



Ondieki v Kisii County Assembly Service Board & 2 others (Cause 87 of 2019) [2023] KEELRC 355 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 355 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 87 OF 2019
S RADIDO, J
FEBRUARY 15, 2023**

BETWEEN

KEROSI ONDIEKI CLAIMANT

AND

KISII COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

CLERK, KISII COUNTY ASSEMBLY 2ND RESPONDENT

KISII COUNTY GOVERNMENT 3RD RESPONDENT

JUDGMENT

1. Kerosi Ondieki (the Claimant), an advocate of the High Court of Kenya was elected as the Speaker of the County Assembly of Kisii in 2013 and he served until September 2017 (the Claimant asserted that he resigned but evidence of the resignation was not placed before the Court).
2. On October 4, 2019, the Claimant sued the County Assembly Service Board, Kisii, the Clerk of the County Assembly and the County Government of Kisii (the Respondents) and he stated the Issue in Dispute as:

Delay and failure to pay the Claimant’s house allowance benefits, service pay and travel reimbursement upon his clearance in 2017.
3. The 1st and 2nd Respondents filed a Response on November 15, 2019, and a Notice of Preliminary Objection grounded on section 90 of the *Employment Act*, 2007 on November 28, 2019 (on March 11, 2021, the Court directed the parties to file and exchange submissions on the Preliminary Objection, but the parties failed to comply and the Court, therefore, dismissed the objection).
4. The 3rd Respondent filed its Response on December 3, 2019.



5. In 2020, the Court sent the parties to mediation, but in a report dated October 7, 2020, the Mediator reported that the Respondents failed to participate in the process.
6. On 25 March 2022, the 1st and 2nd Respondents purported to file another Response. The Court admitted the Response on March 28, 2022.
7. The parties filed Agreed Issues on 21 February 2022, and the Cause was heard on May 12, 2022, September 26, 2022 and December 5, 2022. The Claimant and the Clerk of the County Assembly testified.
8. The Claimant filed his submissions on January 11, 2023 and the 1st and 2nd Respondents on January 30, 2023.
9. The Court has considered the pleadings, evidence and submissions.

House allowance

10. The Claimant prayed for Kshs 7,280,000/- as house allowance for the time served as Speaker. The Claimant relied on a Circular dated 18 December 2013 from the Salaries and Remuneration Commission and another one dated 21 May 2015.
11. The Claimant further urged the Court to consider the effect of section 31 of the [*Employment Act, 2007*](#) which obligates the employer to provide housing or pay a rental allowance.
12. The Respondents also relied on the Circulars produced by the Claimant, and another one dated October 24, 2016, to argue that the Claimant was only entitled to a house (in the alternative to a leased house and with rent paid directly to the landlord if the County had not constructed one), and not to the payment of house allowance.
13. The Court has looked at the Circular dated December 13, 2013. It expressly advised that Governors and Speakers be provided with a housing benefit and noted:

Please note that the provision of a house does not include payment of house allowance to the incumbent of the offices.
14. The Circular, therefore does not support the Claimant's plea for house allowance.
15. The second Circular relied on by the Claimant clarified that where the County Government had not constructed a house for the Governor or Speaker, then the County Government should lease a house and pay the rent directly to the landlord.
16. The Clerk of the Assembly testified that the Claimant had 2 homes in Kisii, and that he never expressed a desire to be provided with housing and that the Claimant was entitled to a residence and not housing allowance.
17. The documents relied on by the Claimant to claim house allowance do not support his claim. The entitlement was to a house, constructed or leased by the County Government.
18. The Court declines to allow this head of the claim.

