



**Macharia v Windsor Golf Hotel & Country Club (Cause E999 of 2021)
[2024] KEELRC 71 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 71 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E999 OF 2021
JK GAKERI, J
JANUARY 30, 2024**

BETWEEN

JUDY NYAMBURA MACHARIA CLAIMANT

AND

WINDSOR GOLF HOTEL & COUNTRY CLUB RESPONDENT

JUDGMENT

1. The Claimant commenced this suit on 6th December, 2021 claiming the following;
 - i. Terminal dues for Kshs.3,857,280.66.
 - ii. Interest on (a) above at court rates from date of filing the suit till payment in full.
 - iii. An order directing the Respondent to remit all unremitted pension contributions payable to the provident fund between June, July, August, October, November and December 2018 to February 2020.
 - iv. Costs of the suit plus interest.
 - v. Any other relief that this court may deem fit to grant.
2. It is the Claimant’s case that she joined the Respondent on 6th January, 2009 and resigned on 29th February, 2020 by which time her consolidated monthly salary was Kshs.349,132/= and acted as General Manager on two occasions.
3. The Claimant avers that although the Respondent acknowledged her resignation, its computation of final dues vide letter dated 26th June, 2020 at Kshs.1,799,087.86 is erroneous in that the sum of Kshs.314,218.80 as the employer contribution to the pension scheme is missing.



4. That the Respondent's attempt to recover the Windsor Sacco Loan of Kshs.1,743,974.00 from her final dues had no basis as the employer and the sacco were distinct legal entities and she intended to continue as a member of the Sacco and would service the loan facility.

Respondent's case

5. In its Memorandum of Response and Counter-claim, the Respondent avers that its tabulation of dues payable to the Claimant vide letter dated 17th February, 2020 had errors which prompted an audit of the actual dues which accounted for the letter dated 26th June, 2021 with zero terminal dues as leave days fell to 55 from 73, off days rose from 22 to 23 and salary in lieu of notice was 1 month and 7 days.
6. Surprisingly, the Respondent avers that the Claimant was negligent in the performance of her duties and discharge of her responsibilities in that she permitted employees accumulate excessive leave days, approved gratuity for employees who were members of the pension scheme and the Respondent suffered a loss of Kshs.4,636,706.70.
7. That the Claimant had an outstanding Sacco loan of Kshs.1,743,974.00 and the Sacco had advised the Respondent to withhold the Claimant's dues as well as other employees who were exiting the Respondent and a decision was made to offset the loans from the final dues.
8. That the Sacco letters gave the Respondent authority to recover the amount outstanding.
9. Finally, the Respondent avers that it had a remedial plan to pay pension arrears and the same had been approved by the Retirement Benefits Authority (RBA).
10. In its Counter-claim, the Respondent avers that the Claimant exaggerated terminal dues owed to former staff, did not verify actual terminal dues owed to former employees, failed or refused to verify leave days and off-days of former staff and awarded excessive compensation and failed to verify actual allowances payable to former staff and was therefore negligent and guilty of breach of contract.
11. That as a consequence, the Respondent suffered special damages in the sum of Kshs.4,636,706.70 and claims the same with interest and costs of the Counter-claim.

Claimant's evidence

12. The Claimant confirmed that he was the Respondent's Human Resource Manager and resigned voluntarily and admitted that she had a loan with the Sacco amounting to Kshs.1,743,974/= and the terminal dues letter indicated that the dues were payable less loans.
13. The Claimant admitted having received pension dues on 11th May, 2022, inclusive of interest and thus Prayer C of the claim had been overtaken by events.
14. The witness admitted having completed the SACCO Loan Application Form and confirmed that the SACCO had written to the General Manager of the Respondent for the recovery of loans owed by staff who were leaving the Respondent's employment.
15. The Claimant further confirmed that as the Human Resource Manager, she prepared letters for employees who were exiting service and employees would be taken through the dues payable to ascertain their correctness and no excess payments were made.
16. It was her testimony that the letter acknowledging her resignation had no qualification.
17. That the Respondent had not provided evidence of its source of authority to deduct her SACCO Loan from the terminal dues.



Respondent's evidence

18. RWI, Leah K. Nzioki confirmed that she joined the Respondent in November 2020 and replaced the Claimant and had no role in the preparation of the Claimant's dues and had no clearance document.
19. The witness conceded that terminal due must be paid within a reasonable time.
20. RWI admitted that the Respondent was experiencing financial challenges though the amount payable to the Claimant was available.
21. The witness confirmed that the Claimant had been invited to answer in relation to the 15 employees but had no invitation letter and was unaware of neither Alexander Anampiu nor Mr. Waiyaki.
22. The witness further admitted that the Respondent was indebted to suppliers and had negotiations with them and settled matters out of court and it commenced remitting pension in January 2017 having not done from 2009 to 2016.
23. That the Claimant's final dues were assessed at Kshs.2,353,054.03 and after deducting the SACCO Loan, the amount payable was negative.

