



REPUBLIC OF KENYA



KENYA LAW
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**Kenya County Government Workers Union v Nairobi County Public Service Board
(Cause 58 of 2020) [2025] KEELRC 749 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 749 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 58 OF 2020
CN BAARI, J
MARCH 13, 2025**

**BETWEEN
KENYA COUNTY GOVERNMENT WORKERS UNION CLAIMANT
AND
NAIROBI COUNTY PUBLIC SERVICE BOARD RESPONDENT**

JUDGMENT

1. The Claimant's Memorandum of Claim is dated 29th January, 2020, and filed on 3rd February, 2020. Under the claim, the Claimant prays for judgment against the Respondent for the following orders:-
 - a. A declaration that the Respondent has discriminated and continues to discriminate against the 483 nurses currently serving in the Respondent County Government in payment of non-practice allowances.
 - b. A declaration that the Respondent is in breach of the Collective Bargain Agreement signed between the Claimant and itself
 - c. An order for Payment of all accrued non- practice allowance for each of the 483 nurses with interest thereon.
 - d. An order directing the Respondent to pay the 483 nurses their non-practice allowance henceforth without fail.
 - e. Any other relief that this Court sees fit to grant
 - f. Costs of this suit.
2. The Respondent responded to the claim by way of a statement of Response dated 29th October, 2021. In the response, the Respondent merely denied the Claimant's claim, but did not call any witness or file any witness statement to support its case.



3. The Claimant's case was heard on 13th November, 2024, when the Claimant called two witnesses: Rosemary Wanjiku Kimani and Gladys Kang'ata. Rosemary produced the Claimant's documents in support of the claim contained in the Claimant's list and bundle of documents dated 29th January, 2020. She then adopted her witness statement dated 6th July, 2023. Gladys also adopted her witness statement as her evidence in chief.
4. Submissions were filed for both parties.

The Claimant's Case.

5. The Claimant states that at all material time, her members were and still are permanently employed as nurses by the Respondent herein.
6. The Claimant avers that it negotiated a Collective Bargain Agreement with the Respondents, which remains in force to date as a result of the extended orders of court delivered in cause number 1023 of 2013. That this agreement provided that officers registered under recognized professional bodies and employed by the county governments be paid a non-practicing allowance of Khs.5000 per month.
7. It states further that since the signing of the CBA, the Respondent has been paying nonpractice allowance to all the other professionals in the healthcare sector to the exception of the grievant. It is the Claimant's case that its membership found the practice discriminatory and informed the Claimant Union to help address the grievances.
8. That this form of discrimination goes against the nurses fundamental rights, specifically freedom from discrimination enshrined under Article 27 of *the Constitution* and is also against the right to fair labour practices as provided under Article 41 of *the Constitution*.
9. The Claimant states that their General Secretary wrote to the Respondent's County Secretary vide a letter dated 4th April, 2016 demanding that the grievants' non-practice allowances be released to them.
10. The Claimant avers that vide a letter dated 10th November, 2011, the then Permanent Secretary Ministry of Local Government directed that non-practice allowance be paid to all professionals in the public service. It states that the Secretary of the Public Service Commission further wrote a letter dated 11th May, 2016, advising County Governments to honour the terms of the CBA.
11. It is its case that the Respondent herein ignored the above letters and this prompted the Claimant's General Secretary to write a further letter dated 6th June, 2016 to the County Secretary of the Respondent referring to the letter dated 4th April, 2016 and giving the County Government 14 days to pay the said allowances.
12. The Claimant states that the Cabinet Secretary also wrote a letter dated 11th May, 2016 to the Respondent's County Secretary, advising the Respondent to honour the terms of the CBA, which it did not do, resulting in the Claimant writing a letter dated 17th October, 2016, to the Cabinet Secretary reporting a trade dispute.
13. The Claimant concedes that the Respondent did not adequately participate in the conciliation process, but nonetheless the conciliator issued a recommendation that the 483 nurses being professionals but bared by the act from private practice, should earn their non- practice allowance.
14. That the matter was then subjected to a conciliation process, but despite this, the Respondent continues to discriminate against the 483 nurses under its employment by refusing to pay their non-practice allowances to date necessitating the filing of this suit.



