



Wareng Nekoi Multi-Purpose Co-operative Society Ltd v Ruto (Cause E025 of 2022) [2024] KEELRC 13530 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13530 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E025 OF 2022
MA ONYANGO, J
DECEMBER 19, 2024**

BETWEEN

WARENG NEKOI MULTI-PURPOSE CO-OPERATIVE SOCIETY LTD CLAIMANT

AND

ISAAC RUTO RESPONDENT

JUDGMENT

1. The Claimant is a cooperative society and was the employer of the Respondent herein.
2. In its Memorandum of claim dated 16th September 2022, the Claimant avers that the Respondent being in charge of the Claimant, deceitfully advanced himself monies belonging to the Claimant for his personal gain without the authority of the Claimant and its members. The Claimant avers that the Respondent took advantage of his access to the Claimant's funds as the manager to advance himself a total of Kshs.4,917,694/=
3. It is the Claimant's case that the Respondent vide his letter dated 20th February 2020 admitted his indebtedness to the Claimant and proposed a payment plan of Kshs.5,000/= per month which proposal was declined by the Claimant as the Respondent's offer, according to the Claimant was untenable.
4. Additionally, the Claimant states that the Respondent on different occasions retained for his own gain Kshs.1,707,450/= which he took from the Claimant under names of persons who are either non-existent or are not members of the Claimant.
5. The Claimant avers that the Respondent has denied and failed to pay the advanced amount up to date being Kshs 4,917,694 and Kshs 1,707,450 making a total of Kshs.6,625,144/= hence necessitating the filing of this claim.



6. The Claimant is therefore seeking the following reliefs against the Respondent: -
 - a. Kshs. 6,625,144/=
 - b. Costs of the suit
 - c. Interest on (a) and (b) at court rates.
7. In response, the Respondent filed a Reply to Memorandum of Claim and a Counter Claim on 30th January 2023 denying the averments made by the Claimant in its Memorandum of Claim.
8. In his defence, the Respondent stated that he is not liable in law to answer for any provable loss not found due by a criminal process and also, that the alluded amount is an afterthought by the Claimant after issuing him an illegal notice of retirement.
9. The Respondent denied using deceitful schemes to take the money as averred by the Claimant. In this regard, it is the Respondent's case that since he started working as the manager of Wareng Nekoi Cooperative Agrovet Shop, no disciplinary measure was taken against him nor a complaint against him placed before the Annual General Meeting of the Claimant.
10. The Respondent denies advancing himself any monies without the knowledge of the Claimant and contends that some of the monies were advanced to him as incentives through farm inputs and others deducted from his salary, which was approved by the Claimant's management committees from time to time in Annual General Meetings or Special General Meetings.
11. According to the Respondent, prior to his retirement, no claim was ever made or a notice to show cause issued on the allegation of debts and money taken without approval.
12. In the Counter Claim, the Respondent avers that the Claimant, without any justifiable cause forced him to retire involuntary and failed to pay his terminal dues.
13. The Respondent has in his Counter claim sought to be paid his terminal dues as particularized hereunder: -
 - i. Three months' pay in lieu of Notice.....Kshs. 345,750
 - ii. Payment for breach.....Kshs 1,380,000
 - iii. Responsibility allowance.....Kshs 855,000
 - iv. Travelling allowance.....Kshs 480,000
 - v. Unpaid leaves.....Kshs. 1,725,000
 - vi. Housing allowance.....Kshs. 2,466,000
 - vii. Risk allowance.....Kshs 6,120,000
 - viii. Underpayment.....Kshs 4,694,650
 - ix. Severance pay.....Kshs 3,986,666.66
 - x. Gratuity.....Kshs 1,326,923.07
 - xi. Uncompensated allowances.....Kshs. 3,060,000
 - Total.....Kshs. 26,439,989.73