Claimant's submissions

24. Counsel submitted that since the Respondent and the SACCO were distinct entities are held in *Salomon V Salomon & Co. Ltd (1897) A.C. 22*, the Respondent had no authority to deduct the SACCO Loan and there was no agreement to that effect and only loans given by the employer were deductible under Section 19 of the *Employment Act, 2007* and the SACCO was a stranger to the employment relationship under the doctrine of privity of contract.
25. Counsel submitted that the Respondent was estopped from varying the computations in the letter dated 17th February, 2020 by virtue of Section 120 of the *Evidence Act* and no evidence was adduced to prove the errors alleged.
26. As regards the Counter-claim, counsel urged that the burden of proof lay on the Respondent and it had not discharged it as no audit had taken place and no documentation was availed as required by Section 37 of the *Evidence Act* and Section 74 of the *Employment Act, 2007*.
27. Counsel urged the court to dismiss the Counter-claim.
28. Reliance was made on the sentiments of the court in *David Bagine V Martin Bundi (1997) eKLR* for the proposition that special damages must be pleaded and strictly proved. That fraud must be proved as well.
29. Counsel submitted that the Claimant had been an employee of the Respondent since 2009 and had no show cause letter or other evidence of carelessness or negligence.

Respondent's submissions

30. Counsel submitted on the reliefs sought and the Respondent's Counter-claim.
31. As regards the reliefs sought, counsel submitted that Prayer (c) had been fulfilled.
32. Counsel relied on the alleged audit to justify the changes made to the computation of dues but made no reference to the actual report.



33. Counsel submitted that by virtue of being a SACCO member, the Claimant had authorised the Respondent to deduct any outstanding SACCO Loan from her dues and cited the decision in John Kinyanjui Gateru V Family Bank Ltd (2016) eKLR on the benefits of employment including loans from the SACCO.
34. Counsel relied on the sentiments of Mbaru J. in Javan Were Mbango V H. Young Co (EA) Ltd (2012) eKLR as well as John Ogutu Ragama V Elimu Co-operative Savings & Credit Society Ltd (2013) eKLR to urge that the Claimant's terminal dues was Kshs.3,857,280.66 and the claim was not viable.
35. As regards the Counter-claim, counsel cited the decisions in Kenya Power & Lighting Co. Ltd V Aggrey Lukorito Wasike (2017) eKLR, Christine Kalama V Jane Wanja Njeru & another (2021) eKLR, Caparo Industries PLC V Dickman (1990) 1 ALL ER 568 and Blyth V Birmingham Water Works (1856) 11 EX Ch. 781 to underscore the place of negligence in the law of torts to urge that the Claimant owed the Respondent a duty of care and acted negligently which led to financial loss and thus owed the Respondent the sum of Kshs.4,636,706.70.
36. Counsel urged the court to dismiss the Claimant's suit and allow the Counter-claim with costs to the Respondent.

Findings and determination

37. It is common ground that the Claimant was an employee of the Respondent up to the end of February 2020 and separated from the Respondent through resignation vide letter dated 7th February, 2020 and forfeited part of outstanding leave days in lieu of the notice period.
38. The resignation was accepted vide letter dated 17th February, 2020 which in addition itemised the Claimant's dues as emoluments till 29th February, 2020, 73 leave days and 30 days salary for each completed years in service less 22 off days, 30 days in lieu of notice, any shortages outstanding bills, loans and advances and any statutory deductions.
39. Vide letter dated 26th June, 2020, the Respondent assessed the Claimant's dues at Kshs.4,028,887.83 less deductions including the SACCO Loan and the net payable was Kshs.1,799,087.86.
40. However, almost one year later by letter dated 24th June, 2021 addressed to the Claimant, under the reference "Audited Final Dues", the figures had changed for instance leave days had been reduced to 55 and off-days had risen to 23.
41. The total amount due had fallen to Kshs.2,353,054.03 and after deductions, the amount payable was in the negative.
42. During the hearing, the Claimant admitted that the amount she was claiming was now Kshs.2,927,303.66 as opposed to Kshs.3,857,280.66 and had no claim on pension benefits there abandoning prayer (c) in the Memorandum of Claim.
43. The issues for determination are:
 - i. Whether the Respondent has the authority to deduct the SACCO Loan of Kshs.1,743,974.00 from the Claimant's final dues of Kshs.2,927,303.66, and
 - ii. Whether the Respondent's Counter-claim is merited.
44. Before delving into the foregoing issues, it is important to dispose of the peripheral issue as to elements of the Claimant's final dues in light of the contradictory letters and computations from the Respondent.



