



Okallo v Kenya Medical Research Institute & another (Cause 558 & 559 of 2019 (Consolidated)) [2024] KEELRC 2849 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2849 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 558 & 559 OF 2019 (CONSOLIDATED)**

**JW KELI, J
NOVEMBER 18, 2024**

BETWEEN

ALICE OKALLO CLAIMANT

AND

KENYA MEDICAL RESEARCH INSTITUTE 1ST RESPONDENT

**KENYA MEDICAL RESEARCH INSTITUTE STAFF RETIREMENT BENEFIT
SCHEME 2ND RESPONDENT**

RULING

(On the Notice of Motion Application dated 20th June 2024 by the Respondents consolidated suo moto with similar application of even date in Nairobi ELRC Cause No. 559 OF 2019 Sarah Mangóli v Respondents)

1. The Applicants, the former employer of the Claimant and the pension scheme responsible for the claimant’s pension benefits, respectively, by way of Notice of Motion Application dated 20th June 2024 sought the following orders:-
 1. This application be certified urgent and it be heard ex parte in the first instance with a view to giving directions for its expeditious hearing. (Spent)
 2. Pending the hearing and determination of this application, the 1st Respondent do deposit the sums of KShs.6,485,304/= in an interest earning account in the joint names of the Advocates for the Parties at the Sarit Centre Branch of the KCB Bank Kenya Limited.(Spent)
 3. Pending the hearing and determination of the Respondents’ Counterclaim and Set-Off, the 1st Respondent do deposit the sums of KShs.6,485,304/= in an interest earning account in the joint names of the Advocates for the Parties at the Sarit Centre Branch of KCB Bank Kenya Limited, towards compromise of the Claimant’s claim.



4. The Claimant's claim be compromised for the sum of KShs.6,485,304/=, being pension dues payable as at 31st March 2024, less the sum of KShs.1,775,000/= on account of the 1st Respondent's claim for unpaid rent for the Claimant's occupation of House No. M04 within the 1st Respondent's Staff Quarters.
 5. Upon compliance of orders (2) and (3) above, this Honourable Court do declare the Claimant's suit as compromised and thus settled.
 6. Upon compliance of orders (2) and (3) above, this Honourable Court do direct the Claimant to vacate House No. M04 situated within the 1st Respondent's Staff Quarters within a period of seven (7) days.
 7. The costs of this application be provided for.
2. The application was based on the grounds stated therein and the supporting affidavit of John Musau to effect that the claimant had retired from the service of the 1st Respondent on the 1st of April 2018. That during her employment she had been allocated House No. MO4 of the 1st respondent with payable rent of Kshs. 25000 pm. The 1st Respondent housing policy well known to the staff gives exiting staff a grace period of 60 days to hand over the residence on ceasing employment (JM-1 was a copy of the policy).
 3. Musau averred that the demand for houses is high as the rent is lower than the market price hence the queue for re-allocation. The grace period for the claimant to vacate the house was 1st June 2018 but she had refused to vacate and has not been paying rent. That as of April 2024, the outstanding rent was Kshs. 1,775,000 (JM2 was the rent statement)
 4. Musau further averred that while the claim was for payment of pension dues they had a counterclaim for the unpaid rent. That in April 2024 the 2nd respondent released the pension benefits payable to the claimant for the sum of Kshs. 6,485,304 as at 31st March 2024. As a result, the said benefits were no longer earning interest, (JM4 was a copy of the pension benefit statement as of 31st March 2024).
 5. Musau contended that the claimant had no claim against the 2nd respondent which had released the pension benefits to the 1st Respondent, and that he was aware that under section 13 of the Pensions Act pension dues are assignable or transferable for purposes of satisfying a debt due to the government and thus could be assigned to satisfy the outstanding rent thus the basis of their application

Response

6. The Respondent vide her replying affidavit dated 27th September 2024 deponed that she was opposed to the application for the reasons already disclosed to the applicants vide letter dated 20th May 2024(A0-2 being a copy of the letter from her advocates to the advocates for the respondents) which in summary communicated that:-
 - a. No prior agreement had been made by the parties to have the pension funds released from the pension fund where it was earning interest.
 - b. That there was no communication made by the 2nd respondent to the claimant informing her of the release of the pension funds to the 1st respondent to settle the pension claim and thus the alleged release was illegal and unprocedural.
 - c. That there was no evidence before the court of the monies having been released from the 2nd respondent to the 1st applicant to satisfy the pension claim.



- d. That the claimant had other claims besides the pension claim and that the act of the Applicants of withholding the pension dues while pursuing the rent and abandoning her other claims was in bad faith.

Reply to response

7. The applicants filed a further affidavit of John Musau in reply to the response and reiterated its position on the offer to release pension dues less the outstanding rent. Musau averred that the release of the claimant's pension funds from the pension scheme was communicated to the claimant's advocates by the respondents' advocates vide letter of 14th May 2024 as evidence of funds hence the averment of lack of evidence of the release of the pension funds by the claimant was in bad faith. The claimant annexed the letter. Musau contended that the consent of the claimant was not required in the release of the pension funds by the 2nd Respondent.

