



Karuga v Nairobi City Water and Sewerage Company Limited & another (Civil Appeal 193 of 2019) [2021] KECA 109 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KECA 109 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 193 OF 2019
S OLE KANTAI, HA OMONDI & P NYAMWEYA, JJA
OCTOBER 22, 2021**

BETWEEN

GEORGE MWANGI KARUGA APPELLANT

AND

**NAIROBI CITY WATER AND SEWERAGE COMPANY
LIMITED 1ST RESPONDENT**

NAIROBI CITY COUNTY 2ND RESPONDENT

(Appeal from the Judgment and Decree of the Employment and Labour Relations at Nairobi (Maureen Onyango, J.) dated 22nd February, 2019 in ELRC Cause No. 1088 of 2014)

JUDGMENT

- 1 The appellant, George Mwangi Karuga, has preferred this appeal against the Judgment dismissing his claim for accrued salaries, benefits, allowance and service pay for the period that he was on suspension between October, 2002 to June, 2011.
- 2 The appellant was employed by Nairobi City Council (the 2nd respondent) from 5th May, 1999 as a Revenue Officer before he was suspended from duty with effect from 28th March, 2002 to 21st June, 2011 for gross misconduct following criminal charges for which he was charged in court. He was eventually acquitted on 10th November, 2008 and subsequently reinstated to duty on 21st June, 2011.
- 3 It is the appellant's contention that the 2nd respondent's Staff Committee meeting of 23rd October, 2010 reinstated him and transferred him to work as an Accounts Assistant scale 7 in Credit Control Section until August, 2013 when he retired. Further, that the 1st and 2nd respondents refused to pay the appellant accrued salaries, benefits and allowances for the period he was under suspension despite his demand and notice to pay him the same having been given.



4 At the hearing, the appellant testified that he did not agree to the conditions of the letter dated 9th July, 2011 which indicated that he would treat the time away under suspension as unpaid leave.

5 He subsequently filed ELRC 1088 of 2014 at Nairobi seeking compensation for failure by the respondents to pay accrued salaries, benefits, allowances and service pay owed to him. He thus claimed a total sum of Kshs. Nine million six hundred and ninety-two thousand, two hundred and seven (9,692,207/=) for accrued salaries, benefits, allowances, and service pay for the period of suspension between October, 2002 to June, 2011 made up as follows:

Basic Pay (as per last pay slip August 2013) Kshs.41,221.00

House Allowance Kshs.16,500.00

Commuter Allowance Kshs. 4,000.00

Gross pay per month Kshs.61,721.00

Salaries, benefits and allowances

in arrears from October 2002 to May 2011 (8 years x 61,721 x 12 months)

Kshs.5,925,216.00

November 2002 & December 2002

(61,721 x 2 months) Kshs. 123,442.00

January to May 2011(61,721 x 5 months) Kshs. 308,607.00

Annual leave allowance for 8 years calculated at

Basic Pay x 41,221 x 8 years Kshs. 329,768.00

Personal laptrust Employee contribution 9,811.97 x 12 x 8

Kshs. 941,949.12

November and December 2002 9,811.97 x 8 Kshs. 91,623.94

Christmas bonus 4,000 x 8 Kshs. 32,000.00

Terminal golden handshake Kshs. 150,000.00

Salary difference Kshs.1,398,696.00

Service Pay for 15 years worked 61,721.30 x 15 x 15

Kshs. 462,907.00

Grand Total Kshs.9,692,207

Together with interest from date of filing suit and costs.

6 The 1st respondent in reply stated that the appellant was not in its employment until the year 2011 when he was reinstated, and subsequently transferred to the 1st respondent company which is separate and distinct from Nairobi City County (the 2nd respondent).

