

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. E106 OF 2023**

JANE MOKUA.....1<sup>ST</sup> CLAIMANT  
VENNAH KWAMBOKA .....2<sup>ND</sup> CLAIMANT  
JAMES KURIA.....3<sup>RD</sup> CLAIMANT  
MARTHA NJOGU.....4<sup>TH</sup>  
CLAIMANT  
SAMWEL RUTTO.....5<sup>TH</sup> CLAIMANT  
EMMANUELLA ATITO.....6<sup>TH</sup> CLAIMANT  
  
VERSUS  
EASTERN AFRICA GRAIN  
COUNCIL.....RESPONDENT

**JUDGMENT**

1. The Claimants filed a joint Memorandum of Claim dated 14<sup>th</sup> February 2023, wherein they aver that they were all employees of the Respondent until their respective terminations from employment on diverse dates. They further claim that the Respondent has failed, refused, and/or neglected to pay them gratuity due upon termination, hence this claim.

2. In response to the claim, the Respondent contends that upon termination of the Claimants' respective contracts of employment, it duly settled all their outstanding dues and remitted part of the gratuity contributions through the authorized fund manager.
3. The Respondent further avers that at all material times, it made full disclosure to the Claimants regarding the status of the unremitted gratuity arrears with the fund manager and expressed its clear intention and willingness to remit the outstanding amounts once funds became available.
4. Consequently, the Respondent denies breaching the Claimants' contracts of employment through any refusal, neglect, or failure to remit the gratuity arrears accrued during their employment.
5. In rejoinder, the Claimants aver that prior to instituting the present suit, the last communication from the Respondent regarding the status of their gratuity arrears was on 18<sup>th</sup> November 2020. They therefore contend that the Respondent cannot be said to have maintained full disclosure on the status of the unremitted gratuity amounts.

6. It is worth noting that in the course of the proceedings, the claims by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Claimants were compromised following an out of court settlement between the parties. The only residual issue for the Court's determination in respect of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants was that of costs, which shall be addressed at the conclusion of this Judgment.
7. With respect to the claims by the 1<sup>st</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Claimants, the matter was heard on 11<sup>th</sup> February 2025 and 5<sup>th</sup> June 2025, during which all parties presented oral evidence in support of their respective cases.

#### **Claimants' case**

8. The 6<sup>th</sup> Claimant, **Emanuella Atito**, testified in support of her case as CW1. At the commencement of the hearing, she adopted her witness statement to constitute her evidence in chief. She proceeded to produce the list and bundle of documents filed alongside the Memorandum of Claim as her exhibits before the Court.
9. CW1 testified that on or about October 2018, the Respondent, through a contract of employment, offered her the position of Programme Officer for the period 21<sup>st</sup> October 2018 to 20<sup>th</sup> October 2021.

10. She accepted the offer and diligently performed her duties until 30<sup>th</sup> March 2020, when the Respondent issued her with a notice of termination citing financial constraints. Her last working day was 30<sup>th</sup> April 2020.
11. CW1 further stated that the notice of termination indicated that, among other terminal dues, her gratuity would be paid upon completion of the clearance process with the Respondent.
12. She averred that under the terms of her contract of employment, the Respondent was obligated to pay her gratuity at the rate of 20% of her monthly basic salary for each completed contract period upon cessation or expiry of the contract.
13. CW1 added that by a letter dated 20<sup>th</sup> July 2020, the Respondent acknowledged outstanding gratuity arrears covering the period January 2019 to April 2020, amounting to Kshs. 542,363.49.
14. She further testified that through a subsequent letter dated 18<sup>th</sup> November 2020, the Respondent undertook to remit the outstanding gratuity arrears at the earliest opportunity.

15.CW1 contended that despite having completed the clearance process and submitting her gratuity claim form, the Respondent has failed, neglected, and/or refused to pay the said gratuity.

16.In closing, CW1 asked the court to allow her claim as prayed.

17.The 1<sup>st</sup> Claimant, **Jane Mokuu**, testified in support of her case as CW2. Equally, she adopted her witness statement as her evidence in chief and produced the list and bundle of documents filed alongside the Memorandum of Claim as her exhibits before the Court.

18.CW2 testified that on or about May 2019, the Respondent, through a contract of employment, offered her the position of Programme Administration Manager for the period 2<sup>nd</sup> May 2019 to 1<sup>st</sup> May 2022. She accepted the offer and diligently performed her duties until 30<sup>th</sup> March 2020, when the Respondent issued her with a notice of termination citing financial challenges. Her last working day was 30<sup>th</sup> April 2020.

