



**Njiru v Attorney General (Civil Case 4 of 2018)
[2023] KEHC 19790 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19790 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL CASE 4 OF 2018
LM NJUGUNA, J
JULY 3, 2023**

BETWEEN

PETER MUTHUCI NJIRU PLAINTIFF

AND

ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The matter for determination before the court is a claim vide the plaintiff's further amended plaint dated April 21, 2017 wherein the plaintiff sought for reliefs that:
 - i. A declaration that the deduction from his dues and non-payment of the plaintiff's pension is illegal and/or unlawful and a further order directing the defendant to release all benefits and / or dues to the plaintiff including his monthly pension.
 - ii. Special damages of Kes 599,431.00/-
 - iii. General damages.
 - iv. Costs of this suit and interest from 2008.
 - v. Any other relief that this Honourable court may deem fit and just to grant.
2. The plaintiff's suit in a nutshell is hinged on the fact that while he was working as Provincial Development engineer at the Provincial Water Offices, Eastern Province, he lived in the houses previously occupied by the Norwegian citizens for a project known as Water and Financial Management (WAFIM). That there broke up diplomatic relations which led to the Norwegian government abandoning the project and as a result, the houses remained empty. That the houses were being vandalized and on May 1, 1995, the plaintiff was asked to move to a one of the houses to offer security just like other occupants too. He averred that he was deducted by the government of Kenya an amount of money totaling to Kes 1, 015, 940 unfairly yet the said houses at that specific time did



- not belong to the government. He therefore sought a declaration that the said deductions were illegal and a further order for release of his benefits.
3. The defendant in opposition filed a memorandum of response dated December 11, 2017 wherein all the averments by the plaintiff were denied.
 4. The court gave directions that the suit be canvassed by way of *viva voce* evidence and thereafter parties file written submissions which direction both parties complied with.
 5. The plaintiff submitted that while he was working as a Provincial Development Engineer at the Provincial Water Offices, Eastern Province, he was asked to move to a house at a place called SIDA village to offer security to the said houses for the same had been vandalized. That the houses did not belong to the Kenyan Government as the same had been built by the Norwegian Government and therefore, no one was paying rent. On September 2, 1996, a communication was issued to Accounts Department of the Water Ministry directing the plaintiff to pay house rent for the house and recovery of house allowance was paid to the plaintiff from May 1, 1995. The amount recovered was Kes 165,940.00 which was effected in the year 1999. It was his case that on November 20, 2001, the amount was revised to Kes 5,000.00, amount which he paid till retirement in the year 2008. He contested that the amount deducted by the government was not deserving as the houses did not belong to the government, in that, the same would have required that a house is registered and the occupant goes through the process of allocation. It was therefore prayed that as the recovery of the amounts deducted was unfair, he thus deserved a refund of the same.
 6. The defendant in his submissions coined two issues for determination to wit: whether the deductions made from the plaintiff's salary and pension were legal and justifiable and whether the plaintiff is entitled to the damages sought.
 7. On the first issue, it was submitted that the plaintiff did not challenge the move by the ministry in stopping his house allowance on the ground that he was in occupation of an institutional house and a further unilateral action of unfair recovery of Kes 165,490. Reliance was placed on the Court of Appeal decision in *Kenya National Examinations Council Vs Republic Ex parte Geoffrey Gathenji Njoroge & Others* Civil Appeal No 266 of 1996 (CAK) [1977] eKLR, Section 13 of the *Pensions Act* and Regulation L2 of the Public Service Code Regulations 2006. That the Ministry of Water acting as an implementing agent for the Ministry for Housing was able to recover rent arrears from the plaintiff's salary as guided by the Ministry of Housing until the plaintiff attained the retirement age. It was submitted that the deductions were legal and justifiable as they were rent arrears owed by the plaintiff.
 8. On whether the plaintiff is entitled to any of the damages sought, it was submitted that special damages must not only be pleaded but also proved. Reliance was placed on the cases of *Hahn Vs Singh*, Civil Appeal No 42 of 1983 [1985] KLR 716 and *Christine Mwigina Akonya Vs Samuel Kairu Chege* [2017] eKLR. In conclusion, this court was urged to dismiss the suit herein with costs to the defendant.
 9. I have considered the suit herein and I find that the main issue for determination is whether the same has merits.
 10. The plaintiff in this matter has averred that the alleged houses did not belong to the Kenyan Government as the same had been built by the Norwegian and therefore, he ought not to have been paying the rent. That the amount deducted by the government was not deserving as the houses did not belong to the government in that the same would have required that a house is registered and the occupant pass through the process of allocation. It was therefore argued that the recovery of the amounts deducted was unfair, he thus deserved a refund of the same.