7 The 1st respondent called one witness, (Monica Oyeyo), the Industrial Relations Officer, whose evidence supported the 1st respondent position that the appellant was suspended from duty due to gross misconduct. On acquittal, and subject to the 2nd respondent's Council Staff Committee recommendation on 23rd September 2010, he was reinstated and transferred to the 1st respondent vide



- letter dated 19th January, 2010. That the appellant's reinstatement was conditional pursuant to a letter dated 9th June, 2011 by the 1st respondent, which dictated that the period the appellant was away would be treated as unpaid leave and the 1st respondent would not pay for the same.
- 8 It was argued that prior to the transfer of the appellant to the 1st respondent, he was an employee of the 2nd respondent, so the 1st respondent could not be held liable for any cause of action that arose during the period that he served as the 2nd respondent's employee. That the appellant after reinstatement as Accounts Assistant at scale 7, requested for upgrading through letters dated 7th and 26th September, 2011, but was advised to wait until completion of his probation.
- 9 That the appellant's request on 30th July, 2013 for early retirement on medical grounds was accepted by the 1st respondent vide letter dated 28th August, 2013 and the appellant was advised to contact the payments office regarding his terminal benefits which would be paid after clearing any liabilities owed to the 1st respondent.
- 10 Further that in the absence of evidence by the appellant that he had cleared all his liabilities, and had not been paid by the 1st respondent for services rendered between 9th June, 2011 to 30th August, 2013, then the claim for accrued salaries, benefits and any allowance between that period is premature. The 1st respondent maintained that it had not refused to pay the appellant accrued salaries, benefits and allowances for the period he was under suspension as he was not the 1st respondent's employee at the time. The 1st respondent stated that the claim was time barred as per section 90 of the *Employment Act* 2007 and prayed that the claimant's claim be dismissed.
- 11 The 2nd respondent did not call any witnesses nor file a reply to the statement of claim.
- 12 The parties then filed written submissions. By a judgment dated 22nd December, 2019 the Court having carefully considered the parties' pleadings, testimony, and evidence of record, found that the appellant had not on a balance of probabilities proven his claim, and accordingly dismissed the claim in its entirety.
- 13 The appellant challenges the judgment of the Employment and Labour Relations Court on grounds, that the trial court erred in finding that he was estopped from seeking payment of his claim for salaries when he was under suspension from October 2020 to May, 2011 on account of the letter of reinstatement dated 9th June, 2011 as he had waived his rights, the trial court erred in finding that the suit was statute barred, and in dismissing his claim.
- 14 With regard to whether he is estopped from seeking payment of his salary while on suspension, it is the appellant's submission that the letter dated 9th June, 2011 was merely referring to another letter dated 18th May, 2011, which had the condition that the appellant would treat the time away as unpaid leave, further that the said letter of 18th May, 2011 was never produced in court by the respondent, nor received by him. In addition, that the letter dated 9th June, 2011 was not the letter that reinstated him, rather it was the letter dated 19th January, 2010 which stated that the appellant would be reinstated to the employment but had no conditional clause as it read: "...with effect from the date you report for duty...".
- 15 The appellant maintains that in their pleadings both parties agreed that he was reinstated as per the letter dated 19th January, 2010. That he did not waive his right as he never received the letter dated 18th May, 2011 and that the court was wrong in holding that he was estopped as per the letter of 9th June, 2011 from claiming dues during suspension period. The appellant further submits that he continuously pursued the issue of his dues as evidenced by the letter dated 11th March, 2013, 30th



