



**Kenya Union of Domestic, Hotels, Educational Institution &
Hospital Workers v Murang’a University of Technology (Cause
E057 of 2021) [2023] KEELRC 1271 (KLR) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1271 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E057 OF 2021
ON MAKAU, J
MAY 19, 2023**

BETWEEN
**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTION &
HOSPITAL WORKERS CLAIMANT**
AND
MURANG’A UNIVERSITY OF TECHNOLOGY RESPONDENT

JUDGMENT

1. The claimant union brought this suit on behalf of 45 members (herein after called the grievants). The grievants were formerly employed by Murang’a College of Technology (MCT) before it was upgraded to become the respondent University. The claim was Amended on 30th May, 2022 and it seeks the following reliefs.
 - a. The Respondent be ordered to release all Terminal Benefits due to the grievants within 10 days of the determination of this matter.
 - b. The Respondent be ordered to release all Terminal Benefits with interest at court rates calculated from 2013 when the Grievants’ Benefits became due.
 - c. The Respondent be ordered to pay damages for the suffering the grievants have undergone due to the delay.
 - d. Cost of this suit be paid for by the Respondent.
2. The respondent filed defence on 15th July, 2022 contending that the suit is time barred by dint of section 90 of the [Employment Act](#). Further the claim is unfounded and should be dismissed with costs.



Evidence

3. The Claimant called Mr. Joseph Thiong'o, one of the grievants as CW1. He relied on his written statements dated 17th November 2021 and 3rd November 2022 as his evidence. He further produced 22 documents as exhibits. He testified that he was employed by the MCT and his appointment letter referred to the collective agreement between the Ministry of Education and the claimant herein.
4. He further testified that the MCT was elevated to University in 2013 and all the employees were told to reapply for their positions. No negotiations were held with the workers during the transition. When they raised concerns they were told that they were free to leave if not willing to work for the University. They were further told by the Deputy Principal that those who apply would have their accrued benefits paid at the time of retirement.
5. All the employees applied and were given either permanent appointment or fixed term contracts. CW1 was given a new PF Number by the University and the terms of service changed completely. Instead of gratuity he enrolled for pension.
6. He testified that clause 31 of the CBA provided for gratuity and it was paid to all employees upon retirement. When he retired he was only paid dues for the 5 years he worked for the University and the 19 years he worked for MCT he was not paid. He wrote a letter but he was told to wait because it was being considered and followed up. He referred to the respondents' letter dated 24th August 2018 which gave the said assurance.
7. He further testified that Auditor General confirmed in the report (Exh.19 page 2) that the respondent had Kshs.104,769,252.00 as payable to former MCT staff which includes Kshs.8,858,091.00 wages and Kshs.6,916,100.00 gratuity.
8. On cross-examination, he contended that the Auditor General's report on payables validates his claim herein. He stated that his letter of appointment by MCT referred to the CBA which provided for gratuity under clause 31 to employees who retired. He reiterated that the Legal Notice Number 129 of 2011 provided for transition from the MCT to the University and he applied for the transition and he was given a new contract which he accepted.
9. He confirmed that the staff of MCT who retired before transitioning to the University in 2013 were paid gratuity. He further confirmed that gratuity was paid to the staff who retired in the public interest or on medical grounds after serving for at least 10 years but through a circular released in 1996 the said service period was reduced to 5 years.
10. On reexamination he contended that he was not explained the legal notice for the transition. However, he was given opportunity to apply for the job in the university.
11. Mr. Peace Agufana, the respondents' Registrar Administration and Planning testified as RW1 and basically adopted his written statement dated 23rd June, 2022. He also produce two bundles of documents as exhibits for the respondent. In brief he contended that the claimant is not entitled to the reliefs sought.
12. He testified that all the employees of the MCT except one John Munene, transitioned to the University staff. Further that Mr. Munene then filed Cause No.E015 of 2020 at ELRC Nyeri and the case was determined.
13. RWI further testified that there was no break in service for the grievants during the transition and as such the claim for salary in lieu of notice does not arise. Further the claim for severance pay is not remitted since the grievants were not victims of any redundancy. Likewise, the claim for gratuity was



