



**Nyaga v Barclays Bank (Cause 1455 of 2018)  
[2024] KEELRC 1220 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1220 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1455 OF 2018  
NZIOKI WA MAKAU, J  
JANUARY 25, 2024**

**BETWEEN**

**LEAH NYAGA ..... CLAIMANT**

**AND**

**BARCLAYS BANK ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this claim against the Respondent for its failure to enforce a duly signed contract and for discrimination. She averred that she was employed as a Clerk at the Respondent Bank on 14<sup>th</sup> March 1994 and that she served it in different capacities until 21<sup>st</sup> July 2017 when she exited through a Voluntary Exit Scheme.
2. The Claimant’s case was that in November 2012, the Respondent advertised for the position of BBR Credit Manager B5, which she applied for and was called for an interview that took place on 26<sup>th</sup> November 2012. That she then received a letter from the Respondent on 13<sup>th</sup> August 2013 informing her that she had been successful in the interview and the Respondent then made an offer for her acceptance within 14 days. She averred that she signed the Letter of Offer dated 13<sup>th</sup> August 2013 and returned the same to INSR-HRBP Corporate Banking, Treasury and Enterprise Function Human Resource Division. That she duly executed the Contract together with the Acceptance Form on 15<sup>th</sup> August 2013 which she again returned to the INSR-HRBP Corporate Banking, Treasury and Enterprise Function Human Resource Division. The Claimant noted that the Letter of Offer had indicated that she was to undertake her duties as Credit Manager from 1<sup>st</sup> August 2013 and further enjoy any other benefit that came with the position. It was the Claimant’s averment that despite requesting severally, the Respondent failed and/or neglected to implement the said Contract until her exit through the Voluntary Exit Scheme. That she thereafter suffered psychological torture and ridicule since she had informed friends and family of the appointment. That because of her persistent requests to implement the Contract, the Respondent had issued her with a letter dated 25<sup>th</sup> October



2013 informing her that the said Contract had erroneously been sent to her. She however contended that the said letter was an afterthought and contradictory because when she was exiting the bank, she was issued with a certificate of service indicating her last position as Credit Manager.

3. According to the Claimant, the Respondent did not have any justifiable reason not to implement the Contract of Employment dated 13<sup>th</sup> August 2013 (hereinafter “the impugned Contract”). That having served the Respondent Bank faithfully and diligently for 23 years and with the requisite qualifications, she deserved the position. She asserted that she is thus entitled to the difference in amount of what she was earning and what she was supposed to receive as a credit manager for the period between 1<sup>st</sup> August 2013 and 21<sup>st</sup> July 2017. Further, that her send-off package was less than what she was entitled to under the said new Contract, which difference she thus claims against the Respondent as follows:

1. Declaration that failure by the Respondent to implement the contract was unlawful.
2. Unpaid salary increments - Kshs. 5,484,881.50
3. Unpaid pension - Kshs. 548,488.14
4. Unpaid bonus - Kshs. 2,599,275/-
5. Unpaid send home package - Kshs. 4,543,051.54
6. Unpaid leave days - Kshs. 121,693.34
7. Unutilized club membership fees - Kshs. 380,000/-
8. Damages for breach of contract
9. Unutilized Bank cottages at Diani - Kshs. 560,000/-
10. General damages for discrimination and subjecting the Claimant to mental torture and ridicule.
11. Interest on (1), (2), (3), (4), (5), (6), (7) & (8) above from the date they became due.
12. Interest on (7) & (9) from the time of filing this suit.
13. Costs of this suit.
14. Such further or other relief that this Honourable Court may deem fit to grant.

#### 4. Respondent's Case

In reply, the Respondent filed a Memorandum of Response averring that the Claimant was unsuccessful in her application for the said position of BBR Credit Manager at the Respondent. According to the Respondent, there was thereafter an internal reorganisation of the Respondent's business further to which the Claimant's position was retitled and enhanced to Assistant Credit Manager. That the Claimant was then given an offer letter for the role of Assistant Credit Manager in a letter dated 8<sup>th</sup> July 2013, which she accepted by signing and returning a copy on or around 15<sup>th</sup> July 2013. It confirmed having erroneously sent the Claimant another letter of offer for the position of Credit Manager and attributed the cause of the error to the aforementioned reorganisation. That it however immediately informed the Claimant of the said error and explained the same in a meeting held between her and her Line Manager sometime in September 2013. That the said meeting was followed up by email correspondence to which the Claimant acknowledged that the error had been explained to her and a formal letter dated 25<sup>th</sup> October 2013 was then sent to her confirming the incident.



