

## 2026 SEPTEMBER | Employment

### What Happens to an Employment Contract When a Work Permit Expires?

*Mastermind Tobacco (K) Limited v Romano (Civil Appeal 19 of 2018) [2023] KECA 635 (KLR)*

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#### 1. Background

- 1.1. The Respondent, Nicola Romano, was employed by the Appellant, Mastermind Tobacco (K) Limited, between November 2011 and March 2014 as a specialised agronomist in the position of Technical Support Manager. At the commencement of his employment, the Appellant secured a work permit for him from the Immigration Department, which was issued on 6 November 2011.
- 1.2. Prior to the expiry of the work permit on 28 December 2013, the Appellant applied for its renewal, paid the prescribed renewal fee, and was issued with an acknowledgment slip dated 28 November 2013 by the Immigration Department.
- 1.3. The Respondent's work permit expired on 28 December 2013 before the renewal application had been determined. However, the Appellant's Human Resources Department assured him that the renewal process was ongoing, and the Appellant continued to retain and remunerate him on the same terms pending determination of the renewal application.
- 1.4. On 28<sup>th</sup> January 2014, the Respondent injured his right knee and was treated at Nanyuki Cottage Hospital. He was subsequently referred to an orthopaedic surgeon, who recommended eight (8) weeks' bed rest and further consultations on 7<sup>th</sup> February 2014 and 5<sup>th</sup> March 2014. The Respondent duly informed the Appellant's Human Resources Manager of his injury.
- 1.5. On 10<sup>th</sup> March 2014, the Respondent received an email requesting him to attend a meeting with the Deputy Human Resources Manager, where he was informed that the Managing Director intended to relieve him of his duties. At the meeting, the Respondent requested two months' unpaid leave to enable him to recuperate, given that his position involved substantial field work. He was subsequently issued with a letter terminating his employment with effect from 13<sup>th</sup> March 2014. The letter stated that his work permit had expired on 28<sup>th</sup> December 2013 and that management had no intention of renewing it.
- 1.6. The Respondent challenged the termination before the Employment and Labour Relations Court ("ELRC"), contending, among other things, that the

real reason for the termination was his knee injury and that the termination was unlawful and violated his right to fair labour practices.

1.7. On its part, the Appellant maintained that the Respondent's employment was dependent upon on a valid work permit and that, once the permit was not renewed, any continued employment was untenable and illegal under the Kenya Citizenship and Immigration Act, 2011.

1.8. The ELRC decided in favour of the Respondent, holding that his dismissal was unlawful and unfair for want of a valid reason under section 43 of the Employment Act, 2007, and that his right to fair labour practices under Article 41 of the Constitution had been violated. In particular, the ELRC found that the Respondent's ill health had led the Appellant not to conclude the renewal of his work permit and, ultimately, to terminate his employment. The Court stated that although the Appellant had applied for renewal of the work permit with a view to continuing to engage the Respondent in employment, things changed when the Respondent was injured and requested two months' unpaid leave. The request for leave was never considered. The Court further held that, although a work permit was a statutory requirement necessary for the legitimate implementation of the contract of service, in the absence of an express contractual provision making the lack of a work permit a frustrating event, the absence of the permit did not, by itself, bar the parties from pursuing their respective rights and obligations under the employment contract.

1.9. Aggrieved by the decision of the ELRC, the Appellant appealed to the Court of Appeal, arguing, among other grounds, that the learned Judge had erred in finding that a valid and enforceable employment contract existed after the Respondent's work permit had expired, and in finding that the Appellant had terminated the Respondent's employment on account of his knee injury.

## **2. Court of Appeal's Determination**

2.1. The Court of Appeal identified three issues for determination:

2.1.1. whether there was a valid contract of employment between the parties

2.1.2. whether the Respondent's dismissal was unlawful and unfair for want of a valid reason under section 43 of the Employment Act, 2007; and

2.1.3. whether the Respondent had been rightfully compensated by the ELRC.

2.2. On the validity of the employment relationship, the Court considered sections 45 and 53 of the Kenya Citizenship and Immigration Act, 2011. The Court noted that section 45 prohibits the employment of a foreign national whose immigration status does not authorize him or her to engage in employment and places a duty on an employer to obtain a work permit or pass authorizing a foreign national to engage in employment before employing him or her. Section 53, on the other hand, makes it an offence for a foreign national to engage in employment without a valid work permit and for an employer to

knowingly employ a foreign national who is not authorised to work in Kenya.

- 2.3. Although the Respondent's work permit had expired on 28 December 2013, the Appellant had already applied for its extension for a further two years. The Appellant thereafter continued to retain the Respondent in employment and remunerated him on the same terms in January and February 2014. The Court found that, by its conduct and actions, the Appellant had demonstrated an intention to continue having the Respondent as its employee.
- 2.4. The Court held that the Respondent's continued employment after the expiry of his work permit did not render the employment contract illegal. Instead, the expiry of the work permit gave rise to intervening circumstances which rendered the continued sustenance of the contract between the parties impossible. The Court held that, at that point, the Appellant ought to have invoked sections 41, 43 and 45 of the Employment Act, 2007 to terminate the contract on the basis that it had been frustrated. The Court agreed with the ELRC that the procedures under those provisions had not been followed.
- 2.5. In reaching this conclusion, the Court referred to *Five Forty Aviation Limited v Edward Lanoe* [2019] eKLR, where the Court had held that parties to a frustrated employment contract may have recourse to the terms of the contract itself or, alternatively, to the termination procedures prescribed under sections 41, 43 and 45 of the Employment Act, 2007.
- 2.6. The Court also distinguished *Kenya Airways Limited v Satwant Singh Flora*, where the employee's contract expressly provided that his continued employment was subject to the renewal of his work permit. In that case, the employee was given three months' notice of termination when his work permit was not renewed, and the Court held that continued employment without a valid work permit would have been illegal.
- 2.7. In contrast, in the instant case, there was no clear fixed-term tenure and no express contractual provision providing that the Respondent's employment would terminate if his work permit was not extended. The Court therefore held that, although a work permit was a statutory requirement necessary for the legitimate implementation of the employment contract, the absence of the permit did not, in itself, preclude the parties from pursuing their respective rights and obligations under sections 41, 43 and 45 of the Employment Act, 2007.
- 2.8. Ultimately, the Court concluded that there was a valid contract of employment between the parties and that the Respondent's dismissal had not been validly undertaken as required under section 43 of the Employment Act, 2007. The Court further found that the ELRC was entitled to grant the reliefs awarded in its judgment. Accordingly, the appeal was dismissed with costs.

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