Kimeu v Catholic University of Eastern Africa (Cause 50 of 2020)
[2025] KEELRC 1711 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1711 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 50 OF 2020

JW KELI, J

JUNE 12, 2025

BETWEEN

DANSON MUSYOKI KIMEU ..... CLAIMANT

AND

THE CATHOLIC UNIVERSITY OF EASTERN AFRICA ..... RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim dated 29th January 2020 and amended on the 18th July 2023 seeking for various Orders against the respondent, namely:-

    a) Pays the claimant the sum of Kshs. 1,663,949.00

    b) Issues the Claimant with a Certificate of Employment

    ba) General damages

    bb) A declaration that the Respondent was to use the Claimant's Terminal dues to offset the outstanding loan with Equity Bank advanced to the Claimant whilst in employment of the Respondent.

    bc) An order that the Respondent do pay all the outstanding penalties and interest over the Loan obtained whilst in employment with the Respondent until the time of judgment and offset the accrued loan from the terminal dues.

    bd) An Order that the Claimant's name be removed from Credit Reference Bureau listing.

    c) Costs of the suit.

    d) Interest on (a) & (c) above.

2. The Claimant in support of the suit also filed his undated witness statement and list of documents dated 29th January 2020 together with the bundle of documents, all filed with the claim. The claimant further filed his supplementary witness statement dated 27th September 2023.

3. The claim was opposed by the respondent, who entered an appearance and filed a response dated 16th June 2020 and amended on 24th November 2023. The respondent at the same time filed a witness statement of Erick Omondi Njiri dated 16th June 2020 and amended on the 24th November 2021, and the respondent's list of documents of the same date and the bundle.

Hearing and evidence

4. The claimant's case was heard on the 18th November 2024 when the claimant testified on oath, adopted his witness statement dated 27th September 2023 as his evidence in chief and produced his documents as exhibits 1-15. He was cross-examined by counsel for the respondent Mr. Situma and re-examined.

5. The respondent's case was heard on the 5th February 2025 when Erick Njiri testified on oath as RW1, adopted as his evidence in chief his witness statement dated 24tH November 2023 and produced the respondent's bundle of documents under list of even date and a further supplementary list of documents dated 14th November 2024. He was cross-examined by counsel for the claimant ,Ms. Musau, and re-examined.

Claimant's case in summary

6. The Claimant was a Professor in Finance working as a Vice-Chancellor, lecturer, Consultant and auditor. He was an employee of the Respondent's University from August 2006 to July 2017 eleven (11) years earning a monthly gross salary of Kshs. 120,602. He was employed as a permanent employee but would be assigned part-time jobs such as part-time lecture classes, research supervision, exam invigilation and marking which would be paid separately.

7. On 31/07/2017, the contract of employment was terminated to allow him to pursue further studies. That there was an agreement that in spite of the termination, he would continue with certain tasks such as supervision of research work of several students who were to graduate in November/December 2017.

8. That at the time of termination of the contract, he was entitled to several benefits of which, though the Respondent paid some of them, there remained unpaid entitlements computed as follows:-

    a) Unpaid Salary (March, April, May, June & July 2017).....Kshs. 603,010.00

    b) Unpaid leave days (34 days 2016/2017)...Kshs. 68,229.00

    c) Unpaid doctorate students Research supervision:-

        (i) Full Project paper (2 students).... Kshs. 168,000.00

        (ii) Proposal Paper(1 student)... Kshs. 84,000.00

        (iii) Independent Study Paper(2)... Kshs. 56,000.00

    d) Unpaid Masters students Research Supervision(2)..... Kshs. 30,000.00

    e) Unpaid Undergraduate Students Research Supervision(4).....Kshs.30,000.00

    f) Exam Invigilation and Marking.....Kshs.6,860.00

g) Unpaid Lecture Hours.....Kshs.617,850.00

Total.....KShs.1,663,949.00

9. Through his advocates on record, the claimant issued a demand notice to sue but the Respondent failed and or refused to settle thus necessitating the instant suit.

Respondent's case in brief.

10. The employment relationship between the Claimant and the Respondent was for fixed term periods. His last contract came into force on 1st August 2016 and would have terminated on 31st July 2019. The Claimant resigned vide his letter dated 30th April 2017. This was after his application for unpaid leave for three (3) years was declined by the Respondent on 27th April 2017.

