



**Owino v Mumias Sugar Company Ltd (Under Recievership) (Employment and Labour Relations Cause 27 of 2023) [2024] KEELRC 2662 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2662 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 27 OF 2023**

**JW KELI, J  
OCTOBER 31, 2024**

**BETWEEN**

**MOSES OTIENO OWINO ..... CLAIMANT**

**AND**

**MUMIAS SUGAR COMPANY LTD (UNDER RECIEVERSHIP) .. RESPONDENT**

**JUDGMENT**

Representation

C/A Macheso

For Claimant - Omondi Otieno & Associates Advocates

For Respondent- Munyao, Muthama & Kashindi Advocates

1. The Claimant on the 30<sup>th</sup> June 2021 filed the Memorandum of Claim dated 29<sup>th</sup> June 2021 against the Respondent seeking the following reliefs:-
  - a. Payment of salary arrears of Kshs. 3,612,253/- together with interest at Court rate from the date of filing till payment in full.
  - b. Gratuity payment of Kshs. 5,400,000/- together with interest at Court rates from the date of filing till payment in full.
  - c. Costs and interest of the suit from the date of judgment till payment in full.
  - d. Any other relief that this Honourable Court deems fit to grant.
2. Also filed together with the Memorandum of Claim was the Claimant's List of Witness dated 29<sup>th</sup> June 2021, his witness statement dated 29<sup>th</sup> June 2021, his list of Documents dated on an even date, and his Bundle of Documents.



3. The Respondent on 27<sup>th</sup> February 2024 filed its statement of Response dated on an even date. The statement of response was accompanied by a list and bundle of documents dated 27<sup>th</sup> February 2024.
4. On 28<sup>th</sup> March 2024, the Respondent filed the Witness statement of Ponangipalli Venkata Ramana Rao dated an even date. on 26<sup>th</sup> July 2024, the Claimant filed a substituted list of witnesses dated 25<sup>th</sup> July 2024 and the witness statement by Patrick Mutuli dated 25<sup>th</sup> July 2024.

## **HEARING**

### **The Claimant's case**

5. The Claimant's case was heard on the 12<sup>th</sup> June 2024, when the claimant testified on oath, adopted his written witness statement dated 29<sup>th</sup> June 2021 as his evidence in chief, and produced the documents under his list of documents of an even date as the Claimant's Exhibits (C-Exh-1 to 15). The Claimant was cross-examined by Counsel for the Respondent, Ms. Ngei.

### **The Respondent's case**

6. The Respondent's case was heard on 29<sup>th</sup> July 2024. The respondent's witness Patrick Mutuli testified on oath and adopted, as evidence in chief, his witness statement dated 25<sup>th</sup> July 2024 together with a list of documents dated 27<sup>th</sup> February 2024. He was cross-examined by Counsel for the Claimant, Mr. Brian Otieno.

### **The Claimant's Case Brief.**

7. It was the claimant's case that vide the contract of employment dated 1<sup>st</sup> July 2015, he was appointed by the respondent for a three-year term as the Manager Corporate Affairs and Strategy, at a consolidated gross salary of Kshs. 600,000. (C- exhb 2).
8. The Claimant asserts that he worked diligently. That vide a letter of 29<sup>th</sup> April 2016 the Respondent appointed him in an acting capacity as the Chief Human Resource and Administration Officer with effect from 26<sup>th</sup> April 2016 until 6<sup>th</sup> June 2017(C- exhb 4) when he was redeployed to his substantive position.
9. That the management of the Respondent appointed the Claimant to lead the Strategic Plan Formulation Team for the period 2017 -2022, which he states successfully culminated in the unveiling of the Strategic Plan in January 2018(C- Exhb 13).
10. That the respondent informed the Claimant of the expiry of his contract on 27<sup>th</sup> February 2018. That vide his letter of 1<sup>st</sup> March 2018 under Clause 4 of his employment contract he requested for the renewal of his contract (C- exhb 7).
11. That the respondent however on 17<sup>th</sup> April 2018 directed the Claimant to proceed on his terminal leave from 14<sup>th</sup> May 2018 in anticipation of the contract expiry(C- exhb 8). The Claimant asserted that he offered impeccable service to the respondent such that on 14<sup>th</sup> May 2018 when he was to start his terminal leave, he was recalled to continue serving in his position awaiting the management's deliberation of his contract renewal.
12. The Claimant contended that, his contract was not renewed, not owing to his performance, but rather due to the respondent's low-level operation which led to the respondent being placed under receivership on 20<sup>th</sup> September 2019. That the respondent never paid him his salary from March 2017



until when he received the letter directing him to proceed in terminal leave which he states is Kshs. 3,612,253.27/=(C- exhb 14 was a document titled Net Pay analysis of salary arrears)

13. The Claimant contended that his contract under clause 14 provided that he was to be paid gratuity at a 25% rate of the annual basic salary for each completed contract year, which he was not paid (C-exhb 2).

