



Mwangi v Banking Insurance & Finance Union (Kenya) (Employment and Labour Relations Cause E319 of 2025) [2025] KEELRC 2129 (KLR) (21 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2129 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E319 OF 2025**

BOM MANANI, J

JULY 21, 2025

BETWEEN

IRENE NYAMBURA MWANGI CLAIMANT

AND

BANKING INSURANCE & FINANCE UNION (KENYA) RESPONDENT

RULING

1. The Claimant instituted this action against the Respondent seeking to challenge the latter's decision to retire her on account of attainment of retirement age. It is her case that she is supposed to retire at the age of 65 years. Yet the Respondent has purported to retire her at the age of 60 years. As such, she, inter alia, seeks a declaration that the Respondent's attempt to retire her prematurely at the age of 60 years is unfair.
2. Together with the Statement of Claim, the Claimant has filed the Notice of Motion application dated 13th April 2025 under certificate of urgency. In the application, she seeks the following orders:-
 - a. Spent.
 - b. That the court issues an order of injunction to stop the Respondent from forcibly retiring her pending inter-partes hearing of the application and the suit.
 - c. That the court issues an order prohibiting the Respondent from implementing the retirement notice it had issued to her dated 1st March 2025 pending the inter-partes hearing of the application and the suit.
 - d. That the court issues an order of injunction to restrain the Respondent from harassing, victimizing and intimidating her pending inter-partes hearing of the application and the suit.
 - e. That the court issues an order to retain her in her employment until she attains the age of 65 years.



- f. That the claim be heard on priority basis.
 - g. That costs of the application be provided for.
3. The application is supported by the grounds on the face of it, the supporting affidavit dated 13th April 2025 and the supplementary affidavit dated 17th June 2025. In the affidavits, the Claimant avers that the Respondent engaged her services as a secretary as from July 2001. She contends that she has since undergone various trainings which enabled her to undertake various other tasks including negotiation of collective bargaining agreements and preparation of conciliation and court memorandums.
 4. The Claimant contends that she is a member of the CIC Jipange Pension Scheme which was started by the Respondent in September 2014. She contends that the said scheme fixed her retirement age at 65 years. As such, she contends that she is supposed to retire at that age.
 5. The Claimant avers that she was born on 18th December 1964. As such, her date of retirement ought to be 18th December 2029.
 6. The Claimant avers that she attained the age of 60 years on 18th December 2025 and continued working for the Respondent without any incident. She contends that on 12th March 2025, the Respondent served her with a retirement notice dated 1st March 2025 purporting to retire her on attainment of 60 years.
 7. She avers that the notice directed her to proceed on terminal leave for one month as from 17th March 2025. In effect, she contends that her last working day was to be 16th April 2025.
 8. The Claimant contends that the retirement notice was issued in violation of the CIC Jipange Pension Scheme on retirement age. She avers that she wrote to the Respondent's General Secretary raising concern about the matter but the Respondent wrote back asking her to justify her contention that her retirement age was to be 65 years and not 60 years.
 9. The Claimant avers that although she wrote to the Respondent providing proof of the fact that she was to retire at the age of 65 years and appealed against the decision to retire her at the age of 60 years, the Respondent did not favour her with a response. As such, she was forced to move to court.
 10. The Claimant contends that there is no fixed retirement age for persons working in the trade union sector. As such, she contends that the only instrument which speaks to her retirement age is the CIC Jipange Pension Scheme form.
 11. The Claimant contends that the Respondent's attempt to retire her at the age of 60 years amounts to a unilateral variation of a term of her contract in violation of section 10(5) of the Employment Act. As such, she contends that the action is illegal.
 12. The Respondent has opposed the application. It has filed the affidavit dated 12th June 2025 to anchor its response to the motion.
 13. The Respondent avers that rule 12D of its constitution sets the retirement age for its employees at 60 years. It contends that according to the Claimant's Identity Card, her year of birth was 1964. As such, it contends that she attained her retirement age of 60 years in December 2024.
 14. The Respondent avers that the Claimant concealed the fact that its constitution has a stipulation on retirement age thus misleading the court to issue an order in her favour barring it (the Respondent) from retiring her. Further, it contends that the Claimant was retired and paid her exit dues in March 2025 before the court orders were issued. As such, it contends that the orders were issued after the fact and were, in effect, overtaken by events.