11. The Claimant was employed as an Associate Professor of Finance and Deputy Vice Chancellor and the acting Vice Chancellor of University of Kigali in Rwanda in February 2017 and took office immediately. The Claimant was in Kigali from February 2017 and he confirmed that he was not at the Respondent's University from February 2017.

12. The Claimant never worked for the Respondent from February 2017 and this forced the Respondent to initiate investigations as to whether the Claimant had disserted duty with the intention of initiating disciplinary proceedings for gross misconduct. It re-assigned his work and the students he supervised to other lecturers in the University. The Respondent produced letters to prove the said re-allocation.

13. The Respondent admitted to have inadvertently continued to pay the Claimant salaries until June 2017, even when he had already resigned on 30th April 2017. The Claimant confirmed that he joined the University of Kigali in February 2017.

14. The Claimant failed to clear with the Respondent on time. He only cleared on 11th December 2019, after his contract in Kigali had ended and as such his terminal dues could not be ascertained and paid before clearance, a fact well admitted by the Claimant.

15. The Claimant directed the respondent on how to proceed and bank his terminal dues after his clearance. The Respondent could not deposit the said dues in any other account contrary to the express instructions by the Claimant. The Claimant was duly paid his terminal dues on 18th November 2023. That the Claimant never submitted and followed up his alleged dues on time as per policy and he cannot claim the same in this claim. The claim , if any, are statute barred.

Determination

Issues for determination

16. The claimant submitted on the following issue:-

Whether the Claimant is entitled to the prayers sought.

17. The Respondent submitted on the following issues:-

a. Whether the Court has jurisdiction to hear and determine claims arising from fixed term contracts before the 30th January 2017;

b. Whether the Claimant is entitled to the reliefs sought in the Amended Memorandum of Claim?

c. Who should bear the costs of the instant claim?

18. The court found the claim was of terminal dues as it was not disputed that the claimant had resigned . The issue of jurisdiction relates to issue of continuing injuries claims and can be determined under the issue identified by the claimant of :Whether the Claimant is entitled to the prayers sought.

19. The claimant sought the following items under his claim :-

a) Unpaid Salary (March, April, May, June & July 2017).....Kshs. 603,010.00

b) Unpaid leave days (34 days 2016/2017).....Kshs. 68,229.00

c) Unpaid doctorate students Research supervision

(i) Full Project paper (2 students)..... Kshs. 168,000.00

(ii) Proposal Paper(1 student)..... Kshs. 84,000.00

(iii) Independent Study Paper(2).... Kshs. 56,000.00

d) Unpaid Masters students Research Supervision(2)... Kshs. 30,000.00

e) Unpaid Undergraduate Students Research Supervision(4).....Kshs.30,000.00

f) Exam Invigilation and Marking....Kshs.6,860.00

g) Unpaid Lecture Hours.....Kshs.617,850.00

Total.....KShs.1,663,949.00

b) Issues the Claimant with a Certificate of employment

ba) General damages

bb) A declaration that the Respondent was to use the Claimant's Terminal dues to offset the outstanding loan with Equity Bank advanced to the Claimant whilst in employment of the Respondent.

bc) An order that the Respondent do pay all the outstanding penalties and interest over the Loan obtained whilst in employment with the Respondent until the time of judgment and offset the accrued loan from the terminal dues.

bd) An Order that the Claimant's name be removed from Credit Reference Bureau listing.

c) Costs of the suit

d) Interest on (a) & (c) above

20. The court proceeds to address each of the orders sought:-

Salary for March, April, May, June and July 2017

Claimant's submissions

21. The Claimant testified that the Respondent did not pay him for the said months despite the fact that he was still in active employment and as discharging his duties including teaching, supervising students and assessing his supervisees. The Respondent alleged that the Claimant was paid for the said months, but failed to produce any proof of such payment. The Respondent produced pay slip drafts for the disputed months. The claimant urged this court to consider the fact the Respondent is solely responsible for preparing pay slips. The draft pay slips do not prove that money was paid to eth

Claimant. The Claimant had a legitimate expectation to be compensated for work done and therefore submit that this court awards the Claimant Kshs 603,010 under this head calculated as:

Kshs 120,602 X 5 months= Kshs 603,010/-

Respondent's submissions

22. The Claimant submitted that the Respondent never accepted his resignation. Clearly, the Claimant is speaking from both sides of his mouth. He confirmed that he had settled in Kigali University in February 2017 only to tender his resignation on 30th April 2017. He further stated in his clearance form that he resigned from employment. In his clearance form, the Claimant stated, albeit erroneously, that he resigned on 31st July 2017.

