



REPUBLIC OF KENYA



**Nyaga & 14 others v Laptrust (Umbrella) Retirement Fund Board of Trustees & 2 others
(Cause 1849 of 2017) [2024] KEELRC 2669 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2669 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1849 OF 2017
J RIKA, J
OCTOBER 31, 2024**

BETWEEN

**JUSTUS NYAGA 1ST CLAIMANT
JANE WAMBUI GICHOHI 2ND CLAIMANT
JAMES GACHOYA MBURU 3RD CLAIMANT
JACKSON MWANGI MIGWI 4TH CLAIMANT
HARRISON NYITA NGUNYI 5TH CLAIMANT
PATRICK MAINA MAGUNU 6TH CLAIMANT
ALICE C CHUMO 7TH CLAIMANT
MILLICENT W KANGARU 8TH CLAIMANT
JACINTA WANJIRU KARIUKI 9TH CLAIMANT
CHARITY WANJA NGARI 10TH CLAIMANT
PETER NGUCHU NGUGI 11TH CLAIMANT
ESTHER MBURU 12TH CLAIMANT
ABSOLOM AMARISON NYAMANDA 13TH CLAIMANT
MICHAEL NJOROGE NG'ANG'A 14TH CLAIMANT
MALLISON NDENA ISIBAI 15TH CLAIMANT**

AND

**LAPTRUST (UMBRELLA) RETIREMENT FUND BOARD OF
TRUSTEES 1ST RESPONDENT
LAPFUND LIMITED 2ND RESPONDENT**



JUDGMENT

1. The Claimants amended their Statement of Claim on 19th November 2021, discharging the 1st and 2nd Respondents from the Claim.
2. The outstanding Claim is solely against the 3rd Respondent.
3. The Claimants aver that they were Employees of the defunct Nairobi City Council. They worked in the water department.
4. They were employed in various positions, on various dates between 1972 and 2010.
5. The 3rd Respondent was incorporated on 22nd April 2004, and took over the water and sewerage functions, from the Nairobi City Council.
6. The Claimants' services were transferred to the 3rd Respondent.
7. Their dispute is that on transfer, they were demoted, as a result of which, they continued to be paid inferior salaries and allowances, until they eventually retired.
8. The 13th Claimant for instance, held the position of senior superintendent scale 6 in the Nairobi City Council. On transfer, he was placed in the position of supervisor / artisan scale 7, which was a demotion. His basic salary stagnated at Kshs. 52,578, with the house allowance stuck at Kshs. 20,000 monthly.
9. If his seniority from the time he joined the 3rd Respondent was retained, he would have moved to the position of superintendent / coordinator scale 5, at a monthly salary of Kshs. 353,905.
10. The other Claimants advance a similar position. They all aver also, that they were denied salary increments contained in the CBAs covering the years 2005-2012-2015.
11. They claim: -
 - a. Declaration that the 3rd Respondent's refusal to pay to the Claimants superior rates on transfer, and salary arrears under the CBAs, was unconstitutional, illegal, null and void.
 - b. Underpayments, and salary arrears, arising from un-implemented CBAs, all computed at Kshs. 93,696,902.
 - c. General damages.
 - d. Costs.
 - e. Interest.
 - f. Any other suitable relief.
12. The 3rd Respondent filed a Statement of Response, dated 23rd August 2022. Its position is that claims made outside the statutory period of 3 years, are time-barred. The 13th and 14th Claimant's contracts were terminated in the year 2007. Their claims are clearly time-barred.



