respondent's staff travels outside Kenya for work purposes. Out of these, many executive staff members of the Respondent travel habitually while several senior executive staff members of the Respondent (including the Group CEO, the Group CFO and the Group HR Partner) travel very frequently.
39. He is not aware of any of the foregoing executives and senior executives being informed that their duties have been frustrated due to their inability to travel outside Kenya for work purposes.
40. The Claimant further stated that the restriction of international travel was a temporary measure by the Government for a limited period.
41. In the Claimant's view, it is not true that the COVID-19 pandemic adversely impacted the Respondent's financial position and cash inflows. In this regard, he averred that the Respondent had raised over USD 8 million new grants since the COVID-19 pandemic started.

Respondent's Case

42. The Respondent called oral evidence through Mr. Jonathan Dutton and Ms. Angela Muchiru who testified as RW1 and RW2 respectively. Mr. Dutton who was the first to go, identified himself as the Respondent's Group Chief Finance Officer. Similarly, he adopted his witness statement to constitute his evidence in chief. He further produced all the documents filed on behalf of the Respondent as exhibits before Court.
43. RW1 stated that in accordance with the Claimant's Job Description, his major responsibility was to lead and manage the technical supervision and to maintain day-to-day oversight of the work of the Finance Managers in Country and Field Offices in Africa in a manner that supports the Respondent's overall mission. He was also expected to provide financial technical oversight on special projects of the Respondent across the Respondent's offices in 11 countries.
44. In order to perform his responsibilities in coordinating and ensuring consistency across the Respondent's offices, the Claimant was expected to and did spend much of his time travelling across the Respondent's offices in the 11 countries. In the year 2019, the Claimant took a total of 17 trips out of the country; each trip lasting at least one week. In the early part of 2020, the Claimant took 2 trips out of the country to work in field offices.
45. The Claimant's Job Description outlined the resources that he was expected to use in order to exercise the oversight expected from his office. These resources include the MS Navision Dynamics System ("Navision System") (and previously the Sun Accounting System), an online management portal that is used by the Respondent's employees in performing their duties.
46. Employees were expected to log into the Navision system on a daily basis in order to perform their oversight duties.



47. The Navision System is an Enterprise Resource Planning system intended to assist the Respondent with the management and oversight of finance, customer relationship management, procurement and supply chains, analytics and internal control.
48. The system is very critical in the management of the Respondent's affairs considering that it operates in 11 countries. It helps provide consistency in operations across the Respondent's offices and helps ensure all expenditure, and particularly any potential overspends or disallowable expenditure, is properly managed and controlled.
49. RW1 averred that it is inconceivable that the Claimant could have performed his responsibilities to any kind of acceptable standard with zero access to the system between January 2019 and April 2020.
50. The Claimant was supposed to ensure that the Financial Managers in the 11 countries, who were his junior officers, used the Navision System in performing their responsibilities effectively. The only means to exercise any degree of oversight of the Respondent's Financial Managers all at once was through the Navision System.
51. He further stated that as a result of the COVID-19 pandemic, several countries across the globe undertook stringent measures to contain the spread of the disease and safeguard their citizens. These measures included partial or total lockdowns of countries; bans on international and regional travel either by air or road; and directives for employees to work from home.
52. Due to the highly restrictive government/international directives and efforts to contain the pandemic, the Respondent took the view that the Claimant could not perform his duties as envisaged under the Service Agreement and the Job Description. His contract was one of the contracts categorized as "frustrated" by the Respondent.
53. On 22nd April 2020, the Claimant's employment was terminated on account of the frustration of his contract of employment.
54. As the Claimant was clearing from the Respondent's service, it was discovered that since the month of January 2019, he had failed to log in to the Navision System in order to perform his duties.
55. It was discovered that the last time the Claimant logged in to the Navision System was in the year 2018. On this issue, RW1 referred to the log-in extracts from the Navision System.
56. Consequently, he is aware that the Claimant did not carry out his duties as was required of him. As a result of the Claimant's omissions with respect to his duties, he believes the relationship of trust required between an employee and an employer has irretrievably broken down.
57. Further, the Claimant's roles included the review and development of financial policies. During his clearance, it was noted that the Claimant had failed to prepare any policies.
58. He averred that there is no policy that was prepared and submitted by the Claimant to be approved by the International Board as is required for all of the Respondent's formal policy documents.
59. Moreover, it was discovered that although he was a signatory to the Respondent's bank accounts, the Claimant failed to take any positive proactive steps to sign off any payments. He actively avoided demonstrating the leadership expected of a senior colleague.
60. He believes that given the Claimant's seniority, his failure to perform his duties as required of him could not be discovered during the tenure of his employment. This was only discovered when he was clearing from the Respondent's service.