19.CW2 further stated that the notice of termination indicated that, among other terminal dues, her gratuity would be disbursed upon completion of the clearance process with the Respondent.

20. She averred that under the terms of her employment contract, the Respondent was obligated to pay her gratuity at the rate of 20% of her monthly basic salary for the completed contract period upon leaving employment, provided she had served for at least one year.

21. CW2 further testified that upon clearing with the Respondent, she was issued with letters dated 20<sup>th</sup> July 2020 and 18<sup>th</sup> November 2020, in which the Respondent undertook to pay the gratuity arrears at the earliest opportunity.

22. CW2 contended, that despite completing the clearance process, the Respondent has failed, neglected, and/or refused to pay her gratuity for the period January 2019 to April 2020, amounting to **Kshs. 851,731.27**.

23. According to CW2 she has suffered loss and damage as a result of the Respondent's breach of the employment contract.

24. The 5<sup>th</sup> Claimant, **Samwel Rutto**, testified in support of his case as CW3. Similarly, he adopted his witness statement to constitute his evidence in chief and produced the list and bundle of documents filed alongside the Memorandum of Claim as his exhibits before the Court.

25.It was CW3's testimony that on or about September 2017, the Respondent, through a contract of employment, offered him the position of Regional Manager – Structured Trading Systems for the period 1<sup>st</sup> September 2017 to 31<sup>st</sup> August 2022.

26.He accepted the offer and diligently performed his duties until 30<sup>th</sup> March 2020, when the Respondent issued him with a notice of termination citing financial challenges. His last working day was 30<sup>th</sup> April 2020.

27.CW3 further averred that the notice of termination indicated that, among other terminal dues, his gratuity would be paid upon completion of the clearance process with the Respondent.

28.He testified that under the terms of his employment contract, the Respondent was obligated to pay him gratuity at the rate of 10% of his monthly basic salary for each completed contract period upon cessation or expiry of the contract.

29.CW3 further stated that by a letter dated 20<sup>th</sup> July 2020, the Respondent acknowledged outstanding gratuity arrears for the period January 2019 to April 2020, amounting to Kshs. 1,097,914.62.

30.He added that through a subsequent letter dated 18<sup>th</sup> November 2020, the Respondent committed to remit the outstanding gratuity arrears at the earliest possible time.

31.CW3 contended that despite clearing with the Respondent and submitting his gratuity claim form, the Respondent has failed, neglected, and/or refused to pay him the said gratuity.

32.That as a result of the Respondent's breach of the employment contract, he has suffered loss and damage.

### **Respondent's Case**

33.The Respondent called one witness, **Gerald Masila**, who testified as RW1. Mr. Masila identified himself as the Respondent's Chief Executive Director. Similarly, he adopted his witness statement constitute his evidence in chief. He further produced the pleadings together with the list and bundle of documents filed on behalf of the Respondent as exhibits before the Court.

34.RW1 testified that with the conclusion of several critical projects in 2018 and 2019, which the Respondent had been implementing through financial support

from major partners, the organization began experiencing serious financial challenges. RW1 stated that this made it difficult for the Respondent to meet its operational costs, including sustaining the Claimants' employment. Consequently, the Respondent's creditors' obligations exceeded its receivables, thereby adversely affecting its working capital position as at 31<sup>st</sup> December 2019.

35. RW1 further averred that the financial support from the Respondent's key partners accounted for approximately 70% of the financing of its Strategic Plan for the period 2014 to 2019.

36. He testified that in an effort to retain the Claimants within the organization, the Respondent offered them consultancy contracts, which they declined, opting instead to have their contracts of employment terminated.

37. RW1 stated that as a result, the Claimants' employment contracts were terminated on account of the Respondent's financial constraints, which he maintained persist to date. Upon termination, the Respondent made several payments to the Claimants in respect of their terminal dues and gratuity contributions through the authorized fund manager.

38.He further stated that at all material times, the Respondent made full disclosure to the Claimants regarding the status of the unremitted gratuity arrears with the fund manager and consistently expressed its willingness to remit the outstanding amounts once funds became available.

39.RW1 added that the Respondent's financial challenges affected not only the Claimants but all its employees, resulting in delays in the payment of gratuity contributions across the board.

40.RW1 was categorical that it was an express term of the Claimants' employment contracts that the sustainability of their positions was subject to the availability of funding to the Respondent.

41.RW1 further testified that the Respondent has made significant efforts to pay the Claimants their full salary arrears and continues to make every effort to source funds to settle the outstanding gratuity arrears owed to the Claimants as and when funds become available.

42.In conclusion, RW1 maintained that the Respondent had not breached the Claimants' contracts of employment.