### **The Respondent's Case Brief.**

14. It was the Respondent's case that it has been under receivership since 20<sup>th</sup> September 2019 under the receiver manager appointed by KCB Bank Limited under the deed of appointment of even date (R-Exhb 1 was the Deed of appointment dated 20<sup>th</sup> September 2019).
15. It was the receiver's case that he was not in control of the affairs of the company during the claimant's alleged cause of action, and the directors of the company failed to provide a statement of affairs as required under the Companies Act relating to saving and transitional provisions and the Insolvency Act, 2005. It was his case that he has not retrieved any records related to the claimant's claim.
16. The receiver asserts that the claimant's contract was for a three-year fixed term effective 1<sup>st</sup> July 2015 to 30<sup>th</sup> June 2018 and thus the claimant is not entitled to demand for payment falling outside the said contractual period.
17. The receiver states that the claimant's contract was to expire on 30<sup>th</sup> June 2018 and the respondent recalled the claimant on 14<sup>th</sup> May 2018, on the basis that the claimant's contract was still in force and he was contractually obligated to report to work. The receiver states that there is no admission of any wrongdoing.
18. The receiver states that the claimant has not substantiated his claim for the alleged salary arrears and gratuity payment, and if the Court were to find he is so entitled, the claimant would be an unsecured creditor who would have to join the queue with other unsecured creditors until the debt owed to secured creditors is fully paid in line with the law on insolvency and receivership.
19. The receiver stated that no demand notice was served upon him and prayed that the suit be dismissed with costs.

### **Written Submissions**

20. The Court directed that the claim be canvassed by way of written submissions. The Claimant's written submissions dated 5<sup>th</sup> August 2024 were filed by Omondi Otieno & Associates Advocates on 14<sup>th</sup> August 2024. The Respondent's written submissions dated 16<sup>th</sup> September 2024 were filed by Munyao, Muthama & Kashindi Advocates.

### **Determination**

#### **Issues for determination**

21. The claimant identified one issue for determination in the claim: -
  - a. Whether the Claimant is entitled to the orders sought, that is to say, salary arrears, gratuity, costs, and interest.
22. The Respondent addressed globally the issue on the claim for gratuity & salary arrears asserting that the claimant had not proved the same to be entitled to the said reliefs.



23. The Court having considered the parties' pleadings, having heard the parties, and having considered their respective submissions finds the issue before the Court:- Whether the Claimant is entitled to the orders sought, that is to say, salary arrears, gratuity, costs, and interest.

#### **Whether the Claimant is entitled to Orders sought**

- a. Payment of salary arrears of Kshs. 3,612,253/- together with interest at Courtrate from the date of filing till payment in full.
24. The claimant in his witness statement stated that the Respondent did not pay his salary as from March 2017 to up to and until he received the letter asking him to proceed on terminal leave. That his salary arrears were to the tune of Kshs. 3,612,253.27. The claimant produced his letter of offer of employment by the Managing Director of Mumias Sugar Company Limited, Coutts Ottolo, dated 5<sup>th</sup> June 2015 offering a consolidated salary of Kshs. 600,000 per month. The offer was followed by a contract of employment dated 1<sup>st</sup> July 2015 signed between the claimant and one Mr. Errol D. Johnson who signed as the Chief Executive Officer. The contract was on the letterhead of Mumias Sugar Company Limited but in the body of the letter, it was stated as The Mumias Sugar Company Ltd. Mr. Errol D. Johnson signed for Mumias Sugar Company Ltd. The contract in clause 7 gave the same remuneration in the letter of offer of Kshs. 600,000 per month.
25. On the 27<sup>th</sup> of February 2018 the employer issued the claimant with notice of expiry of his 3-year contract on 30<sup>th</sup> June 2018. On the 1<sup>st</sup> of March 2018, the claimant expressed wishes to renew his contract. On 17<sup>th</sup> April 2018, the claimant was issued with a letter to proceed on terminal leave. On 14<sup>th</sup> May 2018, he was recalled from the terminal leave. On the 8<sup>th</sup> of June 2018, the employer through the acting CEO responded to the claimant's request for contract renewal rejecting the request.
26. Upon receipt of the response the claimant vide letter dated 8<sup>th</sup> June 2018 requested payment of Kshs. 2 million against his salary arrears stating it was to facilitate his departure and subsequent relocation. At page 39 of the claimant's bundle was a document titled, 'Mumias Sugar Company Net Pay analysis' covering the period March 2017 to July 2018. A demand letter was produced at page 40-42. At page 41 it was stated the arrears were for the period March 2017 up to time of proceeding on terminal leave.
27. During cross-examination the claimant told the Court that Mumias Sugar Company Ltd had offices at Mumias and Nairobi hence the reason he accepted the offer at Nairobi. He said there was no difference between The Mumias Sugar Company Ltd(as per contract) and Mumias Sugar Company Ltd. He confirmed that his contract was signed by the CEO on behalf of the company. He confirmed there was no seal or stamp of the company on his letter nor was there a witness to the CEO. The Claimant confirmed his payroll number was 50082728 and that on page 24 of his documents, the payroll number was indicated as 82778. He confirmed not to have been paid in March 2017. He confirmed his contract was from 1<sup>st</sup> July 2015 to 30<sup>th</sup> June 2018.
28. On the claim for arrears, the claimant relied on the analysis on page 39 of his bundle of documents which he stated was given to him by the accounting officer. The said document was titled Mumias Sugar Company and there was a stamp at the bottom. The payroll number on page 39 was indicated as 50082778. He stated that whereas his letter of acting appointment at page 24 of his bundle indicated payroll number as 82778, the number 500 represented the department he worked in. The Claimant told the Court that the stamp on the net pay analysis of salary arrears (page 36 of claimant's bundle) belonged to Mumias Sugar Company and stated it was signed by the Chief Human Resources Officer. He stated it was stamped from the department but admitted his contract was not stamped.