13. Transfer of the Claimants to the 3rd Respondent was through a tripartite agreement. The 3rd Respondent was a new entity, with different job classifications, that were not a continuation of the job classifications existing under the Nairobi City Council.
14. The Claimants' progression in job grades was not automatic. The 3rd Respondent was a new Employer, entitled to evaluate each Employee, and place them in suitable positions.
15. All the CBAs applicable to the Claimants were implemented by the time of their retirement. There were no dues owed to them from any CBA. Their claim for a total of Kshs. 93, 696,902 is unfounded and based on unsubstantiated assumptions. The Respondent prays the Court to dismiss the Claim with costs.
16. Justus Nyaga, the 1st Claimant, and the Respondent's Industrial Relations Coordinator George Otieno Oketch, gave evidence for the respective Parties on 13th March 2024, closing the hearing. The Claim was last mentioned on 4th July 2024, when the Parties confirmed filing and exchange of their Closing Submissions.
17. Justus Nyaga restated the contents of the Amended Statement of Claim, in his evidence-in-chief. He adopted his Witness Statement and exhibited Documents [1-15], filed by the Claimants. He was a driver. He told the Court that the Claimants were members of the Local Government Workers Union, during their service with the Nairobi City Council. Their salaries were adjusted through CBAs. He was a senior driver at the time of transfer to the 3rd Respondent. The 3rd Respondent however employed him, as an ordinary driver. His salary was reduced. Executive secretaries were reduced to ordinary secretaries. The Nairobi City Council did not pay all the Claimants' dues on transfer. The 3rd Respondent did not promote the Claimants. The Claimants have since retired. Nyaga retired in 2016.
18. Cross-examined, he told the Court that he was authorized by his Co-Claimants, to give evidence for the Claimants. He did not recall what his salary was, as a senior driver at the Nairobi City Council. The Claim is based on salary reduction upon transfer. The letters of secondment to the 3rd Respondent, stated that there were structural changes. Terms and conditions of employment would be affected. He was moved from senior driver to ordinary driver. The Claimants were issued appointment letters, on joining the 3rd Respondent. They accepted the new contracts. They benefited from salary increments, variously approved by the 3rd Respondent's Board. Nyaga told the Court that his own salary increased by over 50%, in an 8-year period. The Claimants' pay slips show salary adjustments made, pursuant to execution of CBAs between their Employer and Trade Union.
19. George Otieno Oketch relied on his Witness Statement and Documents filed by the 3rd Respondent, in his evidence-in-chief.
20. Cross-examined, he told the Court that he joined the 3rd Respondent in the year 2004 as an administrative and logistics supervisor. He was employed by the Nairobi City Council, in 1990 as an accounts clerk. He was aware about CBAs negotiated between the 3rd Respondent and the Claimants' Trade Union. All Employees were paid their dues under the CBAs. The increments were captured in the pay slips. All the CBAs were implemented. Redirected, Oketch told the Court that there were no unpaid salary increments, as suggested by the Claimants, in their Pleadings.
21. The issues are whether, the Claimants were demoted upon moving from the Nairobi City Council, to the 3rd Respondent; and whether they are owed and should be paid, arrears of salaries arising from such demotion and non-implementation of a series of CBAs, concluded between the 3rd Respondent and the Claimants' Trade Union.



The Court Finds: -

22. Transfer and demotion: The Claimants became Employees of the 3rd Respondent, through a transfer of operational assets, staff and operational liabilities, executed between the Nairobi City Council and the 3rd Respondent, sometime in the year 2004.
23. A copy of the agreement exhibited by the Claimants, in their documents filed on 12th March 2024, does not bear the date of its execution, but only gives the year of its execution, 2004.
24. Article 3 of the agreement provided for transfer of staff. The transferee, that is to say the 3rd Respondent, was to ensure that transferred staff, retained the same rights and obligations, as arose between them and the transferor [Nairobi City Council]. They would retain their seniority and remuneration.
25. The 3rd Respondent assumed, in respect of the transferred staff, all obligations imposed by the applicable law, and any CBAs. The agreement, prohibited the 3rd Respondent, from entering into any employment contracts with the transferred staff, which did not reflect terms and conditions of employment, equal to those enjoyed under the Nairobi City Council.
26. It is incorrect therefore, for the 3rd Respondent to submit that the Claimants were offered fresh terms and conditions of employment, by a new Employer. The transfer agreement executed between the 3rd Respondent and the Nairobi City Council in 2004, did not allow the 3rd Respondent to offer the Claimants inferior terms and conditions of employment, to those enjoyed while they served the Nairobi City Council. While the 3rd Respondent was a new Employer as pleaded, it was also, a Successor Employer.
27. The Claimants nonetheless waited too long, until they were retired, many years after transfer, to bring this Claim. They accepted the new contracts and continued to work under the terms and conditions given by the 3rd Respondent, without complaint. If the terms offered by the 3rd Respondent were inferior, the time to raise the grievance, and approach the Court, was at the time of transfer, or soon thereafter, in accordance with the timelines prescribed by the law.
28. Most of their claims appear to the Court, to be time-barred, as submitted by the 3rd Respondent.
29. It is not even clear, from the evidence given by the Claimants, if they were placed at any disadvantage by the 3rd Respondent, upon transfer.
30. Justus Nyaga [1st Claimant], served as a driver 1 grade 16, under the Nairobi City Council. He was employed in 1998. He joined the 3rd Respondent in 2005, as a driver grade 8. His salary in 2005 was Kshs. 15,202 monthly. It was Kshs. 95,101, when he retired in 2016. Jane Wambui [2nd Claimant] was employed on 31st July 1979, by Nairobi City Council. She was an executive secretary 3, grade 10 on transfer in 2005. On transfer she was designated customer assistant. On retirement in 2017, she was an executive secretary, grade 5. Her salary on transfer was Kshs. 29,962 monthly. On retirement, it had risen to Kshs. 181,042 monthly. James Gachoya [3rd Claimant] was employed by Nairobi City Council, on 12th January 1988. He was a Technical Inspector in 2005. His position was renamed Maintenance Assistant, grade 7, on transfer. His salary in 2005 was Kshs. 29,962, and Kshs. 123,437 on retirement, on 1st April 2016.
31. The trend for the other Claimants, was similar to the 3 Claimants' career progressions, sampled above.
32. The Claimants did not establish that the jobs they were offered by the 3rd Respondent, offered them inferior terms and conditions of service than those offered under Nairobi County Council. They did