14. The Respondent prayed for the Claimant's suit to be dismissed with costs and his Counter claim to be allowed in the following terms:
 - a. A Declaration that the forced retirement without benefits was wrongful, unfair and adversely prejudicial to his status as Manager and Member of the Claimant herein.
 - b. A declaration that the forced retirement was involuntary and not based on contract.
 - c. A declaration for payment of Severance Pay and Loss of Pension in arrears not submitted for 20 years of Respondent's service.
 - d. A declaration for compensation of unpaid Gratuity, Uncompensated allowances as calculated in paragraph 14 above.
 - e. A declaration that the Claimant violated the Respondent's rights herein to fair labour practices namely fair remuneration, reasonable working conditions including minimum terms and conditions of service as protected under Article 41 (1), (2) (a) & (b) of the Constitution and the provisions of the Employment Act, 2007.
 - f. A declaration that the forced retirement which was involuntary and not based on the contract is unjust and inequitable and contravenes provision of the constitution and labour laws and be reduced to normal retirement with full benefits and unpaid arrears of unpaid dues.
 - g. A declaration that the retirement of the Respondent without payment of the accumulated arrears and benefits was unfair and unlawful.
 - h. Certificate of service.
15. The matter was set down for hearing on various dates.
16. The Claimant called Japheth Kimutai Butia, its chairperson who testified as CW1. Mr Kimutai adopted his witness statement as his evidence in chief and relied on the documents filed by the Claimant in support of its case. CW1 in his testimony stated that the Respondent was the Claimant's manager and that during the course of his engagement with the Claimant, he misappropriated money and goods belonging to the Claimant.
17. According to CW1, when the Claimant realized that the Respondent owed it huge sums of money, the management held several meetings with the Respondent who promised to pay but did not keep his word.
18. CW1 stated that the Respondent was given a retirement notice and asked to repay the debt but he only paid Kshs 5000 out of Kshs 4,946,814 he owed the Claimant. He averred that the Respondent wrote to the Claimant proposing a payment plan but the Claimant declined the proposal and as a result, he requested that his terminal dues be used to clear the debt.
19. On cross examination, CW1 stated that the Claimant was required to give the Respondent one year's notice before retiring him but stated that the Respondent requested to be retired early and was given a notice of one month on 31st December 2019 to take effect on 31st January 2020.
20. CW1 also conceded that the Respondent was not in employment when the invoices filed in court were generated on 10th February 2021. He stated that the Claimant's auditors did not query the invoice numbers appearing more than once. He however stated that the Claimant's claim is based on the audited accounts and what was incurred. The Claimant's witness admitted that the Claimant owes the Respondent Kshs 500,000.



21. In re-examination, CW1 maintained that the Respondent was retired by the Claimant upon his request and that the matter was not reported to the police since the Respondent kept promising that he would pay his debts to the Claimant.
22. The Respondent testified on 31st October 2023 as RW1 and adopted his witness statement recorded on 27th January 2023 as his evidence in chief. He also relied on the documents he filed in court in his defense and in support of his claim. RW1 denied owing the Claimant any monies and maintained that he already paid the Claimant Kshs. 5.4 million as at October 2019. It was his contention that the Claimant owed him Kshs 26,439,989.75 as his terminal dues.
23. Upon being cross examined, RW1 maintained that he had repaid a total of Kshs. 5.4 million as evidenced by the sales payments report for the period 1st January 2019 to 14th December 2019 in his bundle of documents. RW1 however admitted that in his letter dated 20th February 2020, he had proposed to pay Kshs 5000 per month, and Kshs 1,000,000 to Kshs 2,000,000 by end of December 2020 but did not make good his promise as his offer was declined by the Claimant. He denied that he was agreeable to his terminal benefits being used to offset his debts as alluded to by the Claimant.
24. The Respondent in his testimony maintained that he never went on leave for 15 years in the 20 years he worked for the Claimant and was also not paid overtime despite performing duties over and above his job description. He urged the court to grant him the reliefs he is seeking in his Counter Claim

The submissions

25. The Claimant filed its submissions on 30th November 2023 and framed the issues for determination to be:
 - i. Whether the Respondent owes the Claimant amount of Kshs.4,917,694/=.
 - ii. Whether the Respondent is entitled to reliefs sought in the Counter-claim.
26. On the first issue, the Claimant submitted that the list of debtors attached to the Claimant's documents, shows the Respondent plus a list of people whom he advanced money in their names. It is averred that the said list also entails the breakdown of the total sum which is being claimed by the Claimant herein.
27. According to the Claimant, from the minutes of the meetings held between the parties tendered in court as evidence, the Respondent had made suggestions on how he would pay the debts. It is further submitted that at trial, the Respondent testified and confirmed that he was present in the special management committee meeting held on 18th January 2019 at County Co-operative Commissioner Hall where he indicated at page 48 of the minutes that he was going to sell his personal belongings and clear the debt by 31st March 2019.
28. The Claimant also submitted that the Respondent during trial admitted that he wrote the letter dated 20th February 2020 making a request to pay Kshs 5,000 per month and one million to two million by 31st December 2020 and the remaining balance at the end of the 31st December 2021.
29. The Claimant submitted that during examination in chief, the Respondent testified that he had finished repaying the loan and produced copy of sales payment report. The Claimant has submitted that from a perusal of the sales report, the last payment was made on 31st October 2019 and that the said payments were never backed up with Invoices to ascertain their correctness.
30. It is therefore the Claimant's submission that the Respondent owes it Kshs 4,917,694.



