



**Kyangi v University of Nairobi Enterprises and Services Limited (Employment and Labour Relations Cause E804 of 2023) [2025] KEELRC 566 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 566 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E804 OF 2023**  
**BOM MANANI, J**  
**FEBRUARY 27, 2025**

**BETWEEN**

**FREDRICK OPATI KANYANGI ..... CLAIMANT**

**AND**

**UNIVERSITY OF NAIROBI ENTERPRISES AND SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The dispute between the parties relates to payment of the Claimant's terminal dues. The Claimant contends that having cleared from the Respondent institution in January 2023, he is entitled to be paid the dues. However, the Respondent has allegedly refused to release the amount due to him. And hence this suit to compel release of the funds.
2. On the other hand, the Respondent contends that the Claimant has not cleared with it to enable ascertainment and payment of his terminal dues. As such, he should undertake the exercise and address outstanding audit queries raised by the Auditor General before his terminal dues can be processed.

**Claimant's Case**

3. The Claimant avers that the Respondent hired his services in the year 2017 as a Procurement Officer under a fixed term contract of service for a period of three (3) years. He avers that the said contract was renewed for a further three (3) years with effect from 24<sup>th</sup> March 2020.
4. The Claimant contends that although the contract was to have run up to 23<sup>rd</sup> March 2023, he tendered his resignation from employment on 19<sup>th</sup> December 2022 (erroneously indicated as 17<sup>th</sup> December 2022 in the pleadings). It is his case that after he tendered the notice of resignation, the Respondent allowed him to undertake the clearance process.



5. The Claimant contends that clause 9.2 of the Respondent's Human Resource Manual (the HR Manual) entitles an employee who departs from employment midterm to be paid gratuity on pro-rata basis. As such, he is entitled to his terminal dues and gratuity on these terms.
6. The Claimant avers that he cleared with the Respondent with the expectation that the Respondent will settle his terminal dues once the clearance process was completed. However, this did not happen. He avers that for unexplained reasons, the Respondent has refused to release his dues to date.
7. The Claimant avers that the Respondent is supposed to pay him the sum of Ksh. 1,800,876.86 to cover gratuity. As such, he prays for an order compelling it (the Respondent) to release this amount together with interest and costs of the suit.

### **Respondent's Case**

8. In response, the Respondent does not deny that the parties had an employment relation. It further does not deny that the Claimant resigned from employment as he claims.
9. The Respondent contends that during the term of the Claimant's contract, he was in charge of its procurement functions. As such, he was tasked with the role of managing the procurement and asset disposal processes.
10. The Respondent avers that after the Claimant resigned from employment, he was asked to address pending audit queries arising from its (the Respondent's) Financial Statement for the year 2020/21 as flagged by the Auditor General before he could be cleared, subjected to an exit interview and his final dues paid. However, he did not do so.
11. The Respondent avers that during the financial year 2020/21, the Claimant gave it (the Respondent) his professional opinion authorizing the award of a tender for staff medical insurance cover to a bidder who was subsequently placed under statutory management. It contends that when the bidder was placed under statutory management, it (the bidder) was debarred from undertaking fresh insurance business and all policies that had been issued by it ceased to be effective.
12. The Respondent contends that the Auditor General's report blamed it (the Respondent) for the irregular award of the medical cover to the debarred bidder. The Respondent holds the Claimant responsible for the fiasco. It contends that it was because of the Claimant's failure to exercise his professional judgment whilst rendering his opinion on the subject that the tender was awarded to the debarred bidder.
13. The Respondent contends that the Claimant's resignation from employment did not absolve him from his professional responsibility to redress the fiasco. As a matter of fact, it (the Respondent) contends that the Claimant's current employer (the Office of the Auditor General) has asked him to come back to the Respondent to address the issue so that his terminal benefits can be released.
14. The Respondent denies that the Claimant has finalized the clearance process. It contends that the clearance which the Claimant undertook was with respect to specific items pending formal clearance and exit from the company.
15. The Respondent insists that in order for the Claimant to finalize the clearance process, he must get a letter from its human resource office outlining the status of his benefits. In addition he allegedly ought to issue it (the Respondent) with a letter which will entitle it to give references for him whenever this is requested for by potential employers.



