Kenya National Priviate Security Workers Union v Maseno University Retirement Scheme (Cause E014 of 2019) [2025] KEELRC 1348 (KLR) (12 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1348 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E014 OF 2019

JK GAKERI, J

MAY 12, 2025

BETWEEN

KENYA NATIONAL PRIVIATE SECURITY WORKERS UNION .... CLAIMANT

AND

MASENO UNIVERSITY RETIREMENT SCHEME ..... RESPONDENT

JUDGMENT

1. This case has had a long and chequered history. The suit was filed in this court on 14th February, 2019 vide a Memorandum of Claim dated on even date where the claimant prayed for leave pay, service pay and salary in lieu of notice for Mr. Raphael O. Oloo, Kshs.260,774.80, Japhet Otieno, Kshs.94,503 and Bernard Odhiambo, Kshs.53,861.

2. The claim was subsequently amended on 16th December, 2019 to incorporate claims for underpayment, overtime, unlawful termination of employment, public holidays and rest days raising the totals claimed as follows:

    1. Raphael O. Oloo Kshs.1,521,379.21
    2. Bernard Odhiambo Kshs.1,313,766.21
    3. Japhet Otieno Kshs.1,354,407.61

3. The suit was transferred to the Chief Magistrate's court on 10th December, 2019 and heard by Hon. Wambilyanga, SPM on 12th March, 2020, 28th January, 2024 and 9th May, 2022, and who transferred the suit to this court vide a Ruling delivered on 28th July, 2022, for want of jurisdiction.

4. Having been filed in the proper court initially, the court could not dismiss the suit on the ground that the trial magistrate had no jurisdiction.

5. The claimant's case is that the grievants were employed by the respondent as security guards as follows:

6. Raphael O. Oloo, 1st February, 2000, Japhet O. Ouma, 1st June, 2010 and Bernard O. Odhiambo, 1st December, 2013 but were not given employment letters. That they served diligently until 31st August 2018 when the respondent terminated their employment without notice.

7. It is the claimant's case that after the dispute was reported to the Labour Officer, Kisumu, meetings were held and an agreement reached and the grievants were paid as follows:

    1. Raphael Onyango, Kshs.108,360.00
    2. Japhet Otieno, Kshs.76,860.00
    3. Benard Odhiambo, Kshs.54,960.00

Respondent's case

8. The respondent denied that the grievants were its employees but admitted that the dispute was referred to the Labour Office, Kisumu and they had previously complained to the respondent.

9. It is the respondent's case that the parties engaged in a free open and voluntary negotiations at the Labour Office Kisumu and mutually agreed to settle the matter as admitted by the grievants and the amounts were duly paid in full and final settlement.

10. That the agreement was made in the presence and with full knowledge of the grievants.

11. The respondent avers that being an alternative dispute resolution mechanism, the settlement arrived at the Labour Office in Kisumu was negotiated and the grievants signed the certificate of final settlement as regards any claim they may have had against the respondent and are therefore estopped from raising any fresh claims regarding their employment having signed the agreement with full knowledge and consequences of the agreement.

12. The respondent prays for dismissal of the claimant's case with costs.

13. The court could not trace the claimant's witness statement as none was filed together with the original Memorandum of Claim or the Amended Claim.

14. In his testimony in court, Mr. Raphael Onyango confirmed on cross-examination that he did not file copies of the contracts of employment or terms of employment but admitted that he was serving as a security officer at the Kanyakwar plot owned by the respondent and termination was verbal though salary for August 2018 was paid.

15. The witness admitted that negotiations took place at the labour office Kisumu and parties agreed on the amount to be paid and it was paid and received.

16. The witness, however, stated that they indicated that they were dissatisfied with the amount paid but signed the payment voucher and filed the instant suit barely one (1) month later, but did not serve a demand letter on the respondent.

17. On re-examination, CWI testified that the respondent's manager told them to stop working and were paid for leave, service and notice.

18. The respondent's witness was unavailable and the respondent's counsel closed the respondent's case and directions on the filing of submissions were issued. Parties were accorded 14 days a piece.

Respondent's submissions

19. Concerning entitlement to prayers sought, counsel for the respondent submitted that having accepted the payment in full and final settlement without prejudice, the respondent was discharged from further claims as regarded the employment of the grievants.

