



**Kimani (Suing as the Administrator of the Estate of Anne Ngugi
(Deceased)) v County Government of Nakuru & 2 others (Cause
353 of 2015) [2024] KEELRC 2225 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2225 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 353 OF 2015
DN NDERITU, J
SEPTEMBER 19, 2024**

BETWEEN

**NGUGI KIMANI CLAIMANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF ANNE NGUGI
(DECEASED)**

AND

**COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT
MOI PRIMARY SCHOOL 2ND RESPONDENT
COUNTY EDUCATION OFFICER - NAKURU COUNTY
GOVERNMENT 3RD RESPONDENT**

JUDGMENT

I. Introduction

1. In a memorandum of claim dated 2nd November, 2015 filed through Wachira Wanjiru & Co. Advocates, Anne Ngugi (deceased) prayed for -
 - 4.1. This Honourable court do order the Respondent to pay the Claimant all her underpaid dues as from 1st January 1990 to 31st December, 2013.
 - 4.2. This Honourable court do order the Respondent so pay the claimant all her unpaid Housing Allowances that she was entitled to of Kshs689,615.
 - 4.3. This Honourable court order the Respondents to pay the claimant gratuity of Kshs563,615 for the 29 years worked.



- 4.4. This Honourable court do order he Respondents to pay the claimant for 5 months unpaid leave allowance of Kshs97,175.
- 4.5. This Honourable court do order the Respondents to bear the costs for this suit as provided for under Section 12(4) of the Industrial Court Act.
- 4.6. This Honourable court do make further orders as it shall deem fit as provided for under Section 12(3(viii)) of the Industrial Court Act.
2. Alongside the memorandum of claim was filed a verifying affidavit and a bundle of copies of documents. A witness statement by the deceased was filed on 2nd March, 2016. A further list of documents and a bundle of copies of the listed documents was filed on 29th October, 2019.
3. Upon service the 1st respondent entered appearance on 21st December, 2015 through M. J. Okumu Associates while the Attorney General (AG) entered appearance for the 2nd and 3rd respondents on 4th February, 2016.
4. The 1st respondent filed a reply to the memorandum of claim on 18th February, 2016 wherein it dismissed the cause as incompetent and an abuse of the court process praying that the entire claim be dismissed with costs. A witness statement by P. K. Ronoh was filed on 3rd March, 2016 alongside copies of two documents.
5. The 2nd and 3rd respondents filed their reply to the claim on 19th February, 2016 wherein liability was denied in total and the court urged to dismiss the case as against them with costs.
6. The cause came up for hearing in open court on 14th November, 2018 before Mbaru J when the claimant testified and closed her case.
7. However, in April 2020 the claimant passed on during the pendency of the cause in court. Following an application dated 17th May, 2022 the deceased was substituted with Ngugi Kimani the administrator of her estate as per the court order of 20th September, 2022. Consequently, an amended memorandum of claim was filed on 29th September, 2022 with Ngugi Kimani as the claimant, suing as the administrator of the estate of the deceased. The reliefs sought remained the same as set out in the first paragraph of this judgment. It was by consent agreed that the matter proceeds from where Mbaru J left.
8. The defence was heard on 28th March, 2023 when RW1 testified and the case for the 1st respondent was closed. The 2nd and 3rd respondents did not tender any evidence.
9. Counsel for the claimant and the 1st respondent addressed the court through written submissions. Counsel for the claimant Miss Wachira filed her written submissions on 2nd August, 2023 and Mr. Okumu for the 1st respondent filed on 22nd May, 2023. No submissions were received on behalf of the 2nd and 3rd respondents' counsel, the AG.

II.The Claimant's Case

10. The claimant's case is expressed in the amended memorandum of claim, the oral and documentary evidence by the deceased (CW1), and the written submissions by his Counsel. The same is summarized as hereunder.
11. In the amended memorandum of claim, it is pleaded that the deceased was employed by the defunct Municipal Council of Nakuru in 1984 as a copy-typist-I and deployed to Moi Primary school, managed by the 2nd respondent. She was allegedly issued with a letter of retirement in December, 2013



effective from January, 2014. It is pleaded that the deceased was not paid her terminal dues despite demand made.

