



**Alloy Steel Castings Limited v Githua (Cause 24 of 2016)
[2023] KEELRC 643 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 643 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 24 OF 2016
JK GAKERI, J
MARCH 14, 2023**

BETWEEN

ALLOY STEEL CASTINGS LIMITED CLAIMANT

AND

GEORGE GICHUKI GITHUA RESPONDENT

JUDGMENT

1. The claimant commenced the suit by way of a Memorandum of Claim dated 12th January 2016 alleging that the Respondent sought for an early retirement but did not properly hand over and as a result the claimant incurred losses.
2. The claimant requested the Respondent to fulfil the following handover tasks before leaving.
 - i. Updating of all legal case files and contract persons and handing them over.
 - ii. Handing over all the company documentations and files held by him
 - iii. Development of SERA stocks reports to be completed and handed over to finance and/or IT department
 - iv. IT staff to be retrained fully on SERA and all authorisations and access codes to be handed over
 - v. All payroll requirements and software access codes as well as details of all bank and maarifa contact person, to be handed over.
 - vi. Involvement in collective Bargaining Agreement, provident Fund Schemes and gratuity settlement to be finalised and handed over
 - vii. Any company property currently in your possessions is to be returned and verified.



- viii. To be available to give evidence in court on behalf of the applicant, in relation to court cases that he was handling
3. The claimant states that the Respondent held a managerial position and was a member of the company pension scheme and the claimant paid all the terminal dues but the claimant failed to hand over the matters requested thus breaching his contractual obligations.
4. The claimant states that vide a letter dated 30th November 2015 it engaged East Africa Recovery Experts to recover data from the Respondent's computer but by letter dated 7th December, 2015 indicated that the same was irrecoverable having been deliberately overwritten or corrupted by the Respondent.
5. The claimant alleges that it incurred losses as a result of the respondent's actions;
 - i. Failure by the applicant to recover sum of Kshs.32,574,311/= owing to the loss of court papers in custody of the Respondent in the case of East Africa Foundry Workers v J Ototi.
 - ii. Failure by the applicant to recover the store records in the custody of the Respondent.
 - iii. Failure by the Applicant to recover the Welfare and provident fund Records in the custody of the Respondent.
 - iv. Failure by the Applicant to recover the Annual Returns of the Applicant for the period 2000 to 2013 in the custody of the Respondent.
 - v. Failure by the Applicant to recover Accounting information of the Applicant in custody of the Respondent.
6. The claimant states that the Respondent had a duty to properly hand over all records, assets and material under his docket which he failed to do.
7. The claimant prays for an award of judgment against the Respondent for;
 - a. A declaration that the Respondent is obliged to properly hand over all the applicant's records, files and assets to the Applicants designated officers.
 - b. An order for specific performance directing the Respondent to hand over to Mr. Vinod M. Pachal and perform the following functions within 30 days of the order hereto, following;
 - i. All legal case files maintained by him, all contact persons pertaining thereto
 - ii. All company documentations and files
 - iii. Fully Developed SERA stock Reports
 - iv. Train IT staff fully on SERA
 - v. All authorised and access codes
 - vi. All payroll requirements and software access codes
 - vii. Details of all bank and marifa contact persons
 - viii. Collective Bargaining Agreements, provident fund schemes and gratuity settlements
 - ix. All company property currently in his possession
 - x. To be available to give evidence in court on behalf of the applicant in relation to the court cases that he was handling prior to his early retirement.



