



**Barrito v Phoenix Aviation Limited (Petition 125 of 2018)
[2025] KEELRC 1488 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1488 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 125 OF 2018**

L NDOLO, J

MAY 22, 2025

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27 AND 41(1) OF THE CONSTITUTION OF KENYA**

-AND-

**IN THE MATTER OF ARTICLES 19, 20(1) & (2), 22(1), 23,
159, 258(1) & 259(2) OF THE CONSTITUTION OF KENYA**

-AND-

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

SHAUN WARREN BARRITO PETITIONER

AND

PHOENIX AVIATION LIMITED RESPONDENT

JUDGMENT

Introduction

1. By his Petition dated 20th November 2018, the Petitioner presents a claim of unlawful and unfair termination of employment, by the Respondent. The Respondent filed a replying affidavit sworn by its General Manager, Peter Njoroge.
2. In response to the Respondent's replying affidavit, the Petitioner swore a further affidavit on 10th May 2019.
3. The matter proceeded by way of viva voce evidence with the Petitioner testifying on his own behalf and the Respondent calling its Chairman, Steve William Parkinson. Thereafter, the parties filed written submissions.



The Petition

4. The Petitioner states that he was employed by the Respondent on 1st September 1994, in the position of Financial Controller. He subsequently served in various capacities and at the time of separation he held the position of General Manager.
5. The Petitioner claims to have been assigned additional responsibilities from April 2012, without review of his remuneration. He points out that he was appointed as Accountable Manager-Approval Maintenance Organization (AMO).
6. The Petitioner states that in 2014, a company listed on the Hong Kong Stock Exchange, Frontier Services Group Limited (FSG), purchased substantial shares in the Respondent. He adds that following the entry of FSG, the Respondent got a new Managing Director, Ms. Emma Finlay-Broadbelt.
7. By a letter dated 9th February 2015, FSG made an offer to the Petitioner for employment as International Logistics and Procurement Officer, which the Petitioner declined.
8. Upon acknowledging the Petitioner's letter declining the offer, FSG issued the Petitioner with a 3-month termination notice.
9. The Petitioner avers that he escalated the matter to the Respondent's Chairman, who informed FSG that it had no authority to terminate the employment of any employee of the Respondent. The Chairman is said to have informed the Petitioner that the termination notice would be retracted but this did not happen. Nevertheless, the Petitioner continued serving the Respondent.
10. By a letter dated 1st October 2015, the Petitioner resigned from his appointment as Accountable Manager, while retaining the position of General Manager. The Petitioner gave the reason for this action as lack of experience on the part of Ms. Finlay-Broadbelt to oversee the Maintenance Division.
11. The Petitioner's resignation was accepted via a letter from the Managing Director, which purported to reduce his salary. The Petitioner returned the letter unsigned. The Petitioner raised a grievance through the then Technical Director, Satwinder Singh Reel.
12. Sometime in June 2017, the Respondent's Chairman and Chief Executive Officer held a town hall meeting, at which staff were informed of an intended Voluntary Early Retirement (VER). Staff were encouraged to apply for VER.
13. On 30th June 2017, the Chief Executive Officer sent an internal memo to all members of staff, informing them that the Respondent had decided to rationalise its staff compliment.
14. The Petitioner applied for VER by his letter dated 7th July 2017. He states that while he did not receive a formal acknowledgement of his application, he received a schedule from the Human Resource Manager, showing the employees who were scheduled to leave under VER, with specific exit dates. The Petitioner avers that his name appeared on the schedule with an exit date of 30th September 2017.
15. The Petitioner states that upon following up on his VER application, he was informed by the Respondent's Chairman that the Respondent was not willing to pay his terminal dues based on the VER package. The Petitioner claims that under the VER package, he was entitled to a gross pay of Kshs. 17,937,520.25.
16. The Petitioner avers that he was informed that the decision on his VER application was driven by FSG. He claims that there was concern regarding the substantial amount due to him given his long service



and designation. In addition, FSG is said to have blamed the Petitioner for the high value of spare parts inventory held by the Respondent.