23. During his testimony, the Claimant admitted to have left the Respondent's University in February 2017 and only tendered his resignation letter on 30th April 2017. Clearly, the Claimant contradicts himself in his pleadings, oral testimony and written submissions. In his Amended Memorandum of Claim, the Claimant pleaded that his contract was terminated on 31st July 2017. In his oral testimony, he stated that he resigned on 30th April 2017 as evidenced in his letter dated 30th April 2017 and he was in Kigali as from February 2017 while in his written submissions, he submits that his resignation was never accepted by the Respondent. It is trite law that an employer cannot force an employee to continue working when an employee has voluntarily resigned from work. Furthermore, the Claimant resigned after securing another employment in Kigali Rwanda. The Court in Apudo v Azure Hotel Limited [2024] KEELRC 321 (KLR), held thus:

> " 85. The emerging jurisprudence of the Employment and Labour Relations Court is that a resignation by an employee does not require acceptance by the employer. Being a unilateral act and available to the employee at all times without any limitation save for notice, it becomes effective as soon as it is handed over to the employer who has no mandate to reject it. The employment relationship comes to an abrupt end and the decision is irrevocable at the instigation of the employee." There is no justifiable claim for salary for the months of March, April, May, June and July 2017. However, the evidence on record shows that the Respondent paid the Claimant salary until June 2017, which it has demonstrated was an inadvertent error on its part due to communication breakdown amongst the concerned departments at the University.The Respondent pleaded that it inadvertently paid the Claimant salary for the month of April, May and June 2017 when indeed the Claimant never worked and never served the Respondent with a three months notice or payment in lieu of notice. The Respondent produced pay slips in support of its claim that it inadvertently paid the Claimant. The Claimant subsequently produced his KRA and NSSF statements to further prove and cement the Respondent's claim that it paid him the salary. However, in a rather drastic change of tune, the Claimant submitted at page 2 of his written submissions that the Respondent produced draft pay slips. This was submissions from the bar as the same was never pleaded and neither was the Respondent's witness cross examined on such an issue. The production of the pay slips was never challenged by the Claimant and neither did the Claimant file the alleged proper pay slips. The Claimant did not object to the production of the pay slips, properly stamped by the University and his belated attempt through his submissions is much ado about nothing. The Court of Appeal decision in

> Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] e KLR stated thus:- "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented." (Emphasis supplied)

24. The Claimant, deliberately and with intend on stealing a match from the Respondent, failed to produce his bank statements to prove that the salary was never deposited in his account. He failed to discharge his burden of proof pursuant to Section 47 (5) of the Act. The respondent submitted that the belated attempt by the Claimant cannot amount to anything as it was never pleaded. Nothing much turns on that point. The High Court in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR held thus:- 'It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: - ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..... ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation." The Claimant cannot have his cake and eat it at the same time. Furthermore, the Respondent advised the Claimant on the 27th April 2017 to consider resigning in order to focus on his new roles since he could not be employed in two positions both on full time basis. The Claimant obliged and resigned.

25. The Claimant never discharged his burden of proof pursuant to Section 47 (5) of the Act. He never stated how the agreement to engage him past his resignation was reached. He attempted to blame the Respondent for failing to reduce it in writing yet it was clear that none ever existed at all. It is trite that one cannot put something on nothing and expect it to stand!

Decision

26. During the trial the following was established from the claimant:- The claimant in evidence in chief told the court his last contract was from 2006 to February 2017. He had fixed-term contracts during employment with the respondent. During cross-examination, he stated his last contract was for the period between 1st August 2016 to 31st July 2019. He told the court he wrote a letter in January 2017 to defer his lectures from term starting in January to April 2017. He stated he could not recall the date of the letter. That he applied for unpaid leave vide letter dated 21st march 2017 that was rejected by the Respondent vide letter dated 27th April 2017. The claimant told the court upon the rejection he wrote a resignation letter of 30th April 2017 as advised by the respondent. This was not denied.