### **Claimant's Rebuttal to Respondent's Case**

16. In response, the Claimant contends that the Respondent voluntarily and unconditionally accepted his resignation. He contends that the Respondent did not suggest that acceptance of the resignation was subject to conclusion of any pending or future investigations in respect of any matter. As such, the resignation took effect on 18<sup>th</sup> January 2023.
17. The Claimant avers that when he tendered his resignation, the Respondent asked him to handover all of its properties that were in his possession and to finalize the clearing process using the prescribed clearance form (UNES/FM/A009). He contends that he followed these instructions and was cleared by all of the Respondent's departments that were relevant to the process.
18. The Claimant contends that the Respondent in fact issued him with a Clearance Certificate on 18<sup>th</sup> January 2023 and that the only amount he was required to pay to it was Ksh. 20,262.00. As such, he contends that he is entitled to be paid his terminal dues which the Respondent has declined to release to him.
19. The Claimant contends that he has no knowledge of the audit queries which the Respondent raised after he had resigned from employment. He contends that once his resignation took effect, the employer-employee relation between the two came to a close. As such, the Respondent cannot purport to institute a disciplinary inquiry against him over the alleged audit queries post the employment contract. It is his view that what the Respondent is attempting to do is to convert the process in court into a post-employment disciplinary inquiry against him.

### **Issues for Determination**

20. After analyzing the pleadings and evidence on record, the court is of the view that the following are the issues which emerge for determination in the suit:-
  - a. Whether the Claimant completed the clearance process from the Respondent after he resigned from employment.
  - b. Whether the Respondent is obliged to release to the Claimant his terminal dues at this stage without more.

### **Analysis**

21. There is no contest that parties to the action had a fixed term contract of service whose tenure was to lapse on 23<sup>rd</sup> March 2023. Similarly, there is no dispute that the Claimant voluntarily resigned from employment through his letter of 19<sup>th</sup> December 2022 which was expressed to take effect on the midnight of 17<sup>th</sup> January 2023.
22. The parties do not contest that the Respondent's HR Manual dated 28<sup>th</sup> June 2016 applied to and had been incorporated in the Claimant's contract of service. It is also apparent from the evidence on record that the Claimant signed the Respondent's Leadership and Integrity Code dated 24<sup>th</sup> June 2016 signifying his agreement to be bound by it.
23. The HR Manual recognizes the right of an employee to close his employment relation with the Respondent midstream through resignation. It further entitles such employee to gratuity payment on pro-rata basis so long as the contract was not closed on account of gross misconduct.
24. On the other hand, the Leadership and Integrity Code obligates the Respondent's employees who have a duty to give advice to the Respondent to provide it (the Respondent) with honest, accurate



- and impartial advice. As such, the Claimant was obligated to provide the Respondent with accurate professional advice relating to his procurement docket whilst in its (the Respondent's) service.
25. The Respondent does not contest that the Claimant was entitled to terminal benefits after he resigned from employment. However, it contends that the benefits were to be determined and paid to him after he had completed clearing with it.
  26. The Claimant contends that he undertook the clearance process in accordance with the Respondent's HR Manual. As such, he is entitled to be paid his terminal benefits. However, the Respondent has refused to release the benefits to him and hence this action.
  27. On the other hand, the Respondent contends that the Claimant is yet to clear with it as required under its HR Manual. It contends that the Claimant is yet to resolve an outstanding audit query flagged by the Auditor General relating to its (the Respondent's) financial statement for the year 2020/21.
  28. The Respondent avers that the audit query relates to a bungled tender for provision of staff medical insurance cover. It insinuates that the tender was mismanaged because of the allegedly misleading professional opinion which the Claimant rendered on it.
  29. The instrument containing the professional opinion which the Claimant gave the Respondent and which is the reason for the standoff between them was produced in evidence by the Respondent. It shows that the impugned tender for provision of staff medical cover was evaluated by a Tender Evaluation Committee (the Committee) comprising of seven (7) persons. The Claimant did not, as a matter of fact, sit in the Committee in person.
  30. The Claimant scrutinized the report by the Committee and made the following comments on the aspect of due diligence:-