31. On the second issue, the Claimant maintained that the Respondent is not entitled to the prayers he is seeking in his counterclaim. According to the Claimant, the Respondent was served with a retirement notice which required him to pay his outstanding debts, submit list of debtors and creditors, handover all the assets belonging to the society and submit post dated cheques before the end of retirement notice to enable the Claimant process his dues. According to the Claimant, the Respondent failed to comply with the terms of the retirement notice and as such his dues could not be released to him.
32. Regarding the reliefs sought by the Respondent in his counter claim, in response to the claim for severance pay, the Claimant submits that the Respondent is not entitled to severance pay as his termination was not on account of redundancy but rather he had attained retirement age.
33. On the claim for under payment of wages and unpaid leave, it is the Claimant's submission that there was no cogent evidence tendered before the Court by the Respondent to ascertain that he was underpaid and not paid his leave dues.
34. With regard to the claim for gratuity, the Claimant submits that the Respondent is not entitled to the same since there was no arrangement between the employer and employee over and above the statutory NSSF arrangement.
35. On the claim for housing, responsibility, travelling and uncompensated allowances, the Claimant has maintained that the Respondent is not entitled to the allowances he is seeking as he was paid gross monthly salaries, which were inclusive of allowances. It is submitted that the Respondent in during cross-examination admitted that he received his gross monthly salary.
36. On the claim for Payment in lieu of notice the Claimant submitted that during the hearing, RW1 testified in cross-examination that he had been paid all his dues prior to retirement notice being issued and as such there was is no payment pending.
37. On the claim for Overtime, it is the Claimant's case that the Respondent did not provide any evidence to support his claim of overtime. It is submitted that there was no evidence of a roll signed to support the claim for overtime or a letter to the employer asking for overtime since 2000 to 2019 when he was in office.
38. Lastly, as regard the Respondent's claim for compensation for performing other duties, the Claimant has contended that the Respondent was only exercising oversight role, which was part of his work obligation as the Claimant has an accountant and enough personnel to do various duties.
39. In the end, the Claimant urged the court to allow the claim, find that the Respondent owes it the sum of Kshs. 4,917,694 an to dismiss the Respondent's counter-claim with costs.
40. The Respondent in his submissions filed in court on 5th February 2024 submitted that the Claimant's witness, CW1 in his evidence could not produce audited accounts to confirm or verify payments made. In his submission that no single invoice can be used twice in accounting, the Respondent maintained that CW1 could not account for the entries on page 150 on the further list of Claimants documents as invoice No. 711 has been posted 7 times for dates ranging from 22/01/2011 and 31/7/2017.
41. While submitting on the prayers sought by the Respondent in his counterclaim, the Respondent stated that he worked for the Claimant for 20 years without security of tenure due to frequent changes in Management in Cooperatives only to be forced to retire at the behest of CW1 who had assumed Chairmanship of the Claimant. The Respondent further stated that having worked on poor pay and poor working conditions, he ought to be compensated for the good work he executed as the manager of the Claimant.



42. The Respondent thus urged the court to find that the debts alluded to in the claim had already been paid; find that his counterclaim is merited and to grant the Respondent a decent sent off for his patriotic service to the Claimant.

Determination

43. From the pleadings on record, the oral testimonies tendered in court and the submissions of the parties, I find that the issues that fall for this court's determination are;

- i. Whether the Claimant has proved that it is entitled to the reliefs it is seeking
- ii. Whether the Counter claim is merited
- iii. What orders should issue?

44. On the first issue, the Claimant during trial and in its submissions maintained that the Respondent owed it Kshs.4,917,694/=. The Respondent on his part has contended that it already paid the Claimant the money he owed it.