27. The claimant told the court at time of resignation he was not teaching but supervising. He confirmed that as at time of resignation he was employed at University of Kigali where he had been appointed as Associate Professor of Finance & Deputy Vice Chancellor Academic and Research. He confirmed that he was also acting as the Vice Chancellor of University of Kigali as at the time he resigned. The claimant confirmed he was employed at the University of Kigali in Rwanda on 17th February 2017. He stated that at that time he was on probation for 6 months and on full time functions of an academic duties. He was working for 8 hours and was stationed at the University of Kigali from 17th February 2017. He stated that while at Kigali he was still on full time employment with the respondent. The claimant admitted he did not disclose the contract of employment by University of Kigali with the respondent even at the time of application for deferment. The claimant confirmed that under the policies of the Respondent, rightly so, that the acts by the claimant amounted to gross-misconduct to take another full time employment, being take up of full time employment with another employer and that he was aware of the policy against the conduct while taking the job at Kigali.

28. The claimant insisted that he was not teaching while at Kigali but was supervising students yet he was on full time basis at Kigali working for 8 hours. The claimant had no evidence of working for the respondent after he acquired the job at Kigali. In any case the policy was to effect that it was gross-misconduct to hold another job with another employer. The court believed the claimant 's evidence in chief that his last employment was until February 2017. His application for deferment was done while he was working in Kigali on full time basis. The claimant further resigned in April 2017 and cannot claim salary simply because the respondent never communicated on the resignation letter as the resignation was effective on being received by employer as held by the Court of Appeal in Apudo v Azure Hotel Limited [2024] KEELRC 321 (KLR), held thus:

> " 85. The emerging jurisprudence of the Employment and Labour Relations Court is that a resignation by an employee does not require acceptance by the employer. Being a unilateral act and available to the employee at all times without any limitation save for notice, it becomes effective as soon as it is handed over to the employer who has no mandate to reject it.
>
> 86. The employment relationship comes to an abrupt end and the decision is irrevocable at the instigation of the employee."(emphasis given.) The court emphasis is that salary has to be earned. An employee who does not work is not entitled to salary and it is even worse that the claimant was under salary of a different employer, in secret. That behaviour cannot be condoned by the court. The court found on balance of probabilities the claimant did not work to earn salary after 17th February 2017 when he was employed on full time basis at the university of Kigali and his claim for salary post that date from the respondent was without merit.

b) Unpaid leave days (34 days 2016/2017).....Kshs. 68,229.00

29. The Claimant stated that he did not exhaust his leave days and testified that the

had 34 days remaining. The Respondent did not pay the Claimant in lieu of leave. He submitted that the Respondent denied that the claim for leave days, but failed to adduce any to support that assertion hence the Claimant is entitled to Kshs 68,229 in lieu of leave.

30. The respondent submitted that the Claimant had exhausted all his leave days. The Claimant resigned from employment on 30th April 2017 and cannot claim leave for the year 2017 when he was never

at the Respondent's institution from February 2017. The Respondent produced the Claimant's leave application forms to demonstrate that the Claimant went on leave. This prayer was never substantiated by the Claimant and must fail. In any event, the claim is statute-barred.

31. The court returned that the claimant was paid full salary having left on 17th February 2017. In his resignation letter dated 30th April 2017 he did not make a claim of leave. On a balance of probabilities the court found that the claimant, having been away for days without authority and having been paid in February, the claim for leave had no basis as he had only served 7 complete months under the contract. The letter of employment did not disclose the days of leave hence the 21 days of statutory leave apply. The claim was further statute-barred being a continuing injury claim filed outside 12 months of termination of the contract. The claim for leave is disallowed.

Claims for :-

Unpaid doctorate students Research supervision

(i) Full Project paper (2 students).... Kshs. 168,000.00

(ii) Proposal Paper(1 student)..... Kshs. 84,000.00

(iii) Independent Study Paper(2)..... Kshs. 56,000.00

d) Unpaid Masters students Research Supervision(2).... Kshs. 30,000.00

e) Unpaid Undergraduate Students Research Supervision(4).....Kshs.30,000.00

f) Exam Invigilation and Marking.....Kshs.6,860.00

g) Unpaid Lecture Hours.....Kshs.617,850.00

Claim for unpaid doctorate students research supervision

i. Full project paper (2 students)