15. The Respondent avers that the amendment to its constitution which introduced the retirement age of 65 years was approved and registered by the Registrar of Trade Unions on 18th February 2025. As such, it contends that at the time the Claimant was retired, the provision had taken effect.
16. The Respondent avers that the retirement age alluded to in the CIC Jipange Pension Scheme cannot override express provisions of its (the Respondent's) constitution. As such, it avers that the retirement age for its employees is governed by the constitution and not the CIC Jipange Pension Scheme regulations.
17. In response, the Claimant avers that she only became aware of the changes to the Respondent's constitution which introduced the retirement age when the Respondent spoke to the matter through these proceedings. She contends that there were no consultations with her on the clause that introduced the retirement age in the constitution.
18. The Claimant avers that the letter of retirement did not make reference to clause 12D of the Respondent's constitution on retirement. She further avers that the letter did not speak to the issue of notice pay.
19. The Claimant avers that the Respondent gave her the retirement notice on 12th March 2025 and required her to retire by 17th March 2025. She contends that this did not provide her with adequate notice.
20. The Claimant avers that the Respondent's constitution did not initially contain a provision on retirement age. She contends that clause 12D on retirement age was only introduced on 18th February 2025 after she had already attained the age of 60 years.
21. The Claimant reiterates that her contract was subject to the retirement age spoken to in the CIC Jipange Pension Scheme documents. As such, she contests the Respondent's position that she was bound by clause 12D of its constitution.
22. The Claimant avers that the amendment to the Respondent's constitution was made without her knowledge and was intended to disqualify her from running for an office in the upcoming trade union elections in 2026. She contends that the amendment was made in contravention of section 27(3) & (4) of the [Labour Relations Act](#).
23. The Claimant further contends that the Respondent's National Executive Council has no mandate to amend its (the Respondent's) constitution. In her view, this power is reserved for the Annual or Special Conference organ of the Respondent.
24. The Claimant contends that the amendments to the constitution introduce two tiers of retirement: one for officials of the Respondent fixed at 70 years; and the other for employees fixed at 60 years. It is her contention that this arrangement is discriminatory and irrational.
25. The Claimant contends that legal and policy changes cannot be introduced to adversely affect accrued rights retrospectively. As such, she contends that the changes to the Respondent's constitution on retirement age cannot be invoked to change her retirement age.
26. The Claimant avers that the Respondent has retained some employees beyond the age of 60 years. Yet, it demands that she retires at that age. She contends that the Respondent has not provided a rational justification for this differential treatment.



27. The Claimant avers that through a witness statement filed in ELRC E816 of 2022, the Respondent confirmed that the retirement age for its employees was 65 years. As such, it cannot turn around to deny this fact.
28. In a further affidavit dated 12th June 2025, the Respondent avers that the indefinite contracts of service for the two employees who are in its service despite having attained the age of 60 years were terminated on account of attainment of retirement age. It avers that it only re-engaged them on a one year fixed term contract owing to their experience, skill and special knowledge. As such, it (the Respondent) denies that retention of the two on a one year contract is evidence of differential treatment visited on the Claimant.
29. The Respondent avers that the CIC Jipange Pension Scheme does not in any event fix retirement age for its (the Respondent's) employees at 65 years. It contends that the scheme has left the question of retirement age open with the consequence that one can retire at either 50 years or 55 years or 65 years.
30. The Respondent contends that the retirement age in clause 5D of its constitution relates to elected officials whilst the retirement age in clause 12D of the constitution relates to employees. It contends that these two categories of personnel are distinct by reason of how they gain entry to their positions, that is to say, through election and through appointment. As such, it contends that the fact that there is a difference in the retirement age for the two categories does not proffer evidence of discriminatory treatment against the Claimant.
31. The Respondent avers that the Claimant and all other stakeholders were made aware of the amendments to its constitution which introduced the clause on retirement age. It contends that information on these changes was communicated through an official Gazette Notice. It further avers that by virtue of section 69 of the *Interpretation and General Provisions Act* and sections 40(a), 85 and 86 of the *Evidence Act*, information which is disseminated through a Gazette Notice is considered as publicly availed to all and sundry.
32. When the application dated 13th April 2025 was placed before the trial court on 16th April 2025, it (the court) issued an order of interim injunction restraining the Respondent from retiring the Claimant. The court further ordered the Claimant to serve the pleadings in the cause on the Respondent to enable it (the court) to issue further directions in the matter.
33. When the Respondent was served with the Claimant's pleadings as ordered on 16th April 2025, it filed the application dated 24th April 2025. In the application, the Respondent seeks the following orders:-
 - a. Spent.
 - b. That the court be pleased to set aside, vary, review or discharge the orders which it issued on 16th April 2025.
 - c. That the court be pleased to stay or clarify the said orders.
 - d. That costs of the application be provided for.
34. The gist of the application dated 24th April 2025 is that the orders of 16th April 2025 were obtained on the basis of non-disclosure of material facts. The Respondent accuses the Claimant of not disclosing to the court that it (the Respondent) had amended its constitution to introduce clause 12D which sets retirement age for its employees at 65 years.



