



**Auma v County Government of Kisumu (Cause . E005 of 2021)
[2024] KEELRC 13448 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13448 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE . E005 OF 2021
JK GAKERI, J
DECEMBER 18, 2024**

BETWEEN

FLORENCE AUMA CLAIMANT

AND

COUNTY GOVERNMENT OF KISUMU RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit by memorandum of claim filed on 22nd January, 2021 which was subsequently amended on 27th January, 2023 and filed on 2nd February, 2023 alleging unlawful withholding of the deceased's dues.
2. The Claimants case is simply that her husband the late Mr. Felix Odhiambo Opata was appointed as a member of a Task Force on Irregular and Multiple Allocation of public land in Kanyakwar, Kibos, Mamboleo, Milimani, Nyalenda, Dunga, Maseno and Lake Victoria Reserves Riparian between 200 - 2015 (herein after Task Force) by the County Government of Kisumu, effective 22nd August 2016 for 120 days at Kshs.10,000.00 per day.
3. It is the claimant's case that her late husband worked diligently, faithfully and tirelessly and a report was prepared and submitted to the County Government of Kisumu.
4. The claimant avers that although the husband was paid Kshs.190,000.00, for 19 days, the sum of Kshs.1,010,000.00 remains outstanding.
5. The claimant prays for:
 - i. Finding that the withholding of the claimant's dues is illegal and unfair.
 - ii. A Court Order to compel the respondent to pay the claimant's statutory entitlements and dues with an interest of 30% effective 30th June, 2017.



iii. Costs of this suit.

Respondent's case

5. By a statement of defence dated 26th May, 2023, the Respondent denied all the contents of the memorandum of claim, save for the Court's jurisdiction and prays for dismissal of the suit with costs.
6. Puzzlingly, although the respondent filed a Notice of Preliminary Objection dated 26th June, 2023, the same was not prosecuted.

Claimant's evidence

7. CWI, Florence Auma relied on the letter dated 22nd August 2016 as evidence that her husband was appointed a member of the Task Force as well as Gazette Notice No. 6514 dated 25th June, 2016 published on 19th August, 2016.
8. That the Task Force was to last for 120 days from 19th August, 2016 and the report was dated 30th June, 2017, 270 days later perhaps owing to the time it took to compile the report.
9. CWI maintained that her husband was entitled to Kshs.10,000.00 per day the fact that neither the Gazette Notice nor the letter of appointment had any figure notwithstanding.
10. It was her evidence that the letter on allowances payable was written by Mr. Mwamu, the chairman of the of the Task Force although the letter did not indicate that it had any annexures.
11. The witness, however admitted that she had no basis of the sum of Kshs.10,000.00 or evidence of an attendance register and admitted that the copy of minutes relied upon were not signed. It was her testimony that meetings were being held at the Respondent's boardroom.
The Claimant admitted that she did not know what reimbursement meant as per the Gazette Notice but maintained that the Task
12. Force was given a specific task which it discharged as it visited Land Registries and the National Land Commission Registry. The witness admitted that she had no receipts of expenses incurred by her husband, insisting that he was appointed and worked for the County Government of Kisumu and there was a contract of employment between her husband and the County Government of Kisumu.
13. It was CWI's testimony although her husband accepted the appointment she had no proof.
14. On re-examination CWI testified that the appointment was for 120 days as per the Gazette Notice and the appointment letter and payment was Kshs.10,000.00 per day as per the Gazette Notice.

Respondent's evidence

On cross-examination RWI, Norah Opondo confirmed that a Task Force was appointed by the County Government and Gazetted and the deceased was not a member of the same. However, the witness admitted that she did not have a copy of the Gazette Notice and could not recall the claimant's name being No.4 on the list.



