



**Sunguti and 16 others v Registered Trustees of Monte Carlo Club & 3 others  
(Cause 1335 of 2016) [2023] KEELRC 581 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 581 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1335 OF 2016  
SC RUTTO, J  
MARCH 10, 2023**

**BETWEEN**

**BENSON KADIMA SUNGUTI AND 16 OTHERS ..... CLAIMANT**

**AND**

**THE REGISTERED TRUSTEES OF MONTE CARLO CLUB . 1<sup>ST</sup> RESPONDENT**

**ADMINISTRATOR OF THE ESTATE OF THE LATE STEPHEN**

**KAGIRI ..... 2<sup>ND</sup> RESPONDENT**

**GRACE NYAMBURA KUNGU ..... 3<sup>RD</sup> RESPONDENT**

**KANSAS KAGIRI ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The instant suit has been triggered by the events of 4<sup>th</sup> September, 2015, which arose out of a tenancy dispute between Monte Carlo Club and English Press Properties Ltd, its landlord at the time. This dispute had a domino effect on the claimants who were all employees of Monte Carlo Club, as consequently, they found themselves out of employment.
2. The claimants aver through their joint Memorandum of Claim dated 16<sup>th</sup> June, 2016, that their termination was without any reason and that they were not given a chance to be heard nor issued with a notification of the impending termination. They further state that despite their efforts to settle the matter amicably, the respondents has failed to settle their dues. It is on this account that each of the claimants seek to be paid one month's salary in lieu of notice, untaken leave days, house allowance, compensatory damages for unfair termination and redundancy pay as well as interest and costs of the suit.
3. The respondents entered appearance and filed a Defence dated 3<sup>rd</sup> October, 2016 through which they aver that Monte Carlo Club was under the direct superintendence of the late Stephen Kungu Kagiri



who died on 6<sup>th</sup> April, 2015. That the stoppage of the operations of the said Monte Carlo Club was as a result of the unlawful actions of the landlord and a third party and which matter is still pending in Court. The respondents have further disputed this Court's jurisdiction on grounds that the succession cause in respect of the estate of the late Stephen Kungu Kagiri is pending in Court hence the claim is premature since the respondents' hands are tied. To this end, the respondents asked the Court to dismiss the suit with costs.

4. The matter proceeded for hearing on 5<sup>th</sup> October, 2022 with each side calling oral evidence.

#### **Claimant's case**

5. The 5<sup>th</sup> claimant, Mr. Josephat Saidi Muyumba testified on behalf of the other claimants and to this end, produced a Letter of Authority to Plead and Act dated 21<sup>st</sup> September, 2022. At the outset, Mr. Muyumba informed the Court that the 7<sup>th</sup> claimant had since passed on. He proceeded to adopt his witness statement to constitute his evidence in chief and further produced the documents filed together with the claim and the supplementary documents as the claimants' exhibits before Court.
6. It was Mr. Muyumba's testimony that he had worked with the respondents for 14 years and was therefore knowledgeable about their operations. That on or about 4<sup>th</sup> September 2015 at 7:00 am, a group of unknown persons came to Monte Carlo Club under the escort of Police Officers. That the leader of the group told all the employees that they intended to carry away everything and did not expect any of them to tell them anything.
7. That when their (claimants) manager asked them who they were and what they wanted, they told him that they had a Court Order but they did not show it to the said manager and did not allow him to look at the alleged Court Order. That to their surprise, the said people ordered them out of their work premises and carried away the club items.
8. That they then told them to go home and proceeded to install other people to act as security guards with instructions not to allow them (claimants) into the building. That after about 3 days, on or about 7<sup>th</sup> September, 2015, their manager was called by the 3<sup>rd</sup> and 4<sup>th</sup> respondents and he was told to go back to the Club and establish what was happening since they had obtained a court injunction.
9. That they joined their manager and went to the Club and found that the office partitions had been broken and the place looked re-organised.
10. That the 4<sup>th</sup> Respondent told their manager that the alleged injunction required that the partitions be repaired since they had been destroyed. That on the same day, the 4<sup>th</sup> respondent who was their boss, had installed a new security team but at about 6.00 pm, another group of persons stormed the premises hosting the club and broke the door and entered the building by force. That at this juncture, they were locked out and told never to return again. That the said people claimed that they had another order which required them to vacate the offices. That prior to this, they had seen notices served on the managers of the Club hence they (managers) knew that the cases with regards to rent were ongoing.
11. That on 4<sup>th</sup> September 2015, when the first disruption took place, they had not been paid their July and August 2015 salaries and remain unpaid to date. That when they inquired from the directors, that is the 3<sup>rd</sup> and 4<sup>th</sup> respondents, they told them that there was nothing they could do under the pretext that all the documents had been carried away and in any event, they claimed that they were not the directors since the real director had died on 6<sup>th</sup> April, 2015, but this is contrary to the registration records.
12. That their manager has tried to talk to the 4<sup>th</sup> respondent, who has now installed CCTV Cameras in his new offices and whenever he sees any of them he tells the security guards not to allow anybody in.