Travel reimbursement

19. The Claimant sought reimbursement Kshs 940,000/- for a trip to Portugal and Kshs 117,000/- for a trip to Singapore.



20. To support the claims, the Claimant produced copies of an invitation letter dated 10 September 2016 from the African Institute for Capacity Building and Training, authority to travel dated 16 September 2016 from the Principal Secretary, Ministry of Devolution, electronic ticket, payment receipt for Kshs 109,085/-, visas, request dated 15 September 2016 to the Governor to approve travel to Singapore, budget for the trip to Singapore, boarding pass for 29 May 2016, undated baggage claim card for Lisbon and a boarding pass for 6 June (year not indicated).
21. The Court has perused the supporting documentation produced by the Claimant. The Claimant asserted he travelled to Portugal on May 27, 2016 to 3 June 2016 and he sought for reimbursement of Kshs 940,000/-.
22. However, the Claimant did not produce any invoices or payment records to demonstrate that he incurred reimbursable expenses of Kshs 940,000/-.
23. The head of the claim therefore fails.
24. With respect to the trip to Singapore, the Claimant sought Kshs 117,000/-. The only documentation produced by the Claimant showed that he paid Kshs 109,085/- to Kenya Airways for the ticket.
25. The letter dated September 16, 2016 from the Principal Secretary noted that the County Government of Kisii would meet the expenses for the trip.
26. On the basis of the evidence on record, the Court will allow the claim for reimbursement of Kshs 109,085/- only as against the County Government.

Non-practising and prosecutorial allowances

27. Despite claiming Kshs 2,240,000/- as non-practising and prosecutorial allowances during the period he served as Speaker, the Claimant failed to place before the Court any contractual agreement(s) that the Respondents would pay him non-practising and prosecutorial allowances.
28. The Claimant called to his aid a decision of the Court in *Erastus K Gitonga & 4 Ors v National Environmental Management Authority; Law Society of Kenya (Interested Party)* (2019) eKLR.
29. In the submissions, the Claimant made reference to a letter dated September 17, 2012. The letter was not tendered in evidence or annexed to the submissions as stated in the submissions.
30. In light of the decision in the Gitonga case (above), this Court is of the view that subject to the law of limitation, the Claimant would be entitled to non-practice allowance.
31. The Cause was filed in Court on October 4, 2019, and the Court will therefore allow this head of claim but backdated to October 4, 2016.
32. The Claimant did not place before the Court the relevant Circulars nor disclose what grade the office of Speaker was equivalent to in terms of the Circulars referred to in the Gitonga decision.
33. The Court will therefore apply the SL4 grade allowance of Kshs 15,000/- and award the sum of Kshs 540,000/-.

Practising allowance and continuous professional development fees

34. The Claimant failed to provide any contractual or other legal foundation to these heads of the claim to demonstrate that the any of the Respondents had made a commitment to meet the fees.



Gratuity

35. On account of gratuity, the Claimant pleaded a sum of Kshs 6,537,900/- being 31% of basic pay per year for the period served.
36. The payment of gratuity is either contract based or statute based.
37. The Claimant did not place before the Court any contractual documents during the hearing to show that he was entitled to gratuity.
38. However, in the submissions, he cited Gazette Notice No. 2888 of March 1, 2013. The Gazette notice set an entitlement to gratuity for county state officers at 31% of basic pay for each year served.
39. In the Memorandum of Claim, the Claimant pleaded a salary of Kshs 370,000/- but no documents were put in evidence to enable the Court to determine whether that was basic or gross monthly pay (the Claimant did not file a copy of his pay slip despite indicating so in the list of documents).

Conclusion and Orders

40. In consideration of the foregoing, the Court awards the Claimant:
 - i. Travel reimbursement Kshs 109,082/-
 - ii. Non-practice allowance Kshs 540,000/-
41. The 1st Respondent to compute and pay the Claimant 31% gratuity based on his last basic salary.
42. The other heads of claim are dismissed.
43. The Claimant has only partially succeeded. He is awarded costs on a half scale.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF FEBRUARY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

******Appearances**

For Claimant Mr Nyagaka instructed by Nyagaka S.M. & Co. Advocates

For 1st and 2nd Respondents Mr Nyachio instructed by Muchemi & Co. Advocates

For 3rd Respondent Kennedy Onsembe, Advocate, Office of the County Attorney

Court Assistant Chrispo Aura

