



**Kilakoi v Olkejuado Water and Sewerage Company (Cause 2138 of 2016)
[2023] KEELRC 357 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 357 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2138 OF 2016
SC RUTTO, J
FEBRUARY 10, 2023**

BETWEEN

ELIJAH TORET KILAKOI CLAIMANT

AND

OLKEJUADO WATER AND SEWERAGE COMPANY RESPONDENT

JUDGMENT

1. The suit was commenced by way of statement of claim dated October 14, 2016. The claimant avers that he was an employee of the respondent until his resignation. That the respondent accepted his resignation through a letter dated December 15, 2015 and undertook to facilitate payment of his unpaid salaries, family bank loan check off and statutory remittances. That by a statement dated December 18, 2015, the respondent duly approved and acknowledged the sum of Kshs 1,784,925.00 as the amount due and payable to the claimant. That the respondent only paid to the claimant's salary account a sum of Kshs 146,197.00 hence still owes him Kshs 1,638, 728.00.
2. He further avers that the respondent has not remitted his pension amounting to Kshs 1,478,700.00 to National Water CPC staff superannuation scheme as per its own computation dated December 18, 2015.
3. It is against this background, that the claimant has sought against the respondent the sum of Kshs 1,638,428.00 together with interest as well as an order that it remits his pension to National Water CPC staff superannuation scheme.
4. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim. The claim was therefore undefended. The claimant through his advocate produced an affidavit of service sworn by one Simon James on November 15, 2016, wherein he deponed that he effected service of the summons to enter appearance as well as the memorandum of claim, verifying affidavit, the claimant's list of witnesses and statement, claimants list and bundle of documents upon the



respondent. To this end, he annexed copies of the summons bearing the words “received by Christine Lenin secretary on behalf of the managing director but declined to sign. 11:45 am October 26, 2016.”

5. Consequently, on December 7, 2017, the court certified the matter as undefended.
6. When the matter came up for mention on March 15, 2022, to take a hearing date, Mr Kibet Korir, advocate, informed the court that he had been instructed to hold brief for Mr Mahiri who intended to come on record for the respondent. Subsequently, he sought to be served with the claimant’s pleadings. The court directed the respondent’s advocate to regularize his appointment. The claimant was further directed to serve the respondent afresh with its pleadings. In addition, the respondent was granted leave to file its response and such other documents it may so wish. The matter was slated for mention on May 25, 2022 for purposes of confirming compliance and taking a hearing date.
7. On May 25, 2022, the respondent’s side was absent from court and despite being granted leave by the court on March 15, 2022, it had neither entered appearance nor filed any document. Consequently, the court reaffirmed its orders that the matter proceeds as undefended. In this regard, hearing was scheduled for October 6, 2022.

Claimant’s Case

8. At the outset, the claimant adopted his witness statement to constitute his evidence in chief. He further produced the documents filed together with his claim as exhibits before court.
9. The facts of the case as presented by the claimant are as follows: that he worked for the respondent diligently for 20 years and his position in the company was technical manager. That on or about December 14, 2015, he tendered his resignation to the respondent’s managing director. That on December 15, 2015, he received a letter from the respondent’s managing director, approving his resignation and undertaking to facilitate payment of all his unpaid salaries, Family Bank loan check off facility and statutory remittances. That the respondent prepared a statement dated December 18, 2015 and approved the amount due to him at the sum of kshs 1,748,925.00 but only paid him kshs 146,197.00.
10. The claimant further states that the respondent failed to remit his pension amounting to kshs 1,478,700.00 to National Water CPC staff superannuation scheme despite its computation on the same on December 18, 2015.
11. That despite his demands to recover the outstanding amount from the respondent, they have continuously refused to make payments hence causing his family untold financial difficulties. He asked the court to allow his claim as prayed.

Submissions

12. It was the claimant’s submission that he had proved that he is entitled to the reliefs sought and that his evidence was not controverted. That the respondent had withheld his dues without any justifiable cause. In support of its submissions, the claimant placed reliance on several authorities including the cases of *Amos Munyao Mutua v Friends Diner Company Limited* Cause No 1367 of 2016, *Gordon Kinoti Anampiu vs Economic Housing Group Limited* and *Michael Wanjau Gatheru v Nakumatt Holdings Limited* cause No 58 of 2017.

Analysis And Determination

13. From the pleadings on record as well as the evidence placed before court, the singular issue falling for determination is whether the claimant is entitled to the reliefs sought.



Reliefs?

14. The gist of the claimant's case is that pursuant to his resignation, the respondent undertook to facilitate payment of all his unpaid salaries, Family Bank loan check off facility and statutory remittances.
15. In support of his case, the claimant exhibited a letter dated December 15, 2015 from the respondent's managing director in which he addresses him as follows:

“Elijah Toret Kilakoi

Re: Resignation

We acknowledge receipt of your resignation letter ref No.....dated December 14, 2015 and wish to inform you that your resignation have(sic) been accepted with effect from the date of this letter. The company will facilitate payment of all your unpaid salaries, family bank loan check off and statutory remittances in due course.

We take this opportunity to thank you for the overall contribution to the success of the company. We also take this opportunity to wish you success in your future endeavors.

Thank you and God bless.

Signed

Mr Daniel Karori Sironka

Managing Director”

16. The claimant further exhibited a statement titled “net salary arrears for Elijah Kilakoi year ending December, 2012.” The said statements contain a tabulation of his salary arrears from November, 2013 upto and including December, 2015 with the total being Kshs 1,784,925.00.
17. At the foot of the said statement, it is confirmed, approved and signed by D K Sironka.
18. As stated herein, the respondent did not enter appearance nor file a response to the claim. Therefore, the evidence as presented by the claimant was not refuted. In other words, the respondent did not tender evidence contradicting the claimant's case that it had through its managing director, undertaken to pay him his dues and that the same amounted to Kshs 1,784,925.00. Connected to this, there was no evidence that the respondent settled the said sum which was owing to the claimant.
19. In light of the foregoing, I am satisfied that the claimant has proved on a balance of probabilities that the respondent owes him the sum of Kshs 1,638,428.00 as he admits receiving the sum of Kshs 146,197.00.
20. The claimant further contends that the respondent failed to remit his pension in the sum of Kshs 1,478,700.00 to the National Water CPC staff superannuation scheme, despite its computation on the same on December 18, 2015.
21. To this end, the claimant exhibited a copy of a statement referenced “un remitted NWC pension for Elijah Kilakoi...upto December, 2015.” The tabulation as per the said statement totals the sum of Kshs 1,478,700.00 and was prepared, confirmed and signed on December 18, 2015.
22. Similarly, there is no evidence that the claimant's pension contributions were transmitted to the National Water CPC Staff superannuation scheme. However, I note that there is no communication from the claimant to the respondent advising on the remittance of his pension benefits to the said National Water CPC staff superannuation scheme.



23. Be that as it may, the pension benefits belong to the claimant hence it is his property. Therefore, I do not find any reason why the same should not be transmitted to his new pension scheme as he desires.

Orders

24. The total sum of my consideration is that judgment is entered in favour of the claimant against the respondent who is ordered to:

- a. Pay the claimant's outstanding salary arrears in the sum of Kshs 1,638,728.00.
- b. Pay interest on the amount in (a) at court rates from the date of filing the suit until payment in full.
- c. Remit the claimant's pension in the sum of Kshs 1,478,700.00 to National Water CPC staff superannuation scheme.

25. The respondent shall also meet the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Khafafa

For the Respondent No appearance

Court Assistant Abdimalik Hussein

ORDER

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 had 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.

STELLA RUTTO

JUDGE

