

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E370 OF 2023

FRANKLINE KABURU.....1ST
CLAIMANT

ANN WANJIKU.....2ND
CLAIMANT

DERRICK KOOME.....3RD
CLAIMANT

DENNIS MAKAU.....4TH
CLAIMANT

VERSUS

KIHINGO VILLAGE WARIDI GARDENS
MANAGEMENT....RESPONDENT

JUDGMENT

Introduction

1. Before the Court is the Claimants' Memorandum of Claim dated 5th May, 2023, and filed on 12th May, 2023. Under the claim, the Claimants seek the following reliefs as against the Respondent: -
- i. That the Respondent be compelled to reinstate these workers to their jobs.
 - ii. That this Honorable court enter judgment in favour of the Claimants against the Respondents and order forthwith payment of the terminal dues as tabulated

herein in a circumstance where reinstatement is not viable.

- iii. That this Honourable court enter judgment in favor of the Claimants for a claim of Terminal dues in the sum of Kenya shillings 2,961,565.94 and accruing interest therein.
 - iv. That this Honorable court be pleased to order the Respondent to issue the Claimants with a certificate of service.
 - v. That this Honourable court finds the Respondent liable for offences in the manner provided under Section 88 of the Employment Act 2007.
 - vi. That the costs of this suit be awarded to the Claimants.
 - vii. That any other remedy that this Honourable court may deem fit.
2. The Respondent entered an appearance on 2nd May, 2024, and subsequently filed a Memorandum of Response dated 21st May, 2024. A Notice of Preliminary Objection dated 28th May, 2024, was dismissed vide a ruling delivered by this court on 28th November, 2024, paving the way to the hearing of the suit on the merits.
3. Both the Claimants' and the Respondent's cases were heard on 30th June, 2025. The 3rd Claimant, Derrick Koome, testified on behalf of the Claimants, adopted his witness statement, and produced the list and bundle of documents filed as exhibits in support of the Claimants' case.

4. One Martin Dias testified in support of the Respondent's case, adopted his witness statement, and further produced the list and bundle of documents as exhibits in the case.
5. Submissions were filed for both parties, which have been duly considered.

The Claimants' Case

6. The Claimants' case is that they lawfully joined the KUDHEIHA in accordance with Articles 36 and 41 of the Constitution of Kenya (2010) and Section 4 of the Labour Relations Act (2007), and their membership is evidenced by their membership cards.
7. It is their case that due to internal management disputes in the Respondent's company, the workplace became stressful, and they were subjected to contradictory instructions, threats, and biased treatment. They aver that subsequently, their salaries were unfairly frozen, leaving them unpaid for various months in 2020.
8. The Claimants state that in November 2020, they were denied access to their workplace by security guards acting on the Respondent management's instructions, and that despite them seeking explanations, they received no formal communication regarding their denial of entry. It is their case that this treatment by the Respondent amounted to harassment and discrimination contrary to Section 5(2) of the Employment Act and Article 41 of the Constitution.

9. It is their case that the Respondent assigned other employees to perform the Claimants' duties without issuing any formal notice of termination.
10. The Claimants state that the Respondent failed to remit their NHIF and NSSF contributions from September 2019 until their final day of work, contrary to Section 19 of the Employment Act and Section 19 of the NSSF Act. They state that as a result of lacking NHIF coverage, one grievant, a Mr. Alex, sadly passed away.
11. It is their case that the Respondent also failed to remit their PAYE dues to the Kenya Revenue Authority from July 2020, which action violates their constitutional rights. It is their position that they had pending leave days that were equally not addressed by the Respondent.
12. The Claimants state that efforts by their union to pursue alternative dispute resolution (ADR) were ignored, as the Respondent did not respond to the union's request for a meeting. They aver that collectively, the Respondent's actions amount to an unprocedural and unlawful declaration of redundancy.
13. The Claimants' witness told the court that he was issued with a letter of employment and that salaries were paid by the Respondent. It is his testimony that they worked until November 2020, though salaries were not paid from March 2020.

14. He testified further that the Respondent company experienced wrangles from two brothers who were the Directors of the Respondent's company, leading to the freezing of accounts.

15. The Claimants pray that their claim be allowed.

The Respondent's Case

16. The Respondent states that for the reason that the Claimants stated that their last payment was in March 2020, and since they did not receive any formal termination letters, March 2020 is deemed their last date of employment. The Respondent states that the Claimants were therefore required to file their claim on or before 1st April 2023, but their Statement of Claim was filed on 9th May 2023, which is outside the legally allowed timeline.

17. The Respondent states that it appointed FAPCL Group as its estate agent on 15th May 2019, following an arbitral award issued on 28th July 2016 and adopted by the Court on 6th February 2019 in ELC No. 1225 of 2013. It states further that upon assuming management, FAPCL Group handled the Respondent's operations, including human resource functions.