5. The Respondent further averred that the Claimant performed satisfactorily in her role as Assistant Credit Manager until she voluntarily exited the Bank. However, that the Claimant made no complaint regarding the issues she was raising in her Memorandum of Claim. It argued that the Contract dated 13<sup>th</sup> August 2013 was vitiated on account of mistake and that the certificate of service referred to by the Claimant was erroneous as she had never performed the role of a Credit Manager and was not qualified for the said role. That it would seek to withdraw the said Certificate at the opportune time and replace it with one that correctly states the Claimant's roles whilst in its employment. It was the Respondent's case that the Claimant is thus neither entitled to the remuneration pertaining to the role of Credit Manager nor to any damages pleaded in her Claim. Further, the cause of action having arisen in 2013, the same is time barred and that the suit ought to be struck out for abuse of court process since the Claimant is the 3<sup>rd</sup> Claimant in ELRC No. 1122 of 2018 – Nazarene Nyaga v Barclays Bank of Kenya Ltd. The Respondent also filed a Supplementary Witness Statement dated 8<sup>th</sup> April 2021 by its Head of Employment Relations, Mr. Vaslas Odhiambo. He asserted that the Respondent had noted the erroneous contents of the Certificate of Service dated 21<sup>st</sup> July 2017 and in a letter dated 15<sup>th</sup> March 2021, informed the Claimant of the mistake, withdrew the same and replaced it with a correct one dated 15<sup>th</sup> March 2021. That the same was also sent to the Claimant via an email of 16<sup>th</sup> March 2021 and via registered post on or around 19<sup>th</sup> March 2021.

6. Evidence

The Claimant testified that she spoke to her Line Manager upon returning her acceptance of the offer for the position of Credit Manager that she had received, but that the Line Manager stated that she should not have received the said letter. That she was surprised by the withdrawal of the appointment letter because she knew the procedures and had been properly appointed. The Claimant reiterated in cross-examination that she was aggrieved when she was informed in two meetings of the letter having been issued in error and confirmed that the same was also addressed to her through email. She affirmed that the letter for the impugned position had been properly issued and executed and that she was entitled to all the benefits attached thereto. While admitting that some of the benefits claimed were not monetary, she argued that she had to give figures for the purpose of the Claim and that the calculations were done as per her payslip and the position held. She also acknowledged that salary increments were performance based and that a certain grade would get an amount in increase and further stated that she was seeking damages because the Bank had sinister motives. In re-examination, the Claimant asserted that the Contract was not formally withdrawn because the grievances process was to be deployed for the panel to show why one was being demoted. That the Respondent had instead decided to write a letter which did not mean anything but intimidated her.

7. The Respondent's witness, Mr. Vaslas Odhiambo (RW1), stated under cross-examination that the Respondent's HR confirmed to the Claimant that the letter of appointment had been issued to her in error and formally withdrew the said letter in discussions and emails. He reiterated that the Claimant did not complain about the issue and had continued working in her role as Assistant Credit Manager after all was settled. He explained that the initial Certificate of Service was prepared by an attaché who mistakenly included every role in the Claimant's file, including the position that had been changed, as the subject appointment letter had not been expunged.

PARA 8.

