



**Ogola v Wanene (Employment and Labour Relations Cause
73 of 2017) [2024] KEELRC 55 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 55 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 73 OF 2017
MA ONYANGO, J
JANUARY 25, 2024**

BETWEEN

NAPHTALI MATTHEWS OGOLA CLAIMANT

AND

LIVINGSTONE GICHANGA WANENE RESPONDENT

JUDGMENT

1. The Claimant instituted this Claim through a Statement of Claim dated 11th May 2017 seeking the following reliefs against the Respondent:
 - a. A declaration that the Claimant's termination from employment on account of redundancy was unlawful, unprocedural and unfair.
 - b. Certificate of service
 - c. Costs of this suit and interest at court rates from time of filing suit until payment in full
 - d. Compensation for unfair termination among other claims as itemized hereunder-
 - i. One month Pay in lieu of notice.....Kshs 26,751.76
 - ii. Compensation for unfair termination...Kshs 301,021.12
 - iii. Underpayment
 - iv. Leave Dues
 - v. Service pay.....Kshs 220,992.8
- Total.....Kshs 1,544,128.55



2. The Claimant alleges that at all times material to this suit, the Respondent being the owner of Diagnostics Ultra Sound Services, orally employed him with effect from 11th June 1996 at a salary of Kshs. 10,000 per month.
3. The Claimant avers that he served the Respondent with loyalty, diligence, full dedication and commitment until 14th July 2016 when the Respondent unfairly, and unlawfully terminated his employment orally and refused to pay him his terminal dues.
4. It is the Claimant's case that the Respondent unprocedurally, unlawfully and unfairly declared him redundant on the ground that the premises had been shut down.
5. According to the Claimant, the Respondent's action to declare him redundant on the grounds cited were malicious, ill willed and calculated to form the basis to unfairly terminate his employment in that:
 - a. The Respondent purported to declare the Claimant redundant without following the provisions of section 40 of the *Employment Act*, 2007;
 - b. The Respondent did not issue the mandatory redundancy notice to the Claimant as contemplated under the provisions of the law.
6. In response, the Respondent filed a statement of defence on 23rd June 2017 denying the averments in the claim and particularly, that he employed the Claimant in 1996 as a cashier. The Respondent averred that he introduced the Claimant to the Director of Stich in Time Ltd, which company employed the Claimant in 1996. That the company has since gone under.
7. During the pendency of this claim, the court was informed that the Respondent had passed on. His wife Caroline Barichu Mbici was cited and letters of administration taken out on her behalf. She was subsequently substituted as the Respondent in this suit
8. At the hearing the Claimant testified as CW1 on 26th June 2018 and reiterated the contents of the statement of claim during his examination in chief.
9. On cross examination by Mr. Angu for the Respondent, CW1 maintained that his employment was terminated without any notice. He stated that when he was employed, he was earning Kshs 3,000 and afterwards, his salary was increased to Kshs 10,000 per month.
10. On 27th of June 2023, this court closed the Respondent's case after the Respondent failed to call any witness.
11. The court then directed parties to file written submissions. The Claimant's submissions were filed on 14th July 2023, while the Respondent's submissions were filed on 12th September 2023.

The Claimant's submissions

12. In his submissions the Claimant identified the issues for determination to be:
 - i. Whether the Claimant was employed by the Respondent
 - ii. Whether the Claimant was unlawfully, unprocedurally and unfairly dismissed from employment by the Respondent
 - iii. Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment on account of redundancy as prayed for in the Statement of Claim



- iv. Whether the Claimant is entitled to an award of certificate of service
 - v. Who should pay costs and interests of this suit.
13. On the first issue, it was submitted that the Claimant was orally employed by the Respondent as a cashier on 11th June 1996 earning a monthly gross salary of Kshs 10,000 and that during his employment he was never issued with an employment letter.
 14. It is the Claimant's submission that under section 10 of the *Employment Act*, it is the duty of an employer to keep and provide employment records for every employee.
 15. It is further submitted by the Claimant that the onus of reducing oral communications and production of the same in any legal proceedings lies with the Respondent as per sections 10(5) and (7) of the Act.
 16. On the issue whether the Claimant was unlawfully, unfairly and unprocedurally terminated on account of redundancy, it is the Claimant's submission that he was orally informed by the Respondent that the company was being shut down as a result of which his services were no longer required.
 17. According to the Claimant, the termination was done in total disregard of the procedure set out in section 40(1) of the *Employment Act*.
 18. On the issue whether the Claimant is entitled to compensation for unprocedural and unlawful termination, it is submitted that the Claimant in his evidence tendered before court had proved that he was unfairly terminated on account of redundancy and as such, he was entitled to compensation for unfair termination.
 19. The Claimant further submitted that he is entitled to a Certificate of service as stipulated by section 51 of the *Employment Act*.
 20. Lastly, on who should pay the costs of this claim, the Claimant urged the court to award him costs and interests.