“No due diligence was carried out on the successful bidder. The Evaluation Committee carried out the process based on the criteria provided.”
  31. He then went ahead to, inter alia, render the following opinion:-

“In my opinion, I recommend for consideration of award of contract for provision of UNES Staff Medical Insurance Cover to M/S Resolution Insurance Company Limited as per the committee's recommendations at an annual premium of Ksh. 9,102,448.00.....inclusive of taxes. The contract shall run for a period of one year renewable annually up to three years.”
  32. The instrument has an approval section which ought to evidence the accounting officer's decision either approving or rejecting the Claimant's opinion. This section is supposed to be completed and signed by the Respondent's Managing Director or his appointed representative.
  33. The instrument does not suggest that the Respondent's accounting officer made the decision to either approve or reject the opinion when it was first presented to him. Instead, he made the following comments on the document:-

“A due diligence report be filed with my office before approving or rejecting the professional opinion. Give reasons for dropping some of the vendors.”
  34. In effect and if the above comments are anything to go by, the Respondent's accounting officer deferred his decision to approve or reject the Claimant's opinion pending the Committee undertaking due diligence on the recommended bidder and presenting a report on the matter. The above position was most likely influenced by the Claimant's comments in his opinion to the effect that the Committee had not undertaken due diligence on the successful bidder.



35. It appears that following the aforesaid decision by the Respondent's accounting officer, the matter was remitted to the Committee to conduct due diligence on the recommended bidder. Thereafter, the Committee prepared and presented to the Respondent a due diligence report dated 4<sup>th</sup> June 2021.
36. It is apparent from the due diligence report that besides the technical evaluation of the tender, the successful bidder was supposed to be subjected to due diligence to verify certain competencies by it (the bidder) to execute the contract. This is evident from the following statement in the aforesaid report:-
- “Resolution Health qualified for the Staff Medical Scheme and therefore there was need to conduct [a] due diligence to a certain (sic) what has been proposed and the reality on the ground at the service point, post purchase experiences from clients who are already benefiting from the scheme, the hospital service points and the vendor.”
37. The Committee made the following findings after the due diligence inquiry:-
- “The finding shows that:
- a. The Resolution Health are eligible and have the ability to offer Staff Health Medical Cover.
  - b. The client has positive experience from the services offered by Resolution Health and the raised cases are resolved immediately on their stand by (sic) 24 hours through emergency care center.
  - c. Resolution Health has a wider network coverage with over 850 hospitals and specialists widespread all over 47 Counties.”
38. Based on the foregoing, the Committee asked the Respondent's accounting officer to consider awarding the tender in question to Resolution Health. It would appear that the award was then finalized.
39. The Committee which undertook the due diligence exercise comprised of six out of the seven Tender Evaluation Committee members. The Claimant is not, as a matter of fact, listed as a member of the Committee. And neither does the due diligence report suggest that he participated directly in the due diligence exercise.
40. The parties appear to be in agreement that the impugned procurement process was governed by the *Public Procurement and Asset Disposal Act*, Cap 412 C Laws of Kenya. As such, it was a requirement and indeed it is expected that the Tender Evaluation Committee that oversaw the exercise was constituted in accordance with the aforesaid legislation.
41. Section 46 of the Act provides for membership of the Committee. Of significance is section 46(4)(c) of the Act which provides that the secretary to the Committee shall be the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function.
42. The Claimant was the head of the Respondent's procurement function. As such and by law, he was obligated to serve as the Committee's secretary either in person or through his appointee from the procurement department. Thus, although he (the Claimant) did not sit in the Committee as a matter of fact, it is expected that his appointee served as secretary to the Committee.
43. In effect, the decisions of the Committee (including the one on due diligence) are deemed to have involved the Claimant either through his direct participation in the Committee or through the participation of his representative. As such, the fact that he was not physically present during the deliberations of the Committee at both the tender evaluation and due diligence stage cannot remove him from ownership of the Committee's reports.