- c. In default of compliance by the Respondent within the period that the court shall direct an award of damages of Kshs.32,574,311/= owing to the loss of court papers in custody of the Respondent in the case of East Africa Foundry workers vs J Ototi with interest there on at court rates until payment in full.
- d. Cost of the suit with interest at the court rate until payment in full

Respondent's case

8. The Respondent filed a response to the memorandum of claim and a counter claim dated 4th April 2016 where he admitted having been employed by the Claimant but requested for early retirement.
9. The Respondent admits that the claimant required him to fulfil the tasks as stated in paragraph 4 of the memorandum of claim which he complied with.
10. The respondent states that despite complying with all the claimant's requirements he was never paid all his terminal dues.
11. He also states that he left the data in the computer he was using intact.
12. In response to the alleged particulars of loss and damage the respondent states that the case of East Africa Foundry Workers v J. Ototi is still pending in Kiambu Law courts and that all the exhibits and documents relating to the case are with the prosecutor in the criminal case.
13. He also states that all store records are maintained in the SERA accounting software in the computer server whose keys he handed over to the Managing Director, Mr. Sagoo.
14. He further states that all the files for the Welfare and Provident fund were handed over to Ms Margaret Wanjau who compiled a list.
15. He also stated that the annual returns of the group companies were handed over to Mr. Vinod and that he also trained the staff on accounting.
16. The respondent states that he fully and satisfactorily handed over all records assets and materials which were in his custody and therefore states that the claim is malicious, and vexatious brought to intimidate him after he claimed his terminal dues.
17. The respondent prays that the claim be dismissed with costs.

Counter claim

18. In his counter claim the respondent states that he worked for the claimant for a period of 28 years until 25th September 2015 when he requested for early retirement by issuing three months' notice which was accepted by the claimant.
19. The respondent states that he went through a very smooth and peaceful handing over as required by claimant until 27th October 2015 when he went to the managing director and requested that his terminal dues be computed so that he could make arrangements with his creditors since he was leaving employment.
20. The respondent states that the claimant wrote to him and reduced his working years from 28 to 24 years and he offered to pay him as follows;
 - i. Salary for the month of October 2015



- ii. Service/gratuity pay for 24 years at 15 days per year
 - iii. No accrued leave
 - iv. Deduction of provident fund contribution for the year 2003-2015
21. The respondent disputed the offer and pointed out the discrepancies to the managing director but they could not agree which led to the respondent protesting the offer and gave his tabulation.
22. The respondent states that since that time the Claimant's Managing Director became annoyed and hostile towards the respondent and interfered with the handing over process and almost threw him out of the office before the end of October 2015.
23. The respondent states that he was not paid his terminal dues and the salary for the month of October 2015 was only paid after demand.
24. The respondent states that the claimant's policy to pay gratuity for long service and retiring staff was in accordance with the CBA between the claimant and Kenya Engineering Workers Union and the Respondent states that he is entitled payment as per the policy
25. The respondent states that at the time of retirement the claimant owed him salary arrears amounting to Kshs.420,000/= and 61 untaken leave days.
26. The claimant also states that he worked on Saturdays for 5 hours for 24 years as such claims for overtime for that period.
27. The respondent prays for judgment against the claimant for;
- i. Service gratuity- Kshs.10,160,769
 - ii. Arrears Salary – Kshs.420,000
 - iii. Leave days – Kshs.598,269.23
 - iv. Overtime – Kshs.11,240,816
 - v. Cost of this suit with interest at courts rates until payment in full
 - vi. Any other Remedy the court may deem fit to grant

Reply to Respondent's Response to claim and counter claim

28. The claimant filed a reply to the Respondent's response to the claim together with the response to the counter claim dated 21st October 2016.
29. The claimant denies every averment made by the respondent and states that the Respondent maliciously tampered with the claimant's records prior to leaving employment.
30. The claimant states that the unlawful actions of the Respondent caused loss and damage to the claimant the latest being a claim of Kshs.23,685,900/= lodged by KRA which the claimant is unable to defend in the absence of records stolen, destroyed or withheld by the Respondent.
31. In response to the counter claim the claimant states that the counter claim is misleading as the Respondent worked for a different company known as East Africa Foundry works between 1986 to 1990 when he left to go study.