15. The Claimant prays that this Court grants the orders sought in the memorandum of Claim.

The Claimant's submissions.

16. It is submitted for the Claimant that the Respondent is engaging in a discriminatory practice by failing, refusing, ignoring, and/or neglecting to pay the non- practice allowance for nurses working with the Respondent, and who are members of the Claimant union, and at the same time paying the same allowance to other professionals working with the County government.
17. It submits that it has adduced all the relevant evidence to prove its case against the Respondent to the required standard of a balance of probabilities. It submits that in its list and bundle of documents, it has provided the list of all the 483 nurses whose non-practice allowances the Respondent continues to withhold.
18. It is the Claimant's submission that it has annexed various correspondence with the Respondent on the payment of the non-practice allowance, which have not elicited any response from the Respondent. The Claimant states that it has also produced as part of its documentary evidence the CBA signed between it and the Respondent herein, in which the parties agreed that a non-practicing allowance of Kshs. 5,000/= would be paid to professionals working with the Respondent including nurses.
19. The Claimant further submits that the Respondent's response to the claim contains mere denials and the Respondent has failed to offer any explanation or justification at all as to why it has failed to implement the terms of a valid CBA signed with the Claimant herein. It submits that the only inescapable conclusion which this Court can make is that the Respondent is in breach of the CBA signed on 12th October, 2013 and registered by this Court on 7th February, 2013. The Claimant had reliance In Banking Insurance & Finance Union v Kenya Bankers Association {20211 eKLR to buttress this position.
20. It is the Claimant's submission that the Respondent's failure or omission to pay non-practicing allowance to the 483 members of the Claimant who are working as nurses in the Respondent County amounts to an unfair labour practice.
21. The Claimant submits that its case and evidence remain unchallenged and uncontroverted by the Respondent, there by entitling the Claimant to the prayers sought in the claim. It sought to rely in the case of Billiah Matiangi v Kisii Bottlers limited & another {20217 eKLR for the holding that:-

“Where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiffs evidence is uncontroverted and the statement of defence remains mere allegations.”

22. It submits further that an award of costs is within the discretion of the Court and generally follows the event, and that the event being the successful proof of a party's case. It submits that it has shown why its case ought to succeed and hence submit that it is deserving of an award of costs.
23. The Claimant finally urges the Court to find merit in its claim and grant the prayers sought therein.

The Respondent's Submissions.

24. It is submitted that that since there is no evidence on record showing that the alleged grievants are members of the Claimants, the instant claim is null and void ab initio.
25. It is the Respondent's submission that the Claimant has not proved discrimination against the alleged grievants by the Respondent.



26. The Respondent submits that the fact it did not adduce any evidence is immaterial, the legal burden of proof is on the Claimant to prove its case to the required standard. It submits further that it was not upon the Respondent to prove that it did discriminate against the alleged grievants herein, by failing to pay them non-practicing allowance, as alleged. The Respondent sought to rely in the case of *Wanjohi Mathenge v Lydiah Nyaguthii Agatha & Another* [2007] eKLR to support this assertion.

Analysis and Determination.

27. Upon careful consideration of the pleadings, the oral testimonies and the written submissions, the singular issue for determination is whether the grievants are entitled to payment of non-practice allowance.
28. CW1-Rosemary Wanjiku Kimani told the Court that though she is now retired as a nurse, she worked for the Respondent herein as a nurse during the period of the CBA subject of this case, but that the Respondent never paid her and the 482 others their non-practicing allowance. On her part, Gladys Kang'ata testified that she is one of the 483 nurses whose non-practicing allowances the Respondent has declined to pay in breach of the terms of the CBA.
29. The Respondent only filed a response to the claim, but no witness appeared in court to testify on behalf of the Respondent. This would therefore mean that the Claimant's evidence was not controverted. In *Janet Kaphiphe Duma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007* Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:-
- 'In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations....'
30. Further, in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR the court had this to say on how documents filed in court can be considered evidence:-
- “...How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.”
31. On this basis therefore, the court returns that the Respondent did not tender any evidence in the matter to revert the Claimant's assertions.