18. It is the Respondent's case that when the agent took over, the Claimants were not on the Respondent's payroll and did not transition to the payroll managed by FAPCL Group. The Respondent further states that all its legitimate employees

are paid through bank accounts, not in cash or petty cash as alleged, and that it complies with all statutory deduction requirements for employees on its payroll. It is the Respondent's case that since the Claimants were never employed by the Respondent, it maintains that it had no obligation to remit their statutory deductions.

19. The Respondent's further case is that the Claimants were under the control of Mr. Ndungu Gethinji, who is presumed to be their actual employer and responsible for their salaries and statutory remittances. It avers that it has never remitted union dues to KUDHEIHA because it lacks a Recognition Agreement or Collective Bargaining Agreement with the union; therefore, KUDHEIHA has no locus standi to sue on behalf of the Claimants.

20. The Respondent reiterates that it never employed the Claimants, never placed them on its payroll, and never issued them any instructions.

21. The Respondent further denies all allegations suggesting an employment relationship existed between them. The Respondent denies that it paid the Claimants through vouchers, and states that it never pays salaries through petty cash and that the submitted vouchers lack authenticity, signatures, voucher numbers, or official stamps, which is an indication that they are fabricated.

22.The Respondent states that the Claimants' assertions regarding duties performed, job descriptions, or workplace incidents are not true, arguing that no employment relationship ever existed between it and the Claimants. The Respondent maintains that it had no obligation to remit statutory deductions, which would instead fall on Mr. Ndungu Gethinji, who is presumed to be the Claimants' actual employer.

23.The Respondent further states that there was no legal basis for alternative dispute resolution efforts, as no dispute existed between it and individuals it never employed. The Respondent therefore denies owing any of the claims made and submits that the case lacks merit, urging the Court to dismiss the Claim with costs.

24.On cross-examination, RW1 told the court that Gitai Gethinji and Ndungu Gethinji are brothers and both are Directors of the Respondent company. He further confirmed that Ndungu Gethinji signed the Claimants' employment letters on behalf of the Respondent.

25.It is RW1's further testimony that the Claimants were employed by the Respondent and were paid by the Respondent.

26.RW1's evidence is that when FAPCL Group took over the management of the Respondent's company in March 2020, no handover of employees was done as there was tension

among the Directors. He further confirmed that no termination letters were issued to the Claimants.

Analysis and Determination

27. Having considered the pleadings, the evidence adduced, and the submissions by both parties, the following issues arise for determination: -

- i. Whether the Claimants were employees of the Respondent.
- ii. Whether the claim is time barred under Section 89 of the Employment Act.
- iii. Whether the Claimants were unlawfully and unfairly terminated.
- iv. Whether the Claimants are entitled to the reliefs sought.

Whether the Claimants were employees of the Respondent

28. The Claimants lodged this suit against the Respondent on the basis that it was their employer. Appointment letters were produced in evidence, evidently issued to the Claimants by the Respondent on various dates, spelling out their positions and other terms of employment with the Respondent.

29. Also produced before this court are the Claimants' pay slips depicting payments by the Respondent for various months and leave schedules showing the leave days entitlement for the Claimants.

30. The Respondent's position is that the Claimants were never its employees, asserting that they were under the control of one Ndungu Gethinji, a director of the Respondent, and thus not on its payroll. It contends further that the Claimants were in fact employees of the said director and not those of the Respondent herein.

31. On cross-examination, RW1 admitted that both Gitai and Ndungu Gethinji are directors of the Respondent and that Ndungu Gethinji signed the Claimants' employment letters on behalf of the Respondent. It is RW1's further evidence that the Claimants were employed and paid by the Respondent.

32. It is therefore abundantly clear that RW1's admission directly contradicts the Respondent's pleadings, and instead supports the Claimants' position.

33. Section 2 of the Employment Act, 2007, defines an employee as a person employed for wages or salary. In ***Everlyn College of Design v Director of Youth Training & 2 Others [2013] eKLR***, it was held that an employment relationship is proved by demonstrating control, supervision, and payment of wages.

34. In my considered view, the signed employment letters produced in evidence, the leave schedules, the pay slips, and RW1's admissions, lead me to the conclusion that the

Claimants were indeed employees of the Respondent, and so I hold.

Whether the Claimants' claim is time barred

35. Although the Preliminary Objection on the Respondent's assertion that the suit herein is time barred was determined before hearing, the court maintained that when the cause of action accrued was a question of fact that could only be fully determined upon fully hearing the case. Having now heard both parties, the question of whether the claim is time barred remains unanswered.

36. The Respondent's position is that because the Claimants' last received salary in March 2020, the claim should have been filed by 1st April 2023, but was instead filed in May 2023, hence the assertion that the claim is time barred under Section 89 of the Employment Act.

37. The Claimants' position is that they continued reporting to work despite the wrangles among the Respondent's director and the non-payment of salaries until November 2020, when they were denied access to their workplaces without explanation.

