

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

**CAUSE NO. E816 OF 2022**

**JOHN NJUGUNA RUGU.....**  
**CLAIMANT**

**VERSUS**

**BANKING INSURANCE & FINANCE UNION (K)**  
**.....RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant has instituted this action to challenge the Respondent's decision to suspend him from work. He contends that the suspension was unlawful. He also seeks various other reliefs as set out in the amended Statement of Claim.
2. The Claimant avers that the Respondent hired him to the position of Recruitment and Organization Officer with effect from 6<sup>th</sup> October 2014. He contends that his salary was agreed at Ksh. 50,560.00.
3. The Claimant avers that he worked diligently until 18<sup>th</sup> October 2022 when the Respondent issued him with a letter purporting to suspend him from duty. He believes that the suspension was an attempt to silence him for whistle blowing about alleged malpractices within the Respondent.

He contends that the Respondent's officials had irregularly awarded themselves huge salaries which he says he attempted to expose before he was suspended from work.

4. The Claimant avers that the suspension was indefinite and therefore unlawful. As such, he prays that the court lifts it and reinstates him back to his employment.
5. Besides the dispute about the suspension, the Claimant raises various other grievances in respect of which he seeks a number of reliefs. First, he avers that for the entire of the period he served the Respondent, he did not utilize his leave days. As such, he prays for leave commutation.
6. Second, he contends that the Respondent did not pay him house allowance for the entire period of his contract. Consequently, he prays that the court orders it (the Respondent) to pay him the accumulated house allowance.
7. Third, he contends that although the Respondent was deducting from his salary contributions meant for the National Social Security Fund, it did not remit all the deductions to the agency. As such, he seeks an order to recover the unremitted amounts.
8. Fourth, he avers that the Respondent did not remit some of his contributions to the CIC Jipange Pension Plan. Consequently, he seeks an order to recover the unremitted sums.

9. Fifth, he contends that the Respondent did not pay him salary for October 2022. As such, he seeks an order for payment of the outstanding salary.
10. In response, the Respondent admits that it suspended the Claimant from employment through its letter to him dated 18<sup>th</sup> October 2022. However, it denies that the suspension was indefinite and for no cause.
11. The Respondent contends that the Claimant took a screenshot of a pay cheque for its (the Respondent's) acting General Secretary without permission and shared it with third parties. It contends that this action breached the acting General Secretary's right to privacy. It avers that the Claimant's conduct amounted to gross misconduct for which he was suspended from work.
12. The Respondent avers that the suspension was for a limited period of one month. It contends that the Claimant was subsequently subjected to a disciplinary hearing where after the suspension was lifted.
13. The Respondent contends that although the Claimant's suspension was lifted, it sent him on terminal leave pending his retirement since he had surpassed the mandatory retirement age of sixty (60) years. As such, it contends that the Claimant's employment was lawfully terminated through retirement on account of age.

14. The Respondent contends that the Claimant was on a consolidated salary. As such, it avers that he is not entitled to claim house allowance as a standalone benefit.
15. The Respondent further disputes the Claimant's claim for accrued leave. It contends that he has not demonstrated that he is owed accrued leave. As such, it prays that the claim for leave be disallowed.
16. The Respondent contends that contrary to the Claimant's assertion that he was not paid salary for October 2022, it paid him salary for October, November and December 2022. As such, it avers that his claim for salary arrears is dubious.

#### **Issues for Determination**

17. After evaluating the pleadings and evidence on record, the following issues fall for determination:-
  - a) Whether the Claimant was unlawfully suspended from duty?
  - b) Whether the Claimant is entitled to the reliefs which he seeks in these proceedings.

#### **Analysis and Determination**

18. The Claimant has challenged the Respondent's decision to suspend him from employment pending disciplinary action against him. He contends that the Respondent suspended him from duty without first hearing him. He further asserts that the suspension was indefinite and therefore unlawful.
19. The Respondent disputes this contention. It avers that it was justified in suspending the Claimant from service. It contends

that the Claimant misconducted himself when he took a screenshot of the pay cheque for its acting General Secretary and shared it with third parties without authorization. As a result, the Respondent contends that the Claimant was suspended in order to facilitate investigations and disciplinary action against him. It further avers that the suspension was for a limited period of one month.