12. It is pleaded that the deceased was underpaid during the entire period of her employment. It is further pleaded that the employer failed to remit to the National Social Security Fund (NSSF) statutory deductions made from her salary as a result whereof no pension was available and payable to her upon retirement. It is further pleaded that the deceased was denied annual leave or pay in lieu thereof contrary to Section 19 of the Employment Act (the Act).
13. In her testimony in court the claimant testified as per the pleading in the amended memorandum of claim. She produced her filed documents as exhibits 1 to 10 and prayed for judgment as per the reliefs set out above.
14. In cross-examination by counsel for the 1st respondent the deceased stated that the functions of the defunct Municipal Council of Nakuru were taken over by the County Government of Nakuru, the 1st respondent herein, and as such all the respondents should be held liable for the claim. She stated that Moi Primary School was run and operated by the defunct Municipal Council of Nakuru whose functions were taken over by the County Government of Nakuru. She further stated that she was not issued with pay-slips.
15. In cross-examination by counsel for the 2nd and 3rd respondents the deceased stated that her salary was paid by the Municipal Council of Nakuru as the employer and she served at school owned and operated by the said local government council. She stated that while the letter of appointment was issued by the said council her letter of confirmation was issued by the 1st respondent. She stated that her last monthly salary was Kshs19,500/=.
16. The submissions by counsel for the claimant shall be considered in a subsequent part of this judgment alongside the submissions by counsel for the 1st respondent.

III.The Respondents' Case

17. The 1st respondent's case is expressed in the reply to the memorandum of claim, the oral and documentary evidence tendered through RW1, and the written submissions by its counsel.
18. In the reply it is pleaded that the deceased was not an employee of the 1st respondent. It is pleaded that all former employees of the defunct Municipal Council of Nakuru, as was the case with all employees of the defunct local councils and municipalities, were absorbed by the county governments in 2013 after the promulgation of the Constitution of Kenya, 2010. It is pleaded that if at all the deceased was an employee of the defunct council she ought to have been allocated a pay-roll number and issued with pay-slips for each month's salary pay.
19. It is pleaded that the 1st respondent is not aware or party or privy to the employment of the deceased and or her termination or retirement and as such it was under no obligation, legal or otherwise, to settle or pay her terminal or retirement dues. It is further pleaded that education is not a devolved function under the Constitution (Fourth Schedule) and as such no liability may attach to the 1st respondent. It is further pleaded that all the documentary evidence availed by the deceased are between her and the 2nd respondent and at no point was the 1st respondent a party to the same. It is pleaded that there was no employment relationship between the deceased and the 1st respondent and as such the claim against the 1st respondent should be dismissed with costs.



20. In his testimony in court Moses Bii (RW1), the acting director of human resources, adopted the statement of P. K. Ronoh filed in court on 9th March, 2019 and produced the documents filed as exhibits 1 and 2. He stated that the deceased was not an employee of the 1st respondent.
21. As it was noted in an earlier part of this judgment, although a reply to the claim was filed by the AG for and on behalf of the 2nd and 3rd respondents no evidence was called in support of the defence to the claim. In the circumstances, the allegations in the said response remain just that, mere allegations.