32. The claimant submitted that he was appointed as doctorate of Business Administration Dissertation supervisor (DBA). The Claimant produced documents filed on Page 18 and 20 of the Claimant's trial bundle to show that indeed the Respondent had been appointed by the Respondent as a supervisor, a position that was confirmed by RW1 on cross examination. RW1 further confirmed that the Respondent had not instructed the Claimant to stop supervising students. The Respondent could not provide any proof to his allegation that the Claimant's students that had been assigned to other lecturers. The Claimant testified that he successfully supervised all his assigned students. Therefore, the Claimant is entitled to compensation for work done. On cross -examination, RW1 confirmed that indeed it is impossible that the Claimant could have offered services to the Respondent's students without the authority of the Respondent. On page 22 of the Claimant's bundle, the Claimant proved that his assigned students had been included in the list of graduands in the Respondent's 36th graduation ceremony held on 17/11/2017. On page 23 of the Claimant's trial bundle, the Claimant is named as the supervisor to two of the three students graduating with Doctor of Business Administration. The Claimant testified that he lodged his claims, but the Respondent refused to pay him. At page 21 of the Claimant's bundle, the Claimant's documents show that as 1st supervisor he was entitled to Kshs 28,000 per semester for up to 3 semesters, which translates to Kshs 84,000 per supervisee. Therefore, the Claimant is entitled to Kshs 168,000 for the two doctorate supervisees. Kshs 28,000 X 3 semesters X 2 students = Kshs 168,000

33. The Respondent submitted that duly submitted and raised a jurisdictional bar against the instant claims since they arose in the fixed contract that terminated on 31st July 2016. The Claimant alleged

that he was appointed as the 1st Supervisor of Solomon Okumu Ndiao and Esther Nkatha Mithiria on 26th October 2015 and 3rd August 2016 respectively. According to the said letters of appointment, the Claimant was to supervise the students for the first three semesters (maximum three semesters) and then hand over to the second supervisor. If anything, the Claimant supervised between 2015 and 2016 during the pendency of his fixed term contract that terminated on 31st July 2016. The Claimant did not raise any claim during that semester and only allegedly did so on 26th January 2017. The Claimant submitted incomplete forms to the Respondent and which forms were not approved. Furthermore, the Claimant never instituted any claim to recover the alleged sum for supervision within a period of three years after it arose. The same is statute barred and should fail. The Claimant submitted under this head that RW-1 confirmed that the Respondent never stopped the Claimant from supervising. This is incorrect since at the time this claim became due in 2016, the Claimant was still engaged by the Respondent but never raised the same for payment, neither did he sue for recovery of the said sum.

Decision

34. The claimant was the 1st supervisor vide the appointment memo dated 3rd August 2015 . His term was to run for 3 semesters. The Claimant did not raise any claim during that semester and in the term of that contract and only allegedly did so on 26th January 2017. The Respondent submitted that the Claimant submitted incomplete forms to the Respondent and which forms were not approved. Furthermore, the Claimant never instituted any claim to recover the alleged sum for supervision within a period of three years of that contract after it arose hence statute barred. The court, unfortunately, had to agree the claim was time barred for reason that back pay is continuing injury claim under section 89 of the *Employment Act* hence must be lodged within 12 months of termination of employment. The claims arose from contract that expired on 31st July 2016 when those claims became due. The claimant filed the claim on 30th January 2020 way after the expiry of time of 12 months of claims of back pay or any other employment claim of 3 years under that contract. The court has no jurisdiction to extend time and hence claim fails.

ii. Proposal paper for one student

35. The Claimant submitted that it produced evidence that he supervised an the proposal of one student but was not paid for the same. We urge the court to award the Claimant Kshs 84,000 under this head.

iii. Independent study paper for two students

36. The Claimant submitted that he produced his letter of appointment as supervisor of DBA independent paper dated 20/1/2016 on page 26 of the Claimant's trial bundle. The said document shows that the Claimant was allocated one student under this category. At Page 27 of the Claimant's trial bundle shows the Respondent was to pay the Claimant Kshs 28,000 per semester for DBA supervisory services. The Claimant supervised two students under this category. The Respondent alleged that the Claimant's students were re assigned to other lectures. RW1 referred to various emails filed on page 108-110 of the Respondent's trial bundle. It is worth noting that the said emails do not show which students were reassigned and to whom. The Claimant stated in re-exam that he never received any communication from the Respondent that his students had been reassigned to other lecturers, and respondent did not produce any evidence to rebut this assertion. Section 9 (3) of the *Employment Act* provides it is the responsibility of the Employer to reduce the employment contract into writing.

