REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

CAUSE NO. E006 OF 2025

KENYA UNION OF COMMERCIAL
FOOD AND ALLIED WORKERS……..CLAIMANT

VERSUS

KANYENYAINI FARMERS
COOPERATIVE SOCIETY……...RESPONDENT

JUDGMENT

1. The Claimant instituted the present suit on behalf of four grievants, whom it asserts were its members until their retirement from employment. The Claimant avers that the parties are bound by a recognition agreement under which several Collective Bargaining Agreements (CBAs) have been negotiated and executed, the latest being the 2021–2023 CBA currently in force.

2. The Claimant further states that the **1st grievant, Julius Njuguna Nginya**, was employed by the Respondent on 15th June 1988 as a cherry recorder and that he retired on 1st December 2023 after 35 years of service. Upon retirement, he was allegedly entitled to terminal benefits amounting to Kshs 3,381,865.35, comprising salary for November 2023, salary arrears under the 1998/2000, 2019/2021 and 2021/2023 CBAs, service gratuity, and overtime. It is contended by the Claimant

that the 1st grievant received Kshs 999,000.00 as partial payment, leaving an outstanding balance of Kshs 2,382,865.35.

3. With regard to the **2nd grievant, James Chege,** the Claimant avers that he was employed on 5th May 2008 as a factory manager and that he retired on 1st December 2023 after 15 years of service. The Claimant avers that upon retirement of the 2nd grievant, he was allegedly entitled to Kshs 1,798,246.70, comprising unpaid salary for November 2023, arrears under the 2019/2021 and 2021/2023 CBAs, service gratuity, and overtime. The Claimant contends that the 2nd grievant was paid Kshs 392,000.00 as part payment, leaving a balance of Kshs 1,406,246.70.

4. In respect of the **3rd grievant, Mwangi Mucheke**, it is averred that he was employed on 1st June 1993 as a factory manager and that he retired on 1st December 2023 after 30 years of service. The Claimant states that the 3rd grievant was entitled to terminal benefits amounting to Kshs 2,488,699.00, comprising unpaid salary for November 2023, arrears under the 2019/2021 and 2021/2023 CBAs, service gratuity, and overtime. It is further contended that the 3rd grievant received Kshs 745,000.00 upon retirement as partial payment, leaving an outstanding balance of Kshs 1,743,699.74.

5. Regarding the **4th grievant, Edward Kimani**, the Claimant avers that he was employed on 11th May 1999 as a night watchman and that he retired on 1st December 2023 after 24 years of service. It is stated that the 4th grievant was

entitled to terminal benefits of Kshs 1,829,025.65, comprising unpaid salary arrears under the 2019/2021 and 2021/2023 CBAs, as well as service gratuity. The Claimant contends that the 4th grievant was paid Kshs 585,000.00 upon retirement, leaving a balance of Kshs 1,244,025.65.

6. It is the Claimant's assertion that on 11th January 2024, it held a meeting with the Respondent during which joint computations were undertaken, but the Respondent declined to sign the same or agree on a mode of settlement.

7. Subsequently, the Claimant reported a trade dispute to the Ministry of Labour and Social Protection. Although conciliation proceedings were initiated, they did not yield a resolution, thereby precipitating the present dispute.

8. In light of the foregoing, the Claimant seeks the following monetary reliefs on behalf of the four grievants:

    a) **1st grievant Kshs 2,382,865.35**
    b) **2nd grievant Kshs 1,406,246.70**
    c) **3rd grievant Kshs 1,743,699.74**
    d) **4th grievant Kshs 1,244,025.65**

9. The Respondent opposed the Claim through a Response dated 18th March 2025, contending that the claims for salary arrears are statute-barred and therefore not payable. The Respondent further disputed the claim for overtime.

10. The Respondent maintained that the only outstanding entitlements relate to service gratuity, which it has computed as follows:

    a) **1st grievant Kshs 1,773,662.00**

    b) **2nd grievant Kshs 435,751.00**

    c) **3rd grievant Kshs 977,927.00**

    d) **4th grievant Kshs 765,332.00**

11. The Respondent maintained that the burden rests upon the Claimant to prove all aspects of its claim that have not been expressly admitted, and further argued that the computations relied upon by the Claimant lack evidentiary value as they were not executed or signed.

12. The Respondent also contended that there should be no unjust enrichment in an employment-related dispute such as the present one. It further argued that any sums payable under the National Social Security Fund (NSSF) scheme ought to be deducted from the claim, as the grievants would otherwise receive double payment. Additionally, the Respondent maintained that any claims that are time-barred under Section 90 of the Employment Act are not recoverable, regardless of whether they were incurred.