Background to the application

8. The claimant was a former employee of the 1st Respondent from 1986 to 1st April 2028 when she retired from employment. During the employment, the claimant was under a contributory pension scheme managed by the 2nd Respondent. She claims that during employment the 1st respondent failed to remit her monthly pension contribution to the 2nd respondent who managed the pension scheme. She claims an accumulated unpaid pension of the sum of Kshs, 3,748,754.13. The claimant on account of the claim for unpaid pension continued to stay in the 1st Respondent's staff quarters KEMRI House M04 stating she was awaiting the payment of pension dues to arrange her affairs including alternative accommodation. The 1st Respondent had issued a demand for the claimant to vacate the house and payment of accumulated unpaid rent of Kshs. 350,000 (as at the time of filing the claim). In her claim dated 16th August 2019, the Claimant sought orders for payment of pension dues for the sum of Kshs, 3,748,754.13 and a permanent injunction against eviction from the house until her pension is paid in full.
9. The Respondent filed a response dated 5th June 2024 with a counterclaim and set off with respect to accumulated rent arrears for the sum of Kshs. 1775000./

Decision

10. The application was canvassed by way of written submissions. The claimant's written submissions drawn by NOW Advocates LLP were dated 16th October 2024 and received in court on the 17th October 2024. The applicant's written submissions drawn by Muriu Mungai & Co. Advocates were dated 8th October 2024.
11. The substantive orders in the application were as follows:-
 - a. The Claimant's claim be compromised for the sum of KShs.6,485,304/=, being pension dues payable as at 31st March 2024, less the sum of KShs.1,775,000/= on account of the 1st Respondent's claim for unpaid rent for the Claimant's occupation of House No. M04 within the 1st Respondent's Staff Quarters.
 - b. Upon compliance of orders (2) and (3) above, this Honourable Court do declare the Claimant's suit as compromised and thus settled.



12. The parties in their written submissions were in agreement that Order 25 rule 5 of the Civil Procedure Rules was the applicable procedural rule in determination of the application. It states:- “5. Compromise of a suit [Order 25, rule 5]
 - (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.
 - (2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.”
13. The applicant submits that there are two components of Order 25 rule 5 of the Civil Procedure Rules being a compromise or where the Defendant has satisfied the suit and relied on the decision in AS Sheikh Transporters Limited & another v Barclays Bank of Kenya Limited(2014)e KLR where the judge distinguished the two components as follows:- “Agreement or “consent” of the parties is important in the first category of adjustment of a suit in rule 25 but satisfaction does not require agreement or consent of both parties. In the latter category of satisfaction, conduct of or acts by the Defendant in relation to the suit is what is important. That distinction should be drawn in order to understand the complete scheme of things in rule 25.” The Applicant relied on the later category of satisfaction of the claim. To buttress the submission the Applicants further relied on a similar decision in Transroad (K) Limited v General Tyre Sales Limited (2008) e KLR.
14. It was not in dispute that there was no consent/agreement compromising the claim. The court is then invited to apply the component of satisfaction of the claim under Order 25 rule 5 of the Civil Procedure Rules (supra) in the instant suit.
15. The claimant denied the alleged satisfaction of her claim by the applicants and stated there was no evidence of the money being held by the 1st Respondent and further that she had not authorized the money to be moved from the pension fund to the 1st respondent where it was not earning interest. The claimant stated she also had other claims besides the pension dues.
16. The 1st Respondent submitted that it had offered to settle the claimant’s pension dues less the outstanding rent but the claimant had refused. As a consequence, the claimant’s pension dues ought to be deemed as compromised and the suit adjusted to that extent and the claimant directed to move out of the 1st Respondent’s house.
17. The claimant submitted on same Order 25 Rule 5 of the Civil Procedure Rules and relied on the decision in Kenya- Anti Corruption Commission v Gilbert Mwangi Njuguna & Another(2018)e KLR where the court interpreted the rule as follows:- “ 6. I have carefully discerned the provisions of this order and do find that for the court to enter judgment under Order 25 Rule (1) and (2), there must be an agreement which is lawful or there must be a compromise. According to the Black’s Law Dictionary, an agreement is defined as a concord of understanding and intention, between two or more parties, with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; the act of two or more persons who unite in expressing a mutual and common purpose, with the view of altering their rights and obligations; a coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. The elements required for the agreement to be a legally enforceable contract are: mutual assent, expressed by a valid offer and acceptance; capacity; and legality.



7. A compromise means a settlement of differences by mutual concessions; an agreement reached by adjustment of conflicting or opposing claims and principles, by reciprocal modification of demands.” The Court returns that the decisions relied on by the applicants and the respondent were in agreement on the meaning of consent and satisfaction of claim as basis of compromising a suit under Order 25 Rule 5 of the Civil Procedure Rules. I uphold both the decisions to apply in the instant application. I held it was not in dispute that there was no consent to compromise the claims. The determination is on the component of satisfaction of the claims.
18. Taking into consideration the submissions on facts by the parties and authorities relied on I find that the offer by the applicants to release the pension funds was conditional on deduction of outstanding rent and had not been accepted by the Claimant/ Respondent. The Court holds that there is no compromise before it to record as the offer by the Applicants has not been accepted by the claimant who also contests the payment of the rent. The court’s role is of independent umpire of disputes and can only record compromise by agreement of parties or where it is satisfied that the obligation has been met by the defendant under the second limb of the Order 25 Rule 5 of the Civil Procedure Rules. The satisfaction in this case would have been the applicants having released the pension dues to the claimant. That was not the case and on the table is an offer to compromise but not the compromise. The offer having been rejected by the claimant the Court as an independent umpire of disputes cannot descend to the arena on this issue.
19. In the upshot the application dated 20th June 2024 is dismissed with costs to the claimant in the cause.
20. The Court Orders suo moto for the ruling to apply in the determination of the similar application in Nairobi ELRC Cause No. 559 of 2019 dated 20th June 2024 which is also dismissed with costs to the claimant in the cause.
21. The parties to take steps to fix the suits for interpartes hearing on priority basis. Mention on 10th December 2024 for pre-trial directions in both suits.
22. It is so Ordered.

DATED, DELIVERED, AND SIGNED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2024.

JEMIMAH KELI

JUDGE

In the presence of:

C/A- Caleb

Claimant/Respondent- Mugambi h/b Nungo

Respondent- Diru h/b Opole