61. By the time the Claimant's failure to perform his responsibilities was discovered, his employment had been terminated and it was therefore impossible to subject him to a disciplinary hearing as envisaged under the *Employment Act* 2007 and the Respondent's Employee Manual.
62. Despite the Claimant's failures to perform his duties, he was duly remunerated until the date of his termination. The total amount that the Claimant unjustly received as remuneration amounts to USD 177,400.00 which amounts, the Respondent counter-claims from him (Claimant).
63. Ms. Angela Muchiru who testified as RW2, identified herself as the Respondent's Group Human Resource Director. Equally, she adopted her witness statement to constitute her evidence in chief.
64. It was RW2's evidence that the Respondent is mainly dependent on donor funding for its field and office operations and its employees' continued employment. This fact was notified to the Claimant via clause 3.2. of his Service Agreement.
65. She averred that the Respondent operates in 11 countries in Africa, with Kenya being its Headquarters. The donor funds once received at Headquarters, generally support the Respondent's operations across the other countries.
66. In order to perform his responsibilities in coordinating and ensuring consistency across the Respondent's offices, the Claimant was expected to spend much of his time travelling across the Respondent's offices in the 11 countries.
67. In the year 2019 for instance, the Claimant took a total of 17 trips out of the country, each trip lasting almost a week. In the very early part of the year 2020, the Claimant took 2 trips out of the country to work in other field offices.
68. As a result of the COVID-19 pandemic, several countries across the globe undertook stringent measures to contain the spread of the disease and safeguard their citizens. These measures included partial or total lockdowns of countries; bans on international and regional travel either by air or road; and directives for employees to work from home.
69. In light of the Government directives and the bans on international travel, the Respondent stopped all cross-border travel either by air or road until further notice.
70. At its onset, the pandemic suddenly and significantly impacted the Respondent's operations. A number of proposals for new work in the Respondent's pipeline were withdrawn, or the timeframes were extended for an indeterminate period; or both.
71. The pandemic also affected donor funding to the Respondent as cash flows from donors slowed down and the large grants that sustained the Respondent's operations were reduced or delayed.
72. Additionally, the Government's measures to contain the pandemic meant that the Respondent could not effect many of its projects to the full extent. Social distancing directives meant that some of the Respondent's projects were placed on hold and others were decelerated.
73. In order to manage the Respondent's response to the COVID-19 pandemic and the government/international directives to contain its spread, the Respondent categorized its staff into two.
74. The first category comprised "essential" staff such as health service providers, security personnel and those directly involved in the pandemic response. The second category, in which the Claimant was placed, comprised "regular" staff which includes support staff.