13. Further, the Respondent asserted that, being a coffee processing society dependent on proceeds from coffee payments, it would be in a position to settle any sums found due in four equal monthly instalments.

14. In a rejoinder to the Respondent's response, the Claimant filed a Reply asserting that the salary arrears in question arose from duly negotiated CBAs. The Claimant further contended that the Respondent was well aware of these arrears, as demands for payment had been made long before the grievants retired.

15. The Claimant also averred that the Respondent had been furnished with copies of the muster rolls and was therefore aware of the said claims.

16. The Claimant conceded that the salary for November 2023 had since been paid to the grievants and accordingly revised its claim to that extent.

17. The Claimant further asserted that, over the years, the Respondent's employees have been entitled to both NSSF contributions and gratuity, as provided for under the applicable CBAs.

18. On 20th January 2026, the parties consented to have the matter determined on the basis of documentary evidence in accordance with Rule 59 of the Employment and Labour Relations Court (Procedure) Rules, 2024. The Court subsequently directed the parties to file and exchange written submissions within prescribed timelines.

Submissions

19. Both parties complied with the Court's directions by filing their respective written submissions. On its part, the Claimant submitted that the claim for salary arrears arising from previous CBAs ought not to be contested, as the Respondent had already acknowledged the same by including them in the grievants' terminal benefits.

20. The Claimant further argued that the said salary arrears cannot be deemed time-barred, as they arose from CBAs that were not implemented upon registration due to the Respondent's failure to effect the agreed terms.

21. It was also submitted that the Respondent itself furnished copies of the muster rolls used in computing overtime, thereby demonstrating its awareness that the overtime claimed had not been paid.

22. The Claimant further contended that the Respondent had not produced any evidence before the Court to demonstrate payment of overtime.

23. The Claimant stated in further submission that the issue of NSSF contributions was not raised during conciliation proceedings, as the parties were guided by the provisions of the applicable CBA.

24. It was the Claimant's position that Section 35 of the Employment Act sets out minimum terms of employment, which parties are at liberty to enhance through negotiation.

25. The Claimant further argued that the Respondent breached the CBA by failing to invest gratuity in a provident fund where it could have accrued interest for the benefit of employees, and consequently urged the Court to award interest on the gratuity dues.

26. On the other hand, the Respondent submitted that the grievants are entitled to payment under the superior scheme, in this case the CBA, subject to a deduction of benefits accruing under the inferior scheme. In support of this position, reliance was placed on the case of ***Board of Management Ng'araria Girls Secondary School v. KUDHEIHA Workers [2017] KECA IS (KLR)***.

27. The Respondent further contended that any claims for salary arrears accruing more than three years prior to the institution of the suit are time-barred under Section 90 of the Employment Act. In support, it cited the case of ***William (suing on his own behalf and on behalf of 186 former employees of the defunct Intercontinental Hotel, Mombasa) v. Rao & 3 Others [2025] KEELRC 1232 (KLR)***.

28. With regard to overtime, the Respondent denied having produced the alleged muster rolls, contending that the documents lack a letterhead, identifiable signatures of its officials, or an official stamp.

29. The Respondent further submitted that the muster rolls on record are unintelligible, as they do not contain a clear analysis of hours worked or a properly structured schedule for the computation of overtime.

30. In the same vein, the Respondent maintained that no overtime was in fact worked, and consequently, there can be no claim for non-payment in respect of work that was never performed.

Analysis and Determination

31. Following from the record, it is evident that the sole issue arising for determination by the Court is whether the grievants are entitled to the reliefs sought.

Reliefs?

Salary arrears

32. The Claimant seeks payment of salary arrears for each grievant arising from the 2019/2021 and 2021/2023 CBAs executed between the parties.

33. The Respondent, however, contends that the claim for salary arrears is statute-barred pursuant to Section 89 of the Employment Act.

34. It is common ground that the parties negotiated and executed CBAs covering the periods 2019/2021 and 2021/2023, and that the said agreements were duly registered by the Court.

35. **Section 59(3) of the Labour Relations Act** provides that the terms of a collective agreement are to be incorporated into the contracts of employment of all employees covered by the agreement.

36. Accordingly, upon registration, the CBAs became enforceable and binding upon the parties for the relevant periods, and their terms formed part of the individual contracts of the Respondent's unionisable employees.

37. It follows, therefore, that the salary increments negotiated under and incorporated into the CBAs became payable to the grievants, and to all other unionisable employees, on a monthly basis.