20. Reliance was placed on the provisions of Article 159(2)(c) of *the Constitution* of Kenya and Section 47 of the *Employment Act* on alternative dispute resolution before the labour officers as was the Court of Appeal decision in Daniel Njuguna Muchiri V Sugar Bakery Ltd [2019] eKLR, on the status of an agreement concluded after conciliation.

21. Also cited were the sentiments of the court in George Okoth V Kui Yi Co. Ltd [2018] eKLR and Fatuma Hassan V Sports Management Board [2019] eKLR, to urge that the claimant had not presented any vitiating factors to justify the disregard of the settlement agreement and submit that since the parties were bound by the agreement, the suit ought to be dismissed.

22. Counsel, further submitted that the fact that the claimant did not disclose the conciliation agreement to the court was a sign of bad faith and if the agreement was flawed, the claimant should have rejected it or return the amount received, which the grievants accepted.

23. In its submissions dated 26th May, 2022, the claimant highlighted four issues for determination on, whether the grievants were employees of the respondent, whether paid daily or per month, termination and import of the certificate of settlement.

24. On employment, the claimant submitted that the respondent did not controvert the employment dates of the grievants as guards, as evidenced by copies of payslips, NSSF and NHIF statements.

25. Regarding payment for services, the claimant submitted that the payslips on record proved that the grievants received monthly salaries.

26. As to whether termination of employment was unfair and entitlement to reliefs, reliance was placed on Section 45(1) of the *Employment Act* to urge that the grievants evidence of termination was not rebutted and they were not take through a disciplinary process.

27. The claimant submitted that the grievants sought and were entitled to payment for overtime, leave, underpayment, public holidays, rest days, service pay and house allowance and their salary ought to have been Kshs.14,420.90 per month.

28. According to the claimant, the service pay given to the grievants was less than their entitlement.

29. The claimant submitted that the respondent did not avail documentary evidence to controvert the grievants testimony that they worked 7 days per week, earning 4 extra hours daily and were thus entitled to over time pay.

30. As to whether the certificate of settlement was binding, the claimant submitted that the issue of unlawful termination was not discussed and the respondent did not produce evidence as to how the amount paid was computed or file minutes of the meetings.

31. The claimant further submitted that the grievants could not complaint at the time since they needed money.

32. Reliance was placed on the sentiments of the Court of Appeal in Thomas De La Rue (K) Ltd V David Opondo Omutelema [2013] eKLR to argue that a discharge voucher does not absolved an employer

from statutory obligations. That the circumstances surrounding the signing of the agreement should be considered.

33. According to the claimant, the amount paid covered leave, service and notice only, excluding all other claims.

34. The claimant also contended that the advocates representing the respondent participated actively in the proceedings in the labour office and hence the agreement was not binding.

Analysis and determination

35. It is not in dispute that the grievants were employees of the respondent employed at different times and serving as security guards. The copies of payslips, NHIF and NSSF statements, attendance checklist LR No. 22905 Kanyakwar, and evidence of payment of salary 2011 conclusively establishes that the grievants were employees of the respondent. The respondent did not rebut this testimony.

36. See Humphrey Munyithia Mutemi V Soluxe International Group of Hotels & Lodges Ltd [2020] eKLR.

37. According to Mr. Raphael Onyango, CWI, the grievants were told by one Monica Ogada, the respondent's Manager to stop working on 30th August, 2018.

38. It is equally not in contest that the grievants filed a complaint with vide letter dated 22nd October, 2018, complaining about the challenges they had to endure as guards such as non-payment of house allowance, unremitted statutory deductions and the abrupt termination of employment without notice.

39. Relatedly, an earlier complaint had already been made on 4th October, 2018 at the County Labour Office, Kisumu.

40. Puzzlingly, the grievants availed no evidence to show that the claimant union was aware of their situation, including the complaints to the employer and the labour office.

41. It is clear why the grievants opted to exclude the claimant union in their dealings with the labour office.

42. The foregoing is important because after the labour office brought the two sides together, an agreement was arrived at and the parties agreed that the grievants be paid for leave, service pay and salary in lieu of notice on or before 15th January, 2019 and payment was effected on 15th January, 2019 and the grievants signed the certificate of settlement of even date and the claimant union filed the instant suit less than one (1) month after the payment of the grievants.

43. As correctly submitted by the respondent's counsel, although the greivants admitted having met at the labour office, agreed and were paid by the respondent, they did not disclose that they had signed a certificate of final settlement at the labour office, copies of which the respondent availed as evidence.