- January, 2013 and 26th September, 2011, and that his conduct in no way indicated waiver and/or waiver of his rights to sue for any of the claim during suspension.
- 16 On the issue of the claim being time barred, the appellant insists that the claim is not time barred, and that it was in error for the trial court to hold so, as another court of concurrent jurisdiction had already dealt with the issue. The appellant also submits that the cause of action arose on or before 30th January, 2013 when the respondent denied liability of paying the claim as evidenced by the letter dated 30th January, 2013 and not on 9th June, 2011.
- 17 The 1st respondent reiterates that the appellant accepted the terms of the letter dated 9th June, 2011 as he reported on duty as instructed by the reinstatement letter and even thanked the 1st respondent vide letter dated 7th September, 2011, while at the same time he requested to be upgraded. It is the respondent's contention that the appellant did not object to the condition of reinstatement of him being on unpaid leave for the duration of his suspension, and that there is nothing on record to show that the appellant had objected to the condition for reinstatement. The 1st respondent contends that the appellant had fully accepted the new offer as evidenced by the letter dated 28th January, 2013 wherein the appellant stated that he had been placed way below the required level.
- 18 On the issue of the letter dated 18th May, 2011 the 1st respondent submits that the said letter did not affect the acceptance of the appellant of the conditions of the subsequent letter dated 9th June, 2011 in which the issue of the unpaid leave was reiterated, and the appellant accepted. The 1st respondent further argues that the appellant by his conduct intimated his intention not to pursue the emoluments during the period he was on suspension. To buttress its position on the issue of estoppel either by word or conduct, the 1st respondent refers to the case of *Stephen Bowen v Gilbert Muraguri*, Civil Appeal No 112 of 1996 and *Serab Njeri Mwobi v John Kimani Njoroge* [2013] eKLR.
- 19 Addressing the issue as to whether the suit is statute barred, the 1st respondent disagrees with the proposition that the cause of action arose on or about 30th January, 2013 and submits that the claims for unpaid emoluments should have been raised on 9th June, 2011 when the appellant was reinstated as that is when the cause of action arose and became barred on 9th June, 2014.
- 20 The 1st respondent on this ground submits that at the time of the appellant's suspension he was duly employed by the 2nd respondent and the appellant has not led any evidence to the contrary. It is argued that under the agreement transferring the operational assets, staff and liabilities, the 1st respondent is not liable for any pensions, obligations and such other benefits as well as arrears of statutory deductions that accrued before the services of the appellant had been transferred (reference is made to article 3(2) of the agreement). That the benefits claimed by the appellant are not among the aspects transferred to the 1st respondent. That the contractual liability of the 2nd respondent as regards payment of emoluments during suspension were not transferred to the 1st respondent.
- 21 It is further submitted that the trial court did not err in holding that the appellant was not entitled to the reliefs sought for reasons correctly set out in the judgment.
- 22 The 2nd respondent's submissions are in agreement and in line with the 1st respondent's submissions on the issue of estoppel. The 2nd respondent further states that the appellant's only complaint about arrears was made on 11th March, 2013 just 4 months before he took early retirement. That although the appellant made a claim for the emoluments unpaid during suspension, the same was an after-thought and that his prior conduct estopped him from claiming these unpaid dues during suspension.
- 23 The 2nd respondent further submits that in any event according to Circular No. 27 of 2010 new terms and conditions of service for officers of local authorities in Kenya, provides at paragraph 30 (a) for



suspension of an officer guilty of an act or omission until the matter has been investigated, that the maximum period of suspension is 3 months and that during suspension the officer shall not be entitled to receive any pay except where in the opinion of the head of department, the alleged offence is unlikely to involve the council in financial loss, in which case the officer shall be entitled to half pay.