29. On being asked why he never asked for his entire salary arrears vide letter of 8<sup>th</sup> June 2018 yet his contract was coming to an end, the Claimant told the Court that he asked for advance against his salary arrears and that it was the responsibility of the Respondent to pay his salary hence the partial request. On being asked why between March 2018 to 8<sup>th</sup> June 2018 he did not ask for payment, the Claimant told the Court that there was some partial payment as indicated in page 39.
30. On being asked if he asked to be paid after the expiry of the contract, the claimant stated he did so informally.
31. On the demand letter by his advocates dated 18<sup>th</sup> July 2022, the claimant told the Court he addressed it to the Ministry of Labour. The company was placed under receivership in 2019 and he did not make demand to the receiver. He relied on a letter of 8<sup>th</sup> June 2018. The claimant on being asked why he asked for renewal of contract while he had salary arrears, responded that he was hopeful.
32. On being asked whether he vacated the house he had been allocated by the employer, he responded that the clearance was not done and admitted at the time of demand letter he had not vacated.
331. During re-examination, the claimant told the Court he had not vacated the company house as he was not paid the salary arrears advance he had requested for vide letter of 8<sup>th</sup> June 2018. That the analysis of salary arrears was actioned by John Shiundu, the chief human resource officer. That number 500 before his payroll number represented the department where worked. He signed the letters of employment with the company CEO. He asked for an advance of salary arrears as he waited for the entire payment.

### **Response**

34. The Respondent vide its legal officer Patrick Mutuli(RW) in a written statement stated the company was placed on receivership. He stated that the Claimant's contract was for 3 years and expired on the 30<sup>th</sup> of June 2028 hence any demand beyond the contract period had no legal basis. He further stated that the claimant has not substantiated his claim of salary arrears and gratuity payment.
35. RW told the Court in the event, the Court found that the claimant's case had merit and he was entitled to reliefs sought, which they denied, the claimant was under unsecured creditor and would have to queue with other unsecured creditors until the debt owed to the secured creditors is fully paid in line with law applicable in insolvency and receivership.
36. During cross- examination RW told the Court he relied on documents held by Receiver Manager. RW told the Court that the claimant was not paid the amount reflected at page 39 of the claimant's bundle of Kshs. 3,162,253.27. RW admitted that there were some salary arrears payable to the claimant. That there was no other document before the Court save for the computed outstanding salary arrears at page 39 of the claimant's bundle. On re-exam RW told the document at page 39 was not official.

### **Decision on the claim for salary arrears**

37. The Court finds that there was no evidence placed before the Court to controvert the claim of salary arrears. The evidence of the arrears was based on undisputed payable salary of Kshs. 600000 per month supported by the letter of offer dated 5<sup>th</sup> June 2015 and contract of employment dated 1<sup>st</sup> July 2015.
38. The claim for arrears was supported by the letter of the claimant dated 8<sup>th</sup> June 2018 where he requested Kshs. 2,000,000 against his salary arrears on receipt of rejection of renewal of the contract. The analysis of salary arrears at page 39 was the only evidence of details of the salary arrears.