13. Mr. Muyumba further stated that they have also tried to prevail upon the 3<sup>rd</sup> and 4<sup>th</sup> respondents in their capacities as the registered trustees/directors of the 1<sup>st</sup> respondent to address their plight, but they have repeatedly chased them away from their offices.
14. That their (claimants) former manager has also tried to plead with them but such pleas have fallen on deaf ears.
15. That it is their belief that the respondents are quite aware of the circumstances under which their employment was terminated and have totally refused to pay them their dues which include leave entitlement, service pay, salary arrears and overtime.
16. That they are currently suffering, yet the respondents have now improved their lives and moved into new offices which shows that the termination of their employment and failure to pay their terminal dues was pre-arranged in advance without their knowledge.
17. Closing his testimony, Mr. Muyumba asked the Court to allow the claim as prayed.

### **Respondent's case**

18. The respondent called oral evidence through Mr. Kagiri Kungu who testified as RW1. He identified himself as the 4<sup>th</sup> respondent. That he is one of the administrators of the estate of the late Stephen Kungu Kagiri who died in April 2015. That the 3<sup>rd</sup> respondent who was his co-administrator of the said estate has since passed on. RW1 proceeded to adopt his witness statement to constitute his evidence in chief and produced the documents filed on behalf of the respondents as exhibits before Court.
19. It was RW1's evidence that the late Stephen Kungu Kagiri was the trustee of Monte Carlo Club, a registered society under the Societies Act Cap 108, Laws of Kenya.
20. That the late Stephen Kungu Kagiri, operated a hotel & club business located along the then Accra Road, Nairobi which tenancy commenced in the year 1994. That the lease expired in 1999 and thereafter the tenancy became a protected tenancy.
21. That on the 4<sup>th</sup> September 2015 around 11:00 am, the landlord of the premises, English Press Properties Ltd through its agents Wilson M. Kariuki T/A Wiskam Auctioneers accompanied by police officers from central police station under the command of the deputy commander under the guise of levying distress, forcibly entered the premises of Monte Carlo Club and ordered the claimants and the customers out saying they were enforcing a court order.
22. That upon entering the Club premises, they damaged and or dismantled everything therein including documents and records, carted away the goods of trade and locked the premises thereby effecting an eviction.
23. That the purported court order was acquired ex-parte, without notice to the club management and through misrepresentations and non-disclosure to the Honourable Court of material facts known to the landlord at the time, that is, pending references in the Business Premises Rent Tribunal Case Nos.423 of 2005, 217 of 2006 and 316 of 2006.
24. That together with his co-administrator of the estate of the deceased, they were forced to move to Court under Certificate of Urgency and filed Nairobi High Court Civil Case No. 428 of 2015 (currently E.L.C No.110 of 2016), challenging the illegal levy of distress and eviction and they got interim orders which were served on the landlord and immediately thereafter before they could be given access to the premises, they were served with orders of status quo by a third party who was claiming to have been given tenancy by the landlord. That the case is still ongoing.



25. That therefore, the events leading to the stoppage of the operations of Monte Carlo Club and eventual termination of the claimants' employment were sudden, without notice and was as a result of the unlawful actions by third parties that is, the landlord and her agents which the claimants themselves witnessed and or were aware of and which events and actions should not be blamed on the claimants' employer.
26. That given that the documents relating to the operations of the Club were destroyed by the third parties during the fracas, he is unable to ascertain some of the claims made by the claimants but he knows as a matter of fact that each claimant used to be paid a consolidated salary and each employee used to utilize their leave days annually.