45. In support of its case, the Claimant filed a membership register, copy of the debtors list, statement and invoices as at 31st December 2019. The Respondent's letter dated 20th February 2020, the Claimant's letter dated 28th April 2020, invoices and account statements as well as the minutes of the meetings held at the Claimant's co-operative were also filed by the Claimant in support of its case.

46. From the evidence on record, it is not in contest that the Respondent as the manager of the Claimant owed some monies to the Claimant prior to his retirement. In fact, from Respondent's letter dated 20th February 2020 which he did not dispute during hearing that he authored, the Respondent admitted to owing some money to the Claimant and made a proposal on how to settle his debts. From this piece of evidence, the Respondent's defense that he had settled his debts with the Claimant as at October 2019 is therefore not true.

47. The Claimant responded to the Respondent's letter vide a letter dated 28th April 2020 where it declined the Respondent's proposal. From that letter, the Claimant was demanding Kshs. 4,368,207 from the Respondent.

48. I have perused at the Respondent's list of documents dated 27th January 2023 and did not find any documentation evidencing that the Respondent paid the outstanding debts upon being issued with the letter dated 28th April 2020.

49. It is therefore my considered view that the Respondent owes the Claimant Kshs. 4,368,207.

50. As regard the second issue with respect to the Respondent's counterclaim, the basis of the Respondent's claim as I understand is that he was forced to retire by the Claimant and also, that he was not paid his terminal dues.

51. The Claimant on the other hand denied involuntarily retiring the Respondent and averred that the Respondent requested to be retired. In response to the allegation that the Respondent was not paid his terminal dues, the Claimant's witness CW1, in his testimony stated that the Respondent agreed to have his terminal dues utilized to settle the debts he owed the Claimant.

52. CW1 in cross-examination stated that under the Co-operatives Act, the Claimant was required to give the Respondent one-year notice prior to his retirement. Although the Claimant alleged that the Respondent requested to be retired early, no evidence was tendered in court to confirm that the



Respondent was agreeable to the decision to retire him on a one-months' notice. There was also no evidence that the Respondent was entitled to one-year notice under the Co-operatives Act.

53. It is however evident that the Claimant forced the Respondent to retire early. There is no evidence of any process undertaken to justify the early retirement. I thus find that the decision to retire the Respondent early was unlawful.

54. I have also not found any evidence showing that the Respondent agreed that his terminal dues be used to offset his outstanding debts with the Claimant.

55. I will therefore address the terminal dues sought by the Respondent in his Counter-Claim in separate heads as hereunder:

i. Three months' pay in lieu of Notice

The Respondent did not tender his employment contract to prove that he is entitled to three months pay in lieu of notice. The *employment Act* under section 35(1)(c) provides for one month notice which I award at Kshs.39,100 as evidenced by the Respondent's salary schedule for January 2020.

ii. Payment for breach

Under this head, the Respondent in his Counter Claim sought for 12 months compensation. In view of this court's finding that the Claimant unprocedurally retired the Respondent and taking into account his length of service, I grant the Respondent 12 months' salary totaling to Kshs. 408,000 under this head.

iii. Allowances

The claim for allowances must fail totally as the Respondent did not prove what allowances he was entitled to.

iv. Underpayment

The Respondent in a managerial position did not provide evidence of what he was entitled to so as to enable the court make a determination based on the minimum wage applicable. This claim therefore fails.

v. Severance pay

Under section 40(1)(g) of the *Employment Act*, 2007, only employees separating with an employer on account of redundancy are entitled to payment of severance pay. The claim for severance pay is declined.

vi. Gratuity

The Respondent has not adduced a contract of service or his terms and conditions of service that would shed light on whether gratuity was incorporated in his contract of service. The prayer for gratuity fails.

56. Consequently, the Respondent is entitled to Kshs. 447,100 as his terminal dues which the Claimant is entitled to set off against what the Respondent owes it.

57. Flowing from the above, and noting that the Respondent owes the Claimant Kshs. 4,368,207, I make the following orders:

a. Judgment is entered for the Claimant in the sum of Kshs 3,960,207.



- b. A Declaration that the forced retirement without benefits was wrongful, unfair
- c. The Respondent is awarded terminal dues of Kshs. 447,100 which has been set off against the amount the Respondent owes to the Claimant.
- d. Each party will bear its own costs.

58. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 19TH DAY OF DECEMBER, 2024.

MAUREEN ONYANGO

JUDGE