### **Claimant's Submissions**

According to the Claimant, the following were the issues for determination by this Court:



- a. Whether the Claimant's Contract of Employment dated 13<sup>th</sup> August 2013 was vitiated by mistake and thus voidable at the option of the Respondent.
  - b. Whether the failure by the Respondent to implement the Contract of Employment dated 13<sup>th</sup> August 2013 was unlawful.
  - c. Whether the Claimant is entitled to the reliefs sought.
9. The Claimant submitted that paragraph 1 of the impugned Contract dated 13<sup>th</sup> August 2013 stated that, 'Following your successful interview, I am pleased to offer you a new role within Barclays Bank of Kenya Limited on the terms set out below with effect from 1<sup>st</sup> August 2013.' That the evidence before Court was undisputed that she was successful in the interview for the position of Credit Manager. That the Respondent failed to provide any documentary evidence in terms of minutes of the interview or a score card showing that someone else was successful in the interview and not the Claimant as alleged. That it is trite law that he who alleges must prove. The Claimant further submitted that whereas the Respondent's case was that the impugned Contract was issued to her in error and was thus withdrawn, it failed to consider the laws governing contracts, more specifically on when a contract is voidable on the ground of mistake. She urged this Court to be guided by the decision of the Court in the case of Richard Ng'ang'a Wairutu v Standard Chartered Bank Kenya Limited [2017] eKLR in which the Court held as follows:

“

“(41) And, even if, arguendo, I were to find that there was indeed a mistake on the part of the Defendant, it is now trite that a party cannot rely on his own mistake to the disadvantage of the other party. In *Solle vs. Butcher* [1949] 2 All ER 1107, Lord Denning had the following to say in this respect:

“...once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. A fortiori if the other did not know of the mistake, but shared it...”

(42) Similarly, in *Hassanali Holdings vs. Citizen Corporation Limited* HCCC No. 35 of 1995, Mwera, J. was of the view, which I entirely agree with, that a mistake must be common to both parties to an agreement. He expressed this view thus:

“...That mistake should however be common to both parties to a pact. It is the element of mutuality that says that the parties were not acting with the meeting of minds i.e. *ad idem*. But in this case it is not shown that the parties acted under a mistake and common to both at that, regarding the effect of LN No. 111 of 2003. The Plaintiff denies it and the defendant has not established which common mistake before and up to signing the letter on 1<sup>st</sup> September 2004...”

10. The Claimant's submission was that the Respondent failed to establish it entered the impugned Contract with her by a unilateral mistake and that in any event, it cannot purport to rely on its own mistake to her detriment. That the said Contract was not vitiated by mistake and thus not voidable at the option of the Respondent. She further submitted that the inconsistencies in the records of the



Respondent in terms of the alleged erroneous Certificate of Service are a clear indication of the ongoing malice in relation to her employment as a Credit Manager. That it took the Respondent four (4) years to issue a subsequent Certificate of Service purporting to change the error.

11. The Claimant maintained that the Respondent's failure to implement the said Contract amounted to breach of contract having submitted that it was entered into validly and was enforceable. She relied on the case of Samuel Chacha Mwita v Kenya Medical Research Institute [2015] eKLR in which the Court held that where parties execute an employment contract, it becomes enforceable and the Court cannot interfere with its terms unless any term is contrary to the law. She further referred to the decision of the Court in the case of Edwin Onyono & another v Judicial Service Commission [2019] eKLR noting the lack of evidence that the respondent considered section 10(5) of the *Employment Act* in changing the terms of the contract. The Claimant further submitted that she had a legitimate expectation that the Contract would be implemented and she would be entitled to the salary, benefits and other terms set out in Schedule One of the Contract of Employment. She argued that the purported withdrawal of her Contract was done without consulting her. It was the Claimant's submission that the Respondent's failure to implement the impugned Contract denied her the right to enjoy the benefits that came with the position of Credit Manager. That ultimately, she was entitled to all the benefits of a Credit Manager having held a valid contract for the said position. She further urged this Court to take judicial notice of the Ruling of Hon. Radido J. dated 22<sup>nd</sup> November 2019 issued in the suit wherein the Court held that the proceedings herein relate to breach of contract and not redundancy as is the case in Nairobi Cause No. 1122 of 2018 and found the suit not to be sub judice and further that the suit is not caught up by the law of limitation of time. She concluded that since costs follow event, the Court should award costs to the Claimant.

12.