35. The Respondent further contends that when the Claimant moved the court for the impugned orders, her retirement had already crystalized. It avers that the retirement took effect on 17th March 2025 long before the Claimant applied to court on 13th April 2025 for the impugned orders.
36. The Claimant has opposed the Respondent's application on the grounds that she was not aware of the amendments to its constitution through which clause 12D on retirement age was introduced. In addition, she has raised several other grounds which are in pari-materia with what is contained in her supplementary.

Issues for Determination.

37. After evaluating the applications and affidavit evidence by the parties, the following issues present for resolution:-
 - a. Whether the two applications are merited.
 - b. Whether the orders sought in the applications should be granted.
38. In addressing the above issues, I will begin by considering the application dated 13th April 2025. The outcome on this application will determine the fate of the application dated 24th April 2025.
39. At the very outset, I wish to point out that the court is not required or indeed expected to make conclusive findings on contested matters in the suit at this stage of the proceedings. All that is required of it is to make a preliminary evaluation of the material before it in order to determine whether the interim reliefs that are sought should issue.
40. I mention this because a perusal of the affidavits and submissions presented by the parties demonstrates an effort by them to invite the court to conduct an extensive inquiry into contested matters even before the trial has been conducted. Such an invite must be resisted since the court should only make conclusive findings on disputed issues after evaluating evidence which has been tested through cross examination during a full trial.
41. The application dated 13th April 2025 seeks an equitable remedy of injunction. It is a cardinal rule that a party who seeks an equitable remedy should make full disclosure of all material facts that are relevant to his request to enable the court to take them into account whilst making its orders. The consequence of failure to make full disclosure of such facts is that the orders sought may be denied (*Munene v Church Commissioner for Kenya & 3 others* (Environment & Land Case 117 of 2022) [2023] KEELC 16943 (KLR) (20 April 2023) (Ruling)).
42. Further, for an order of interim injunction to issue, the applicant must satisfy the conditions for grant of injunction as enunciated in the celebrated case of *Giella v. Cassman Brown & Co. Ltd* EA 358. These are:-
 - a. Establishing a prima facie case with a probability of success;
 - b. Demonstrating that an award of damages will not be adequate to compensate the injury that will ensue if the orders of injunction are not granted;
 - c. If the court is in doubt as to whether the first two conditions have been satisfied, it may resolve the matter on a balance of convenience.
43. The obligation on an applicant for an equitable remedy to make full disclosure of material facts is closely related to the equitable maxim that he who comes to equity must come with clean hands



(*Esther Nugari Gachomo v Equity Bank Limited* [2019] eKLR). The maxim obligates the court to deny equitable reliefs to a party who approaches it devoid of good faith.