Respondent's submissions

21. The Respondent on her part framed the issues for determination to be;
 - i. Whether the suit had abated as against the Respondent
 - ii. Whether there existed an employment relationship between the deceased (Respondent) and the Claimant
 - iii. Whether the Claimant is entitled to any payment from the estate of the deceased.
22. In her submissions, the Respondent stated that the suit against the deceased Respondent, Livingstone Wanene who died on 10th November 2019, abated on 10th November 2020.
23. It is submitted that the Claimant instead of filing an application to substitute the Respondent or extend time, cited the wife of the deceased two years after his demise.
24. According to the Respondent, since the Claimant did not seek to revive the suit, the same abated and is non-existent. To buttress this position, the Respondent referred to the decision in ELC No. 57 of 2020 at Mombasa John Muthee Matumo v Thomas Gerishon & 4 others and Titus Kiregu v Jackson Mugo Mathai [2015] eKLR.



25. On the issue whether there existed an employment relationship between the deceased Respondent and the Claimant, it is submitted that the Claimant did not produce any documentation to prove that he was indeed employed by the Respondent.
26. In conclusion it was submitted that the Claimant, having not been an employee of the deceased, is not entitled to any benefit as he has demanded. The court was urged to dismiss this claim.

Determination

27. From the pleadings on record, the evidence of the Claimant tendered in court and the rival submissions of the parties, the issues that fall for determination are:
 - i. Whether the claim herein abated;
 - ii. Whether there was an employer-employee relationship between the Claimant and the deceased Respondent;
 - iii. Whether the Claimant was unprocedurally terminated from employment;
 - iv. What reliefs should the court grant.

Whether the claim herein already abated

28. According to the Respondent, the instant claim abated as the Claimant failed to substitute the Respondent within one year as stipulated by Order 24 Rule 4(3) of the Civil Procedure Rules.
29. Order 24 Rule 4 of the Civil Procedure Rules provides as follows: -
 4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]
 - (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
 - (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (3) Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.
30. In this case, the Respondent is said to have died on 10th November 2019. There is however no evidence of the same on record. No letters of administration or death certificate were produced by the Respondent as proof of the same.
31. The foregoing notwithstanding, the plea of abatement was never made by the Respondent at any time during the proceedings. The courts abhor proceedings by ambush. That is why there is a rule that parties are bound by their pleadings unless they can prove that they fall within the exceptions to the rule as was held in *Odd Jobs v Mubea* where an issue that was not pleaded was brought up during the hearing and fully ventilated by the parties.
32. The position that new issues that were not pleaded cannot be brought up in submission was aptly captured by Odunga J (as he then was) in *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020]



eKLR where he cited with approval the decision in *Erastus Wade Opande v Kenya Revenue Authority & Another* HCCA No. 46 of 2007 where Mwera, J (as he then was) observed:

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

33. In *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993*, Mwera, J expressed himself on the issue as follows:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

34. Similarly, in *Ngang’a & Another v Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

35. As stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR:

“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 endeavouring 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.”

36. It is further my view that although a suit abates by operation of the law, it must be brought to the attention of the Court so that a formal order is made on the file on the same. Abatement in my view cannot be a presumption. It must be declared by the court. It can therefore not be a subject to be raised in submissions. This was the position of the Court of Appeal in *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others* [2015] eKLR where the Court stated:

“The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. There have been arguments, as to whether or not a formal order is necessary to



confirm the fact of abatement. See *M'mboroki M'arangacha v Land Adjudication Officer, Nyambene and 2 others*, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in *KFC Union v Charles Murgor (Deceased)* NBI HCCC No.1671 of 1994. From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit." [emphasis added]

37. In the instant case, it is the Claimant who applied for citing of the personal representatives of the Respondent. The Respondent was subsequently substituted by the Citee Respondent, who thereafter fully participated in the proceedings hearing. The suit was adjourned on numerous occasions by the Citee Respondent. On the 6th June 2023 the parties took a hearing date by consent in court. On the said date the suit had been fixed for hearing but counsel for the Respondent Ms. Kibaru sent Ms. Muiruri to hold her brief and seek yet another adjournemtn. The parties agreed to have the suit heard on 27th June 2023. On the hearing date the Respondent did not show up. Since the Claimant's evidence had been taken on 9th May 2018 the Court closed the Respondent's case and directed the parties to proceed and file written submissions. It is in the submissions that the Respondent first brought up the issue of abatement of the suit.
38. The citation order is dated 9th December 2021. The order is specific that "The letters of administration of the estate of Livingstone Wanene are hereby granted to Caroline Barichu Mbici with the intention of defending Eldoret Employment and Labour Relations Cause No. 73 of 2017".
39. Upon being served, the Citee Respondent entered appearance dated 27th January 2022 through MS Njiru Kibaru & Co Advocates. Thereafter the Citee Respondent fully participated in the hearings by appearing in court on 17/1/2022, 21/2/2022, 30/3/2022, 12/5/2022, 6/6/2022, 4/10/2022, 6/6/2023 and 27/6/2023. The Citee Respondent also filed a Citee Statement dated 28th October, 2022. Having fully participated in the hearing of the suit from 17th January 2022 when the Citee Respondent filed Memorandum of Appearance, and having not raised the issue of abatement of suit, the issue does not fall for determination by this court.