75. Following the initial government directives issued in mid-March 2020 and faced with the unexpected pandemic situation, the Respondent directed all its staff (the Claimant included) to work from home.
76. Thereafter came a Staggered Work Schedule as the Respondent (alongside all other Kenyans and indeed the world), struggled to come to terms with the realities of the pandemic situation. The Staggered Work Schedule was not implemented as the situation continued to worsen.
77. In the face of the pandemic and the growing uncertainty of the situation, the Respondent was forced to take more drastic measures for business continuity.
78. By the Respondent's Group CEO's email of 2nd April 2020, staff were informed of the measures to be taken which included termination of internship and short-term contracts.
79. Employees were also requested to take salary reductions yet others were requested to take unpaid leave. Further, any member of staff who was not able to undertake his or her duties during the pandemic would be deemed to have had their contracts of employment frustrated.
80. As the situation worsened, it became apparent that the Claimant could not possibly execute his duties from home in the manner contemplated in his contract of employment. Restricted funding similarly meant that the Respondent could not possibly remunerate him in accordance with his contract of employment. She is also aware that the COVID-19 pandemic affected the Claimant's ability to perform.
81. Consequently, the Claimant, through no fault of his own, was unable to perform his obligations under the contract of employment. The Respondent also through no fault of its own, was unable to perform its obligations under the contract of employment with the Claimant.
82. The employment contract was fundamentally frustrated and the Respondent was therefore constrained to terminate the Claimant's employment.
83. RW2 was categorical that the Claimant's termination of employment by way of frustration was not at all performance-related; it was simply because the pandemic situation had rendered it impossible for him to remain employed for the work he was employed to do and be remunerated for it.
84. Due to the prevailing situation at the time the Claimant's employment was terminated, it became impossible to give him the contractual two months' notice. The Respondent, trying to be as humane as the circumstances would allow, paid the Claimant two months' salary in lieu of notice in order to provide some cushion against the prevailing circumstances.
85. The Respondent was faced with an unprecedented situation and as such, it is not true that its actions towards the Claimant were malicious as he claims.
86. RW2 further averred that the Claimant was not the only employee whose contract of employment was frustrated by the pandemic situation. Other employees in the "regular" category had their contracts of employment frustrated as well.
87. In addition to the contracts of employment which were frustrated, other members of staff including those in the "essential" category had their salaries reduced. Yet other employees were asked to go on unpaid leave as there were simply not enough funds to continue operations at full capacity.
88. The Claimant was informed of the reasons for the termination of his contract of employment during a call with his Line Manager, RW1.



89. The Claimant's final dues were paid to him on 4th February 2021. Although the Claimant's employment was terminated on 22nd April 2020, the Respondent erroneously paid him for the entire month of April and the month of May. These payments were deducted from the Claimant's terminal dues.

Submissions

90. Both parties filed written submissions which I have considered. It was submitted on the part of the Claimant that the Respondent did not explain to him in its letter of termination what roles he was unable to carry out. The Claimant argued that all the attempted explanations by the Respondent in furtherance of this ground were made as afterthoughts.

91. The Claimant further submitted that with new finance managers having been inducted and the rollout of the ERP system being finalized in December 2019, the special circumstances that existed in 2019 did not exist in 2020 and therefore there would have been no reason for him to travel as much as he did in 2019.

92. It was further submitted that the restriction on international travel was a temporary measure by the government for a limited period and that the Respondent simply used the travel restrictions as a flimsy excuse to unfairly dismiss the Claimant from work.

93. The Claimant further posited that there was no justification for the Respondent's claim that it was unable to remunerate him.

94. It was his further submission that none of the reasons advanced by the Respondent were substantiated hence no case for frustration arose in relation to the Employment Contract.

95. The Claimant maintained that he was able and willing to perform his duties and there is no proof of any circumstances having occurred that would render him completely unable to perform any of his duties under the Employment Contract.

96. He further contended that the Respondent's Manual at clause 21.4.1 mandated the Respondent to declare him redundant where his employment would be terminated by no reason of his own. In support of this proposition, the case of *Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 others* (2014) eKLR was cited in support.

97. He further argued that if the reason for his termination was justified, the Respondent ought to have declared him redundant. However, no redundancy was declared.

98. The Claimant stated in further submission that the Respondent terminated him because it was attempting to avoid a lawful redundancy by payment in lieu of notice. It was the Claimant's submission that his employment was terminated on account of redundancy.