### The claimant's submissions

39. The nature of the Claimant's employment contract was that salary was to be paid monthly in arrears. Other allowances and gratuity were to be paid in line with the company policy. (See paragraph 7 of the Contract of Employment dated 1st July 2015 C- exhb 2). According to the Net Pay Analysis (C-exhb 14 page 39 of the Claimant's Bundle), the amount of money owed to the Claimant as of July 2018 was Kshs. 3,612,253.27. The Respondent attempted to disparage the document by questioning the payroll number stated therein being 50082778. The Claimant's testimony was unshaken, and he stated that the first three digits, that is to say, 500, represented the department where an employee was working. The Respondent's witness did not bother to explain or contradict the Claimant's version of events.
40. The Claimant to buttress his submissions relied on Section 17(1) of the Employment Act to wit: -“ Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya— ... Further, Section 5 (5) of the Employment Act imposes a duty on an employer, in this case, the Respondent, to pay an employee, in this case, the Claimant, for services of equal value. Subsection 6 of the aforesaid section 5 criminalizes the contravention of Section 5(5). The Claimant submits that the Respondent was obliged to abide by the provisions of the contract, and the law.

### Respondent's submissions

41. The Respondent submits as follows on the salary arrears: - When tasked with providing evidence that he indeed requested for payment of the alleged salary arrears, the Claimant did not provide any proof save for a request of Kshs. 2,000,000 which he made on 8th June 2018. The Claimant also failed to explain to this Court during the oral hearing why he only requested Kshs. 2,000,000 whereas his claim for the alleged salary arrears is KShs.3,612,253/=. This is contradicting information. Additionally, the Claimant even went ahead to apply for renewal of the contract when allegedly he was not receiving his full salary.
42. The Respondent further submits that without prejudice to the foregoing and in the event the Honorable Court finds that the Claimant's case has merit and that the Claimant is entitled to reliefs sought (which is denied), the Respondent asserts that the Claimant would be an unsecured creditor who would have to join the queue with other unsecured creditors until the debt owed to secured creditors is fully paid, in line with the law applicable in insolvency and receiverships. The Claimant shall be required to submit proof of debt to the Receiver Manager for registration.
43. The Respondent submits that the above position is supported by the holding of the Court in the case of Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others (Insolvency Petition E004 of 2021) [2021] KEHC 242 (KLR) (Commercial and Tax) (19 November 2021) (Ruling) where the Court stated as follows; “In this regard, since the 2nd respondent will henceforth be an officer of this court, for purposes of the rescue and re-organization of the Company, it is expected that he will act in the best interest of the 1st respondent, then the other secured creditors, followed by the unsecured creditors and more importantly the public interest. That the lessee of the Company's assets shall be at his direction and control.” That the case of Njoroge Regeru v Wanda Baird as the Administrator of the estate of the late George Neil Baird & 4 others [2015] eKLR, the Court stated that that a secured creditor ranks in priority over an unsecured creditor. With regard to a Charge as is stated in the book “Land Law” by Nigel P. Gravells, 3rd edition- “The advantage of such real security is that, even if the borrower becomes insolvent, the lender, as a secured Creditor, will take priority over the general unsecured creditors of the borrower ...” In the case of Eltex Sacco Limited v Rift Valley Textiles Ltd (Under Receivership) & Raphael Masinde [ (Civil Suit 61 of 2004) [2020] KEHC 2662 (KLR) (8 July



2020) (Judgment)], the Court stated as follows; “The position of Eltex Sacco against the Company is that it is an unsecured creditor. It has no interest in the Company’s property of secured in favor of secured creditors. The appointed receiver manager exercised his powers in accordance with the provisions of the law. The plaintiff ought to have pursued the previous directors of the company and not the receiver manager”.