32. It is however trite law that a party must prove his case even where the opponent has not defended the same. I thus agree with the submission by the Respondent, relying in the case of Michael Wanjohi Mathenge v Lydiah Nyaguthii Agatha & Another [2007] eKLR where the Court held: -
- “...the burden of proving the case was upon the Plaintiff. The Defendants on their part could have, if they so wish, kept quiet without presenting their defence. The burden therefore did not shift to the Defendants to prove their defence.”
33. What the Claimant seeks on behalf of its membership, is payment of non-practice allowance that it alleges continuous to be paid to the rest of the professional staff of the Respondent to their exclusion.
34. The Claimant’s claim arises from a Collective Bargaining Agreement (CBA) entered between the Claimant and the Respondent and registered by the Court on 7th February, 2013. Clause 55 of the said CBA provides thus:-
- “An officer registered with a recognized professional body shall be paid nonpracticing allowance of Kshs. 5,000/= per month to encourage and retain professionalism in the councils, provided that the councils paying higher shall continue paying at their rates.”
35. In Banking Insurance & Finance Union v Kenya Bankers Association [2021] eKLR, the Court stated thus:-
- “Any agreement on wages and terms and conditions of service in a CBA thus become incorporated into the contracts of employment of all unionisable staff covered by the same and become part of their terms of service, from the date of registration of the CBA. By withholding the implementation of the July, 2020 salary notch and efficiency bars increment, the Respondent and its members, in addition to violating the terms of the CBA, also breached the terms of contract of all the unionisable employees of the Respondent’s members whose terms were covered by the CBA.”
36. The provision for payment of non-practice allowance under the CBA, formed part of the grievants contract by virtue of their unionisable status. It therefore follows that non-practice allowance became a term of the grievants terms of service, and by not making the payment, the Respondent was in breach of CBA.
37. This court notes that both the Permanent Secretary, Ministry of Local Government, the Public Service Commission and the Cabinet Secretary Ministry of Labour directed in their various correspondences placed before this court, that the Respondent complies with the terms of the CBA in respect of the non-practice allowance.
38. For reason that the Respondent did not defend the suit, the court did not have the benefit of getting to know the reason the Respondent found it difficult to comply with an express term of the CBA.
39. Further, the Claimant’s assertion that some employees of the Respondent enjoyed the benefit of non-practice allowance while the 483 were not, is in my view a clear case of discrimination. In the case of Louw v Golden Arrow Bus Services (Pty) Ltd [1999] ZALC 166, the court held that denial of the two allowances amounted to unequal treatment and therefore unfair discrimination that was founded upon arbitrary or unreasonable grounds.
40. In the end, I find and hold that the Respondent’s action of not paying the grievants a non-practice allowance is unlawful, wrongful and amounts to an unfair labour practice.



41. In the final analysis, I find the Claimant's claim merited, and I grant the following orders:-
- a. A declaration that the Respondent is in breach of the Collective Bargain Agreement signed between the Claimant and itself
 - b. An order for Payment of all accrued non- practice allowance for each of the 483 nurses.
 - c. An order directing the Respondent to pay the 483 nurses their non-practice allowance henceforth without fail.
 - d. That in the interest of social partnership, parties shall bear their own costs of the suit.
42. Judgment accordingly.

DATED, SIGNED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 13TH DAY OF MARCH, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Oginga present for the Claimant

Mr. Liechi present for the Respondent

Ms. Esther S - CA