37. The Claimant contended that the Respondent ought to have written to the Claimant informing him that his students had been reassigned. On re-examination the Claimant also testified that the procedure for reassignment of students entailed a communication from the Respondent to the out-

going supervisor, the incoming supervisor and the student. Kshs 28,000 X 2 students= Kshs 56,000. The claimant urged the court to find that the Claimant has proven his case under this head and to award him Kshs 56,000/-

Unpaid masters student research supervision

38. The claimant asserted that at Page 43 of the Claimant's bundle of documents was his claim for supervising two (2) masters students. That the Claimant is entitled to pay for work done for Kshs 30,000/-(Kshs 15,000 X 2 students = Kshs 30,000). The court noted the claim was dated 26th January 2017 at page 42.

Unpaid undergraduate students research supervision for four (4)students

39. The claimant produced his claim supervising undergraduate students at page 44 of his bundle of documents. The same is dated 26/1/2017. The said document shows the list of the students that the Claimant supervised. That the said claim form clearly shows that the Claimant ought to have been paid Kshs 30,000 under this heading. The Respondent did not produce any evidence to show that it paid the claimant the monies owed. Page 44 shows that the compensation payable was Kshs 7,500 per student. Therefore the money owed under this head is Kshs 7,500 X 4 = Kshs 30,000. The court noted the claim was under page 43.

Exam invigilation and marking

40. The Claimant produced several claim forms he had submitted to the Respondent for invigilating exams at page 45 of the claimant's trial bundle. He also produced examination attendance register at page 46 to 51 of the claimant's bundle of documents which clearly shows that the Claimant did invigilate several exams. The said documents are authenticated by the Respondent's official stamp. The Respondent did not adduce any evidence to dispute the validity of the claim forms. The claimant submitted that that the Claimant ought to be awarded Kshs 6,860 under this head.(page 44 of the bundle of claim)

Unpaid lecture hours

41. The claimant contended that it is not disputed that the Claimant was employed as a lecturer by the Respondent. The Claimant however submitted that he was not fully compensated for teaching hours. The Claimant produced his clearance form on page 15 of his bundle, which showed that Kshs 617,850 was unpaid. The said clearance form was approved by all departments of the Respondent and stamped. In addition, the human resource manager cleared the Claimant and confirmed that he ought to be paid his dues as tabulated. The Claimant testified that the submitted his claim forms to the relevant department. He further stated that the standard practice was to present claim forms to the relevant departments, and the forms would be actioned and forwarded to the dean for his signature. Therefore, having filled and submitted his claim forms, the claimant had discharged his obligations On the Claimant's cross examination, counsel for the Respondent alleged the said documents were not signed by the head of department. The claimant urged the court to find that the Claimant's responsibility was to fill in the claim forms and hand them to the departments, as he could not process his own claims any further. The claimant relied on the case of Peterson Guto Ondieki V Kisii University [2020] Eklr where the court held that; -

> " Where the claimant is owed salaries for work done, upon application per the respondent's work place requirements, these pending payments should be processed without undue disadvantage to him. Where the claimant has undertaken his part diligently, applied

the policy, used the payment guide and based on his teaching claims forms duly filled for payment and there is no attendance, nothing stops him from moving the court as appropriate." The claimant urged the court to award the Claimant Kshs 617,850 being unpaid lecture hours.

Decision

42. The court finds all these claims were back pay claims and hence continuing injury claims sought after 12 months of termination of the contract, hence statute time barred under section 89 of the *Employment Act*. The claims from period before 1st August 2016 related to a contract that expired on 31st July 2016 or the rest to subsequent contract where the claimant resigned in April 2017. Section 89 reads:-' 89. Limitations

> Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof. In John Kiiru Njiiri v University of Nairobi [2021] eKLR the court held ''Equally in this case, upon cessation of employment on 12th July, 2016 any claims arising out of employment and relating to unpaid leave days commuted, such ought to have been addressed within 12 months as otherwise, these claims are time barred.'' The issue of continuing injury is now settled by the Court of Appeal in The German School Society & another v Ohany & another [2023] KECA 894 (KLR) which considered cases of continuing injury and observed citing authorities:- ''There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. This position was upheld by this Court in G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR. The contestation before this Court is whether the claims in question fall within the ambit of "a continuing injury" as contemplated by section 90. The essential question for determination before the High Court was the maintainability of the complaint due to the limitation period prescribed by the above section. Central to this question is the meaning of the phrase "a continuing injury" and whether the respondent's claims fell within the said definition. Before the High Court and this Court, the parties did not attempt to define what constitutes "a continuing injury." From the record, we note that the respondent's counsel only cited the definition of 'back pay" in the Black's Law Dictionary 9th Edition at page 159 which defines it as "the wage or salary that an employee should have received but did not because of an employer's unlawful action as setting or paying the wages or salary" to support her claim that back pay was a continuing state of affairs.'' The Court adopted with approval the elaborate definition of continuing injury claims in M. R. Gupta v Union of India, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of "continuing wrong" and "recurring wrongs" and reversed the decision. It held:"The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in