44. In the application dated 13th April 2025, the Claimant hinged her request for interim injunction on the fact that the Respondent was trying to retire her at the age of 60 years in contravention of the CIC Jipange Pension Scheme rules which allegedly fix her retirement age at 65 years. The application does not allude to the fact that the Respondent's amended constitution provides for retirement at 65 years.
45. The Respondent accuses that Claimant of having deliberately withheld this information from the court in order to obtain the injunctive orders. On the other hand the Claimant contends that she was unaware of the fact that the Respondent had amended its constitution to introduce clause 12D which addresses the issue of retirement age. Was the Claimant aware of the amendment to the Respondent's constitution or was she, in law, deemed to have been aware of the said amendments?
46. Clause 12D of the Respondent's constitution provides, in part, as follows:-
- “All staff/employees of the union shall retire at the age of sixty (60) years. The last day of such employee(s) shall be the sixtieth (60th) birthday.”
47. According to the documents attached to the Respondent's affidavits, the amendment to the Respondent's constitution to introduce the above clause was approved by the Respondent's Special Delegates Conference that was held on 26th June 2024 and 11th November 2024. On 18th February 2025, the Registrar of Trade Unions wrote to the Respondent informing it that the amendment had been accepted and registered.
48. The Respondent has provided evidence to suggest that the process of amendment was publicized through local newspapers. This appears at pages 136 to 141 of the Respondent's bundle. Besides the newspaper publications, notice of the proposed amendment was published in the Kenya Gazette of 12th April 2024 vide Gazette Notice No. 4465.
49. Although the Claimant contends that she was not notified of the amendments, there is preliminary evidence to suggest that notice of the amendments was circulated publicly as required by law. This is particularly so in view of section 69 of the *Interpretation and General Provisions Act* and sections 40(a), 85 and 86 of the *Evidence Act*.
50. Section 69 of the *Interpretation and General Provisions Act* provides as follows:-
- “The production of a copy of the Gazette containing a written law or a notice, or of a copy of a written law or a notice, purporting to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.”
51. Section 40(a) of the *Evidence Act* provides as follows:-
- “When the court has to form an opinion as to the existence of any fact of a public nature, any statement of it shall be admissible which is made in any written law of Kenya, or in any notice purporting to be made in pursuance of any such written law, where the law or notice (as the case may be) purports to be printed by the Government Printer.”
52. Section 85 of the *Act* provides as follows:-
- “The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such



law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.”

53. In *M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others* [2013] eKLR, the court observed that a notice published through the Kenya Gazette is deemed to be published to the whole world. The court observed on the matter as follows:-

“ The only publication in Kenya that is deemed to serve as notice to the whole world is the Kenya Gazette.”

54. Having regard to the foregoing, it is apparent that the Claimant was or ought to have been aware of the proposed amendments to the Respondent’s constitution which introduced the clause with the retirement age. As such, at the time that the Respondent issued her with the retirement notice, she is deemed to have been aware of the fact that its (the Respondent’s) constitution had been amended to provide for retirement at 65 years.

55. The Claimant having been deemed to have been aware of the fact that the Respondent’s amended constitution contained a clause on retirement age, she was under obligation to disclose this fact to the court at the time she moved it (the court) for the order of interim injunction. As the record shows, she did not.

56. The Claimant’s failure to disclose the fact that the Respondent’s constitution had been amended to introduce a clause on retirement age of 65 years amounted to non-disclosure of a material fact in the suit. Such non-disclosure, in the court’s view, disentitles her to the orders of interim injunction that she seeks (*Munene v Church Commissioner for Kenya & 3 others* (Environment & Land Case 117 of 2022) [2023] KEELC 16943 (KLR) (20 April 2023) (Ruling) & *Tbika Road Gym Limited v TRM Holdings Limited* (Civil Appeal E540 of 2021) [2022] KEHC 11132 (KLR) (Civ) (31 May 2022) (Ruling)).

57. As indicated earlier, for the court to grant the Claimant the injunctive orders she seeks, she must demonstrate that she meets the conditions for the grant of injunction as developed in the case of *Giella v Cassman Brown* (supra). According to the Claimant, the Respondent attempted to improperly terminate her services by seeking to retire her prematurely. She contends that her retirement age is 65 years and not 60 years as contended by the Respondent.

58. It is noteworthy that neither of the parties presented to court the Claimant’s contract of service to enable it (the court) to discern whether it (the contract) has provision for retirement age. What the Claimant relies on to anchor her case for retirement at 65 years is a document referred to as the CIC Jipange Pension Plan Contract Schedule which shows that her retirement age is 65 years. However, there is no preliminary material placed before the court to suggest that the above information is derived from the contract of service between the parties. It is also not clear whether the information was based on the Claimant’s unilateral declaration to the pension fund administrator.

59. In its response to the application, the Respondent denies that the Claimant’s retirement age was agreed to be 65 years. It denies that the retirement age mentioned in the Claimant’s pension documents applied to their employment relationship.