32. The claimant states that at the departure from the said company the respondent was paid all his terminal dues and in the event of a claim then the same is statute barred.
33. The claimant states that the Respondent was actually engaged by the claimant in the 1st December 1991 therefore he worked for the claimant for a period of 24 years.
34. The claimant states that the Respondent did not hand over all the records as he claimed.
35. It also states that the Respondent was not entitled to gratuity as he was a member of a pension scheme which the claimant remitted on behalf of the Respondent.
36. The claimant avers that the CBA did not apply to the Respondent as he was part of the management of the claimant's company
37. The claimant avers that all the Respondents dues were settled through the advocates letter dated 11th November 2015.
38. The claimant denies the Respondents claim for overtime stating that working on Saturday half day was a term in the employment contract and in any case the Respondent was part of the claimant's management therefore not entitled to payment of overtime.
39. The claimant states that the respondents counter claim is unfounded and without merit and urges the court to dismiss it with costs.

Claimant's evidence

40. The matter proceeded for hearing on the 31st January 2022 where one witness testified in support of the claim.
41. One Navaraj Sagoo who is a director of the claimant, adopted the witness statement dated 27th January 2022 which rehashes the averments in the Memorandum of Claim.
42. On cross-examination, the witness stated the respondent was in finance and operations and that he retired as the Chief Operations Officer of the group of companies.
43. The witness stated that the group of companies consisted 7 companies and that EAF Works Limited is the oldest of the companies.
44. The witness confirmed that the Respondent was first employed by East Africa Foundry Works (K) Ltd on the 16th April 1987 and he left for one year for studies and was re-employed by Alloy Steel Limited, the claimant.
45. The witness stated that the respondent failed to fully comply with the handover as he did not hand over a hard drive.
46. It was his testimony that there is no evidence to show that Margaret Wanjau received the documents as alleged by the respondent.
47. The witness further states that he was not sure if Jasdeen Sagoo was actually trained on the payroll as alleged by the Respondent.
48. The witness stated that it took them time to discover that there was some information missing in the computer and that the hard drive was dry.



49. The witness stated that he did not know if there was bad blood between the Claimant and the respondent as when the respondent requested for early retirement the claimant gladly accepted subject to handover.
50. The witness stated that the accounting information was in the computer and the documents in the computer were not handed over which costed the claimant a lot of money.
51. The witness stated that the retirement dues did not apply to the respondent as he was offered gratuity before he signed the pension scheme

Respondent's evidence

52. The respondent testified in opposition of the claim and in support of the counter claim he filed against the claimant.
53. The respondent stated that he was the Chief Operations Officer and the personal assistant of the Directors and he worked for a group of seven companies.
54. He stated that he was first engaged by EAFW Ltd but other companies later joined and he worked for a period of 28 years from 16th April, 1987 and took an early retirement on the 31st October 2015 but had taken one (1) year study leave in 1990.
55. The respondent states that upon request for early retirement, the claimant asked him to hand over which he gladly did and, on the date, when he was leaving, he was given a letter which requested him to avail himself when required which he did not have an issue with.
56. On cross-examination, the respondent stated that he was not a member of the union, no union dues were deducted from his salary and had no list of unionisable employees or those who were members.
57. The witnesses stated that the salary arrears are from the month of March 2008 to May 2014 as during that time there were non-payment from time to time.
58. The witness stated that he had accrued leave days that he had not utilised due to the nature of his work but had no evidence of application or rejection of leave.
59. The respondent further stated that he worked for 9 hours on Saturdays for 24 years hence the prayer for overtime but had no evidence to demonstrate that other employees were paid overtime.

Claimant's submissions

60. The Claimant's counsel isolated Five issues for determination
 - i. Whether the Respondent properly handed over and whether the claimant suffered loss as a result?
 - ii. Whether the Respondent is entitled to the gratuity sought.
 - iii. Whether the Respondent is entitled to salary arrears as sought.
 - iv. Whether the Respondent is entitled to leave days sought.
 - v. Whether the Respondent is entitled to overtime as sought.
61. On the first issue the claimant's counsel submitted that the respondent admitted that for every item he handed over a list was prepared and was signed by both him and the official of the claimant.