- not establish that they were demoted, deprived of seniority and continuity of service, or subjected to inferior remuneration.
33. If the 3rd Respondent dishonoured the agreement it executed with the Nairobi City Council, by offering transferred Employees inferior terms and conditions of service, it was stipulated in the agreement that such disputes, would be resolved through arbitration.
 34. Underpayments under the CBAs: This limb to the dispute, was wholly unsubstantiated. The relevant CBAs were not placed before the Court, and relevant benefits conferred under the CBAs, and denied to the Claimants, laid bare before the Court.
 35. The agreement between the 3rd Respondent and the Nairobi City Council, required the 3rd Respondent to assume all existing CBA obligations. The Claimants did not establish that there were any pending CBA obligations inherited by the 3rd Respondent from the Nairobi City Council, concerning their negotiated benefits.
 36. They did not inform the Court whether their Trade Union, which negotiated and concluded all the CBAs, invoked the dispute resolution mechanism existing between the Union and the Employer, for non-implementation of any CBA. The least the Claimants should have done, was bring in their Union as a party or witness in this Claim, to enlighten the Court on the state of implementation of the relevant CBAs. They Claimants were merely beneficiaries, of the CBAs, not the authors, and would only be in a position to give substandard evidence to the Court, with regard to a document they did not author or execute.
 37. The lead witness, Claimant No. 1, Justus Nyaga in any event, conceded that the Claimants enjoyed salary increments of over 50%, over a stretch of approximately 8 years. It cannot be true that the Claimants stagnated, on transfer. CBA increments were included, and captured in the Claimants' pay slips. Nyaga conceded that salary adjustments were made. His evidence was confirmed by the 3rd Respondent's witness, George Oketch. He told the Court that salaries negotiated between the 3rd Respondent and the Claimants' Trade Union, were paid in arrears. The payments were reflected in the Claimants' pay slips.
 38. There is no evidence of any outstanding CBA obligations, and if any, the Trade Union which authored the CBA ought to have been a party to the Claim, or given evidence before the Court.
 39. It is the respectful view of the Court also, that Claimants' dispute hinges on the transfer agreement, between their previous Employer, and successor Employer. It would have aided the Claimant's cause, if both parties to the transfer agreement, were parties or witnesses in this Claim.
 40. The parties in, and authors of, the transfer agreement and CBAs relating to the Claim, were necessary parties or witnesses, in establishing the Claim.
 41. There is evidence from both the Claimants and the 3rd Respondent showing that salary increments under the CBAs, were effected. The pay slips capture payments made.
 42. There are no arrears of salaries shown by the Claimants to exist, arising from what they characterize as their demotion on transfer, and non-implementation of a succession of CBAs.
 43. The Claim has no merit.
 44. It is ordered: -
 - a. The Claim is declined.
 - b. No order on the costs.



DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI,
UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT
PRACTICE DIRECTIONS 2020, THIS 31ST DAY OF OCTOBER 2024.

JAMES RIKA

JUDGE