44. Under the certificate of settlement, the grievants received respective amounts for leave, notice and service pay as final dues and stated inter alia

45. This is to further confirm that the complainant .....has no further claim against the employer.

    Received by name.....

    Signature.....

    Paid in by name.....

    Signature.....

Witnessed by.....

Dated in Kisumu this 15th day of January 2019

46. The three grievants signed the certificate of final settlement on 15the January, 2019 without any protest or qualification and no evidence was adduced to demonstrate that they did not understand the import of the certificate of settlement or that the contents were misrepresented or there was a mistake, duress or undue influence or other vitiating element.

47. Contrary to the claimant's argument, the absence of minutes of the meetings which the grievant admitted to having attended could not vitiate the settlement.

48. The labour officer is the custodian of the minutes of meetings held in that office and parties are at liberty to request for copies as necessary.

49. The reference on re-examination that the respondent attended the meeting with a lawyer could not, in the court's view vitiate the fact that the parties agreed and payment was made.

50. Relatedly, the submission that the respondent's advocate participated in the proceedings at the labour office was equally of little consequence as nothing prevented the grievants from engaging the union to represent them, if they were members, being in mind that it sued on their behalf barely a month after they received payment.

51. Closely related to the foregoing is the claimant's submission that the settlement agreement contained three items only yet the greivants had other claims.

52. Whereas the submission is correct, the grievants by design or default opted to pursue the claim alone and presented their case during the conciliation process. They were clear in their minds as to what they wanted, were heard and were part of the agreement and they signed the certificate of final settlement voluntarily and freely.

53. None of the grievants signed it on a without prejudice basis or in any other manner to register their disagreement if they had any.

54. As to whether termination of the grievants employment was fair and lawful, the court is in agreement with the claimant that the termination did not pass the fairness test.

55. It is trite law that for a termination of employment to pass muster, the employer is required to prove that it had a valid and fair reason to terminate the employee's employment and conducted it in accordance with a fair procedure.

56. In other words, there must have been a substantive justification for the termination of employment and procedural fairness, as held in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR and Naima Khamis V Oxford University Press (E.A) Ltd [2017] eKLR.

57. The respondent adduced no evidence as to why it terminated the grievant's employment and demonstrate that the procedure it employed was fair.

58. Having opted not to testify during the hearing, the respondent denied itself the opportunity to demonstrate its version of the events that culminated in the termination of the grievant's employment.

59. The foregoing notwithstanding, this case turns on whether the grievants were estopped from filing the instant suit on account of the dispute having been resolved by conciliation and whether by signing the certificate of final settlement the grievants waived right to pursue further claims against the respondent.

60. Concerning conciliation as an alternative dispute resolution mechanism, there is judicial authority for the proposition that once it has been successfully invoked and the dispute concluded, what remains is enforcement as opposed to another suit.

61. Section 47 of the *Employment Act* and Article 159(2) of *the Constitution* of Kenya are categorical on the place of conciliation. These provisions do not envision litigation on the same facts and circumstances after parties have agreed during conciliation.

62. The foregoing is fortified by the decision in David Njuguna Muchiri V Sugar Bakery Ltd (Supra), where the Court of Appeal held:

> ...the initiative to refer the matter to the labour officer was the appellant's own... Strangely, however, the appellant seems to invite us to totally ignore the agreement and consider the claim as pleaded. And so it is that conciliation made before the labour officer in this matter on 21st October, 2009 cannot be ignored. The appellant initiated it, both parties were involved; it was not, made without prejudice, the appellant pleaded it, testified on it, and received part payment under it. In those circumstances the trial court did not err in finding that the appellant is estopped from denying the settlement. The appellant would have done better enforcing the settlement rather than filing a fresh suit. To do so in our view would be an abuse of court process".

63. The foregoing sentiments apply on all fours to the facts of the instant case. The grievants initiated the conciliation process by a complaint filed on 4th October, 2018 and the respondent was summoned by the labour office and both sides actively participated in the process and an agreement was reached, signed and payment made as per the agreement.

64. In the court's view, the grievants cannot be heard to say that they were not bound by the conciliation agreement dated 7th December, 2018 signed on even dated in the presence of the labour officer, Marlyne Wakhungu.