38. In the event of default by the Respondent in paying the salaries due under the CBAs, such default constituted a continuing injury.

39. A continuing injury denotes a wrong that is not confined to a single act or omission, but one that persists over a period of time through repeated or ongoing breach.

40. According to **Black's Law Dictionary (9th Edition p.856),** a continuing injury is defined as: ***"An injury that is still in the process of being committed."***

41. On the question of continuing injury, the Court of Appeal in ***The German School Society & Another v. Ohany & Another [2023] KECA 894 (KLR)*** expressed itself as follows:

> ***"The principles underlying continuing wrongs and recurring/successive wrongs have been applied in employment disputes. A 'continuing wrong' refers to a single wrongful act that results in a continuing injury, while 'recurring or successive wrongs' are those that occur periodically, with each instance giving rise to a distinct and separate cause of action."***

42. The Learned Judges of Appeal further referenced the decision of the **Supreme Court of India** in ***Balakrishna S.P. Waghmare v Shree Dhyaneshwar Maharaj Sansthan AIR 1959 SC 798***, where the concept was explained thus:

> ***"It is the very essence of a continuing wrong that it creates a continuing source of injury and renders the wrongdoer responsible and liable for the continuance of the said injury. If the wrongful act causes an injury that is complete, there is no continuing wrong, even though the resulting damage may persist. However, if the wrongful act is such that the injury itself continues, then it constitutes a continuing wrong. A distinction must therefore be drawn between the injury caused by the act and the subsequent effects of that injury."***

43. The Court of Appeal also cited with approval the decision in ***M.R. Gupta v Union of India (1995) 5 SCC 628,*** where it was held as follows:

> ***"The appellant's grievance that his pay was not fixed in accordance with the rules constituted a continuing wrong, giving rise to a recurring cause of action each time he received a salary that was wrongly computed. So long as the appellant remained in service, a fresh cause of action arose every month when he was paid on the basis of the erroneous computation."***

44. Further reference was made to the case of ***M. Siddiq v Suresh Das (2020) 1 SCC,*** where the Indian Supreme Court held that:

> ***"A continuing wrong arises where there exists a legal, contractual, or other obligation to act or refrain from acting in a certain manner. The breach of such an obligation extends beyond a single act or omission, giving rise to a legal injury of a continuing nature."***

45. Applying the foregoing precedents to the present case, it is evident that each month in which the Respondent paid the grievants a salary below that prescribed under the applicable CBA constituted a continuing injury.

46. **Section 89 of the Employment Act** sets out the limitation period for employment-related claims, including those premised on a continuing injury, in the following terms:

"Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of, <u>or in the case of a continuing injury or damage, within twelve months next after the cessation thereof</u>." *(Emphasis added)*

47. Fundamentally, the Employment Act provides for a limitation period of 12 months for claims founded on a continuing injury, calculated from the date on which the injury ceases, that is, when the breach or wrongful act comes to an end.

48. Accordingly, any claim founded on a continuing injury must be filed within 12 months from the date the alleged breach or injury ceases.

49. In ***G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR***, the Court of Appeal interpreted the import of Section 89 in relation to continuing injuries and stated as follows:

"Regarding a 'continuing injury', the proviso to Section 90 of the Employment Act requires that the claim be made within twelve months next after the cessation thereof. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year, failing which it became time-barred."

50. In the present case, the continuing injury ceased upon the retirement of the grievants from service on 1st December 2023.

51. The record shows that following the retirement of the grievants, the Claimant engaged the Respondent through a letter dated 4th December 2023, to which the Respondent replied vide its letter dated 21st December 2023. Subsequently, by a demand letter dated 12th January 2024, the Claimant referenced a meeting held on 11th January 2024 and asked the Respondent to settle the amounts due to the grievants.

52. Subsequently, the Respondent reported a trade dispute to the Ministry of Labour and Social Protection through a letter dated 2nd July 2024. A conciliation process thereafter ensued, ultimately giving rise to the present dispute.

53. In applying **Section 89 of the Employment Act** to the circumstances of this case, the Court is of the view that the claim herein cannot be said to be time-barred, given that the Claimant invoked the statutory dispute resolution mechanism under **Section 62 of the Labour Relations Act** by referring the matter to the Ministry of Labour and Social Protection for conciliation within 12 months of the cessation of the continuing injury.

54. In arriving at this finding, the Court draws guidance from the decision of the Court of Appeal in ***Kiige v National Hospital Insurance Fund (Civil Appeal 657 of 2019) [2026] KECA 309 (KLR) (20 February 2026) (Judgment)*** where the Court held that the cause of action accrued only upon notification of the outcome of the employee's appeal. The Court further held that, until the right of appeal was either waived or exhausted, no actionable grievance arose capable of founding a cause of action.