62. In addition, the claimant submitted that any item not included in a duly signed handover list was not handed over which means the list of items in the claimant's statement of claim were therefore not handed over.
63. The claimant further submitted that the laptop which the respondent was using was maliciously damaged and the contents could not be accessed and as a result the claimant suffered loss including receiving tax demands amounting to Kshs.33,041,992/= which it could not defend due to lack of documentation.
64. On the issue of gratuity, counsel submitted that the respondent relied on the contents of CBA yet he was not a member of the union and the CBA could not apply to him as he was a member of the management.
65. The claimant submitted that the Respondent was a member of the claimant's pension scheme since its inception in 2003 and was a trustee in the said scheme.
66. The counsel stated that typically gratuity is based on an agreement between the employer and the employee and in this case, there was no particular agreement between the claimant and the respondent and as such the respondent had no right to seek for gratuity. Counsel further stated that having established that the respondent was not a member of the union, he could not rely on the CBA as it did not apply to him.
67. The claimant's counsel relied on the holding in *Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi* (2019) eKLR to buttress his submissions.
68. The claimant submitted that the respondent having been a member of the pension scheme could benefit from gratuity.
69. Counsel relied on the Court of Appeal decision in *Lake Basin Development Authority v Aguko*.
70. On the fourth issue, the claimant submitted that the respondent's claim for salary arrears amounting to Kshs.420,000/= being arrears for the period between 12th March, 2008 and 25th June, 2014 was unsustainable. That the salary arrears constituted a continuing injury that had to be brought within 1 year of the cessation of the injury and since the same was never brought on time, it was statute barred.
71. The Claimant relied on the holding in *John Charo Ngumbao v Leisure Lodge Limited t/a Leisure Lodge resort* (2021) eKLR where the court held;

“The claimant further claims salary arrears for the year 2015 and unpaid leave for a total of 11 days. In my view the claim for salary arrears falls within what is referred to as continuing injury within the meaning of Section 90 of the *Employment Act* and should have been brought within 12 months. Because the claimant filed his Memorandum of Claim in 2017 the limb on salary arrears is statute barred.”
72. On the prayer for leave days, the claimant submitted that arrears in leave days was also a continuing injury that should be brought in court within 1 year from cessation of the same.
73. The claimant submits that the only leave days the Respondent would be entitled to is 11 days and not 61 days as tabulated by the Respondent.
74. As regards the claim for overtime, the claimant submitted that Saturday was an official working day that is 8 hours Monday to Friday and 5 hours on Saturday amounting to 45 hours a week. The General



wages order provides that normal work week is 52 hours as such the respondent did not work overtime as alleged.

75. The claimant urged the court to allow the claim and dismiss the counter claim with costs.

Respondent's submissions

76. In his submissions, the Respondent's counsel highlighted similar issues for determination.
77. Counsel submitted that the Respondent had a smooth handover process until the last day when he disputed the tabulation of his dues. He states that there was no bad blood between him and the claimant and he had no reason to destroy or delete any data from his computer as alleged by the claimant.
78. On the issue of payment of gratuity, the Respondent submitted that it was the policy of the claimant to pay gratuity to all long serving employees and that the gratuity was paid as a matter of policy whether the employee was unionised or not.
79. The respondent further submitted that he did not claim for gratuity as a member of the union but claimed it as a policy.
80. He further stated that the claimant had offered to pay gratuity as a show of good will but when the Respondent disputed its tabulation of the dues, the offer was no longer available.
81. The Respondent submitted that he attached a reconciliation schedule for his salary payment which confirmed that the Claimant owed him salary arrears of Kshs.420,000/=.
82. The respondent submitted that the claimant's assertion that the claim for salary arrears was statute barred could not stand as the cessation date as per Section 90 of the Employment Act means the date of exit which was 31st October 2015 as such the claim was not statute barred.
83. The respondent submitted that from the nature of his work as the group's Chief Operations Officer it was not possible to take all leave days hence the accumulation to 61 untaken leave days.
84. The respondent submitted that Section 74(1)(f) of the Employment Act requires an employer to keep a written record of its employees' annual leave entitlement days taken and days due, the respondent submitted that the claimant did not produce such a record in rebuttal of the respondent's claim.
85. The respondent submitted that its claim for overtime was not rebutted by the claimant as such prays that the same be awarded as prayed.
86. The respondent urged the court to dismiss the claim against the respondent and allow the counter claim with costs.