### **Submissions**

27. The claimants submitted that the closure of the premises of the Monte Carlo Club cannot be said to have been an unforeseeable event. That it was an issue within the knowledge and control of the respondents as employers and not an act of God. That upon frustration of the tenancy agreement, the respondents ought to have invoked frustration as a ground to terminate their employment. That the *Employment Act* envisages no room for silence upon termination of an employment contract of service. In support of this position, the claimants placed reliance on the cases of *Five Forty Aviation Limited v Erwan Lanoe*(2019) eKLR and *Justin Beswick v Local Ocean Conservation (LOC) Kenya Ltd* (2022) eKLR.
28. It was further submitted that the claimants had a legitimate expectation to continue working as their contracts were open ended thus creating an expectation that they would continue until retirement, unless otherwise terminated by one month notice as required by their service contracts. To buttress this argument, the claimants referred to the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR.
29. It was the claimants' further submission that the death of one of the officials of Monte Carlo Club did not extinguish the responsibilities it had nor their labour rights.
30. The claimants further submitted that the name of John Muthiani Kimanzi is missing on the front page of the claim but his name and the claims he makes are well listed within the body of the claim at number 16. That he had to manually add his name to the Letter of Authority to act and plead. That this is a minor blind spot of the drafter not going to the root of the claim.
31. On the part of the respondents, it was submitted that as the proprietor of Monte Carlo Club had passed away hence his estate was being administered in accordance with the law, the claimants' claim ought to have been made pursuant to section 66(1) (a) of the *Employment Act*.
32. It was further submitted that without a formal amendment and or leave of the Court to amend pleadings, the name of John Muthiani Kimanzi was improperly inserted in the Letter of Authority to plead and act hence should be struck out.
33. The respondents stated in further submission that the claimants have belatedly introduced the doctrine of frustration of contract and at the same time, they are arguing repudiatory breach of contract. That the evidence by the claimants that they would be rotated to other venues run by the respondents was a fishing expedition intended to support the so called repudiatory breach of contract.



## Analysis and determination

34. Flowing from the pleadings on record, the evidence exhibited, and the opposing submissions, it is apparent that the Court is being called to determine the following issues: -
- i. Have the claimants sued the right respondents?
  - ii. Does the court have jurisdiction to determine the suit?
  - iii. Whether there was unlawful and unfair termination.
  - iv. Whether the claimants are entitled to the reliefs sought.

## Respondents as Parties to the Suit

35. At the outset, I wish to point out that the claimants have not specifically pleaded the capacity in which each of the respondents has been sued and their liability in respect of the claim. Case in point, the claimants plead at paragraph 2 that

“The claimants were all employees of the respondent having worked for varied periods of time but had their employment terminated under similar circumstances ...”

At paragraph 3, they plead that

“The respondent is a society duly registered in Kenya under the provisions of the Societies Act Cap 23 (*sic*) laws of Kenya.”

In both instances, they do not specify which respondent they are referring to. In addition, at paragraph 4, they plead

“The late Stephen Kungu Kagiri and Grace Nyambura Kungu were the registered owners of the Club known as Monte Carlo Club, the 1<sup>st</sup> respondent herein”.

However, this is not true from the face of the pleadings as the 1<sup>st</sup> respondent is not Monte Carlo Club, rather the

“Registered Trustees of Monte Carlo Club”.

36. The issue of the parties to the suit do not end there as the problem is replicated in the entire claim, with the claimants referring to the respondents in a joint manner. This being an employment dispute, it was imperative for the claimants to be clear in their minds who they were suing and in what capacity?
37. Turning to the specific respondents, it is not clear in why the 2<sup>nd</sup> respondent being the “The Administrator of the Estate of the late Stephen Kungu Kagiri”, was sued, whereas the claimants’ former employer, being Monte Carlo Club is registered as a Society with office bearers.
38. Still on the issue, it is not clear why the 3<sup>rd</sup> and 4<sup>th</sup> respondents were sued in their individual capacity despite the claimants’ employer, Monte Carlo Club being a registered Society with office bearers. If I may add, it is notable that the claimants have not pleaded that the 3<sup>rd</sup> and 4<sup>th</sup> respondents have been sued in their capacity as office bearers of Monte Carlo Club or in their personal capacity.
39. It is therefore evident that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are not proper parties to the instant suit. That being the case, it is the finding of this Court that the suit against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents is bad in law and incompetent.