45. To buttress its case, the Respondent provided a copy of its letter to the Claimant dated 24th June, 2021 on the Audited Final Dues signed by one Lemmy Mathenge who did not testify as to who conducted the audit, when and the resultant report or what necessitated the alleged audit.
46. Such evidence was critical as the Respondent's previous computation of final dues had been authenticated by the Chief Accountant, Human Resource Officer and the Operations Manager, although the Claimant did not acknowledge the same.
47. In the courts view, without credible evidence as to what precipitated the alleged audit, when it was done and by whom, including the audit report with relevant attachments to justify the variations, the Respondent's letter of 24th June, 2021, written more than one (1) year after the Claimant's resignation lacks a justification or foundation as the Respondent has failed to demonstrate the transition from Mr. Vijay Krishnan's letter dated 17th February, 2020 to Mr. Lemmy Mathenge's letter dated 24th June, 2021.
48. An Audit Report would effortlessly have demonstrated the variations.
49. RWI had no evidence of the alleged errors in the computation of days by the Respondent's officers.
50. In the circumstances, the Respondent's letter dated 24th June, 2021 lacks credibility as the basis of computation of the Claimant's final dues and is thus unreliable.
51. The Respondent is thus bound by its letter to the Claimant dated 17th February, 2020.
52. As to whether the Respondent has authority to deduct the SACCO Loan from the Claimant's final dues, parties have adopted opposing positions with the Claimant testifying that she was ready to repay the loan after leaving employment and in any case, the employer and the SACCO were distinct legal entities.
53. The Respondent on the other hand relies on two letters from the Chairperson and Secretary of the SACCO dated 1st January, 2021, on the Claimant's outstanding loan of Kshs.1,743,974.00 and two general letters dated 10th August, 2022 and 13th December, 2022 instructing the General Manager to withhold payment of final dues to former employees including the Claimant until they sought clearance from the SACCO Management regarding settlement of their outstanding loans.
54. It is common ground that the Claimant was indebted to the SACCO to the tune of Kshs.1,743,974.00 and had undertaken to repay the same as a member of the SACCO. She admitted having completed the Loan Application Form but the Respondent did not produce a copy of the same as evidence that the Claimant borrowed regularly and provided guarantors typical in SACCO'S Loans.
55. The Respondent's case is grounded on the fact that officials of the Sacco intimated to the General Manager of the Respondent that the Claimant and others owed the Sacco specific sums of money as outstanding loans.
56. This is a clear acknowledgement by the Respondent that the two were different entities and the Respondent was not involved in the management of dealings of the SACCO, other than deduction and remission of the amount payable by members of the SACCO.
57. SACCO's are typically societies composed of employees of a particular employer and membership is voluntarily. They have registered by-laws and are regulated by the [SACCO Societies Act](#), 2008 but registered under the [Co-operative Societies Act](#), 1997.



58. Regrettably, unlike banks which require the employee to authorise the employer to deduct any outstanding loans from terminal dues in case of a separation during the subsistence of the loan, SACCOs seldom do.
59. They generally require guarantors who may be called upon to make good the borrowers liability in the event of default, a patently unconscionable mechanism of loan recovery, in particular where the principal debtor is dishonest or deserts the work place.
60. More significantly, SACCO Loans are extended to employees as members of the SACCO not as employees and unless the employer is looped in by the Application Form, the employer has no role in the recovery of the loan as it is not privy to the relationship and the amount outstanding is payable to the SACCO.
61. For unexplained reasons, the Claimant did not tender evidence that she cleared with the SACCO.
62. The clearance form would have shown the method by which the Claimant would liquidate the amount due to the SACCO.
63. Having admitted the fact that she was indebted to the SACCO, it was incumbent upon the Claimant to make arrangements with the SACCO on how to repay the loan or clear with it.
64. In the courts view, the fact that the Claimant had not endeavoured to agree with the SACCO on how to liquidate her liability would not pass the test of good faith.
65. Relatedly, the SACCO notified the Respondent that the Claimant was indebted to it and explained that the loan application form provided that the amount due was recoverable from the guarantors and final dues.
66. The Claimant did not contest the contents of the letter and admitted that she signed the Application Form.
67. In determining this issue, the court is guided by the persuasive sentiments of Mbaru J in *Javan Were Mbango V H. Young & Co (EA) Ltd (2012) eKLR* as follows:

“Employees who out of their free will join employees Sacco do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the Sacco for their welfare and collective good of all. An employee is therefore stopped from claiming that once their employment is terminated, they are owed all their savings without taking into consideration the collective agreement under their Sacco and or co-operative society. Where an employee has enjoyed a loan facility from the collective kitty he is equally under a duty to make good any dues where his relationship with the collective is severed by virtue of termination of his relationship with the principal”.
68. The foregoing sentiments were cited with approval in *Joshua Toroni Ntabo V Hipora Business Solutions (EA) Ltd (2020) eKLR*.
69. In *Casto Gitongah Mwai V Brookside Dairy Ltd (2020) eKLR*, where the employer had without authority deducted the sum of Kshs.33,191.37 to repay a loan the employee had guaranteed, the court held that the sum of recoverable from the employer, the employee had not authorized the deduction and the SACCO had not informed the employer that the employee was indebted to it.