11. The *Government Lands Act* Cap 280 Laws of Kenya (now repealed), gives the Commissioner of Lands power to allocate ‘unalienated Government land.’ The said Act goes on to provide the procedure for the same. Unalienated Government land is defined in the Act as: ‘Government land which is not for the time being leased to any other person, or in respect of which the Commissioner had not issued any letter of allotment.’
12. It therefore follows that the land wherein the Norwegians built the houses was alienated by the government so that the said project known as Water and Financial Management (WAFIM) could be actualized. After the said Norwegians citizens had left, it automatically remains clear that the said project reverted back to the government. The same is buttressed by the plaintiff himself when he submitted that they were asked to occupy the houses as security was needed to stop the vandalism that was being occasioned on the houses.
13. Further, in the case of *Niaz Mohamed Jan Mohamed Vs Commissioner for Lands & 4 Others* Hccc No 423 of 1996, the court held that land acquired in public interest cannot be alienated and allocated to private individuals, even a portion thereof. [Also see *Timothy Ingosi & 87 Others v Kenya Forestry Services & 2 Others* [2015] eKLR].
14. It therefore translates to the fact that Kenyan government having alienated, leased and/or licensed the land for the said project, the fact that there ensued diplomatic row between the Norwegian government and the Kenyan government, the same did not defeat the fact that the land and the structures thereon belonged to the Kenyan government
15. Article 40 of the *Constitution* states as follows;

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - a. of any description; and
 - b. in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
 - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—



- i. requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- 4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

....."

(See Article 40 of the [Constitution](#))

16. Having found that all that land whereon the project was carried out belonged to the government and so the structures on it, the question that I ask myself therefore is whether the government erred in deducting the amount owed from the salary and/or benefits of the plaintiff?
17. The provision of housing to government employees is governed by the Code of Regulations (Revised 2006) which state in part as follows;

Section L - Government Housing

Introduction

This section deals with the rules governing the provision of Government quarters and related matters. The long term policy of the Government is to gradually move away from the responsibility of housing civil servants with the aim of paying a consolidated wage. In this connection, the Government pays civil servants House Allowance pegged at market rates and charges market rates for its houses.

In addition, the Government intends to sell all non-institutional houses to civil servants through a tenant mortgage scheme. It will also provide mortgage to Civil servants to acquire houses. However, the Government will continue to provide institutional housing for staff working in essential institutions such as schools, hospitals and at remote stations." [Emphasis mine]

18. Section L.1 of the Code of Regulations (Revised 2006) entitles the employee to House Allowance and it states as follows;

- "i. All civil servants are eligible to automatic house allowance applicable to their grades as stipulated in Government Circulars issued from time to time.
- ii. An officer who has been allocated a Government owned quarter, by the appropriate Housing Allocation Committee or an institutional house by his Permanent Secretary or Head of Department, will be required to pay the market rent for the house allocated as determined by the Ministry responsible for housing.
- iii. Government housing will be restricted to officers whose housing will be considered to be strategic in view of the nature of their work. These include houses for disciplined services, institutional houses, State Houses, State Lodges and Staff quarters, houses situated in water supply/treatment works, forests stations, historical sites and other houses which the Government has identified as strategic.



- iv. Officers occupying institutional houses and whose services have been categorised as essential to the respective institutions will pay the market rents applicable to the quarters or surrender their house allowance whichever is lower." [Emphasis mine]
19. The provision of house allowance is consistent with provisions of the Section 31 of the *Employment Act* which provides that;
 - 31(1) "An employee shall at all times at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment or shall pay to the employer such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee obtain reasonable accommodation."
20. Section 17 of the *Employment Act* protects the salary of an employee from being deducted. The only exception to the foregoing right is in the few instances provided for under Section 19 of the Act which are either automatic taxes to the government, levies to social security, or court awards or deductions consented to by the employee. [See *Richard Were & 11 others Vs Permanent Secretary Ministry of Health & 3 others* [2013] eKLR].
21. Therefore, having found that the said houses belonged to the employer who in this case is the government, therefore it follows that the employer was within the law to deduct the rent from the plaintiff's salary and/ or benefits.
22. The plaintiff in the same breadth stated that in January, 2012, the ministry carried out a re-assessment of market rent of the said establishment to that of the surrounding environment and comparable houses were charged more that Kes 12,000.0. That the rent of Kes 12,000.00 could only apply after the 2012 re-assessment was done and therefore the same ought not to have applied to him given that he retired in the year 2008.
23. It is trite that rent not being one of the automatic statutory levies or an award from a court of law; consequently the employer was bound by Section 17 and 19 of the Act to secure a consent from the plaintiff before effecting the new rent rates. If the plaintiff could have refused to agree, then the defendant could have commenced the relevant proceedings as a landlord to seek authority to first hold the plaintiff liable to pay the new rent rates and if he failed, to enforce its rights as a landlord as provided by the law. The decision to use its power as employer to take a short cut in effecting the rent rates was not only mischievous but unlawful.
24. In my view, the same infringed on the plaintiff's legal rights to protection from unlawful deduction of his salary as he was not notified of the same or given an opportunity to decide whether he could vacate the said house. In reference to the above therefore, I enter judgment as follows:
 - i. A declaration is hereby issued that the deduction from the claimant's dues on account of accrued rent is illegal.
 - ii. Special damages of Kshs 599,431/=.
 - iii. The plaintiff is hereby awarded Costs of the suit and interest from the date of filing of the suit to date.
25. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