15. The witness admitted that the respondent did not file any document to counter the claimant's case. That the claimant did not receive any letter as far as RWI could tell as in Case No. E045 of 2021 George Otieno Weda V County
16. Government of Kisumu, the claimant was not listed as a member of the Task Force and there was no indication that the Task Force commenced its work and had no evidence of the work done.
17. The witness, however, admitted that Mr. Mwamu had been appointed the chairman of the Task Force but was unaware of any report being presented by Mr. Mwamu and had not seen one.
18. The witness admitted that Architect Derek Obura tentatively approved the Work Plan of the Task Force, but maintained that the work was not done and no report was presented to the County Government but had no evidence of non-completion of task or complaint about the Task Force.
19. The witness denied being aware of Civil Case No. 30 of 2020 by Mr. Mwamu and confirmed that she had no records that the deceased was paid by the County Government as no work was done as the project collapsed and the minutes on record were unsigned and thus not minutes at all but had no alternative minutes.
Claimant's submissions
20. On employment, counsel urges that the deceased was appointed by the respondent to work for a specified period for a sum of money and was therefore an employee and the court has Jurisdiction to hear and determine the suit.
21. Counsel further submits that the deceased Mr. Felix Odhiambo Opata was a member of the Task Force on Irregular and Multiple allocation of public land as per the Gazette Notice No. 6514 and Letter of Appointment dated 22nd August 2016 notwithstanding RW1's denial.
According to Counsel, the Task Force completed its task.
22. As regards payment, Counsel submits that CW1 admitted that Part Payment had been made and in Kisumu Cause No. 30 of 2020 Aggrey Mwamu V. County Government of Kisumu, the Claimant admitted having been paid Kshs. 330,000 out of Kshs. 1,800,000.
23. That the deceased was paid Kshs. 190,000.00 for 19 days only and the balance was outstanding as the deceased rendered services
Respondent's submissions
24. Counsel for the respondent submits that the suit is liable for dismissal for want of merit as the Claimant had failed to establish the foundation of her allegations as by law required.
25. Counsel urges that the claim for withheld salary is unsustainable as the deceased was a member of a Task force not an employee of the respondent, a kin to a consultancy and no claim lay under the [Employment Act](#).
26. Reliance was made on the decision in George Onyango V. Board of Governors of Sacred Heart Primary School (2013) eKLR on the status of a Consultancy agreement to urge that the court lacks Jurisdiction in such matters.



27. On statutory dues, Counsel submits that the parties had no continuing obligations after the 120 days as stipulated by the Gazette Notice and the Claimant had no evidence of signed minutes, receipts/ expenses or basis of the amount owed.
28. Counsel further submits that special damages must be specifically pleaded and proved, yet the prayers are silent on the amount sought.
29. Reliance was made on the decision in *Gella V. Casman Brown* (1973) EA 358 to underscore the equitable principle that he who seeks an equitable relief must approach the court with clean hands.
30. It is however unclear as to how the maxim applies to the instant case where the reliefs sought are not of an equitable nature.

Analysis and determination

31. It is common ground that the respondent constituted a Task Force on irregular and multiple allocation of public land in defined areas of the County from 2000 - 2015 vide Gazette Notice Number 6514 published in the Kenya Gazette on 19th August, 2016 and its members were Eba Eban Orwa, James Aggrey Mwamu Advocate, Betty Okello, Felix Opata Chamber of Commerce Mohammad Ibrahim Hassan Edmond Onyango Magdalene Wssame (Ms) and George Weda.
32. It is also not in contest that Mr. Mwamu was appointed the chairman of the Task Force whose lifespan was 120 days from the date of gazettelement, 19th August 2016.
33. Although, RWI, Nora Opondo denied that Mr. Felix Opita was a member of the Task Force she had neither the Gazette Notice nor the letter of appointment or other controverting evidence.
34. According to RWI the Task Force did not do its work and no payment was made.
35. Intriguingly, the respondent filed no documentary evidence to counter the claimant's case.
36. Evidence of who the members of the Task Force were excluding the deceased, would have embellished the assertion that the deceased was not a member or that the Task Force had not done anything and its mandate was revoked or other decision made.

In the Courts view, there is overwhelming evidence on record to

37. show that the deceased was a member of the Task Force, whether it performed his work or not.

The salient issues for determination are:

- i. Whether the deceased was an employee of the respondent.
Depending on the answer to (i) above,
 - ii. Whether the suit is statute barred.
38. As to whether the deceased was an employee of the respondent the claimant maintains that her husband was an employee of the County Government of Kisumu by virtue of the letter dated 22nd August, 2026 and the Gazette Notice. The Respondent did not
 39. testify on this issue directly as RWI maintained that she was unaware of the deceased's having been a member of the Task Force.

Granted that the deceased was a member of the Task Force, the pertinent issue for determination is whether such membership



qualified him as an employee of the respondent.