60. As a matter of fact, the Respondent contends that the pension documents do not suggest that the indisputable retirement age for its employees is 65 years. It contends that the documents only give an employee the latitude of selecting the age of his/her retirement for purposes of the pension scheme. It further avers that the employee is free to choose 50 years, 55 years or 65 years for this purpose.



61. The Respondent contends that the only document that firmly speaks to the retirement age for its employees is its amended constitution which fixes this age at 60 years. It contends that the Claimant cannot rely on the pension scheme documents to override an express provision in its constitution regarding retirement age.
62. Having regard to the contrasting positions expressed by the parties on the subject and keeping in mind that neither of them produced the Claimant's employment contract to assist the court to determine whether it (the contract) speaks to the question of retirement age, the court is of the view that it is not possible to determine whether the Claimant has a prima facie case with a chance of success based on the preliminary material placed before it. The parties ought to have provided further material, including the contract of service between them, to enable the court to determine this aspect of the case.
63. Although the Claimant contends that the Respondent had affirmed 65 years as the retirement age for its employees through another suit, the document that she relies on to anchor this argument is a witness statement that was not prepared under oath. As such, it is of little probative value. Importantly, the document was prepared on 28th February 2023 long before the amendment to the Respondent's constitution to introduce the clause on retirement age was effected on 18th February 2025.
64. Apart from establishing the presence of a prima facie case, the Claimant is obligated to demonstrate that the injury she will suffer if the injunction she seeks is not granted cannot be redressed by an award of damages. However, a perusal of the affidavits filed in support of her application do not speak to this issue.
65. The court notes that at the time that the Respondent purported to retire the Claimant, she was 60 years. Yet, according to the Claimant, her retirement was due at the age of 65 years. In effect, if it turns out after trial of the case that the Respondent's decision was irregular, the Claimant would have lost approximately five (5) years of active employment.
66. According to the Claimant's affidavit dated 13th April 2025, her monthly salary as at March 2025 was Ksh. 113,237.00. This means that her annual salary was Ksh. 1,358,844.00. As such, her income from salary from the Respondent for the five years would be Ksh. 6,794,220.00.
67. The foregoing demonstrates that the loss that the Claimant will suffer if she is retired prematurely is capable of quantification. Therefore, although there is no guarantee that she would have served for the entire five (5) years, the court is able to quantify her loss and issue an order to compensate her in damages, should she establish that her contract was irregularly brought to a close before she attained the age of 65 years.
68. As such, the court finds that the injury that the Claimant will suffer if the interim injunction sought is not granted is quantifiable and capable of compensation by an award of damages. In the premises, it is the court's considered view that she (the Claimant) has failed to overcome the second condition for the grant of an order of injunction.
69. Regarding the balance of convenience, the court notes that the letter of retirement stated that the Claimant was to exit employment on 17th March 2025. As such, by the time she moved the court for the injunctive orders, her retirement had already crystallized.
70. The Respondent has sworn an affidavit stating that it replaced the Claimant as soon as she left its employment. As such, it contends that there is no vacancy which the Claimant can occupy should the injunction order issue. The Claimant has not expressly controverted this assertion.



71. The fact that the Respondent has already filled the impugned position renders it onerous for it (the Respondent) to facilitate the Claimant to resume the position. As such, an order for mandatory injunction will subject the Respondent to undue hardship by requiring it to return the Claimant to a position which has already been taken up by another employee.
72. One of the reasons why a court of law will be reluctant to issue the discretionary order of injunction is if the consequence of the order will be to subject one of the parties in the suit to undue hardship (see David Bakibinga, *Equity and Trusts* (LawAfrica Publishing (U) Ltd, Uganda) 99). In the circumstances, the balance of convenience tilts in favour of not granting the injunction.

Determination.

73. Having regard to the foregoing, the court arrives at the conclusion that the application dated 13th April 2025 is unmerited. As such, it is disallowed.
74. The application dated 13th April 2025 having been dismissed, the orders of interim injunction which were issued on 16th April 2025 automatically lapse. As such, it is unnecessary to consider the application dated 24th April 2025 whose tenor was to lift the said orders.
75. Costs of the two applications shall abide the results of the suit.

DATED, SIGNED AND DELIVERED ON THE 21ST JULY, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