- opposed for reason that it was not a benefit stipulated in the letter of appointment by the university. Further, that gratuity was provided in the CBA and the schemes of service for the MCT only on account of retirement.
14. RW1 testified that during the transition, the MCT staff had the option of transferring to other institutions; transition to the university subject to appraisal; or retire normally or under early retirement. He contended that the transition report does not mention service gratuity to any one and there is no document committing the university to pay gratuity to the grievants.
 15. On cross examination, he testified that CBA provided the terms of service for workers at the MCT but upon transitioning to the university, a new dawn came and they were given new contracts. He contended that there was a legal notice indicating how employees were to transition. Further, that a committee was set up to address all the issues concerning staff and it fully addressed them. However, he could not confirm whether the grievants belonged to any union while at the MCT or whether they were represented in discussing the transition. He could not also confirm whether there was a document committing the university to pay gratuity to the grievants. He could also not confirm whether they were paid gratuity when their services at MCT ended as the report by the transition committee is silent about that.
 16. However, he contended that, while under the university the employees were entitled to gratuity. He clarified that at the transition from MCT, there was no termination or redundancy and therefore they were not paid salary in lieu of notice, severance pay or gratuity. He clarified further that a legal notice by the president wound up MCT and set up the university.
 17. He confirmed that letters from the university provided for gratuity but those in permanent terms, their letters provided for contribution of pension.

Submissions

18. The claimant submitted basically on two issues: whether the claim is time barred; and whether the grievants are entitled to the reliefs sought. On the first issue, it was submitted that the claim herein is not time barred because time to lodge a claim did not run from the time when the grievants transitioned from MCT to the university but when their services at the university ended. It was contended that their employment was not terminated but it was extended after absorption into the university which took over all the debts and liabilities from the MCT under clause 4 of the Legal Notice aforementioned.
19. It was submitted that the respondent ought to have computed the gratuity payable to the grievants under the CBA and pay the same together with pension at the end of their employment by the university. Examples of other cases of staff transitioning from Colleges to Universities were cited to support the submission that the staff benefits that accrued before the transition were transferred with their services until their employment by the university ended. Such cases included Dedan Kimathi University and Technical University of Mombasa.
20. It was further submitted that before a claim can be said to be time barred, the court must first establish when the claim became due. It was argued that the circumstances of this case are such that it is not possible to tell when the gratuities became due. Therefore the court was urged to find that time started to run from the date the individual grievant's contract ended either by effluxion of time or retirement.
21. As regards the second issue for determination, it was submitted that the grievants are entitled to the reliefs sought in the suit. From the onset, it was submitted that section 59 of the [Labour Relations Act](#) provides a registered CBA forms part of the contract of the concerned employees and binds the parties



- to it. The CBA between the claimant and the Ministry of Education gave certain rights to the grievants which were transferred to the respondent by dint of clause 4 of the Legal Notice No.129 of 2011.
22. The said rights under the CBA included gratuity, severance pay and salary in lieu of notice. It was urged that clause 30 and 31 of the CBA entitled the grievants to gratuities and the same could not be denied because of NSSF contributions.
 23. The respondent also submitted on the said two issues. On the issue of the suit being time barred, it was submitted that the suit was filed after the lapse of the 3 years limitation period provided under section 90 of the *Employment Act*. It was submitted that the transition from MCT to the university stations occurred in September 2011 vide the said Legal Notice and new contracts were issued to the grievants in April, 2013. Accordingly it was argued that the claimant ought to have filed suit within 3 years from September 2011 or April 2013 and therefore the suit herein is time barred since it was filed outside the limitation period.
 24. For emphasis the respondent cited the case of Ephraim Gachigua Mwangi v Teachers Service Commission of Board of Management, Thogoto Teachers College (2018) eKLR, John Kiiru Njiiri v University of Nairobi (2021) eKLR and Sammy Mbuvi v Sai Office Suppliers Limited (2020) eKLR.
 25. As regards the second issue for determination, it was submitted that the claimant is not entitled to the reliefs sought. It was submitted that under Legal Notice No.129 of 2011, MCT transitioned to University status and thereby ended the grievants employment. They were however eligible for employment by the University subject to appraisal by the university council. All the staff applied for transition and indeed transitioned except on John Munene. The latter sued in this court vide Cause No.E015 of 2020 and the matter was determined. Consequently, the court was urged to find his claim to be res judicata.
 26. It was further submitted that some of the transitioned staff have since left employment of the university while some are still in employment. It was argued that in MCT, gratuity was only payable upon retirement as per clause 1.2.6 (a) of the MCT schemes of service. According to the respondent, the CBA and the MCT schemes of service ended upon transition of the MCT to university status and therefore gratuities could only be paid upon meeting the conditions set out in the university scheme of service at clause 16.0.
 27. It was argued that the grievants who had attained the age of 55 years as at March/April 2013 had the option of retiring in order to be paid gratuity but they chose to sign new contracts with the university containing distinct terms. Consequently, it was submitted that the grievants cannot be allowed to approbate and reprobate by forcing the legal existence of their contractual terms with MCT. For emphasis reliance was placed on the doctrine of election as explained by Lord Atkin in *United Australia Ltd v Barclays Bank Ltd* (1940) 4 ALL ER 20 at 37-8.
 28. It was further submitted that the grievants were not declared redundant and therefore the claim for severance pay does not add up. Likewise the claim for salary in lieu of notice was denied on ground that there was no termination of employment by mere transition from one entity to the other without any break in employment.
 29. Finally the claim for general damages for suffering due to the delay in payment of gratuity was said to be unjustified and mysterious. Reliance was placed on the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* (2019) eKLR where the Court of Appeal held that general damages are not awardable for wrongful termination. The respondent urged for the suit to be dismissed with costs.