55. Similarly, in the present case, the claim would only be deemed time-barred if the Claimant had failed to invoke the statutory dispute resolution mechanism provided under Section 62 of the Labour Relations Act within 12 months of the cessation of the injury.

56. Indeed, it is worth emphasising that disregarding the time spent by parties engaged in conciliation under Section 62 of the Labour Relations Act would render the conciliation process irrelevant and defeat its statutory purpose.

Overtime

57. The Claimant has also sought overtime pay in respect of each grievant. In its Reply to the Respondent's Response, the Claimant pleaded that the grievants were entitled to overtime payments at the end of every month.

58. Accordingly, it follows that the claim, to the extent of unpaid overtime, constituted a continuing injury, and each month in which overtime was not paid gave rise to a fresh cause of action.

59. As with the claim for salary arrears, the claim for overtime cannot be said to be time-barred, given that the Claimant invoked the statutory dispute resolution mechanism under **Section 62 of the Labour Relations Act** within 12 months of the cessation of the injury.

60. Be that as it may, it is noteworthy that although the Claimant produced muster rolls before the Court, it did not particularise the relevant periods for which overtime was claimed, nor did it specify the number of overtime hours attributable to each grievant so as to justify the global sum pleaded. This is more so noting that overtime is a specific claim that must be strictly pleaded and proved. What's more, it is notable that the muster rolls produced by the Claimant cover the period from September 2009 to November 2023, which is considerably long.

61. For the foregoing reasons, the claim for overtime is declined.

Gratuity

62. It is the Respondent's contention that any sums payable to the grievants under the NSSF scheme ought to be deducted from the gratuity payable. Indeed, in the

Respondent's computations, it reduced the gratuity by the amounts attributable to NSSF contributions.

63. Clause 4 of the CBA produced by the Claimant provides that service gratuity is payable to an employee upon retirement, resignation, or termination of employment for any reason other than redundancy.

64. Notably, the Respondent has not cited any provision in the said CBA or any law that authorises the reduction of gratuity on account of NSSF benefits payable to an employee.

65. As correctly submitted by the Claimant, Section 35 of the Employment Act provides the minimum terms and conditions of employment, which parties are at liberty to improve upon through negotiation.

66. In the present case, it is evident that, in addition to statutory NSSF contributions, the parties expressly provided for payment of service gratuity to employees upon exit from service.

67. Had the Respondent intended that gratuity be offset against NSSF benefits, nothing would have been easier than to expressly provide for such a deduction in the CBA. This is particularly so given that, at the time of negotiating and executing the CBA, the Respondent was fully aware of the existence of NSSF as a statutory deduction.

It therefore begs the question why this factor was not taken into account and incorporated into the CBA if that was the parties' intention.

68. Further, it should be appreciated that the service gratuity provided for under the CBA produced by the parties is distinct from the service pay contemplated under Section 35(5) of the Employment Act, in respect of which Section 35(6) guards against double compensation.

69. All in all, the Court finds that the grievants are entitled to payment of service gratuity in full as provided under Clause 4 of the CBA.

Orders

70. In the final analysis, the claim partially succeeds to the extent of the salary arrears and gratuity, as set out hereunder:

a) **1st grievant (Julius Nginya)**

Salary arrears Kshs 51,206.80

Gratuity Kshs 2,188,506

Total Kshs 2,239,712.8

b) **2nd grievant (James Chege)**

Salary arrears Kshs 27,533.80

Gratuity Kshs 704,746.00

Total Kshs 732,279.80

c) **3rd grievant (Mwangi Mucheke)**

Salary arrears Kshs 59,757.50

Gratuity Kshs 1,448,498

Total <u>Kshs 1,508,255.50</u>

d) **4th grievant (Edward Kimani)**

Salary arrears Kshs 64,982.75

Gratuity Kshs 1,116,903.30

Total <u>Kshs 1,181,886.05</u>

71. Interest shall accrue on the respective total sums at court rates with effect from 30 days after the date of this judgment until payment in full.

72. In view of the subsisting social partnership between the Claimant union and the Respondent, each party shall bear its own costs.

DATED, SIGNED and **DELIVERED** at **NYERI** this **17th** day of **April** 2026.

……

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant	Ms. Macharia
For the Respondent	Mr. Ndonga instructed by Mr. Mbuthia
Court Assistant	Ndati

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 15th March 2020 and subsequent directions of 21st 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