## Submissions

43. In their submissions, the Claimants argued that although gratuity is not expressly provided for under the Employment Act, it becomes an enforceable contractual right once incorporated into the terms of employment or a collective bargaining agreement. In support of this position, they relied on the decisions in **Bamburi Cement Limited v William Kilonzi [2016] eKLR** and **Bamburi Cement Ltd v Farid Aboud Mohammed [2016] eKLR**.

44. In the same vein, the Claimants contended that the express contractual provisions and the Respondent's written acknowledgments leave no doubt that gratuity was a fundamental term of their employment. They maintained that having served for over one year, they had satisfied the contractual conditions necessary to earn this entitlement.

45. The Claimants further submitted that the Respondent's persistent failure, neglect, and/or refusal to pay the acknowledged gratuity arrears despite repeated commitments and having settled similar dues for other former employees, amounts to a clear and discriminatory breach of contract.

46. The Respondent, on the other hand, submitted that it acted in good faith towards the Claimants prior to and after termination of their employment contracts.

47. The Respondent further contended that it did not breach the Claimants' employment agreements, having fully complied with Clause 8 of the standard employment contracts governing gratuity. In support of this position, the Respondent cited the cases of **Nelson Keshei v Narok County Government & Another [2019] eKLR** and **Bamburi Cement Ltd v Farid Aboud Mohammed [2016] eKLR**.

#### **Analysis and Determination**

48. Having considered the pleadings, the evidence on record, and the parties' respective submissions, the Court finds that the principal issue for determination is whether the Claimants have established entitlement to the reliefs sought, and in particular, the claim for gratuity.

49. The Claimants' contracts of employment were in similar terms and provided at Clause VIII as follows:

*“The employer or its appointed agent shall pay the employee a gratuity of 20% of the monthly base salary for the completed contract period upon leaving employment, subject to the restriction described below, or upon expiry of the contract. Funding of the EAGC shall always determine the sustainability of this agreement.”*

50. From the foregoing clause, it is clear that the payment of gratuity was an express term of the Claimants' employment contracts. The Court further notes that the Respondent expressly linked the fulfilment of this obligation to the availability of funds. Notably, the Respondent has relied on this provision to justify the delay in remitting the Claimants' gratuity.

51. Be that as it may, it is noteworthy that upon termination of the Claimants' respective employment contracts, the Respondent issued standard termination notices expressly indicating that payment of gratuity would be effected upon completion of the clearance process.

52. It follows, therefore, that at the point of termination, the only condition attached to the payment of gratuity by the Respondent was the completion of the clearance process. Notably, there was no reference to financial hardship as a factor affecting the payment of gratuity.

53. The Respondent further reaffirmed its commitment to pay the Claimants' gratuity through letters dated 18<sup>th</sup> November 2020, wherein it acknowledged that the Claimants had completed the clearance process and specified the gratuity amounts that remained unremitted for the period between January 2019 and April 2020, undertaking to settle the same at the earliest opportunity.

54.It is evident that the Respondent has not remitted the Claimants' gratuity to date, thereby precipitating the filing of the present suit.

55.The Court has carefully considered the explanation advanced by the Respondent for its failure to remit the Claimants' gratuity, namely, financial constraints. While this may be the case, such constraints do not absolve the Respondent from its contractual obligations to the Claimants. This is bearing in mind that the Respondent made several written commitments to pay the Claimants' gratuity without citing financial hardship as a hindrance.

56.The Court therefore finds the Respondent's express acknowledgment and repeated commitments to settle the Claimant's gratuity as constituting clear evidence of liability on its part.

57.In the circumstances, the Court finds that the Claimants have proved their claim for gratuity on a balance of probabilities. Accordingly, the Respondent is liable to honour its contractual obligation by paying the Claimants their accrued gratuity.

### **Orders**

58.Accordingly, the Court enters judgment in favour of the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Claimants and directs the Respondent to remit their gratuity as follows: -

- a) 1<sup>st</sup> Claimant Kshs 851,731.27;
- b) 5<sup>th</sup> Claimant Kshs 1,097,914.62;
- c) 6<sup>th</sup> Claimant Kshs 542,363.49; and
- d) Interest shall accrue on the above amounts at court rates from the date of filing the suit until payment is made in full.

59. As it is the Respondent's omission that occasioned the present suit, it shall bear the costs arising from this claim, including those of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants.

**DATED, SIGNED and DELIVERED at NAIROBI this 21<sup>st</sup> day of October, 2025.**

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimants	No appearance
For the Respondent	Mr. Kimata
Court assistant	Millicent

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**STELLA RUTTO**

**JUDGE**