99. The Claimant further submitted that prior to his termination, he was not accorded an opportunity to make representations on the Respondent's intention to terminate his contract. He contended that the termination was not procedurally fair.

100. In the Claimant's view, the circumstances as stated in the witness statement of RW2 that led to his termination, fall within the definition of redundancy under the *Employment Act* and the Respondent's manual.

101. Referencing the case of *Samuel Mutuku Mutunga v Steel Makers Limited* (2019) eKLR, the Claimant submitted that failure by the Respondent to produce clear records of payment of his final dues was



- done to obfuscate the nonpayment of his entitlement and the intention by the Respondent not to pay him what was due.
102. As to the Respondent's Counterclaim, the Claimant submitted that the allegations made in the Counterclaim are untrue, baseless, malicious and a clear attempt to discredit him in the eyes of this Honourable Court. In the same vein, the Claimant argued that he had demonstrated that, up until his termination, he was diligently performing his duties as envisaged under the Employment Contract and Job Description.
 103. In opening, the Respondent submitted that it is against the backdrop of great uncertainty caused by the COVID-19 pandemic that the Claimant's contract of employment was lawfully terminated on account of frustration.
 104. It was the Respondent's position that Contracts and the law do not function in times of chaos. That during such times, the common law shines its light into the darkness brought by chaos and guides parties to find their way out of the darkness. The Respondent argued that in the instant case, the common law doctrine of frustration was invoked when the COVID-19 pandemic hit the country. In support of its argument, the Respondent cited the case of *Kenya Airways Limited v Satwant Singh Flora* (2013) eKLR.
 105. Referencing the case of *Five Forty Aviation Limited v Erwan Lanoe* (2019) eKLR, the Respondent submitted that the doctrine of frustration applies to excuse further performance of a contract. The Respondent further argued that frustration is distinguished from redundancy in that in the latter situation, there is no unforeseeable supervening event of a fundamental change of circumstances beyond the control and original contemplation of the parties. That a redundancy purely requires a change in operational requirements on the part of the employer. On this score, the Respondent maintained that there was no redundancy situation in this case as alleged by the Claimant or at all.
 106. It was the Respondent's further submission that the Claimant's own evidence indicates that travel was an integral part of the performance of his role and as a result of the pandemic, the Claimant's role could not be performed or could be performed only in a manner not contemplated by the parties to Service Agreement.
 107. The Respondent maintained that the Claimant was unable to continue supervising the country managers in the 11 countries as he was not able to travel. Further, the Respondent relied on donor funding to run its operations, including remuneration of employees but this position drastically changed with the onset of the COVID-19 pandemic. In support of this argument, the Claimant placed reliance on the case of *Jomo Kenyatta University of Agriculture and technology v Kwanza Estate Limited* [2023] KECA 700 (KLR).
 108. The Respondent further submitted that in the circumstances of the pandemic, it did the best it could by invoking the contractual recourse to give payment in lieu of the notice required by clause 18.1 of the Service Agreement.
 109. With respect to its Counterclaim, the Respondent submitted that the Claimant was responsible for the performance of his duties on the MS Navision system. That his juniors performed key duties on the system and he could only perform his duties effectively by logging onto the system and ascertaining the performance of the country managers he supervised. The Respondent contended that failure to do so meant that the Claimant was paid for work not done.
 110. The Respondent further argued that the Claimant, who was a senior official at the Respondent's service, failed to call any evidence to challenge the fact that he failed to log into its MS Navision and perform his duties hence its evidence remains un rebutted.



Analysis and Determination

111. Flowing from the pleadings by both parties, the evidentiary material placed before the Court as well as the rival submissions, the following issues stand out for determination: -
- i. Whether the Claimant's contract of employment was frustrated;
Depending on the answer in (i) whether termination of the Claimant's contract of employment was fair;
 - ii. Whether the Counterclaim is justified;
 - iii. Is the Claimant entitled to the reliefs sought?