## **Jurisdiction?**

40. With regards to the question of jurisdiction, the respondents have stated that the late Stephen Kungu Kagiri was the proprietor of and the person who was responsible for operating Monte Carlo Club. That upon his death, his estate was to be administered in accordance with the Law of Succession pursuant to section 66(1) (a) of the *Employment Act*.
41. On the other hand, the claimants have urged that the 1<sup>st</sup> respondent being an unincorporated society and lacking in legal personality, could only be sued through its officials. That the death of the late Stephen Kagiri did not extinguish the responsibilities the Club had.
42. It is not in dispute that the claimants were all employees of Monte Carlo Club hence had individual contracts of service to that effect. With regards to its legal status, it is common ground that Monte Carlo Club is a registered Society under the *Societies Act*. This therefore discounts the arguments by the respondents that the late Stephen Kungu was the sole proprietor of Monte Carlo Club. If this was the correct position, then the said Club would have been appropriately registered as a sole proprietorship business as opposed to a society.
43. As per the respondent's evidence, two of the office bearers being Stephen Kungu Kagiri and Grace Nyambura have since passed on. This leaves RW1 as the only surviving office bearer. Therefore, Monte Carlo Club still has an office bearer in office and the death of the two office bearers did not in any way affect its legal status.
44. In addition, there is no evidence that Monte Carlo Club being the employer in this case, was wound up hence ceased to exist as a Society. Therefore, its legal status is still intact.
45. In light of the foregoing, I am in agreement with the claimants that the death of one of the office bearers of the said Monte Carlo Club did not extinguish its responsibilities as an employer. Therefore, it is not true that following the death of the late Stephen Kungu Kagiri, the claim fell for determination under the *Law of Succession Act*.
46. What this boils down to is that the matter is properly before this Court noting that the employer being Monte Carlo Club has been sued through its Registered Trustees.

## **Unfair and unlawful termination?**

47. It is not in dispute that Monte Carlo Club ceased operations following the events of 4<sup>th</sup> September, 2015 when in a bid to levy distress for recovery of rent arrears, auctioneers raided the premises hosting the Club and effected an eviction. It was the claimants' testimony that they were ordered out of the Club premises, being their work place, by the said auctioneers who were accompanied by police officers. That when they went back on 7<sup>th</sup> September, 2017, after the 3<sup>rd</sup> and 4<sup>th</sup> respondent had obtained a court injunction, they found the office partitions had been destroyed. That on the very same day at around 6:00 pm, another group stormed the premises hosting the Club, locked them out and told them never to return again.
48. It was the respondents' case that Monte Carlo Club ceased operations as a result of the unlawful acts of third parties and that to date, the cases in respect of the dispute regarding the tenancy of the premises previously hosting the Club, are still ongoing.
49. What can be deduced from the foregoing is that the said Monte Carlo Club is not in operation as at now. From the narration by both parties regarding the events of 4<sup>th</sup> September, 2015, the claimants'



employment ended unceremoniously due to the actions of third parties following the eviction of Monte Carlo Club from the premises it was occupying at the time.

50. The respondents exhibited photographs in the aftermath of the raid by the auctioneers and it is apparent that the premises hosting the Club were destroyed. This was also confirmed by the claimants who stated that when they went to the Club on 7<sup>th</sup> September, 2015, they found the partitions destroyed and the place had been reorganized. They further stated that the auctioneers who stormed the premises took away items of the Club in three lorries and asked them to go home.
51. Therefore, it is apparent that the cessation of the employment relationship between Monte Carlo Club and the claimants was not at the behest of the employer and was as a result of intervening events from third parties outside the employment relationship.
52. It can be very well said that the employment contract was frustrated moreso noting that the substratum of the employment relationship, being the continued operation of Monte Carlo Club, was destroyed.
53. The Court of Appeal in the case of *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR, had this to say with regards to the doctrine of frustration:-

“According to *Halsbury's Laws of England* (3rd edition), volume 8 pages 185 (ii), the Doctrine of Frustration para 320:

“...the doctrine of frustration operates to excuse further performance where

- (i) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and
- (ii) before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party, and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.”