IV.Submissions By Counsel

22. On the one hand, in summary, counsel for the claimant identified the following two issues for determination by the court – Whether the claimant (deceased) was an employee of the 1st or the 2nd respondent; and, Whether the claimant is entitled to the reliefs sought.
23. On the first issue, it is submitted that the deceased was an employee of the defunct Municipal Council of Nakuru as per a letter of appointment dated and issued on 18th January, 1984. It is submitted that the said council was “the predecessor” of the 1st respondent. It is submitted that the above letter is proof of employment and the court is urged to be persuaded by the decision in *Esther Wambura Ndegwa v Laboratory & Allied Limited* [2021] eKLR. It is further submitted that the 1st respondent ought to have absorbed the deceased into its workforce upon promulgation of *the Constitution* of Kenya, 2010. The court is urged to follow the reasoning set by the Court of Appeal in *Kenya County Government Workers Union v Kisumu County Public Service Board & Another* [2019] eKLR.
24. It is submitted that upon dissolution of the Municipal Council of Nakuru the 1st respondent took over the responsibilities and absorbed the deceased into its workforce under the command and direction of the now dissolved Transition Authority.
25. The court is urged to find and hold that the respondents are liable as prayed and the cause be allowed with costs. The submission on the reliefs shall be dealt with in a succeeding part of this judgment.
26. On the other hand, counsel for the 1st respondent submitted that at no time was the deceased an employee of the 1st respondent. She was neither issued with a letter of appointment/employment nor a pay-roll number and as such no employment relationship existed. It is submitted that in 2013 the 1st respondent absorbed all employees of the defunct Municipal Council of Nakuru who had not reached the mandatory retirement age of 60 yrs.
27. Counsel for the 1st respondent identified two issues for determination – Whether the claimant (deceased) was in the employment of the 1st respondent and if she is entitled to the prayers sought; and, Whether the 1st respondent is to bear costs for this suit as provided for under Section 12(4) of the Industrial court Act (sic!).
28. On the first issue, it is submitted that the 1st respondent did not exist as a legal and constitutional body until after the promulgation of *the Constitution*, 2010 and even then, it did not become functional until 2013. It is submitted that education is not one of the functions that were devolved to the county governments including the 1st respondent. Further, it is submitted that the deceased was not an employee of the defunct Municipal Council of Nakuru but was an employee of the 2nd respondent as per the letter of appointment dated 8th January, 1984. It is submitted that the claimant (deceased) has neither availed evidence nor proved that she was absorbed into the workforce of the 1st respondent at any given point in time. If she was so absorbed, it is submitted, she ought to have been allocated a pay-roll number and issued with pay-slips over the time of such employment.



29. It is submitted that employment in the county or national government is a matter of public interest and details of such employment shall be maintained and retained in accordance with Sections 10 & 74 of the Act. It is submitted that no such records of employment of the deceased are in possession of the 1st respondent as none exist. It is further submitted that no reasonable cause of action has been disclosed against the 1st respondent and the court is urged to dismiss the case against the 1st respondent with costs.
30. As stated above no evidence was adduced by the 2nd and 3rd respondents and no submissions were filed by their counsel, the AG.

VI. Issues for Determination

31. Upon careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered by the deceased (CW1) and RW1 for the 1st respondent, and the submissions by counsel for the claimant and for the 1st respondent, the court identifies the following issues for determination –
- a. In whose employment was the deceased?
 - b. Is the claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

VI. Employment

32. By a letter dated 18th January, 1984 the deceased was appointed a copy-typist by the defunct Municipal Council of Nakuru and posted to serve in Moi Primary School, managed by the 2nd respondent. For ease of reference the said letter provided as follows –

REF: MA/14/162/BMO/JAN. 18TH JANUARY, 1984

Mrs. Anne W. Ngugi

C/O Flamingo Sec. School,

Box 10308

Nakuru

Dear Madam,

Re: Appointment

With reference to the interview held on 14th January, 1985, I am pleased to inform you that you have been offered a post of Copy Typist at Moi Primary School with effect from the date of this letter.

Please confirm in writing if you accept the appointment.

By a copy of this letter, the headmistress, Moi School is requested to let us know when you report on duty.

Yours faithfully

B.M. Oweke

for: Municipal Education Officer

Nakuru

C.C. Municipal Treasurer.