Whether the Claimant's contract was frustrated

112. It is evident from the record that the Claimant's employment was terminated on grounds that the contract of employment was frustrated following the COVID-19 global pandemic. This is discernible from the letter of termination dated 22nd April 2020, which is couched as follows:

"Dear Timothy,

Re: Contract of Employment

We refer to your contract of employment with Amref dated 01/10/2019.

further to that contract, you had to carry out the duties of Regional Finance and Special Projects Manager. As you are aware, there are highly restrictive Government/International directives and efforts to contain the COVID-19 pandemic. The resulting circumstances are such that the duties stipulated under your contract of employment cannot now be performed; neither can Amref continue to remunerate you.

Consequently, we regretfully inform you that your Contract of Employment has been frustrated and stands terminated with immediate effect. Your last day of work shall be 22nd April 2020 and you shall be remunerated upto this date.

As the aforementioned circumstances have rendered it impossible to give you the contractual notice period, and in order to provide you with some cushion, against what are likely to be tough financial times ahead, we shall endeavour to pay you two months' salary. Any outstanding leave days will also be paid to you.

In the event the situation improves and Amref advertises these vacancies, please do reapply for this position."

113. Under the common law doctrine of frustration, a contract is treated as discharged by operation of law when an event has occurred which renders continued performance impossible, illegal or radically different to that contemplated by the parties when they entered into the contract. Differently expressed, if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated [See Black's Law Dictionary, 10th ed., p. 785].
114. It is worth pointing out that where a contract of employment is frustrated, it is terminated by operation of law and there is no dismissal. As such, the contract ends automatically and without the fault of either party.



115. Thus, the question that begs to be answered is whether the Claimant's contract of employment was frustrated in light of the circumstances of this case.
116. According to the Respondent, the Claimant's duties required him to travel to its regional offices to physically supervise financial implementation and oversight of projects. To this end, the Respondent cited the international and national travel restrictions into and out of the country. On this account, the Respondent averred that it was impossible for the Claimant to perform his duties across the 11 countries in which it had its operations.
117. In her testimony, RW2 stated that the key purpose of the Claimant's role was to support the country and field offices excluding Kenya and headquarters from the financial point of view. That the country finance staff require considerable help which is delivered face to face through practical assistance hence the reason the Claimant undertook so much travel.
118. She further stated that the special projects element of the Claimant's role was to support the installation and development of the Enterprise Resource Planning (ERP) systems which required his physical presence in order to be effective.
119. Revisiting the Claimant's job description, it is apparent that his overall purpose was to lead and manage the technical supervision and to maintain day to day oversight of the work of the finance managers in country and field offices in Africa. He was also required to provide financial technical oversight on special projects.
120. The Claimant's job description was further broken down into the following principal responsibilities; review of policies and procedures; annual budgeting and planning management; cash flow management; systems development and implementation; proposal development and donor management; audit management; performance management and reporting; technical support; financial accounting; staff management and capacity building; contract management; risk management and special projects.
121. Disputing the reasons advanced for the termination of his employment, the Claimant averred that he had been carrying out his duties on a day to day basis and had been attending the Respondent's offices and working from there every alternative week during the period of the pandemic.
122. The Claimant further averred that he had various ongoing tasks and had projected tasks and duties for the ensuing weeks and months and there was no foreseeable break in his workflow.
123. He further averred that COVID-19 had led to an increase in the amount of work he had to carry out and that he was required to support and review proposal budgets before submission to donors.
124. From the Claimant's perspective, the pandemic did not have any adverse effect on the ability of the Respondent's finance function to perform its normal tasks. To this end, he argued that no aspect of his employment had become impossible to perform.
125. Notably, this position was not discounted by the Respondent. Further, it is notable from the Claimant's job description that his responsibilities were broad and went beyond providing financial technical oversight of special projects and oversight of the work of the finance managers in the country and field offices. In this regard, he was required to inter alia perform duties related to budgeting; cash flow management; financial accounting; review of policies and procedures; systems development and implementation; proposal development and donor management; and risk management.
126. Further, it is common ground that the Claimant undertook 17 work trips outside Kenya in 2019. From his oral testimony, these trips lasted a week each hence he was away for 17 weeks out of 52 weeks in the