Section 2 of the *Employment Act* defines an employee to mean

40. a person employed for wages or salary and includes apprentice and indentured learner.
41. Needless to emphasize the definition of an employer under Section 2 of the *Employment Act* is very broad and includes the respondent.
Essential to the definition of employer is the express reference to the existence of a contract of service between the employee and
42. the employer, which may be oral or in writing, and whether express or implied was there a contract of service between the deceased and the County Government of Kisumu?
43. The Court is not persuaded that there was any in that the letter dated 22nd August, 2016 by Architect Derek O, Obura, the Chief Officer Land Housing Physical Planning & Urban Development of the County Government of Kisumu to the deceased at P. O. Box 148 – 40123 Mega City Kisumu, appointed the deceased to a Task Force. It did not offer him employment which is discernible from the contents of the letter.
44. The letter makes no reference to the position he was being appointed to work but to be a member of a temporary Task Force
45. whose life span was limited to 120 days. Significantly, the letter makes no reference to the terms of appointment.
46. The letter of appointment cited on the Gazette Notice CXVIII - No. 95 dated 19th August, 2016 which identified members of the Task Force by name, Objectives and Terms of reference.
47. The Task Force was free to regulate its procedure and had a quorum of 5 save for the appointment of a temporary chairman.
48. Members other than public officers could resign at will by writing to the Governor.
Notably, the Gazette Notice makes reference to payment of allowances in respect of the members and the secretariat.
The Gazette Notice was signed by the appointing Authority, the County Governor.
The contents of the Gazette Notice lay it bare that there was no contract of service between the deceased and the respondent.
49. The foregoing position is fortified by the sentiments of the Court, in *Gilbert Sule Otieno V Seventh Day Adventist Church (EA) Limited* [2014] Eklr.

“...None of the obligations, duties and responsibilities accruing to the claimant are of the genre which constitute the fundamental rights or basis conditions and terms of employment of an employee such as entitlement to a wage/salary which is an essential of a contract of service, hours of work entitlement to annual leave public holidays, accommodation or in lieu housing allowance, pension and protection against unfair or a wrongful dismissal”.



50. It trite that in determining whether a person is an employee of another, Courts have employed a multiplicity of tests such as presence of absence of control of some person, ownership of tools chance of profit risk of loss and integration; None of these tests is determinative and all relevant circumstances must be considered as held by the Canadian Supreme Court in *Ontario V Sagaz Industries Canada* [2001] 2 SCR 983: 2001 SCC 59.
51. See also *Ready Mixed Concrete (South East) Ltd V. Ministry of Pensions & National Insurance* [2010] BTC 49 and *Maurice Oduor Okech V Chequered Flag Ltd* [2013] among others.
52. From the foregoing, it is clear that the deceased was not an employee of the respondent as he had neither a contract of service
53. nor other essentials of an employment relationship such as wages/salary, job description work station, leave and many others.
Evidently, the absence of an employment relationship between the deceased and the respondent means that the Claimant cannot sustain a suit against the respondent in this Court.
54. Needless to belabour, the absence of an employer/employee relationship between the deceased and the respondent denies this
55. Court jurisdiction to hear and determine the claim herein by virtue of the provisions of Article 162(2) (a) of *the Constitution* of Kenya and Section 12(1) of the *Employment and Labour Relations Court Act*.
56. See *Samuel Kamau Macharia & Others V Kenya Commercial Bank & 2 Others*, where the Supreme Court stated thus:

“A Courts jurisdiction flows from either *the constitution* or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”.
57. The mode of operation of Task Forces is analogous to those of consultants who are typically engaged for a specific purpose for a short duration under a contract for services and are either paid allowances or a consultancy fee as may be agreed between the parties.
58. In this case the Task Force had a lifespan of 120 days to deliver a report to the Governor and the claimant believes it delivered.
59. As was in this case, members of Task Forces are paid allowance for the days worked and expenses directly incurred in the discharge of the task are reimbursed.
60. Minutes are an important indicator of performance by a Task Force as decisions are made at plenary and tasks distributed accordingly with clear timelines for reporting.
61. Regrettably, the only copy of minutes on record are unsigned and thus lack probative value.
62. Would the claimant have succeeded if the deceased was an employee of the respondent?
63. The answer to this question is regrettably in the negative on account of the limitation period.
64. According to the claimant, the deceased worked as a member of the Task Force from the date of appointment until 30th June,2017when the report was handed over to the appointing authority, H.E Jack Ranguma Governor, Kisumu County.



65. Assuming that 30th June, 2017 was the last date of “employment” and the instant suit was filed on 22nd January, 2021, simple arithmetic shows that the suit was filed after 3 years from the date the cause of action arose and was therefore statute barred.

Section 89 of the *Employment Act* provides that:

Notwithstanding the provisions of Section 4 (1) of the *Limitation of Actions Act* (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

66. Since limitation of time implicates a court’s jurisdiction, a court has no jurisdiction to hear or determine a statute barred suit for the simple reason that ‘jurisdiction’ is everything as held in *The Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd [1989] eKLR*.
67. The upshot of the foregoing is that the Court has no jurisdiction to hear and determine the instant suit and hereby downs its tools and strikes out the claimant’s suit against the respondent with no orders as to costs.
69. In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 18TH DAY OF DECEMBER, 2024.

DR. JACOB GAKERI

JUDGE