44. The Claimant tendered his opinion to the Respondent's accounting officer on the basis of sections 47(2) and 84 of the *Public Procurement and Asset Disposal Act*. Section 84 of the Act underscores the dual mandate the Claimant had in the process. He was to tender two reports on the process: one to the Committee in the form of a commentary on its evaluation of the tender in his position as its secretariat; and the other to the Respondent's accounting officer in the form of a professional opinion in his capacity as head of the procuring function of the Respondent.
45. Although the Claimant pointed out that the Committee (to which he was, by law, a member as its secretary) did not conduct due diligence on the preferred bidder, he nevertheless recommended that the bidder be appointed. However, after studying the Claimant's opinion, the Respondent's accounting officer opted to remit the matter back to the Committee to conduct due diligence. As the record shows, the Committee undertook the exercise and gave the bidder a clean bill of health.
46. As pointed out earlier, the Claimant is in law deemed to have been part of the Committee by virtue of his secretarial role to it. As such, he (in law) is deemed to have been party to its report regarding the due diligence it conducted on the successful bidder.
47. The Claimant argues that the Respondent's accounting officer was not bound by his professional opinion when deciding whether to award the impugned tender. That may be so.
48. However, a professional opinion must count for something. As such and especially where the law has decreed for one (an opinion) it should be taken into account whilst making a decision unless there is cogent justification for ignoring it.
49. In this case, it is my view that the Respondent's accounting officer did in fact consider the Claimant's opinion whilst making his decisions. It is noteworthy that it is because of the Claimant's comments on lack of due diligence by the Committee that the officer remitted the matter back to the Committee for this purpose.
50. It is further noteworthy that despite the Claimant's reservations on the impugned tender on account of lack of due diligence, he nevertheless recommended that the successful bidder be awarded the tender. The record shows that after overcoming the due diligence requirement, the Respondent's accounting officer proceeded, on the basis of the Claimant's earlier recommendation, to finalize the award. As such, it is apparent that the accounting officer took into account both the Claimant's and Tender Evaluation Committee's (to which the Claimant was a member by law) recommendations in making his final decision.
51. The Auditor General faulted the aforesaid tender award in her report of 27<sup>th</sup> June 2023. She observed that the winning bidder had been non-responsive during the bidding process after it failed to submit the required financial statements.
52. In the Auditor General's view, because the winning bidder did not provide its financial statements, the Tender Evaluation Committee ought to have recommended the second highest bidder for award of the tender. This is because this particular bidder had provided the requisite financial statements.
53. The Auditor General's concerns over the process were informed by the fact that the winning bidder was placed under statutory management shortly after it had been awarded the tender. She implies that this eventuality would have been avoided had the Committee recommended the second bidder for the tender award.
54. The report by the Auditor General covers the period up to 30<sup>th</sup> June 2022 when the Claimant was still in employment. However, it was issued on 27<sup>th</sup> June 2023.