Determination

87. The issues for determination are:
- i. Whether the Respondent properly handed over at retirement and if the claimant is entitled to damages
 - ii. Whether the Respondent is entitled to salary arrears as prayed in the counter claim
 - iii. Whether the Respondent is entitled to the unutilised leave days
 - iv. Whether the Respondent is entitled to gratuity



88. In its Memorandum of Claim, the Claimant states that the Respondent did not properly hand over and as a result documents were lost leading to the company incurring costs amounting to Kshs.32,574,311/= which they now claim from the Respondent.
89. Regrettably, the Claimant did not attached any document in support of their claim and how the company ended up incurring such costs. In the court's view, the Claimant failed to demonstrate the nexus between the alleged conduct of the respondent and the damages claimed. The absence of evidence on how the loss was arrived at is puzzling and in particular the formula used to arrive at the figure of Kshs.32,574,311/=.
90. The Claimant did not call, as witnesses, the persons the Respondent allegedly handed over to to discount his claim.
91. The Respondent on the other hand states that he properly handed over as requested by the claimant vide the letter dated 28th September 2015 and attached hand over notes to his reply to the memorandum of claim containing a list of files and handwritten notes which documents were produced in court.
92. The claimant did not rebut the respondent's evidence with any documentary evidence.
93. The claimant has also not supported its allegation of the loss of Kshs.32,574,311/= with any documentary evidence as the loss suffered as a result of the missing documents or how the amount was arrived at. The document from the Kenya Revenue Authority does not signify any loss.
94. Significantly, the claimant did not demonstrate the procedure that respondent was supposed to have followed in handing over process as a guide to the court in establishing the regularity or otherwise of the handing over process.
95. Guided by the mantra that he who alleges must prove the allegations as encapsulated by the provisions of Section 107, 108 and 109 of the *Evidence Act*, it is the finding of the court that the claimant has on a balance of probabilities failed to establish that it is entitled to the damages claimed against the respondent.
96. In the counter-claim, the Respondent seeks for gratuity, salary arrears, unspent leave days and overtime.

Gratuity

97. The Respondents relies in the provisions of the CBA between the claimant and Kenya Engineering Workers Union dated 4th December, 2013. The Preambular provision of the agreement states that;

“This agreement shall apply to all unionisable staff members of the company who are members of the union, other than those excluded by the terms of the current industrial relations charter.”
98. The agreement further states that;

“This agreement shall cover all employees of the company who are members of the union and for whom the company deducts union dues under the check-off system.”



99. The respondent, who confirms to be a member of the management having held the position of the Chief Operations Officer invoked paragraph 22 of the CBA that provides

“All employees will be retired at the age of 55 years or earlier in case of or on the grounds of ILL HEALTH. The gratuity for long service employees who are ineligible to join the provident scheme. The following payment will be made:-

(d) 16 years and above continuous service 37 days basic pay for each completed year.”

100. From the foregoing provisions of CBA, for one to invoke the agreement, one would have to be a member of the union which is determined by membership and deduction of union dues or be ineligible to join provident scheme.

101. The Respondent was a member of the management holding the position of Chief Operations officer of the group of companies. The respondent also confirmed on cross-examination that he was not a member of the union and no union dues were being deducted. Further, he confirmed that he was a member of the Claimant’s pension scheme and infact a trustee of the said scheme.