38. The Respondent's witness (RW1) told this court on cross-examination that the Respondent did not issue any termination. It is now settled that the limitation period begins on the date the cause of action arises, and not the date of the last salary payment. In ***G4S Security Services***

(K) Ltd v Joseph Kamau & 468 Others [2018] eKLR, the Court of Appeal held that the limitation period begins to run on the actual date employment ends. Further in **Rift Valley Railways v Hawkins Wagunza Musonye & 2 Others [2016] eKLR**, the court opined that denial of access to work constitutes termination.

39. In light of the foregoing, it is evident that the Claimants having continued to report to until November 2020, the cause of action could not have accrued in March 2020 as alleged, and it could only be considered to have accrued in November 2020 when the Claimants stopped reporting for work.

40. The claim by the Respondent that the suit herein is statute barred is therefore unfounded, and is devoid of merit.

41. I hold that the suit is not time barred.

Whether termination was unlawful and unfair

42. The Claimants herein were denied entry to their workplace without explanation. The Respondent's witness confirmed that no termination letters were issued, and the Claimants further contend that they were replaced by other workers, and which contention was not controverted.

43. The Respondent did not allude to having taken the Claimants through any disciplinary procedure nor having issued them with show cause notices for whatever reason.

44. It is therefore evident that the Respondent did not attempt the fairness requirements demanded of every employer under Sections 41, 43, and 45 of the Employment Act. The Respondent insisted that the Claimants were not her employees, even when the evidence before the court speaks to the contrary.

45. In ***Walter Ogal Anuro v Teachers Service Commission [2013] eKLR***, it was held that termination of employment without following due process is unfair. This position was later affirmed in ***Ken freight (E.A.) Ltd v Benson K. Nguti [2016] eKLR***.

46. Further, the Respondent's argument that FAPCL Group took over management, yet employees were not handed over, does not negate its obligations to accord employees fair process.

47. By any standards, the termination of the Claimants' employment is both procedurally and substantively unfair, and so I hold.

Whether the Claimants are entitled to the reliefs sought **Reinstatement**

48. On the claim for reinstatement, Section 12(3)(vii) of the Employment and Labour Relations Court Act provides for the reinstatement of an employee within 3 years of the termination, and even where the termination is still within 3 years, the same has to be practicable.

49. In the instant case, the Claimants were terminated more than 3 years ago, and as evidenced by the court record, their former workplace is marred by conflict between directors, not to mention an evident breakdown of industrial relations, which makes reinstatement impracticable. (See ***Kenya Airways v Aviation & Allied Workers Union [2014] eKLR***).

50. This prayer thus fails on the foregoing accounts.

Terminal dues

51. The Claimants claim payment of terminal dues comprising of leave days not taken, gratuity, notice pay, salary arrears, and statutory deductions.

52. The record supports the Claimants' assertion that they were not paid salaries between March and November 2020. The Claimants have also produced a leave schedule showing the number of days that each of the Claimants is owed, and which were not paid for at their termination.

53. On gratuity, the Claimants' employment letter does not provide for payment of gratuity, and the pay slips produced show that they were contributing to NSSF. The claim for gratuity is thus not merited and is dismissed.

54. The Claimants are equally not entitled to claim statutory deductions on the premise that deductions belong to statutory bodies once taken from an employee's pay, and

failure to remit does not affect an employee's entitlement. Further, liability falls on the employer who fails to remit statutory deductions.

55. In the end, I find and hold that the Claimants are entitled to payment of terminal dues in respect of pending leave days, one month's pay in lieu of notice, and salary arrears.

Compensation

56. Having held the Claimants' termination unfair, entitles them to an award of compensation pursuant to Sections 49 and 50 of the Employment Act, 2007.

57. Considering the Claimants' opportunities to secure alternative comparable employment, I deem an award of 4 months' salary sufficient compensation for the unfair termination, and which is hereby awarded.

58. In whole, the Claimants' claim succeeds in terms of the following orders: -

- a) A declaration that the Claimants' termination is unlawful and unfair
- b) That the Respondent shall pay each Claimant four months' salary as compensation for the unfair termination
- c) One month's salary in lieu of notice
- d) Costs of the suit shall be borne by the Respondent
- e) That the Respondent shall issue the Claimants with certificates of service within 14 days of this Judgment.

- f) An order that the Respondent pay the Claimants' terminal dues as follows;
- i. Pending leave days,
 - ii. One month's pay in lieu of notice; and
 - iii. Salary arrears (March-November, 2020)
- g) Interest shall accrue on prayers numbers b, c, d & f from the date of this judgment until payment in full.

59. Judgment accordingly.

SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 11TH DAY OF DECEMBER, 2025.

**C. N. BAARI
JUDGE**

Appearance:

Mr. Otieno present for the Claimant

Mr. Frankline Otieno present for the Respondent

Ms. Esther S - C/A