55. On the other hand, the Claimant handed in his letter of resignation on 19<sup>th</sup> December 2022. The resignation crystalized on 18<sup>th</sup> January 2023. As such, at the time the Claimant was handing in his resignation, the aforesaid audit queries had already crystalized (since they relate to the period before 30<sup>th</sup> June 2022) even though they had not been brought to the attention of the parties to the action.
56. The Respondent contends that it informed the Claimant about the audit queries through its letter to him dated 18<sup>th</sup> January 2023. It contends that the Claimant was still undertaking the clearance process at the time.
57. On the other hand, the Claimant contends that he completed the clearance process on 17<sup>th</sup> January 2023 and was issued with the requisite Clearance Certificate on 18<sup>th</sup> January 2023. He denies that the Respondent issued him with its letter dated 18<sup>th</sup> January 2023 on that day (18<sup>th</sup> January 2023) as purported by the Respondent.
58. I have looked at the available evidence on this aspect of the controversy. The Auditor General's report which raised the audit query in controversy is dated 27<sup>th</sup> June 2023. During his testimony in court, the Respondent's witness admitted that the Respondent received the report on 27<sup>th</sup> June 2023. It is therefore inconceivable that the Respondent would have been able to write to the Claimant on 18<sup>th</sup> January 2023 regarding audit queries that were flagged in an audit report that was prepared and shared with it on 27<sup>th</sup> June 2023, approximately six months ahead. As such, it appears to me that the Respondent's officers backdated the letter dated 18<sup>th</sup> January 2023 to serve an ulterior purpose.
59. The fact that the Respondent's letter of 18<sup>th</sup> January 2023 was backdated for suspect reasons is further fortified by the Respondent's email to the Claimant dated 12<sup>th</sup> September 2023. Through this email, the Respondent's officers forwarded the aforesaid letter to the Claimant.
60. Why did it take the Respondent up to 12<sup>th</sup> September 2023 to release to the Claimant a letter which had purportedly been authored on 18<sup>th</sup> January 2023? It appears to me that the Respondent's action was triggered by the Claimant's decision to demand for settlement of his terminal benefits through his lawyers. In a bid to fight off the demand, the Respondent decided to backdate its aforesaid letter in order to paint the picture that it had delayed processing the Claimant's benefits because of the outstanding audit query.
61. However and as fate would have it, the Respondent's officers failed to realize that the audit report which they were referring to was dated 27<sup>th</sup> June 2023. Therefore, their impugned letter could only have been crafted after and not before this date.
62. The fact that the Respondent's officer(s) tried to manipulate the aforesaid document in a bid to bolster the Respondent's defense is also apparent from the WhatsApp texts that its witness sent to the Claimant on 29<sup>th</sup> August 2023 after the latter issued a formal demand for his terminal dues. It is after the Claimant had issued this demand that the Respondent's witness reminded him through the texts that "choices have consequences" and that because the Claimant had elected to go that route, the Respondent would require him to address the "OAG query on Regular Procurement of Medical scheme you did for the Company."
63. The aforesaid conduct by the Respondent's officer(s) is, to say the least, appalling. It must be deprecated. It is not right that an officer would manipulate documents in a dispute in a bid to bolster his defense to the dispute. Notwithstanding this, I must decide the matter justly after wholesomely evaluating the evidence on record without being clouded by this less than desirable conduct.