65. As adverted to elsewhere in this judgment, the argument that the conciliation agreement covered only three (3) claims others cannot avail the grievants since they had the opportunity to present all their claims but failed, refused or neglected to do so and opted to pursue only three. They are bound by the conciliation agreement hook, line and sinker and cannot be heard to allege otherwise. They have not demonstrated that the agreement was vitiated. (See the sentiments of Denning L.J. in Combe V Combe [1951] 2 KB 2015 on the doctrine of promissory estoppel).

66. Similarly, the sentiments of the court in George Okoth V Kiu Yi Co. Ltd (supra) cited by the respondent's counsel are spot on the import of a settlement agreement signed in a conciliation process.

67. See also Fatuma Hassan V Sports Management Board (supra).

68. In the court's view, the instant suit is incompetent on this score alone as it ought not to have been instituted.

69. Finally, it is not in dispute that the grievants executed the Certificate of Final Settlement dated 15th January, 2019 having received payment vide cheque numbers 000280 (Japhet Otieno), 000281 (Raphael Onyango) and 000279 (Benard Odhiambo), a fact Mr. Raphael Onyango admitted on cross-examination.

70. As adverted to earlier in this Judgment, the grievants received the cheques in respect of final dues and confirmed that they had "no further claim against the employer"

71. Analogous to the conciliation agreement, the grievants signed the certificate of final settlement in the presence of the labour officer, Marlyne Wakhungu.

72. Both parties signed the certificate of final settlement and were therefore bound by it.

73. At common law, signature prima facie means acceptance (see L'Estrange V Graucob [1934] 2 KB 394.

74. It is trite law that the principles that govern settlement agreements and/or discharge vouchers are fairly well articulated by the Court of Appeal and as correctly argued by the claimant's counsel, the circumstances in which the agreement was entered into must be taken into consideration.

75. In Coastal Bottlers Ltd V Kimathi Mithika [2018] eKLR, the court held;

> Whether or not a settlement or discharge voucher bars a party thereto from making further claim depends on the circumstances of each case. A court faced with such an issue, in our view should address its mind, firstly, on the import of such a discharge voucher agreement; and secondly, whether the same was voluntarily executed by the concerned parties".

76. Similarly, in Thomas De La Rue (K) Ltd V David Opondo Omutelema (supra), the court stated as follows:

> We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge"

77. The court is in agreement with these sentiments and is bound by them. The effect of signing a discharge voucher or settlement agreement was aptly captured by the Court of Appeal in its rendition in Trinity Prime Investments Ltd V Lion of Kenya Insurance Co. Ltd [2015] eKLR as follows:

> The execution of the discharge voucher, we agree with the learned Judge, constituted a complete contract even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged".

78. Finally, in Coastal Bottlers Ltd V Kimathi Mithika (Supra) the Court of Appeal stated inter alia:

> In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties..."

79. Although the claimant's witness alleged, during the hearing, that they were dissatisfied with the amount received, he provided no scintilla of supportive evidence, more so because neither of the grievants signed the certificate on a 'without prejudice' basis or qualified the signature in any way or

allege that the contents were misrepresented or that there was a mistake duress or undue influence, which would have rendered the agreement voidable at the option of the grievants.

80. The grievants were thus thoroughly bound by the certificate of final settlement and are estopped from alleging otherwise. The grievants made a promise or assurance to the respondent that they would accept the amount agreed upon and would have no further claim against the respondent and the respondent relied on the promise or assurance and paid them the amount due, which they accepted.

81. By paying the sum, the respondent's liability to the grievants was extinguished and they could not allege that the respondent owed them anything else as it would be inequitable to do so.

82. In Nurdin's Case Ltd [1965] EA 304 Newbold JA stated:

> The precise limits of an equitable estoppel, are however, by no means clear. It is clear however, that before it can arise one party must have made to another and "clear and unequivocal" representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of the representation acted upon it".

83. The promise or assurance to accept the amount as final dues which the respondent relied on effectively denied the grievants the right to revert to the position they were before receiving the payment and were estopped from invoking it.

84. Having found that the instant suit was not sustainable and ought not have been filed on account that the matter had been resolved through conciliation and having further found that the grievants were bound by the certificate of final settlement and thus estopped from pursuing other claims against the respondent, it is clear that the claimant's case against the respondent lacks a foothold to stand on an it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 12TH DAY OF MAY, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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