The Headmistress,
Moi Primary school

33. The uncontested evidence on record is that the deceased reported upon appointment and worked until about December, 2013 when she voluntarily resigned, as per her testimony in court.
34. As noted above the claimant was recruited by the defunct Municipal Council of Nakuru as a copy-typist and posted to serve in Moi Primary managed by the 2nd respondent. The evidence on record in regard to payment of salary is that the deceased's salary was paid by the 2nd respondent as per the bank statements availed up to and including November, 2013.
35. From the foregoing it is the finding and holding of the court that while the deceased was sourced and recruited by the defunct Municipal Council of Nakuru, she was posted to and engaged by the 2nd respondent and became its employee as a copy-typist as per the evidence of payment of monthly salary as stated above. The 2nd respondent operates and manages the school wherein the deceased served. Of course, as of 1994 the 1st respondent was not constituted and the 3rd respondent did not exist. Likewise, no evidence was adduced that the deceased was absorbed into the workforce of the 1st respondent in 2010, or 2013, or at any other time. The court finds and holds that the claimant resigned before the 1st respondent took over and or absorbed the workforce of the defunct council and or before the 1st respondent became operational.
36. In any event, education is not one of those functions that were devolved under the Fourth Schedule of *the Constitution* of Kenya, 2010.
37. Again, no evidence was availed by the deceased on the exact date when she resigned and her alleged letter of retirement was not availed in evidence but her evidence on record is that she retired in December, 2013 effective January, 2014.
38. In all the foregoing circumstances and based on the evidence on record, it is the finding and holding of the court that the deceased was an employee of the 2nd respondent and there is no liability attributable to the 1st and 3rd respondent as no employment relationship was established between those two respondents and the deceased. The court shall therefore proceed on the basis that the deceased was an employee of the 2nd respondent and any liability or award made may only be footed by the 2nd respondent.
39. For the forgoing reasons the 1st and 3rd respondents are hereby discharged from liability for any awards that may be made.

VII. Reliefs

40. Having held that the deceased was an employee of the 2nd respondent and that she retired on or about December, 2013 the court shall now consider each of the reliefs sought as hereunder.
41. Prayer 1 is for an order directing the respondents to settle the dues claimed. Of course, such an order can only be made upon evaluation of the entire cause and this far the court has discharged and exonerated the 1st and 3rd respondents from any liability. The court shall thus proceed to evaluate the reliefs and determine the extent to which the 2nd respondent may be liable. It is only then that the court may order the 2nd respondent to settle the same.
42. Prayer 2 is for unpaid house allowance in the sum of Kshs689,615/= for the entire period of employment. As noted elsewhere the 2nd respondent did not avail any evidence before court. As the employer and custodian of employment records, the 2nd respondent ought to have availed records to



rebut the allegation and evidence by the deceased that she was denied house allowance during the entire period of her employment. For the above reasons the relief is granted as prayed.

43. For the same reasons as above the reliefs of gratuity in the sum of Kshs563,615/= and leave allowance in the sum of Kshs97,175/= in prayers 3 and 4 are allowed as well.

44. The three awards above are subject to statutory deductions.

VIII.Costs

40. Costs follow the event and therefore the claimant is awarded costs of this cause against the 2nd respondent.

IX. Disposal & Orders

46. In disposal of the cause, the court issues the following orders: -

a. A declaration be and is hereby issued that the claimant failed to disclose, establish, and or prove a cause of action against the 1st and 3rd respondents and they are thus hereby discharged from any liability.

b. A declaration be and is hereby issued that the deceased was an employee of the 2nd respondent.

c. The claimant is awarded a total of Kshs1,350,405/= made up as follows –

i. Housing allowance in arrears Kshs689,615/=

ii. Gratuity Kshs563,615/=

iii. Unpaid leave Kshs97,175/=

TotalKshs1,350,405/=

This award is subject to statutory deductions.

d) The claims against the 1st and 3rd respondents fail and are hereby dismissed with no order as to costs.

e) Costs of the cause to the claimant against the 2nd respondent.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 19TH DAY OF SEPTEMBER, 2024.

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DAVID NDERITU

JUDGE

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