64. I have looked at the evidence relating to the clearance process. It is not in doubt that the Claimant was issued with a Clearance Certificate signed by or on behalf of the Respondent's Managing Director on 18<sup>th</sup> January 2023. However and in my view, this certificate was not the sole consideration for payment of his exit dues.
65. The above view is informed by the manner in which clause 9.10 of the Respondent's HR Manual is framed. Clause 9.10 (c) provides thus, "the final payments shall be made after clearing and exiting the company....". On the other hand, clause 9.10 (i) provides thus, "following termination of the contract, former employees shall receive a letter from the Human Resource Office that outlines the status of their benefits upon termination".
66. It is noteworthy that the two sub-clauses fall under one rubric titled "Separation Process". That means that they (the two sub-clauses), together with the other sub-clauses under clause 9.10 of the HR Manual, set out the procedure to be followed whilst processing release of an employee from employment. This procedure is, in my view, cumulative and not disjunctive in nature. It is this process that culminates into the payout of the employee's final dues.
67. As such, although the Claimant had been issued with the Certificate of Clearance on 18<sup>th</sup> January 2023, he was still required to obtain a letter from the Respondent's Human Resource Office under clause 9.10 (i) of the Manual setting out his terminal benefits to enable payment of his exit dues. It is this letter which was to tabulate the benefits to be paid to him under clause 9.10 (c) of the HR Manual.
68. It is true that once the Claimant's resignation took effect on 18<sup>th</sup> January 2023, the Respondent lost disciplinary control over him. However, this did not discharge the Claimant from fulfilling the requirements under clause 9.10 of the Respondent's HR Manual with respect to the clearance process.
69. Although the Respondent's Managing Director and the Claimant executed the latter's Clearance Certificate on 18<sup>th</sup> January 2023, nothing in the Respondent's HR Manual or indeed the law suggests that this meant that the clearance process was thereby irrevocably closed and that the parties could not revisit it under whatever circumstances. It is in this context that I look at the Respondent's averments regarding the issue of the pending audit query.
70. Although the Claimant had been issued with a Clearance Certificate on 18<sup>th</sup> January 2023, he could only have been paid his terminal dues after the Respondent's Human Resource Office had computed them in terms of clause 9.10 (i) of the HR Manual. In my view, until the Respondent's Human Resource Office discharged this function, the Respondent was still entitled to raise with the Claimant any outstanding issue (including on the impugned tender) which was likely to affect the quantum of his final dues. As long as the Respondent raised the issue(s) before its Human Resource Office had finalized computation of the Claimant's final dues, this would still be deemed to fall within the clearance process.
71. Indeed and as the Claimant's advocates correctly submit, the Respondent's HR Manual makes payment of an existing employee's terminal benefits subject to him clearing all liabilities he may be having with the Respondent. In this regard, clause 9.2 (e) of the Manual provides as follows:-
- "Payment of terminal dues shall be subject to clearance of the staff concerned from all liabilities to UNES." Emphasis added through underlining.
72. It is true as the Claimant's counsel points out that the Respondent's letter to the Claimant dated 13<sup>th</sup> January 2023 required the Claimant to: prepare a handover report; hand over all company assets in his possession; and complete an online exit interview form to enable him clear with it (the Respondent). It is also true that the Claimant undertook these procedures.