- year. Thus, I cannot help but question what the Claimant was doing in the remaining 35 weeks during the year. I can only conclude that he was performing his other roles that did not necessitate travel.
127. With regards to the ERP system, the Claimant averred that as of 22nd April 2020, he had no outstanding or planned trips for the purposes of overseeing the rollout of the system. Again, this position was not converted by the Respondent.
 128. All things considered, I am led to conclude that the contract of employment was not frustrated by the travel restrictions imposed by the Government at the onset of the COVID-19 pandemic. Granted, the restrictions may have altered the manner in which the Claimant would be required to execute his duties moving forward. However, that is not to say that the contract as a whole was frustrated.
 129. In the event there was no work available to allow the Claimant perform the contract of employment, then it follows that Clause 21.4.1 of the Respondent's Employee Manual would have come into play noting that it makes express provisions for a redundancy situation.
 130. The bottom line is that in the circumstances of this case, it cannot be said that the performance of the contract was made completely impossible or radically different from what the parties originally intended.
 131. After all, with the onset of the pandemic, employers quickly adapted to the situation and became innovative. Technology came in handy and virtual work spaces became the new normal. Indeed, this is consistent with the Respondent's approach at the time, seeing that it adopted a Remote Working Policy. Therefore, it is evident that the parties had an alternative way with regards to the manner in which the contract of employment could be performed as initially contemplated.
 132. The second ground advanced by the Respondent in terminating the Claimant's employment is that it could not continue remunerating him.
 133. In her evidence, RW2 stated that a number of proposals for new work in its pipelines were withdrawn and or the timeframe extended for an indefinite period. That cash flow from donors slowed down. She further stated that as of 22nd April 2020, the Respondent found itself incapable of remunerating the Claimant for work he could not effectively perform.
 134. This position was disputed by the Claimant who averred that the Respondent raised over 8 million USD in new grants since the pandemic started. In support of his case, he exhibited communication from the Respondent's CEO to this effect.
 135. Evidently, Section 40 of the *Employment Act* provides for mechanisms and avenues for an employer who is in financial distress to exit an employment contract. What's more Clause 21.4.1 of the Respondent's Employee Manual envisages such a situation at clause (1) in cases where there is need to reduce the workforce as a result of reduced funding. Indeed, if it is true that the Respondent was unable to remunerate the Claimant as a result of reduced cashflow, it follows that such a situation would have called for a redundancy. Why didn't the Respondent exercise this option?
 136. In my respectful view, the Respondent opted for the easiest way out of the employment contract hence elected to cite frustration of contract.
 137. The total sum of my consideration is that the circumstances of this case do not fit the bill of what would be deemed as frustration of contract.
 138. Having so found, it follows that the reasons advanced by the Respondent for termination of the contract of employment were not fair and valid within the meaning of Section 45(2) (a) and (b) of the *Employment Act*. Ultimately, the termination of the Claimant's contract of employment was unfair.