- 24 The 2nd respondent is in agreement with the 1st respondent that the appellant was not entitled to any of reliefs sought, adding that there was no shifting of liability between the respondents, contending that the 2nd respondent reinstated the appellant vide letter dated 19th January, 2010 and informed him that his services would be transferred to the 1st respondent, so the said transfer did not amount to shifting of liability. The 2nd respondent alludes to the existence of an agreement also referred to by the 1st respondent transferring operational assets, staff and operational liabilities to say that the appellant had a duty to prove every payment he was seeking.
- 25 It is the appellant's case that the 2nd respondent placed so much weight on the submissions, yet it did not file any pleadings in the trial court, and as such the 2nd respondent could only submit on points of law.
- 26 As the first appellate court, it is our duty to reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial Judge are consistent with the evidence. (See *Sanitam Services (EA) Ltd. vs. Rentokil* [2006] 2 KLR 70).
- 27 We have carefully considered the judgment of the trial court, the record of proceedings, the submissions and find that the main issues in in this appeal are: Whether the appellant waived his rights to pursue a claim for his dues, whether the claim was statute barred due to effluxion of time, and whether the trial court erred in dismissing the suit.
- 28 On the issue as to whether the appellant waived his rights to pursue a claim for his dues, we consider the respondents' contention that the appellant is estopped by his conduct from claiming the unpaid dues whilst he was on suspension. The argument here being that if the appellant had an issue with the condition attached to his reinstatement, he should have raised it at the first instance and not on 11th March, 2013 (four months before he took his early retirement). Further the 2nd respondent maintains that in any event, the terms and conditions for officers of the local authorities in Kenya provided that during suspension an officer would not be entitled to receive any pay.
- 29 Both respondents have relied on the holding in *Serab Njeri Mwobi vs John Kimani Njoroge* [2013] e KLR that :
- “It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and be acted on, the other party has taken his word and acted upon it, the party who gave the assurance or promise cannot afterwards be allowed to revert to the previous legal position as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualifications which he has himself introduced.”
- 30 It is not in dispute that the appellant was reinstated vide the letter dated 9th June, 2011. What is in contention is the clause that the appellant would treat the period during which he was under suspension as unpaid leave, and that is where the spanner is thrown in the works. The appellant contends that the letter dated 9th June, 2011 had no such conditional clause, and that the letter with the alleged clause was dated 18th May, 2011 which letter the appellant claims not to be aware of. The question is, at what point did the appellant realize that there was a clause referred to in a certain letter that he was not privy to, as to place the burden on him to inquire about the said letter, and to fully



understand what the condition upon which his reinstatement really intended. The respondents are invoking a belated communication, which does not offer them a lifeline.

31 It is not disputed that the appellant had written several letters asking about his salary whilst he was on suspension. From these letters, we note that there was no communication presented by the respondents, demonstrating that the appellant, had unequivocally accepted the terms that the time he was on suspension would be treated as unpaid leave. We also note that there was no further communication by either of the respondents, after the reinstatement letter of 9th June, 2011 and after the letters of the appellant asking for his back pay, confirming whether or not the appellant was agreeable to the terms of conditional reinstatement.

32 We take note of the position stated in the case of *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd*[2007] eKLR that:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting off one’s guard and leading one to believe that the other has waived his right.”

33 The above is a decision by the High Court which persuasive, but which must be considered in light of the circumstances prevailing in this matter. From the evidence, it is apparent that the appellant was not accorded an opportunity to say that he was accepting the conditions alluded to, and the argument that by his conduct, and the argument that he led the respondent to believe that he had accepted the conditional reinstatement, is deflated by the letters he wrote following up his accrued dues. The appellant was therefore not given a clear opportunity to accept or refuse the terms of the conditional reinstatement. We therefore find that the appellant in no way by his conduct or otherwise waived his right to claim for the unpaid salary while he was on suspension, and as such the appellant does not fall into the category as is envisaged in the *Sita Steel Mills case* (supra). We also note that in Circular No. 27/2010, dated 13th October, 2010, the new terms and conditions of service for officers of local authorities in Kenya, provides at paragraph 3 (a):

Where in the opinion of the Head of Department, an officer has been found guilty of an act or omission...the Head of Department may subject to the act or rule in force, Public Service Commission (Local Authority Officers) Regulations, 194 Rule No. 4, the officer may be suspended from duty until the matter has been investigated. The maximum period of suspension to be 3 months, during which the officer shall not be entitled to receive any pay.

34 The appellant confirms that he was suspended as a result of criminal charges for fraud levelled against him, and he was later on acquitted after around 8 years. Our understanding of the above circular is that the appellant was not entitled to any pay, during the term of suspension for 3 months. Circular No. 27 /2010 is clear that upon suspension, the officer concerned shall not be entitled to any pay, and that the suspension is for a maximum of 3 months. We note that after the lapse of the three months, there was no communication to the appellant regarding his status. After the acquittal the appellant was reinstated on the condition that the suspension period would be taken as unpaid leave, with the appellant not being given a chance to accept or refuse the said condition of reinstatement. The reinstatement buttresses the appellant’s right to salary for that period. We hold that the appellant was entitled to his salary for the period of suspension after his acquittal.