70. In *Alice Ndaani & 5 others V Mwalimu National Savings & Credit Co-operative Society Ltd* (2021) eKLR, the court held as follows;

“I further find that the Claimant’s rights to fair labour practices and freedom from servitude was violated when the Respondent off-set their outstanding Sacco loans from their employment terminal dues without their consent or any lawful justification.”

71. In light of the foregoing, it is the finding of the court having undertaken to be bound by the SACCO’s By-laws relating to loans, and having not endeavoured to clear with the SACCO, the Claimant cannot be heard to say that she had not seen any document authorising the employer to retain terminal dues for purposes of the SACCO Loan.

72. The SACCO’s letter to the General Manager of the Respondent is explicit on the modes of recovery of loan balances from an employee who is exiting service.

73. The totality of the evidence is that the Respondent had a lawful justification to retain part of the Claimant’s terminal dues owing to the outstanding SACCO loan.

74. Having found that the Claimant is entitled to terminal dues as computed pursuant to the letter dated 17th February, 2020 and duly signed by the three officers of the Respondent, the Respondent shall compute the dues and deduct the loan outstanding to the SACCO of Kshs.1,743,974.00

Counter claim

75. In its Counter-claim, the Respondent prays for the sum of Kshs.4,636,706.70 with costs and interest.

76. In support of the Counter-claim, the Respondent attached undated and unauthenticated sheets entitled Employee Leave and off-duty analysis sheets for 15 employees allegedly paid excess amounts on account of the Claimant’s negligence.

77. Although the Respondent’s witness statement contains the names of the employees, days awarded by the Claimant, actual number of days variance, daily rates and total variance, the witness did not testify on the issue nor avail the raw report from which the information was extracted.

78. There is no evidence to show that the Claimant awarded the days alleged on the sheet pasted on the witness statement or indeed the amount stated thereon was received by the former employee.

79. Similarly, the Respondent adduced no evidence as to when the audit was carried out, by whom and whether it invited the Claimant to respond to the issues raised by the auditor or investigator.

80. Finally, the Respondent adduced no scintilla of evidence to prove that it suffered the loss of Kshs.4,636,706.20 which it is claiming as special damages and has pleaded the same.

81. It is trite law that special damages must be specifically pleaded and proved as held by the Court of Appeal in *Hahn V Singh* (1985) KLR 716 at page 717 and 721 as follows:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved . . . for they are not the direct and natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves”.



82. See also Nizar Virani T/A Kisumu Beach Resort V Phoenix of East Africa Assurance Co. Ltd (2004) 2 KLR, Gulhamid Mohamedali Jivanji V Sanyo Electrical Co. Ltd (2003) KLR 425, Coast Bus Service Ltd V Sisco E. Murunga Ndanyi & 2 others Civ. Appeal No. 192 of 1992.
83. As held in Swalleh C Kariuki V Haron Victor Nyongesa (2021) eKLR,
“A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury . . . an invoice is not proof of payment and that only a receipt meets the test”. (See Total Kenya Ltd V Janevans Ltd (2015) eKLR, Zacharia Waweru Thumbi V Samuel Njoroge Thuku (2006) eKLR.
84. In the instant case, the Respondent has not furnished specific evidence to prove that it suffered the loss in question and that the alleged loss was occasioned by the Claimant.
85. An auditor’s report with the necessary attachments or the company’s financial reports would have effortlessly established that the Respondent suffered the alleged loss and that the same was traceable to the Claimant’s negligence.
86. In the circumstances, it is the finding of the court that the Respondent’s Counter-claim lacks merit and it is accordingly dismissed with no orders as to costs.
87. In the upshot, judgement is entered in favour of the Claimant against the Respondent in the following terms:
- a. Claimant’s dues be computed pursuant to the Respondent’s letter dated 17th February, 2020.
 - b. The sum of Kshs.1,743,974.00 owed to the SACCO be deducted from the Claimant’s dues.
 - c. The Claimant is awarded costs of this suit plus interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF JANUARY 2024

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