73. However, it is also noteworthy that before the Respondent had computed and released to him (the Claimant) his terminal dues, the Auditor General flagged an audit query with respect to the Respondent's financial statement for the year 2020/21. The query related to a tender for provision of medical insurance cover which the Respondent had awarded to a firm which was subsequently placed under statutory management.
74. According to the audit report, the Respondent's management did not demand for indemnity in the sum of Ksh. 910,244.00 from the bankers of the company that was placed under statutory management. As a result, the Respondent had forfeited this amount.
75. The Respondent relies on this report to demand that the Claimant addresses the bungled tender issue as part of the clearing process. In effect, I understand the Respondent to be saying that it incurred liabilities associated with the impugned tender and which, in its view, the Claimant was to address as part of the clearance process.
76. It is true that the Respondent may have failed to flag this matter in its letter to the Claimant dated 13<sup>th</sup> January 2023 as a component of his clearance requirements. However, the issue was nevertheless raised before the clearance process was closed through computation and release of the Claimant's terminal dues.
77. As mentioned earlier in the decision, the responsibility for ensuring that the impugned tender was properly managed lay with the Claimant. In terms of section 46 (4) (c) of the *Public Procurement and Asset Disposal Act*, the Claimant was, in law, a member of the Tender Evaluation Committee which oversaw the exercise. Further, under clause 25 of the Leadership and Integrity Code of the Respondent as read with sections 47 (2) and 84 of the *Public Procurement and Asset Disposal Act*, the Claimant was obligated to ensure that the professional opinion he gave the Respondent with regard to the impugned tender was sound. Therefore, if the process ran into headwinds, the buck stopped with him.
78. In my view, it was totally unnecessary for the Respondent's officer(s) to have sought to backdate the letter dated 18<sup>th</sup> January 2023 in a bid to evade this claim. The fact that the Respondent's Human Resource Office had not computed the Claimant's terminal dues at the time the Auditor General raised the audit query in June 2023 meant that the matter, albeit late, came up before the Claimant's clearance process had come to a close through release of his terminal dues.
79. The Claimant's advocates argue that the liability flagged by the Respondent was a future and not historical liability. I do not think so. The fact that the audit query was raised in the Auditor General's report dated 27<sup>th</sup> June 2023 after the parties had signed off the initial clearance form did not convert it into a future liability. As was mentioned earlier in the decision, because the query related to the financial year 2020/21, it crystalized when that year closed. As such, it was a historical liability which was only raised at the tail end of the clearance process.
80. The Claimant's counsel argues that the Respondent's insistence that the Claimant addresses the impugned audit query at this stage is tantamount to it (the Respondent) purporting to exercise disciplinary control over him post the employment contract. I do not think that this is the case. Parties to a closed contract of service are entitled to ascertain and settle liabilities arising from and associated with the contract as part of the clearance process.
81. An employer is not prohibited from seeking indemnity from an employee or a departing employee for losses which he may have suffered as a result of the employee's or departing employee's actions. This reality is for instance evidenced by section 19 (1) (d) of the *Employment Act* which empowers the



employer to recover from an employee amounts he may have lost because of the employee's negligence or dishonesty.

82. The foregoing, in my view, applies, *mutatis mutandis*, to resolving outstanding liabilities between parties to an employment contract at the exit stage. There is no law that bars them from doing so. The fact that an employer insists on this approach at the exit stage of a contract of service does not, in my humble view, mean that he is attempting to exercise disciplinary control over the former employee post the employment contract. Otherwise, parties to an employment contract would not be enabled to settle contested liabilities between them during the clearance process after the contract between them has come to a close.
83. The Claimant relies on the case of *Mtati v KPMG Services (Pty) Ltd* (J2277/16) [2016] ZALCJHB 403 to contend that the Respondent has no disciplinary jurisdiction over him post the employment contract stage. That is correct. However, the issue between the parties, as I perceive it, is not one of the Respondent seeking to exercise disciplinary control over the Claimant. Rather, it is one of the Respondent requiring the Claimant to address the impugned audit query as part of his clearance process to enable the two agree on the quantum of the Claimant's terminal dues in terms of clause 9.2 (e) as read with clause 9.10 (i) of the Respondent's HR Manual.
84. The Claimant also invokes the case of *Ansari v Capcom Limited & another* [2024] KEELRC 2319 (KLR) to contend that the Respondent is not entitled to make post-employment claims against him. However, the two cases are distinguishable. It is noteworthy that in the aforesaid case, the parties did not invoke any human resource instrument to anchor their case. In contrast in the instant case, the parties rely on an HR Manual which regulates release of an employee from employment. Clause 9.10 (i) of the Manual provides as follows:-
- “Following termination of the contract, the former employee shall receive a letter from the Human Resource Office that outlines the status of their benefits upon termination.”
85. The above provision in the Manual acknowledges the fact that matters relating to the status of exit emoluments payable to a former employee of the Respondent are to be handled at the post employment stage between the Respondent's Human Resource Office and the “former” employee. As such and unlike in the case referred to by the Claimant's counsel, the HR Manual in the instant case specifically acknowledges that the parties were to deliberate on and settle the Claimant's terminal benefits at the post employment stage.
86. The Claimant also relies on the case of *Achieng' v Africa Diatomite Industries Limited & another* (Employment and Labour Relations Cause 13 of 2020) [2023] KEELRC 293 (KLR) (2 February 2023) (Judgment) to contend that an employer should not be allowed to waive the issue of failure to clear to deny an employee his benefits. However, this case is also distinguishable from the instant suit. Unlike in the instant case where the Respondent contends that it has not been able to pay the Claimant his terminal dues because he is yet to address the audit query as part of the clearance process, the employer in the *Achieng' v Africa Diatomite* case did not suggest that the employee's plea for terminal dues was not honoured on account of a liability that was allegedly outstanding.
87. The Claimant further relies on the decision in *Odhiambo v University of Nairobi Enterprises and Services Limited* (Cause E497 of 2021) [2023] KEELRC 994 (KLR) (18 April 2023) (Judgment) (the *Odhiambo* case) to anchor his case. However, the facts and issues in the two cases are not on all fours.
88. In the *Odhiambo* case, the employer sought to offset from the employee's terminal dues a sum of Ksh. 4,500,000.00 which had allegedly been pilfered by the employee. The court described the claim as spurious since, in its view, the loss was attributable to the employer's management and not the