20. The Respondent contends that suspending the Claimant from duty was within its prerogative as his employer. As such, it avers that there was nothing irregular about the decision.
21. The Respondent further contends that the suspension was in any event lifted after the disciplinary case against the Claimant was heard and concluded. As such, it contends that the Claimant's challenge of the decision has been overtaken by events.
22. An administrative suspension occurs when an employee is removed from the workplace in order to conduct investigations against him. The removal is usually intended to be for a limited duration to enable the investigations. As such, an indefinite suspension is deemed irregular (see ***Mutwol v Moi University [2022] KECA 537 (KLR)*** & ***Shibira v Board of Directors Vihiga County Farmers Sacco Society [2023] KEELRC 190 (KLR)***).
23. In the instant case, the Respondent issued the Claimant with a letter dated 18<sup>th</sup> October 2022 through which it suspended

him from the workplace. The letter stated that the suspension was to last until further notice to enable the Respondent conduct investigations into alleged misconduct by the Claimant.

24. It is true that the letter of 18<sup>th</sup> October 2022 did not set specific timelines for the suspension. However, the Respondent lifted the suspension on 1<sup>st</sup> December 2022 after it (the Respondent) subjected the Claimant to a disciplinary hearing on 25<sup>th</sup> November 2022.
25. Thus, even though the letter was silent on the specific duration of the suspension, it is evident that it (the suspension) was not indefinite. It only lasted until 1<sup>st</sup> December 2022 when the Respondent made a decision to lift it. As such, the Claimant's assertion that the suspension was indefinite is incorrect.
26. An employer is entitled to suspend an employee from duty in order to conduct investigations against him. Further, he (the employer) has no obligation in law to hear the employee before imposing the suspension (see ***Mutwol v Moi University (supra) & Luka Korir v Moi Teaching and Referral Hospital [2022] KEELRC 14700 (KLR)***).
27. Consequently, the Claimant's assertion that the Respondent ought to have granted him a hearing before it suspended him from duty is misplaced. In the premises, the court arrives at the conclusion that the impugned suspension was legitimate.

28. In any event, the evidence on record shows that the Respondent lifted the suspension on 1<sup>st</sup> December 2022 after taking the Claimant through a disciplinary hearing. As such, the Claimant's plea that the court lifts the suspension has been overtaken by events.
29. The record shows that after the Respondent lifted the Claimant's suspension on 1<sup>st</sup> December 2022, it (the Respondent) sent him on terminal leave pending his retirement on account of having attained retirement age. He was subsequently retired on this account with effect from 31<sup>st</sup> December 2022.
30. The Claimant did not amend his pleadings to challenge the legitimacy of the decision to retire him on account of age. Yet he attempted to make it an issue for trial during the hearing of the case. He insinuated that because the Respondent's internal regulations and policies do not fix retirement age for its employees, it was irregular for it (the Respondent) to retire him on account of age.
31. The position in law is that parties are bound by their pleadings. They are not entitled to frame their case on unpleaded matters. In the same vein, the court is not entitled to determine matters which fall outside the pleadings on record (see ***Tolksdorf v Mwangi & 3 others [2025] KEELC 848 (KLR)*** & ***Ibrahim Isaack and Company Advocates v Monarch Insurance Company Ltd [2025] KEHC 13709 (KLR)***). This being the case, I

decline to determine whether the Respondent's decision to retire the Claimant was illegitimate and whether it resulted in the unlawful closure of his contract of service.