### **Respondent's Submissions**

The Respondent submitted that the following issues presented themselves for determination by this Court:

- a. Whether the Letter of Offer dated 13<sup>th</sup> August 2013 for the position of Credit Manager was vitiated on account of mistake;
  - b. Whether the claim before the Court is time-barred;
  - c. Whether the Claimant performed the roles and duties of a Credit Manager without enjoying the benefits of that position and whether this constituted breach of the employment contract between the parties;
  - d. Whether the Claimant is entitled to the reliefs sought; and
  - e. Who should bear the costs of this suit.
13. On the first issue, the Respondent submitted that the Letter of Offer was vitiated on account of mistake as there was an error of misunderstanding by both parties involved. That contracts, including employment contracts, ought to be based on the principle of fairness and that sustaining a contract where one party informed the other that the offer was issued in error would undermine the foundational principles of contract law. That it would be allowing the Claimant to enforce a contract, which she was well aware and informed had been issued to her on account of a mistake on the part of the Respondent. The Respondent affirmed that it raised the issue of mistake immediately after becoming aware of it. It referred the Court to the case of Tropical Food Products International Limited v Eastern And Southern African Trade



And Development Bank (The PTA Bank) [2007] eKLR in which the Court of Appeal held that “mistake” in its legal sense both in the common law and equity, has availed relief to parties invoking it to either declare a contract void or voidable. The Court of Appeal went on to cite the passage by Lord Denning in *Solle v Butcher* [1949] 2 All ER 1107 at page 1119:

“Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. While presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained...”

So that, equity will come to the aid of a party pleading mistake without distinguishing, as the common law did, whether it was one of fact or law, or that it was common, mutual or unilateral.” (Emphasis by Respondent)

14. The Respondent implored this Court to exercise its discretion if favour of the Respondent considering the compelling facts before the Court. That after informing the Claimant that a mistake had occurred and she was satisfied, or at least as shown in the evidence, the Claimant continued with her employment for four (4) years and left voluntarily without raising any issue. It urged the Court to decline the Claimant’s invitation to this Court to disregard all these facts and bequeath her benefits based on the said Letter of Offer erroneously issued to her, because it would be bad in the eyes of the law of contract and frowned upon by the doctrines of equity. Regarding whether the claim herein is time-barred, the Respondent submitted that if this Court finds that the Letter of Offer dated 13<sup>th</sup> August 2013 is the basis of the cause of action, it should find that the Claimant’s right to bring an action against the Respondent arose the day she requested for and received further written communication that the Letter of Offer had been issued erroneously. That the Court should consider when the Claimant became entitled to complain or obtain a remedy from the Respondent employer through the court and not set the precedent, as argued by the Claimant, that time for employment claims only starts running when the employment relationship comes to an end. That the risk of accepting the Claimant’s argument is that any employee can approach the Court even after retirement to assert rights perceived to have arisen at some point during the course of the employment relationship, as had previously been argued in the case of *Meshack Otieno Kachuodho v Commissioner General – Kenya Revenue Authority* [2019] eKLR. The Respondent thus urged this Court to find that even if the Claimant had a claim, which the Respondent denies, such a claim is tainted by laches.
15. It was the Respondent’s submission that the Claimant never pleaded that she performed the duties of a credit manager other than executing the said erroneous Letter of Offer. That this Court cannot consider that whatever duties the Claimant discharged as an Assistant Credit Manager were sufficient to entitle her the benefits of a credit manager because there is a clear distinction of the duties between the two roles. The Respondent argued that in the absence of evidence, even if there was a valid contract between the parties, neither of them gave it effect because neither of them performed any of the obligations under that contract. That one party cannot benefit on a claim of breach whereas that party did not perform any part of the contract in question.