Whether there was an employer-employee relationship between the Claimant and the deceased Respondent.

40. The Claimant testified that he was employed by the Respondent in 1996 at a gross salary of Kshs. 10,000/- per month but was never issued with an employment letter. He submitted that it was the duty of an employer to issue the letter and the burden of the Respondent to disprove his allegations. He relied on section 10(7) of the Employment Act which provides that:(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
41. The Claimant produced an NSSF statement which indicates that his employer was Dr. Livingstone Gichanga and the date of employment as 01.11.1996. The Respondent did not rebut this evidence. In his witness statement the Respondent stated that he knew the Claimant in 1996. I find that the Claimant has demonstrated that he was employed by the Respondent.



Whether the Claimant was unprocedurally terminated from employment

42. The parties are in agreement that the Diagnostic Ultra Sound Services operated by the Respondent where the Claimant worked closed down in 2016 and as a consequence the Claimant lost his job. This was therefore a case of redundancy.

43. Section 40(1) of the *Employment Act* sets out the procedure for redundancy including the terminate benefits of an employee declared redundant. The section provides:

44.

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
- (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

45. Section 67 of the *Employment Act* defines insolvency to mean

67. Definition of insolvency

An employer is insolvent for the purposes of this Part—

- (a) if the employer is a person who—
 - (i) has been adjudged bankrupt or has made a composition or arrangement with his creditors; or



- (ii) has died and his estate is to be administered in accordance with the *Law of Succession Act*;
- (b) if the employer is a company—
 - (i) a winding-up order or an administration order has been made, or a resolution for voluntary winding-up has been passed, with respect to the company; or
 - (ii) a receiver or a manager of the company's undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge.

68. Debts to which this Part applies

This Part applies to the following debts—

- (a) any arrears of wages in respect of one or more months, but not more than six months or part thereof;
- (b) any amount which the employer is liable to pay the employee for the period of notice required by section 36 or for any failure of the employer to give the period of notice required by section 35 (1)(b), and (c);
- (c) any pay in lieu of leave for annual leave days earned but not taken in accordance with section 28;
- (d) any basic award of compensation for unfair dismissal; and
- (e) any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice.

69. Limitation on amount payable under section 68

- (1) The total amount payable to an employee in respect of any debt to which this Part applies, where the amount of the debt to which this Part applies, where the amount of the debt is referable to a period of time, shall not exceed—
 - (a) ten thousand shillings or one half of the monthly remuneration whichever is greater in respect of any one month payable; or (b) in respect of a shorter period an amount proportionate to the shorter period based on the amount payable under paragraph (a).
- (2) The Minister may, on the advice of the Board, by order in the Gazette, vary the limit specified in subsection (1).

46. In this case, the Respondent clearly falls under the definition of insolvency as he is deceased. No information has been given to the court in respect of administration of his estate. In the absence of contrary information, the court presumes that his estate was or is being administered under the *Law of succession Act*.

47. From the evidence on record I do not find proof of unfair or unprocedural termination. The evidence points to a situation where the business of the Respondent where the Claimant was working collapsed due to the ill health of the Respondent occasioned by alcohol abuse and the Claimant lost his job as a



consequence thereof. What the Claimant is entitled to is therefore the terminal dues set out in section 68 as read with section 69 of the Act.

48. In view of the fact that the Respondent did not disapprove the Claimant's evidence that his last salary was Kshs. 10,000/- I award him the following:
- i. Pay in lieu of notice in the sum of Ksh.10,000
 - ii. Pay in lieu of leave which I limit to only Ksh. 10,000 as per section 28(4) of the [Employment Act](#).
 - iii. Severance pay of Ksh. 5,000 for every year worked for 10 years from 1996 to 2016 being Ksh. 50,000.
 - iv. The Respondent shall in addition pay the Claimant's costs of this suit and interest to accrue from date of Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF JANUARY 2024

MAUREEN ONYANGO

JUDGE