32. Besides the foregoing, the Claimant raised several other claims which largely relate to his purported entitlements under the contract of service. These include: a claim for house allowance; a claim for accrued leave pay; a claim for unpaid salary; a claim for unremitted pension funds; and a claim for unremitted contributions to the National Social Security Fund. In this section, the court will consider these claims.
33. The Claimant contends that the Respondent did not pay his salary for October 2022. However, the Respondent contests this assertion. It contends that it settled all of the Claimant's salary until December 2022 when he retired from employment.
34. Although the Claimant has claimed salary arrears for October 2022, it is noteworthy that he did not speak to the alleged outstanding October 2022 salary during the trial. Further, the record shows that he conceded during cross examination that the Respondent paid him salary for November and December 2022.
35. On the other hand, the Respondent's witness stated on oath that the Claimant was paid his salary for October, November and December 2022. He presented copies of cheques numbers 711632 and 711685 and a letter dated 12<sup>th</sup> January

2023 which intimated that the Claimant's salary was paid up to December 2022.

36. The Claimant did not controvert this evidence. As such, based on the evidence on record, the court is satisfied on a balance of probabilities that the Claimant's salary was paid up to December 2022. That being the case, his claim for salary arrears is declined.
37. The evidence on record shows that the Respondent engaged the Claimant's services on 6<sup>th</sup> October 2014. This fact is pleaded by the Claimant at paragraphs 5 of the original and amended Memorandum of Claim and conceded by the defense at paragraph 7 of the Statement of Defense.
38. The record shows that the Claimant was retired from service with effect from 31<sup>st</sup> December 2022. This was slightly over eight years after the parties entered into the employment relationship.
39. Section 9 of *the Employment Act* provides that contracts of service which are for a period of three months and beyond should be reduced into writing. This requirement is couched in mandatory terms. Further, the provision places the obligation of reducing the contract into writing on the employer.
40. As noted earlier, the contract between the parties to this suit lasted for more than three months. As such and by law, it was required to have been reduced into writing. And the obligation to facilitate this rested on the Respondent.

41. The court notes that despite the aforesaid legal position, the parties to the action did not reduce their contract into writing. During the Claimant's testimony, he stated that the Respondent did not provide him with a letter of appointment. He asserted that the contract between them was oral. The Respondent's witness affirmed this fact when he stated during cross examination that the parties did not have a written contract.
42. Section 10 of *the Employment Act* requires a written contract of service to contain certain particulars. These include: the remuneration and details of other benefits that are payable to the employee; and the employee's entitlement to annual leave. The benefits contemplated under the section include house allowance.
43. Section 10 (6) and (7) of the Act provides as follows:-  
*"The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.*  
*If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."*
44. Section 74 (1) of the Act provides as follows:-

*“An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars:-*

- a) of a policy statement under section 6(2) where applicable;*
- b) specified in section 10(3);*
- c) specified in section 13;*
- d) specified in sections 21 and 22;*
- e) of an employee’s weekly rest days specified in section 27;*
- f) of an employee’s annual leave entitlement, days taken and days due specified in section 28;*
- g) of maternity leave specified in section 29;*
- h) of sick leave specified in section 30;*
- i) where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;*
- j) of food rations where applicable;*
- k) specified in section 61;*
- l) of a record of warning letters or other evidence of misconduct of an employee; and*
- m) any other particulars required to be kept under any written law or as may be prescribed by the Minister.”*

45. From these provisions, it is apparent that the employer bears the burden of keeping employment records touching on various matters under a contract of service including house allowance and leave. Further, it is apparent that if there is a dispute regarding implementation of any of the terms of a contract of service which was supposed to have been reduced into writing but was not, the responsibility of presenting evidence to prove that the contested terms were fulfilled rests on the employer.
46. Having regard to the provisions of section 74 of *the Employment Act*, it is irrefutable that the law imposes the obligation of keeping employment records on the employer and not the employee. As such, it is sensible to conclude that the employer has special knowledge of the matters which are contained in such records including: house allowance; and leave entitlements for an employee.
47. Section 112 of *the Evidence Act* provides as follows:-  
*“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”*
48. As demonstrated earlier in the decision, the Respondent being the legal custodian of the employment records between the parties, has special knowledge of the contents of the records, including on house allowance and leave. As such, it (the Respondent) bears the burden of presenting evidence to either rebut or affirm contested matters

contained in the said documents. This burden does not lie with the Claimant.