the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred...."In the upshot the entire claim for back pay failed for being stale. The claimant ought to have lodged all the said claims within 12 months of the termination of the contracts, that is after the expiry of contract in July 2016, claims which were due under the expiring contract and under the subsequent contract upon resignation.

43. The court will handle the following prayers together, namely :-

bb) A declaration that the Respondent was to use the Claimant's Terminal dues to offset the outstanding loan with Equity Bank advanced to the Claimant whilst in employment of the Respondent.

bc) An order that the Respondent do pay all the outstanding penalties and interest over the Loan obtained whilst in employment with the Respondent until the time of judgment and offset the accrued loan from the terminal dues.

bd) An Order that the Claimant's name be removed from Credit Reference Bureau listing.

44. Under the heading was a claim for damages on the ground of the respondent having spoilt the Claimant's credit score and general Reputation .The Claimant stated that on 16/2/2015 he obtained a concessional check off loan with Equity Bank. The Claimant entered and authorization agreement with the Respondent on 30/1/2015 which provided that the Respondent would utilize his terminal dues to offset the loan. The Respondent failed to pay the Claimant's terminal dues and to offset the loan, causing the Claimant's credit standing to be downgraded. The Claimant produced the said loan application form and Authorization agreement on page 86 and 93 respectively. The Respondent's RW1, on cross examination, confirmed that he was well aware that that the Claimant's salary account was held at equity bank and that the Claimant's terminal dues ought to have been paid into the said account. The Respondent's failure to pay the Claimant his dues in time caused him financial constraints and loss and is a breach of the Authorization agreement. Therefore, the Claimant has a right to be awarded general damages for to compensate him for his harm and loss. In Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) The court stated, 'Turning on the issue of the damages awarded, one of the guiding principles for the remedies under section 49 is that damages are awarded to compensate the claimant, not as punishment to the employer but to make good the employees loss...' The award of damages is at the discretion of the court as expounded in the case of Co-operative Bank of Kenya Ltd vs Banking Insurance & Finance Union *CA No 188 of 2014* where the court stated as follows:

> '"Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies....are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13

considerations which the court must take into account before determining what remedy is appropriate in each case...'The claimant urged the court awards damages for the same at salary for 12 months being:

> Kshs 120,602 X 12 months = Kshs 1,447,224. That the court to finds that the Respondents failure to pay the Claimant promptly caused him great loss as the loan he had taken accrued penalties and interest. That the court to direct that the Respondent pay all outstanding penalties and interest until time of judgment.

Respondent's submissions

45. On General damages & damages for spoiling the Claimant's credit score and general reputation the respondent submitted as follows:- The Claimant admitted that it was his responsibility to repay the loan he took from Equity Bank. This loan was taken for his benefit and he was solely responsible for its payment. He further admitted that he failed to clear with the Respondent on time and only did so in December 2019. He confirmed that he was aware that terminal dues are only available after one has cleared with the Respondent. He also confirmed on 30th April 2017, he expressly instructed the Respondent to deposit his alleged dues to his account and also on the clearance form he expressly directed that his dues be deposited in his account.The Respondent did not have an obligation to use his terminal dues to settle his loan. He admitted that the loan agreement between the Bank and himself only bound the parties thereto and that the Respondent was not a party to the contract. He also admitted that he never informed the Bank that he had resigned from employment but defaulted in repaying his loan. Clearly, this claim is merely an afterthought and should be dismissed. The Claimant never provided any fodder to substantiate this claim. Even more, the alleged breach of contract is a matter for civil enforcement through the High Court and this Court is bereft of jurisdiction to determine the same.