16. The Respondent submitted that the Claimant's claim for the difference in salary between what she earned during the course of her employment and what she thinks she should have earned is similar to a claim made by an employee for salary anticipated to be earned from the date of unlawful termination to the anticipated age of retirement. The Respondent cited the case of *David Wanjau Muhoro v Ol Pejeta Ranching Limited* [2014] eKLR in which the Court rejected such a claim while referring to the decision of the Court of Appeal in *Elizabeth Wakanyi Kibe v Telkom Kenya Limited* [2014] eKLR, that while employees must not be denied fair pay for fair work actually done, they must not crave pay for doing nothing. The Respondent argued that the Claimant in the instant matter was craving pay and interest thereon without evidence of actual work done as a credit manager. It invited this Court to return a finding similar to the one aforementioned and in the same breath decline the prayers stemming from breach of contract. It further argued that whereas the Claimant had allocated her claims figures that are precise to the cent but which cannot be interrogated further because the basis is unknown. The Respondent urged this Court to decline the task that comes short of the standard of proving claims brought before court and consequently dismiss the claims as was the case *Douglas Odhiambo Apel & another v Telkom Kenya Limited - CA 115 of 2006* [2014] eKLR by the Court of Appeal and *Inter Security Services Ltd v Mwaniki Associates Ltd* [2015] eKLR.
17. Further, the Respondent submitted that the Claimant had also converted non-monetary benefits such as unutilized club membership and unutilized bank cottages at Diani into cash emoluments in her claim. It argued that there was no basis for the said claims and that the Claimant had not shown how she came up with the figures prayed for under the claims for purposes of rebuttal or to the Court for purposes of determining whether the claims are valid, proven and allowable. It further submitted that the amounts put forth by the Claimant for salary increments and bonus are not entitlements guaranteed in the employment contract or the law as the same are made periodically based on factors such as personal and team performance assessments. Moreover, that they are discretionary incentives which this Court should not be persuaded to grant in a vacuum based on the Claimant's personal assessment. It invited the Court to be persuaded by the reasoning of Rika J. in the case of *Stephen K Kachila v Bamburi Cement Limited* [2015] eKLR. The Respondent submitted that this Court should be greatly concerned with what would happen if the Voluntary Exit Scheme that is challenged in separate proceedings ELRC Cause No. 1122 of 2018 and from which the send-home package arises, is set aside altogether or found to be a binding contract between the parties. That either of those outcomes would result in uncertainty and even an embarrassing situation if this Court has already made a finding that will vary the terms of that Voluntary Exit Scheme. Lastly, the Respondent submitted that considering the circumstances of this case and the impulse with which the Claimant advanced the claim before this Court, the Court should award costs to the Respondent.
18. The Court has before it, a claim by the Claimant seeking recompense for the alleged wrongful acts of the Respondent. In the matter, the Respondent asserts that there is limitation on the basis that there was a Letter of Offer dated 13<sup>th</sup> August 2013. It is argued that if the letter of offer aforesaid is the basis of the cause of action, the Court should find that the Claimant's right to bring an action against the Respondent arose the day she requested for and received further written communication that the Letter



of Offer had been issued erroneously. Looking at the entirety of the case, it hinges on whether or not the action could be initiated on 3<sup>rd</sup> August 2018. It is common ground that section 90 of the *Employment Act* applies to all suits where a right such as the ones being articulated herein by the Claimant arise. Section 90 of the *Employment Act* provides:-

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.

19. This provision applies squarely to the Claimant's claim. As such, the court needs to ascertain when the cause of action arose. According to the Claimant, the Respondent did not have any justifiable reason not to implement the Contract of Employment dated 13<sup>th</sup> August 2013. Tacit in this assertion is that the cause of action would be pegged to the unimplemented contract of 13<sup>th</sup> August 2013. By computation of time 3 years from date of 13<sup>th</sup> August 2013, the Claimant herein had until 12<sup>th</sup> August 2016 to file a claim against the Respondent in respect of the contract. Having filed the claim on 3<sup>rd</sup> August 2018, the Claimant was approximately 2 years out of time, limitation having set in on 12<sup>th</sup> August 2016. Section 90 of the *Employment Act* does not contemplate the extension of time and as such, the claim that was filed before this court was dead on arrival having been struck by limitation per section 90 of the *Employment Act*. Granted the claim is stale, the court would render a disservice to the rule of law if it were to delve into the merits of the case and make contemplative finding as to whether the Claimant would have been entitled to any of the reliefs had her claim been made on time. In other words, determining the other issues isolated by the parties would be an academic exercise and, at best, an exercise in futility. The claim herein being incompetent to the extent of limitation is dismissed with costs to the Respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**Nzioki wa Makau**

**JUDGE**