17. The Petitioner states that the Respondent, through its Board Chairman, verbally offered him Kshs. 7,000,000 as terminal dues, which the Petitioner declined. A further offer of Kshs. 10,000,000 is said to have been made, in addition to the Petitioner's salary for September 2017.
18. The Petitioner claims to have been coerced to accept the latter offer. He was presented with a Settlement Agreement on 25th September 2017, which he signed on 27th September 2017. He left employment on 30th September 2017.
19. The Petitioner claims that after his exit, the Respondent extended the VER offer to other members of staff. Feeling aggrieved, the Petitioner wrote to the Respondent, demanding the balance of terminal dues, which he had forfeited through the Settlement Agreement.
20. The Petitioner's case is that he was coerced to sign the Settlement Agreement. In this regard, he cites the following particulars of duress and undue influence, on the part of the Respondent:
 - a. Failing to issue a formal response to the Petitioner's application for VER, while including his name on the list of employees designated to leave employment under VER;
 - b. Raising issues about the Petitioner's performance which had not been formally put to him, and which were unrelated to his VER entitlement, with the aim of intimidating and unsettling the Petitioner emotionally;
 - c. Informally communicating willingness to terminate the Petitioner's services following his VER application but not willing to pay his full terminal dues under the VER package;
 - d. Informing the Petitioner that the offer of Kshs. 10,000,000 plus salary for September 2017 was final;
 - e. Making it clear that if the Petitioner did not accept the offer, he would be frustrated in the discharge of his duties to push him out or force his resignation;
 - f. Putting the Petitioner in a position where he had to negotiate for a deal that was not representative of his full dues.
21. The Petitioner accuses the Respondent of subjecting him to discrimination, contrary to Article 27(5) of *the Constitution* of Kenya and Section 5(3)(b) of the *Employment Act*. The Petitioner cites the following particulars of discrimination:
 - a. That he was the only one of the Respondent's employees who never received a formal response to his VER application, yet his name was listed in the schedule of employees set to leave the Respondent's employment through VER;
 - b. That he was the only one of the Respondent's employees who was not paid his full dues under the VER package, despite being listed in the schedule of employees set to leave the Respondent's employment through VER;
 - c. That no other employee of the Respondent who had applied for VER signed a Settlement Agreement, as a basis for terminating employment;
 - d. That the Settlement Agreement had substantially less favourable terms than the terms of the VER.



22. The Petitioner terms the Settlement Agreement as unconstitutional for having been arrived at through discriminatory actions, meted against him. The Petitioner adds that the Settlement Agreement is illegal, null and void on the basis of having been arrived at through coercion and undue influence.
23. The Petitioner therefore seeks the following remedies:
 - a. A declaration that the decision by the Respondent to engage and prevail upon the Petitioner to accept less favourable terms than those officially communicated by the Respondent under its VER policy, and accorded to other employees who applied for VER, was a violation of Articles 27(4) & (5) and 41(1) of *the Constitution*;
 - b. A declaration that the Settlement Agreement dated 27th September 2017 was illegal, null and void having been entered into through discrimination, coercion and undue influence against the Petitioner;
 - c. An order directing the Respondent to pay the Petitioner Kshs. 7,937,520.25 (excluding taxes) being the balance of the VER package payable to the Petitioner;
 - d. General and aggravated damages for discrimination and unfair labour practices;
 - e. Interest on (c) above at the rate of 14% per annum from October 2017 to date of judgment;
 - f. Costs of the Petition.

The Respondent's Reply

24. In its replying affidavit sworn by Peter Njoroge, the Respondent states that the Petition raises no issues of constitutional interpretation. The Respondent further accuses the Petitioner of misrepresentation of material facts relating to this matter.
25. Njoroge depones that vide its letter dated 9th February 2015, the Respondent offered the Petitioner the position of International Logistics & Procurement Officer, which the Petitioner declined vide his letter dated 16th February 2015. The Respondent states that the Petitioner's letter declining the offer was duly acknowledged.
26. As a result of the partnership between the Respondent and FSG, the Respondent referred ongoing transition of administrative tasks that made up the function of General Manager, then held by the Petitioner, to the appropriate personnel at FSG.
27. According to the Respondent, the Petitioner was given a 3 months' notice for the end of his employment in the position of General Manager and was requested to transition his duties to FSG, during the notice period. It was confirmed that the Petitioner would retain his position as Accountable Manager in Phoenix Aviation.
28. Njoroge depones that as at 17th May 2015, the Petitioner was no longer the General Manager of the Respondent.
29. The Petitioner resigned from his position as Accountable Manager, through his letter dated 1st October 2015 by which he gave 3 months' notice. He is said to have remained an employee of the Respondent, working as Personal Assistant to the Base Maintenance Manager, Satwinder Reel. The Respondent maintained the Petitioner's salary at that of Accountable Manager, despite the fact that his position as Personal Assistant was of a lower level.