The modern context of frustration was first formulated by Lord Radcliffe in the case of *Davis Contractors Ltd v Fareham U.D.C.*, (1956) A.C 696 which sets out the radical change in the contractual obligation at p. 729:

“...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. “Non haec in foedera veni”. It was not what I promised to do.”

54. The circumstances of this case are very clear that the claimants’ individual contracts of service were frustrated and parties were excused from further performance of their respective obligations.



55. The claimants contended that the closure of the Club was not an unforeseeable event and that the respondents could have entered into rent arrangements with their landlords. What the claimants are suggesting is quite subjective in my view and is just but one of the remedial actions the respondents could have taken. From the record, the respondents were equally aggrieved by the actions of the landlord through the auctioneers and indeed, moved to Court and secured an injunction which did not last long as the third party who had secured tenancy of the premises obtained orders in his favour. From the evidence of RW1, the cases related to the tenancy of the premises were still pending in Court at the time this matter went to trial. It cannot therefore be said that the employer was aware of the events that transpired and the claimants' termination was prearranged.
56. Having found that the claimants' individual contracts of service were frustrated, the question is whether the respondents were obliged to proceed and terminate the said contracts under the *Employment Act*, 2007.
57. On this issue, the claimants invited the Court to borrow the determination in the case of *Justin Beswick v Local Ocean Conservation (LOC) Kenya Ltd* (2022) and find that upon frustration of the tenancy agreement with the landlord, the respondents ought to have invoked frustration as a ground to terminate the employment contracts.
58. I find the above case to be quite distinct from the one herein for the reason that in the Justin Beswick case, the employee's termination was as a result of the employer's failure to renew his work permit. The circumstances of the said case are similar to those in the case of *Five Forty Aviation Limited v Erwan Lanoe* (2019) eKLR.
59. As stated herein, the employment relationship between the claimants and Monte Carlo Club ended unceremoniously due the actions of third parties. In the circumstances, was it possible for the respondents to formalize the disengagement and apply the provisions of section 41 of the *Employment Act*? In my considered view, given the circumstances under which the parties separated, the answer is no. If anything, the circumstances leading to the disengagement appear to have been quite chaotic to allow for a normal separation. The premises hosting the Club had been destroyed and a new tenant had taken over. In both the *Justin Beswick case* and the *Five Forty case*, the employers were still in operation unlike this case.
60. Indeed, I pose to ask, what purpose would have been served by undertaking the procedure under Section 41 of the *Act*? In my view, such an exercise would only have been for ritualistic purposes and would not have been within the spirit of Section 41 of the *Employment Act* whose sole objective is to ensure that an employee is accorded a fair hearing prior to termination.
61. The total sum of my finding on this issue is that the manner in which the claimants left the employment cannot be termed as amounting to unfair and unlawful termination.
62. Having determined as much, what reliefs if any, avail the claimants?

### **Reliefs**

63. As the Court has found that the claimants were not unfairly and unlawfully terminated, the only logical relief that can be awarded is in respect of their terminal dues where applicable.
64. It is only the 6<sup>th</sup> and 12<sup>th</sup> claimants, Isiah Zachariah Wamalika and Thomas Opuka Nyangweso who prayed for award of service pay. However, there was no evidence of an employment contract between the 6<sup>th</sup> claimant and Monte Carlo Club, thus his claim to this extent cannot be sustained.



65. In the case of the 12<sup>th</sup> claimant, it is clear from his pay slip in respect of April, 2015 that the employer was not remitting his NSSF dues. Further, there is no evidence that he fell within the exclusions under section 35 (6) of the Employment Act. He is therefore entitled to service pay for the period served.

### Orders

66. In the final analysis, the joint claim substantially fails save for the 12<sup>th</sup> claimant who is awarded service pay for five years in the sum of kshs 25,255.00. Interest shall apply at court rates from the date of Judgement until payment in full.

67. The rest of the claims are dismissed with no orders as to costs.

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

**STELLA RUTTO**

**JUDGE**

### Appearance:

For the Claimant Mr. Muchiri

For the Respondents Mr. Ogeri

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