46. That the Claimant, in his written submissions, has belatedly attempted to quantify the amounts under the heads of general damages and damages for spoiling the Claimant's credit score and general reputation, each assigning a sum of Kenya Shillings One Million Four Hundred and Forty Seven Two Hundred and Twenty Four (Kshs. 1,447,224/=), which sum was never pleaded. This is unconscionable, to say the least. It is trite principle of law that parties are bound by their pleadings. The Supreme Court of Kenya in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in a petition: - "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...." The said computations by the Claimant were not pleaded, were not founded in law and clearly unconscionable. The Court of Appeal in Barclays Bank of Kenya Limited & Another v Gladys Muthoni & 20 others [2018] eklr, at paragraph 64 stated thus:- As regards matters employment, Rika, J. expressed the following view, which we respectfully agree with, in the case of Abraham Gumba vs Kenya Medical Supplies Authority [2014] eKLR:- "The employment relationship is not a commercial relationship, but a special relationship, which must be insulated from the greed associated with the profit-making motives, inherent in commercial contracts. This has been the historical justification of capping compensatory damages since the era of the Trade Disputes Act Cap 234 the Laws of Kenya, to a maximum of 12 months' salary.

The Industrial Court traditionally functioned in the manner of the English Employment Tribunal, and in addition to capped compensatory awards, or as alternative to such awards, could order for the reinstatement or re-engagement of the Employee. The Civil Courts on the other hand had no capping on the amount of damages they could award for breach of the contract of employment, but were conversely deprived of the power of reinstatement or re-engagement. The rationale for capping was explained in the House of Lords cases of Eastwood & Another vs Magnox Electric PLC; McCabe vs Cornwall County Council & Others [2004] UKHL 35, where the Court stated: 'in fixing these limits on the amount of compensatory awards, Parliament expressed its view on how the interests of the Employers and the Employees, and the socio-economic interests of the country as a whole, can best be balanced in cases of unfair termination. It is not for the Courts to extend further a common law implied term, when this could depart significantly from the balance set by legislature. To treat the legislature as creating the floor, and not the ceiling, would do just that....it would be inconsistent with the purpose Parliament sought to achieve by imposing compensatory awards payable in respect of unfair dismissal.' This Court is of the view that in general, judicial restraint must be exercised in exceeding the capping of 12 months' salary, in compensating Employees for the wrongful acts of their Employers. The proliferation of monetary damages above the equivalent of 12 months' salary will only disturb the equilibrium intended to be achieved by Parliament in placing the capping."

Decision

47. The court perused the check off form at page 93 of the claimant's bundle dated 30th January 2015. In the said document the claimant authorised the employer on termination of the employment to deduct the balances outstanding from his final salary payment and terminal benefits excluding pension. The employer accepted and stated it would implement the instructions. That it would also notify the bank immediately the employment is terminated. The claimant stated that in breach of the said documents the respondent failed to off set the loan as a result he was listed under credit reference bureau on or about 12 November 2020 where his credit rating was downgraded and his reputation suffered loss and damage. During cross-examination the claimant admitted he knew of the clearance policy. That payment of terminal dues was subject to clearance but the part-time was due. The claimant admitted that on 30th April 2017 he demanded that his outstanding dues of 565,950 be paid to his Standard Chartered Bank account . He started clearance on 9th December 2019. He had operated the Equity Account during employment and had not repaid the loan. He admitted after clearance, he instructed employer to deposit the money in his NCBA bank account. During re-examination, the claimant stated that his terminal dues were paid into Equity Bank. RW1 told the court that terminal dues could only be paid after clearance and according to the employee's instructions.

48. The court finds that the claimant had responsibility to settle his loans and cannot shift the burden of his personal obligations to the employer. On taking a new employment, the claimant ought to have notified the bank and done a fresh check off. The claimant further knew of the clearance policy but failed to clear until 2019. He was working for another employer from partly February 2017. The claimant told the court that by time of clearance, the loan was already in arrears and listed with CRB. The claimant cannot be heard to blame his former employer who he left in secret for his financial woes and it would be unfair to place the said burden on the employer in the circumstances. The claim is rejected.

Conclusion

49. The claims for terminal dues of back pay are all held as statute-barred. (Continuing injury claims under section 89 of the *Employment Act*). The entire claim on damages is hled to lack merit. The entire claim is dismissed with costs to the respondent.

50. It so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE , 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Claimant : - Ms. Philip h/b Ms Musau

Respondent: Situma