102. From the foregoing, it is evident that the Respondent had no entitlement to invoke clauses of the CBA as it did not cover him.

103. The respondent also urged that his claim for gratuity was based on the Claimant’s policy and indeed the Claimant had agreed to pay the Respondent gratuity for 24 years at 15 days per year by letter dated 27th October, 2015 before the parties fell out on account of computation of terminal dues. Since the Respondent failed to provide a copy of the Claimant’s policy on gratuity to demonstrate its practice previously, the claim for gratuity remains unproven. Instructively, the Respondent became a member of the pension scheme in 2003.

104. The court is in agreement with the claimant’s position that an employee should not benefit from double social security as held by Court of Appeal in Lake Basin Development Authority v Aguko (Civil Appeal 61 of 2017) (2022) KECA 855 KLR;

“I think and would hold that the appellant was entitled by dint of the provisions of section 35(6) of the Act, to withhold payment of the gratuity so as not to make a double payment. It’s my finding that the trial courts judgment should be set aside only to the extent that the appellant should be allowed to deduct any sum it made as contributions to the pension scheme from the gratuity due to the respondent. . .”

105. However, for the long service the Respondent offered to the claimant, it would be fair if the claimant paid the Respondent gratuity for the years worked before the establishment of the pension scheme.

106. From the evidence in court the claimant’s witness confirmed that the Respondent was the Chief Operations Officer of a group of seven (7) companies and was a diligent and loyal employee.

107. He confirmed that the claimant was first employed on the 16th April 1987 by East Africa Foundry Workers and when he took one (1) year study leave he was re-employed by the claimant.

108. These companies worked as one group and it would be unfair to deny the claimant service pay for the four years that he worked for East Africa Foundry Workers which was the first company to be established before other companies were established.

109. Therefore, the service period for the Respondent should be calculated at 28 years instead of 24 years.



110. However, to avoid double payment, the court will only award gratuity at 15 days per year for the period prior to the establishment of the pension scheme.
111. The Respondent sought payment of salary arrears amounting to Kshs.420,000/= that accrued from March 2008 to June 2014. These are salary arrears the Respondent had not claimed from the Claimant before the Claimant sued him and did not feature in his computation of dues.
112. The court is in agreement with the claimant's argument that salary arrears are a species of continuing injury that should be brought within one year from the cessation of the injury and the Respondent having not brought the claim within the prescribed duration of 12 months, the claim is statute barred and the court has no jurisdiction to determine it.
113. Section 90 of the Employment Act, 2007 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.
114. As regards outstanding leave, the respondent confirmed on cross-examination that he was claiming 61 leave days, Kshs.598,269/= a fact confirmed by the witness statement.
115. Strangely, the respondent tendered no evidence to controvert the respondent's claim on leave days by showing that he proceeded on leave being the custodian of such documents.
In the circumstances, the respondent is awarded payment for 61 leave days.
116. On overtime, the respondent's allegation was not supported by any scintilla of evidence and as submitted by the claimant Saturday was a working day and no overtime claim was sustainable. Relatedly, the claimant was part of management.
117. A claim similar to the one before the court that the respondent worked 5 extra hours per week for 24 years without any supportive documentation or demand payment for such a long period and nothing for to buttress the claim, generally lack credibility and are difficult to sustain.
The court has no material on which to justify an award of this nature.
The claim is disallowed.
118. In the end, the counter-claim is partially successful to the extent of gratuity prior to the pension scheme and 61 leave days.

Conclusion

119. Judgement is entered for the Respondent against the Claimant as follows;
- a. Gratuity for the years served prior to the establishment of the pension scheme.
 - b. Outstanding leave of 61 days.
 - c. Costs of the suit.
 - d. Interest at court rates from the date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF MARCH 2023



DR. JACOB GAKERI

JUDGE

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 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.

DR. JACOB GAKERI

JUDGE