employee. In the premises, the court observed that the employer ought to have recovered the amount from its management and not the employee. As such, it was not legitimate for it (the employer) to wave the purported claim as a basis for not paying the employee's terminal dues. The court observed that this being the only issue which stood between the employee and his terminal dues, he was deemed to have legitimately finalized the clearance process and was entitled to be paid his terminal dues.

89. Conversely in the instant case, the court has found that in law, the Claimant was responsible for the procurement process. Therefore, the Respondent is entitled to take up any lapses in the process with him at any time including during the clearance process. As such, the two cases are distinguishable.
90. In their submissions, the Respondent's advocates argue that the Claimant's letter of resignation was supposed to have been copied to its Human Resource Office and his supervisor as a precondition for its efficacy. They contend that because this was not done, the resignation was vitiated by failure to satisfy a condition precedent. As such, the Respondent is not, in any event, obligated to release the Claimant's terminal benefits on this account.
91. This argument is not premised on the Respondent's Statement of Defense. Nothing in the Statement of Defense or indeed the filed witness statement advances the foregoing as a defense to the claim.
92. Parties are bound by their pleadings. They are not entitled to frame and build their case or defense on matters that are not pleaded (*South Nyanza Sugar Company Limited v John Gituki Gomba* [2022] eKLR). And neither is the court entitled to decide a dispute that is before it on the basis of a matter which was not pleaded. As such, I will disregard the Respondent's submissions in this respect.
93. The final question to consider is whether the Claimant is entitled to the reliefs that he seeks through this action. As observed earlier in the decision, the Claimant is yet to finalize the clearance process by addressing the audit query which was raised by the Auditor General with respect to the Respondent's Financial Statement for the year 2020/21. The report by the Auditor General was published on 27<sup>th</sup> June 2023 before the Respondent's Human Resource Office had computed and paid out the Claimant's terminal benefits. Therefore, the matter was flagged during the clearance process. As such, the Respondent was entitled to raise it as one of the issues which the Claimant was to address in the clearance process.
94. The foregoing being the case, the court arrives at the conclusion that the Claimant filed the instant suit to compel release of his terminal dues before he had finalized the clearance process. As such, the action was presented prematurely and fails on this account.
95. Finally, I note that the Respondent has sought a number of reliefs from the court. However, it did not file a counter claim to anchor them (the reliefs). Absent this, the court cannot consider the prayers. As such, I decline to pronounce myself on the requests.

### **Determination**

96. The upshot is that the court finds that:-
  - a. The Claimant's suit against the Respondent was instituted prematurely before the Claimant had finalized clearing with the Respondent.
  - b. As such, the case fails on this account and is hereby dismissed.
  - c. Each party shall bear own costs.

**DATED, SIGNED AND DELIVERED ON THE 27<sup>TH</sup> DAY OF FEBRUARY, 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.