49. The parties have taken contrasting positions on the Claimant's claims for house allowance and accrued leave. Whilst the Claimant contends that he was not granted an opportunity to utilize his leave days for the entire period that he worked for the Respondent, the Respondent disputes this fact. According to the Respondent, the Claimant has not tabled evidence to demonstrate that he was not allowed to utilize his leave days.
50. Further, whilst the Claimant contends that the Respondent did not pay him house allowance, the Respondent's position is that the allowance was paid as part of the Claimant's monthly salary. It avers that the Claimant's salary was consolidated to include other benefits such as house allowance.
51. Section 31 of *the Employment Act* deals with the benefit of house allowance. An employer is under duty to provide an employee with either physical housing or house allowance. However, he (the employer) is not obligated to pay house allowance as a standalone benefit if he has included it in the employee's consolidated pay.
52. The section further provides that for an employee's salary to be considered as consolidated, the contract between the parties must contain a specific provision speaking to this fact. It provides, inter alia, as follows:-

*“This section shall not apply to an employee whose contract of service contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation....”* Emphasis added through underlining.

53. Although the Respondent contends that the Claimant’s salary was consolidated to include house allowance, it did not table a contract between the parties to demonstrate that it contained a clause consolidating the Claimant’s basic pay with house allowance. As noted earlier, the Respondent was supposed to have reduced the contract between the parties into writing but did not do so. Therefore, the burden of proving that the Claimant’s salary was consolidated to include house allowance rested on it (the Respondent). Regrettably, it (the Respondent) did not discharge this burden.
54. Besides asserting that the Claimant’s salary was consolidated, it (the Respondent) did not present cogent evidence to speak to the matter. For instance, it (the Respondent) did not present the Claimant’s pay slips to back its claims that although the parties had no written contract, the Claimant’s salary was consolidated to include house allowance as per the pay slips. This is despite sections 10 (7)

of *the Employment Act* and section 112 of *the Evidence Act* which, read together with section 74 of *the Employment Act*, place the burden of proof on the matter on the Respondent.

55. Having regard to the foregoing, the court is left with no choice but to conclude that the Respondent did not pay the Claimant house allowance for the duration that the parties were in the employment relationship. It is so declared.
56. With respect to accrued leave, it is also noteworthy that the Respondent was obligated to keep records on this entitlement and present them to court particularly now that the contract between the parties was not reduced into writing notwithstanding that the law obligated the Respondent to reduce it into writing. As the court record demonstrates, the Respondent did not present this evidence to court.
57. Again, under sections 10 (7) of *the Employment Act* as read with sections 112 of *the Evidence Act* and section 74 of *the Employment Act*, the burden lay with the Respondent to prove that the Claimant utilized his leave days now that the Respondent had failed to reduce the contract between them into writing and there was a dispute on the matter (leave entitlement). Besides making general assertions on the matter, the Respondent did not provide cogent evidence to prove that it granted the Claimant annual leave for the duration of their contract. This being the case, the court

must find that the Claimant was deprived of his leave entitlement for the duration under consideration.

58. The Court of Appeal has had occasion to consider similar matters in the case of **Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] KECA 388 (KLR)**. The case involved a dispute that related to an employee's terminal benefits which included accrued leave days and salary arrears. The court held that the responsibility of keeping records on the matters under inquiry lay with the employer. The court further held that in the event of a dispute on the said matters, the burden lay with the employer to present evidence on them.
59. Having regard to the foregoing, I find that the Claimant is entitled to claim pay in lieu of accrued leave and unpaid house allowance. It is so declared.
60. According to the evidence on record, the Respondent hired the Claimant from 6<sup>th</sup> October 2014. The contract between the parties ran until 31<sup>st</sup> December 2022. This was a period of 98 months.
61. The Claimant's house allowance was to be paid at the rate of 15% of his monthly salary of Ksh. 50,560.00 (see **Enoch Marita & 3 others v Maggies Restaurant Co Ltd & another [2014] eKLR** & **Nicholus Lihugu Bwumira v Colette Gureshi t/a Wild Earth Wellness Centre Limited [2016] KEELRC 1772 (KLR)**). This works out to  $50,560.00 \times 15\% \times 98 \text{ months} = \text{Ksh. } 743,232.00$ . In the

premises, I enter judgment for him for the aforesaid amount of Ksh. 743,232.00 to cover unpaid house allowance.