30. It is deponed that sometime in June 2017, the Respondent informed its employees that due to the harsh business environment and economic downturn that resulted to reduction of business, it was conducting a staff rationalisation exercise. In that regard, the Respondent offered a VER/Retrenchment programme to its employees.
31. In its memo dated 30th June 2017, the Respondent indicted that the VER/Retrenchment package was available to all employees. Employees were required to send their applications to the Respondent by 7th July 2017, with the processing criteria being on a first come basis. The Respondent retained discretion to accept or decline any application.
32. The Respondent states that several employees, including the Petitioner applied for VER. The Petitioner submitted his application on 7th July 2017 but his application was rejected on the basis that the costs of his exit under the VER package would be prohibitive, as he earned a considerably high salary. This decision was communicated to the Petitioner through the Respondent's Chairman.
33. The Petitioner is said to have engaged the Respondent's Board with a view to negotiating the terms of his exit. According to the Respondent, the figure of Kshs. 10,000,000 as final terminal dues, was the Petitioner's proposal, which the Respondent's Board accepted.
34. Njoroge states that upon mutual agreement, a Settlement Agreement containing the Petitioner's exit terms was prepared and forwarded to him for his consideration and approval, without any interference from the Respondent.
35. The Settlement Agreement was executed by the Petitioner and the Respondent's representative on 27th September 2017. It provided receipt of Kshs. 1,156,035 being the gross salary payable for the month of September 2017 plus Kshs. 10,000,000, subject to normal statutory deductions, as full and final settlement.
36. The Petitioner was paid the sum contained in the Settlement Agreement, which he duly accepted. The Respondent therefore asserts that the Petitioner is estopped from making any further claims.
37. The Respondent maintains that the Petitioner's application for VER was rejected and he could not therefore lay a claim under the VER package.
38. Regarding the schedule relied upon by the Petitioner, it is deponed that this was an internal document for operational use, indicating the dates of exit for various employees in general, and did not specifically refer to employees exiting under the VER program. It is further deponed that the document was circulated to employees.
39. On the Petitioner's exit date, it is deponed that he had earlier indicated his willingness to continue working for a further three months from July 2017 to September 2017, so as to train a replacement. The Petitioner's exit date was 30th September 2017.
40. The Respondent counters the Petitioner's averment that he was coerced into signing the Settlement Agreement. The Respondent asserts that the Petitioner agreed to the terms of the Settlement Agreement, which he executed willingly, without any undue influence.
41. The Petitioner's claim that his right to fair labour practices guaranteed by Article 41(1) of *the Constitution* was violated is denied. The claim for discrimination under Article 27(5) of *the Constitution* and Section 5(3)(b) of the *Employment Act* is also denied.
42. The Respondent accuses the Petitioner of approbating and reprobating, by obtaining advantage from the Settlement Agreement, while challenging its validity.



Findings and Determination

43. The Petitioner’s claim arises from a Settlement Agreement between himself and the Respondent, by which the Petitioner left the Respondent’s employment. Related to this is a VER program rolled out by the Respondent, by which other employees left the Respondent’s employment.
44. The Petitioner complains that he was discriminated against, because the terms of his exit, under the Settlement Agreement, were inferior to those contained in the VER package. He goes on to suggest that he was coerced into signing the Settlement Agreement.
45. Black’s Law Dictionary (Tenth Edition) defines coercion as:
- “Compulsion of a free agent by physical, moral, or economic force or threat of a physical force.”
46. Apart from his complaint that his application for VER was rejected, the Petitioner did not adduce any evidence of force or threat applied on him to accept the Settlement Agreement. Clause 2 of the Agreement states as follows:
2. Mutual termination of employment
- The parties hereby agree to the mutual and amicable termination of the Employment Contract and the terms and conditions thereof shall terminate and cease to have effect as from the date of execution of this Agreement.
47. Clause 4 of the Agreement fully releases and discharges the Respondent from any further liability. Notably, the Petitioner held a very senior position within the Respondent’s establishment and the Court could not fathom any reason why he would execute a Settlement Agreement, whose terms he did not agree with.
48. Moreover, there is evidence that the Petitioner received full payment of the sums indicated in the Settlement Agreement. In fact, his claim is for the difference between what he perceives would have been his entitlement under the VER package and what he actually received.
49. In the final submissions filed on behalf of the Respondent, reference was made to the decision in *Alfred Nzomo Kithusi v Hillcrest Investments Limited* [2012] eKLR where it was held that a Settlement Agreement between an employer and an employee is a binding contract, which can only be vitiated by coercion, fraud, mistake, misrepresentation or undue influence.
50. The Respondent further relied on *Patel & another v MJC & another* (Suing as the guardians of PJP) [2022] KECA 364 (KLR) where the Court of Appeal stated the following:
- “It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has to [be] specifically proved by cogent evidence and not on the balance of probabilities...Proof has to be higher than on the balance of probabilities but slightly lower than proof beyond reasonable doubt.”



51. In affirming the efficacy of a Separation Agreement, the Court in *Barasa v Opibus Ltd* [2022] KEELRC 13119 (KLR) stated thus:

“ A separation agreement, just like any other agreement, becomes enforceable the moment it is signed by the parties. It is binding on the parties unless it is set aside on grounds that will assail any other contract.”

52. In *Sheila Kiplangat v Unilever Tea Kenya Limited* [2022] eKLR it was held that a Settlement Agreement will conclusively settle an employment dispute unless it is proved that the Agreement was procured through fraud, coercion or undue influence.

53. In this case, the Petitioner did not prove any elements of fraud, coercion or undue influence. More significantly, he chose to come to court to challenge a Settlement Agreement, while retaining the proceeds emanating from that same Agreement, thus breaching the rule against approbating and reprobating.

54. Overall, I find and hold that the Petitioner has no valid claim against the Respondent. His Petition dated 20th November 2018 is therefore dismissed with costs to the Respondent.

55. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MAY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Mwangi h/b for Ms. Aremo for the Petitioner

Mr. Rao h/b for Mrs. Opiyo for the Respondent