Whether the Respondent's Counterclaim is justified

139. The Respondent avers that the Claimant wrongfully earned 117,104 USD for a period of 16 months during which time he did not present himself in the system designated for the performance of his work. In this regard, the Respondent exhibited log in extracts of the MS Navision system to support its case.
140. Notably, the Claimant's job description provided the resources for his work as being MS Navision Dynamics and Sun Accounting system; established processes and procedures; highly confidential and important management information; and Amref Health Africa financial reports.
141. In his defence, the Claimant averred that between 2019 and 2020, he had clear objectives with clearly defined Key Performance Indicators that were agreed between him and his supervisor. That at no time during the review with his supervisors was the issue of his non-performance raised by the Respondent. He further averred that the MS Navision system was not the only resource designated for the performance of his work.
142. In support of his position, the Claimant exhibited a copy of his Contract Renewal Evaluation in which he was evaluated on 6th August 2019 by his supervisor Mr. Daniel Maina. With respect to that, Mr. Maina made the following comments; "For six months I have been supervising Timothy since January after the restructuring in January 2019. He has provided relevant background and institutional memory on financial management issues. His performance meets expectations."
143. In light of the above appraisal, I find it highly improbable that the Claimant's supervisor would rate him as such if at all, he was not performing his work s required of him.
144. Further, in an email dated 22nd February 2019, Mr. Misrak writes:
- "Based on our meeting this evening with the finance team and Timothy, we required immediate assistance from HQ to support us in this."
145. In light of the foregoing, it is implausible that the Claimant did not work completely as to warrant a refund of the salary paid to him during the period in question.
146. It is on the premises of the foregoing that I disallow the Respondent's Counterclaim. Consequently, the same is dismissed in its entirety with no orders as to costs.

Reliefs

Reinstatement

147. The Claimant has sought for an order of reinstatement. Under the *Employment Act*, the remedy of reinstatement is provided for under Section 49(3) (a). The factors to be considered by a court of law when deciding whether to grant an order reinstatement, are spelt out in Section 49(4).
148. Further, in terms of Section 12 (3) (vii) of the *Employment and Labour Relations Court Act*, this Court can only order the reinstatement of an employee within three years of dismissal. The Claimant in this case was terminated from employment with effect from 22nd April 2020. Therefore, as at now, an order of reinstatement is not feasible as it will be contrary to Section 12 (3) (vii) aforesaid.

Compensatory Damages

149. The Claimant has sought maximum compensation under this head. Taking into consideration the length of the employment relationship, the circumstances attendant to the termination of the



Claimant from employment and most of all the fact that the Court has found that the said termination was unfair, the Claimant is awarded compensatory damages equivalent to six (6) months' salaries for the unfair termination under section 49(1) (c) of the *Employment Act*.

Unpaid terminal dues

150. The Claimant further seeks the sum of 8,229.85 USD being unpaid terminal dues.
151. By its very nature, the Claimant's claim constitutes a specific claim. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as the circumstances permit. In this case, the Claimant did not particularize his claim as required. He merely threw in a global figure without demonstrating how he arrived at the same.
152. In this regard, I cannot help but question how the Claimant arrived at the figure of 8,229.85 USD. What did it constitute? In as much as the Claimant exhibited his computation of the expected terminal dues vis a vis what was paid, the same was not included in his Further Amended Claim.
153. It is apparent from the said computation that the same constitutes unpaid salary, notice pay and leave pay. Why didn't the Claimant provide better particulars of his claim by including the said components? That way, the Respondent would have responded appropriately and put in evidence, if it so wished.
154. In the circumstances, I cannot help but disallow the Claimant's claim under this head.

Severance Pay

155. As the court has awarded the Claimant compensatory damages, the claim for severance is declined. In so holding, the Court is guided by the principle a "fair go all round" which requires the court to balance the interests of the employer and that of the employee.

Orders

156. In the end, I enter Judgment in favour of the Claimant against the Respondent in the following manner:
 - a. A declaration that the Claimant's termination from employment by the Respondent, was unfair.
 - b. The Claimant is awarded compensatory damages in the sum of 66,414 USD being equivalent to six (6) months of his gross salary.
 - c. Interest on the amount in (b) at court rates from the date of Judgment until payment in full.
 - d. The Claimant shall also have the costs of the suit.
 - e. The Counterclaim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI THIS 20TH DAY OF MARCH, 2024.

STELLA RUTTO

JUDGE

In the presence of:

Mr. Ndung'u for the Claimant

Ms. Muturi instructed by Ms. Ngige for the Respondent



Millicent Kibet Court Assistant

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 had 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.