62. The Claimant was entitled to 21 days of annual leave for every year worked (see section 28 of *the Employment Act*). The record shows that he worked for the Respondent for approximately eight (8) years before he was retired.
63. The Claimant's gross salary was to have been Ksh. 50,560.00 (basic pay) + Ksh. 7,584.00 (house allowance) = Ksh. 58,144.00. Spread over thirty (30) days, his daily rate was Ksh. 1,938.00. As such, leave pay for twenty one (21) days works out to Ksh.  $1,938 \times 21 =$  Ksh. 40,698.00.
64. As noted earlier, the Claimant worked for the Respondent for slightly over eight (8) years before he was retired. As such, his accrued leave pay for the eight (8) years works out to Ksh.  $40,698.00 \times 8 =$  Ksh. 325,584.00.
65. However, in the Claimant's lawyers' final submissions, they prayed for Ksh. 318,528.00 under this head. As such, I enter judgment for him for the aforesaid amount of Ksh 318,528.00 on account of accrued leave pay.
66. The Claimant also seeks compensation for unfair termination of his contract of service. However, this claim is not tenable since he lost his employment through retirement which he did not challenge through his pleadings in court. As such, the prayer for compensation for unfair termination of his contract is declined.

67. The Claimant further prays for salary in lieu of notice to terminate his contract. However, this claim is not contained in the amended Memorandum of Claim. As such, it is declined.
68. The Claimant has claimed for contributions which the Respondent allegedly did not remit to CIC Jipange Pension Plan and National Social Security Fund. However, these claims were not cogently substantiated.
69. In any event, contributions to the National Social Security Fund are payable to that agency directly and not the beneficiary employee(s). As such, the Claimant cannot seek that the contributions which the Respondent did not allegedly release to the National Social Security Fund be paid to him directly.
70. In the premises and having regard to the foregoing, the court declines the claims for alleged outstanding benefits under CIC Jipange Pension Plan and the National Social Security Fund.
71. The amounts which have been awarded to the Claimant attract interest at court rates from the date of this decision.
72. The awards are subject to the applicable statutory deductions.
73. The Claimant is awarded costs of the case.
74. Any other relief which was sought but has not been expressly granted is deemed to have been declined.

### **Summary of the Findings and attendant Award**

75. After evaluating the evidence on record against the applicable law, the court makes the following findings and attendant orders:-

- a) The Claimant's suspension from duty was lawful.
- b) The Claimant did not challenge the legality of the Respondent's decision to retire him from employment through his Statement of Claim. Absent this, he cannot validly challenge the legitimacy of the Respondent's decision to retire him.
- c) As such, the court declines to interrogate whether the Respondent's decision to retire the Claimant constituted an unlawful termination of the latter's contract of service.
- d) The court finds that the Respondent did not pay the Claimant house allowance for the duration of his contract of service. As such, it enters judgment for the Claimant for house allowance in the sum of Ksh. 743,232.00.
- e) The court finds that the Claimant did not utilize his accrued leave days for the entire of the period he worked for the Respondent. As such, it enters judgment for the Claimant for leave pay in the sum of Ksh. 318,528.00.
- f) The court declines the Claimant's plea for compensation for unfair termination of his employment because his contract was terminated through retirement which he did not regularly challenge.
- g) The Claimant's claim for pay in lieu of notice to terminate his contract is declined since it was not pleaded.

- h) The Claimant's claim for salary arrears is declined.
- i) For the reasons appearing in the body of the judgment, the court declines the Claimant's claims for alleged outstanding benefits under CIC Jipange Pension Plan and the National Social Security Fund.
- j) The awards to the Claimant attract interest at court rates from the date of this decision.
- k) The awards are subject to the applicable statutory deductions.
- l) The Claimant is awarded costs of the case.
- m) Any other relief which was sought but has not been expressly granted is deemed to have been declined.

**Dated, signed and delivered on the 28<sup>th</sup> day of November, 2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**