35 We also find that, the appellant has established that the employer proceeded in a manner that was manifestly unfair in placing a condition that the period during which the appellant was on suspension,



8 years, be treated as unpaid leave, and further reinstating him to a lower position than he occupied before the suspension. The law is settled that in the clearest of cases the court may order reinstatement without loss of back salary, benefits, and privileges (Section 49 & 50 of the *Employment Act*) and we refer to the decision in *Kenya Broadcasting Corporation vs Geoffrey Wakio* [2019] eKLR where this court held that an employee whose half salary was withheld during the period he was on interdiction was entitled to the arrears. We therefore find that the trial court erred in its finding that the appellant was estopped from claiming any pay/ dues for the period in which he was under suspension. We find that the appellant is entitled to his accrued salary and leave allowance for the entire period he was on suspension.

- 36 On the issue as to whether the claim is time barred by dint of Section 90 of the *Employment Act*, we refer to Lord Diplock's definition on the meaning of cause of action ds in the case of *Letang vs Cooper* (1964) 2 ALL ER 929 as 'a factual situation that existence of which entitles one person to obtain from the court a remedy against another person.' This then begs the question when did the right for the appellant to claim from the respondent accrue? In the case of *Diana Katumbi Kiio vs Reuben Musyoki* CA 211/2015 (2018) e KLR, the court stated:

'the cause of action accrues when the breach occurs when the damage is first sustained. The cause of action whether in tort or contract arises regardless of whether or not the claimant could have known about the damage.'

- 37 We concur with the appellant that the claim was not time barred having been instituted on 30th June, 2014, and find that the learned trial Judge fell into error when he found the suit to have been time barred.
- 38 The appellant accuses the respondents of playing the blame game of shifting liability among themselves, hinged to the contention that the cause of action arose when the appellant was in the 2nd respondent's employment, and therefore that the 1st respondent cannot be held liable for any cause of action that arose during the said employment. We take into account the 1st respondent's reference to the agreement dated 4th March, 2004 signed between the respondents transferring the operational assets, staff and liabilities to the 1st respondent. It is noteworthy that the appellant has not mentioned anything to do with the agreement in his submissions. The appellant was employed by the 2nd respondent on 25th February, 1999 and suspended on 28th March, 2002. On 19th January, 2011 he was transferred to the 1st respondent. We note that the effective date of the transfer agreement was 4th March, 2004 whereas the claim for dues during the appellant's suspension is for the period between October, 2002 to May, 2011. The 1st respondent would be liable (if at all), for dues when the appellant would have been transferred to its employment that would be from 19th January, 2011 to May, 2011.
- 39 The existence of the agreement notwithstanding, our view is that the burden does not rest on the employee to figure out the terms and conditions thereof, but the respondents who are parties to the agreement. The court will also not re write agreements between parties as it is settled law that parties are free to negotiate and enter agreements.
- 40 With regards to the emoluments of Christmas Bonus, terminal golden handshake and salary difference, these are special damages which must be specifically pleaded and proved. We also note that nothing was tendered into evidence by the appellant to prove his entitlement to the same during suspension. It is also doubtful that an employee would be entitled to bonus or handshake as of right. We uphold the trial court's finding that the appellant was not entitled to the relief sought under these heads.



41 In conclusion the appeal succeeds in part as follows:

- 1) The appellant is entitled to payment of his salaries for the period he was under suspension.
- 2) The claim was not statute barred by effluxion of time
- 3) Costs of the appeal be awarded to the appellant

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

S. ole KANTAI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

**I certify that this is a true
copy of the original.**

DEPUTY REGISTRAR

