



REPUBLIC OF KENYA



KENYA LAW
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**Kawinzi v East Africa Portland Cement (Cause 24 of 2019)
[2025] KEELRC 1109 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1109 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 24 OF 2019
MN NDUMA, J
APRIL 3, 2025**

BETWEEN

DONALD KAWINZI CLAIMANT

AND

EAST AFRICA PORTLAND CEMENT RESPONDENT

RULING

1. The Claimant retired on 31/12/2017. The Respondent paid the Claimant gratuity as follows:
 - a. Kshs. 1,000,000.00 on 15/2/2018
 - b. Kshs. 3,469,717.25 on 20/2/2019
 - c. Kshs. 5,000,000 on 20/2/2019
2. The Claimant submits that all gratuity was due and payable on 31/12/2017 upon retirement of the Claimant and so any late payment of gratuity attracted interest.
3. The Claimant relies on the case of Alfred Mwangera Mutema versus Kenya Methodist University (2018) eKLR where the court stated the following on payment of gratuity:-

"There is no dispute that the Claimant is entitled to gratuity. This entitlement accrued upon the expiry of his contract. The Respondent did not pay the gratuity when it fell due prompting the Claimant to file suit. The court became seized of the matter when the suit was filed. This therefore ought to be the period from which interest payable should be reckoned.

Concerning the interest rate courts have always awarded interest at court rates unless agreed to the contrary by the parties or in exceptional circumstances. No exceptional circumstances have been demonstrated in this case to warrant awarding of interest at a different rate.



In conclusion the court orders that interest is payable on the admitted gratuity amount at the rate of 12% p.a. from the date of filing suit until payment in full.”

4. The Claimant further seeks payment of costs of the suit since he was forced to file suit to claim the delayed payment of costs. The court relies on the case of Omondi versus Associated Motors (Cause 1306 of 2018)[2023] KEELRC 3092 (KLR) (29 November 2023) (Judgment) where the court held:-

“The Claimant will therefore be entitled to Kshs. 453,200.09 as well as costs of the suit as the suit was unnecessary since the Respondent knew its obligations to the Claimant yet made him wait through a trial and for over 5 years. The interest on the sum is to run from the date of filing suit and shall be at court rates.”

5. The Claimant further submits that costs follow the outcome of the suit in terms of section 27 of the Civil Procedure Act and affirmed in the case of Machakos ELC Petition No. 6 of 2013 party of Independent candidate of Kenya and another versus Mutula Kilonzo and 2 others [2013] eKLR which was quoted case of Levben Products versus Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227 where the court held:-

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp versus Gibbon and Co., 1913 ADD 345). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

6. The Respondent opposes payment of interest and costs relying on section 27 of the Civil Procedure Act which provides as follows:-

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid: and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.”

7. The Respondent therefore submits that award of costs is at the discretion of the court depending on the circumstances of the case. That the discretion must be exercised Judiciously considering the conduct of the parties, the subject of litigation, the circumstances that led to filing of the suit, the events which eventually led to the termination of the suit and at what stage the proceedings were terminated. That courts need to promote settlement of disputes by not awarding costs where a suit has been settled by consent of the parties as in the present case.

8. The Respondent relies on the case of Catherine Kavata Musuva versus Safaricom Investment Cooperative Society Limited [2021] eKLR that quoted with approval the case of Hussein Janmohamed & Sons versus Twentche Overseas Trading Co. Ltd [1967] EA 287.



9. That the court herein has reason to depart from the principle that costs follow the event and exercise its discretion in favour of the Respondent.
10. That Respondent faced financial difficulties hence delay in payment of gratuity but in good faith proceeded to enter an amicable settlement of the suit. That gratuity was settled in full by February 2019 as confirmed by documents before court.
11. That denial by the Claimant, unfairly, that he had been paid all gratuity by 20/2/2029 led to delay of settlement of the matter until 24th January 2024 when the Respondent filed documents to prove the said payment. That this conduct should be considered in the exercise of the court's discretion.
12. The Respondent further submits that the Claimant is not entitled to interest on paid amount since the case was settled by consent. The Respondent relies on the case of Haraf Traders Limited versus Narok County Government [2022] eKLR while discussing the issue of interest, the court held that:

But one thing is clear: parties settled the claim herein between themselves and in good faith. A consent ordinarily bury everything beneath it, and the court will not inquire into the reasons for settlement by parties. Except, it is desirable that parties should clearly spell out the terms of settlement to avoid disputes on the scope of the consent. In this case, parties seem to blame each other for breach; and it is safe to leave them at where I found them. Accordingly, I find no basis to order interest on the principal sum in such matter full of obscurities on interest; and the conduct of the parties which generally is not inspiring or seductive of equity into resolving the question of interest for one party and against the other. I decline to award interest on the principal sum in light of the amicable settlement of the claim between the parties.”
13. The Respondent prays that the prayers for costs and interests be dismissed.
14. The parties informed court that upon settlement of the claim they were unable to agree on the matter of interest and costs. The court has considered the submissions by the parties and has come to the conclusion that in terms of the contract of employment, the Claimant was entitled to payment of gratuity immediately upon retirement on 31/12/2017.
15. The Respondent experienced financial difficulties and so paid gratuity in three instalments as shown herein. The Claimant was forced to file this suit due to the breach of the terms of employment contract by the Respondent.
16. The fact that parties eventually settled the suit by consent does not detract from the contractual obligation of the Respondent and the contractual entitlement by the Claimant.
17. Whilst, the court encourages such voluntary settlement of the dispute, the court is also cognizant of the difficulties the Claimant faced due to the delayed payment necessitating going into expense to file this suit as the Claimant did.
18. Accordingly, the court finds that the Claimant is entitled to payment of interest at court rates from the date of retirement being 31st December 2017 to 20th February 2019 when the amount was fully paid.
19. Recognizing the goodwill by the Respondent to settle the claim by consent, the court awards the Claimant half the costs of the suit to be taxed accordingly.

DATED AT NAIROBI THIS 3RD DAY OF APRIL 2025

MATHEWS NDUMA



JUDGE

Appearance:

Mr. Muema for Claimant

Ms. Morara for the Respondent

Mr. Kemboi – Court Assistant