44. The Court having considered the evidence and submissions finds that the net pay analysis on salary arrears (C-Exhb 14) was stamped by the Chief Human Resource Officer of Mumias Sugar Company Limited. The only issue raised by the Respondent on the analysis was that it was not official. The Respondent did not inform the court what it meant by official. The Court returns that it was a valid document admissible as evidence on the arrears.
45. The Court holds that the claimant discharged his burden of proof on the claim for salary arrears through producing documents to lay basis of the same, namely; contract of employment, request for salary arrears advance of Kshs. 2 million vide letter dated 8<sup>th</sup> June 2018 and the demand letter though addressed to the Minister on Labour affairs though the receiver was in place. RW admitted that the claimant was owed salary arrears during cross-examination corroborating the claim. RW also admitted he relied on documents held by the Receiver. It was thus not true they had no records of the claimant’s employment.
46. Once the claim was filed, the respondent’s receiver was obliged to produce documents on the claimant’s employment and especially on his salary payment. section 74 of the *Employment Act*:- ‘74. Records to be kept by employer
  - (1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act ....”
47. The Court agreed with the Respondent’s witness that the employer’s obligations to the claimant were limited to the expiry of the contract being 30<sup>th</sup> June 2018. Consequently, the claim for salary arrears of Kshs. 3,612,253.27 being not controverted was payable less the amount stated for July 2018 (C-exhb 14) of Kshs. 383,000 which the Court holds was a payment by the employer in respect to the contract period.

#### **Whether the claimant is entitled to payment of gratuity.**

48. The Claimant states that his contract under clause 14 provided that he was to be paid gratuity at a 25% rate of the annual basic salary for each completed contract year, which he was not paid. During the hearing, the Claimant produced the contract of employment (C-exhb 2) and relied on clause 14 which read in part:- ‘Gratuity (a) this is a non-pensionable appointment. (b) on the satisfactory completion of the contract period herein, the employer shall pay the employee a gratuity of equal to twenty five percent (25%) of the annual basic salary period during the term hereby created. ’

#### **Claimant’s submissions**

49. Paragraph 14 of the Contract of Employment (at page 14 of the Claimant’s bundle) provided that the employer would pay the employee a gratuity equal to 25% of the annual basic salary for the term created. In this case, the term created was 3 years and the annual basic salary was KShs.7,200,000/= . Therefore, gratuity shall be calculated as follows: - 7,200,000 X 25% X 3 = KShs.5,400,000/= Just like on the issue of salary arrears discussed above, the Respondent’s witness admitted that the Respondent had not been paid any gratuity upon his exit. This admission therefore rubberstamps the authenticity of the Claimant’s claim. The Respondent must be called out to honour the contractual agreement between parties. In this case, there was a valid contract which had never been revised and/or altered,



duly executed by the parties and the very basis upon which the Claimant rendered his services in favour of the Respondent. The Respondent cannot be allowed to renege on its obligations as stipulated in the contract.

50. The response was a general denial to state the claim for gratuity was not substantiated.
51. During cross-examination the Respondent challenged the letter of employment based on the name of employer, the Personal number of the employee, and the signature of the CEO. These issues were found in favor of the Claimant under issue 1.

### **Decision on gratuity claim**

52. The Claimant's contract of employment was for 3 years and there was uncontroverted evidence he served the entire contrary which expired on 30<sup>th</sup> June 2018. The Court returns the Claimant was entitled to gratuity under clause 14 (b) of the contract to wit:- " (b) on the satisfactory completion of the contract period herein, the employer shall pay the employee a gratuity equal to twenty five per centum (25%) of the annual basic salary period during the term hereby created." The contract was non-pensionable hence the gratuity was the social security protection of the Claimant upon separation. It was also a contractual right and obligation of the employer to pay the gratuity as per clause 14 of the contract.
53. The Court holds that the claimant discharged his burden of proof on the preponderance of balance of probabilities. Clause 7 of the contract provided for a consolidated salary of Kshs. 600,000. The Court holds that this was the figure for computing the gratuity. Therefore, gratuity shall be calculated as follows: -  $(600,000 \times 12) \times 25\% \times 3 = \text{KShs. } 5,400,000/=$

### **On Interest.**

54. The Court took into consideration that the Claimant failed to follow up on his dues immediately after the contract expired. The employer is now under receivership. I decline to award interest as sought.

### **Costs.**

55. Costs follow the event. The claim was successful and the claimant is awarded costs.

### **Conclusion and Disposition**

56. The claim was successful. The Court took notice that the Respondent is under receivership. Execution of judgment is at the liberty of the claimant and the Court has no business advising the claimant on getting his judgment how to proceed to execute. The Court rejects the submission by the respondent to inform the claimant to queue with other unsecured creditors.
57. In the upshot, the claim dated 29<sup>th</sup> June 2021 is allowed for the Claimant against the Respondent as follows: -
  - a. Payment of salary arrears of Kshs. 3,229,253
  - b. Gratuity payment of Kshs. 5,400,000/-
  - c. Costs of the claim.
58. It is so Ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> OF OCTOBER 2024.**

**JEMIMAH KELI,**



## **JUDGE**

**In the presence of: -**

Court Assistant: Caleb

For Claimant: Brian Otieno

For Respondent: - Absent