Issues for determination

30. I have considered the pleadings, evidence and submissions. There is no dispute that all the grievants were previously employed by MCT until 2011 when it became Murang'a University College (MRUC) under Jomo Kenyatta University of Agriculture and Technology (JKUAT). There is clear evidence that all the grievants except one John Munene transitioned to be staff of the new university college and signed new contracts after being appraised. It is common ground that the university college has since transitioned to Muranga University of Technology. There is also evidence that Mr. John Munene filed suit after failure to get appointment in the new university college and the suit was determined. The issues for determination are:-
- a. Whether the claim by John Munene is res judicata.
 - b. Whether the suit is time barred.
 - c. Whether the court should grant reliefs sought.

Claim by John Munene

31. The respondent has produced copy of pleading and judgment in respect of Cause No. E015 of 2020 which was filed by John Munene after being left out during the transition. In the suit he alleged that his employment had been terminated unfairly and sought compensation for unfair termination plus other dues. He also sought service gratuity for 32 years he worked for MCT equaling to Kshs. 284,800.
32. In the present case, the grievant is claiming service gratuity for 31 years served from 1982 to 2013 amounting to Kshs. 275,900. He also seeks other dues related to the termination of his employment in 2013. The said claim is obviously res judicata since the claims were determined by a court of competent jurisdiction vide the judgment of Marete J dated 28th September 2022. The judgement was never appealed against and therefore it binds the parties even in the present suit.
33. I gather support from the case of C.K Bett Traders Limited & 2 others v Kennedy Mwangi & Another, High Court Kajiado Civil Appeal No.7 of 2020 where the court observed thus;

Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact defence if the issue (s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.”

34. Again in the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, (2017) eKLR, the court held thus;

“(f) for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.



- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

Time barred suit

35. The respondent has vehemently objected to the suit for being statute barred by dint of section 90 of the *Employment Act*. The suit seeks to recover service gratuity, severance pay and salary in lieu of notice as at 2013 when MCT became a university as pleaded, the claims are tabulated in paragraph 51 of the Amended Memorandum of Claim. The suit was filed on 1st December, 2021, about 8 years from 2013 when the cause of action arose.
36. Section 90 of the Act provides that:

“Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act*, 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.”
37. The suit herein specifically seeks for payment of the grievants’ benefits that accrued as at 2013 when they transitioned from MCT to the university. Pursuant to the above mandatory provision, the suit herein ought to have been filed in court within three years from the date when the cause of action arose. However, the claimant waited for 8 years before filing the suit. Consequently, I agree with the respondent that the suit is time barred and the court lacks jurisdiction to determine it.
38. I gather support from the case of *Beatrice Kahai Adagala v The Postal Corporation of Kenya* [2015] eKLR the Court of Appeal held that:

“Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the *Employment Act* 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within three 3 years. As the court stated in *Divecon Limited vs Samani* [1995-1998] 1 EA p. 48 ... the limitation period is never extended in matters based on contract.”
39. The claimant has contended that the grievants could not receive the service gratuity before their new employment with the university ended. There is however no evidence to support the forgoing averment by the claimant which in my opinion is just an afterthought. Although the Legal Notice No. 129 of 2011 transferred all the MCT’s liabilities to the new university, there is nothing to show when the liabilities relating to the employees were payable. It seems that the claimant did not represent the grievants properly to ensure that the gratuity earned during their service to the MCT was secured. In my view, the court should not assume anything or rewrite contracts for parties. The claimant ought to have negotiated for the grievants what it is asking the court to award from the blues.
40. Having found that the suit is time barred and that the court lacks jurisdiction to determine it, I must with sympathy down my tools and strike out the suit. I will not condemn the claimant to pay costs considering that the suit has not been determined on merits.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF MAY, 2023.

ONESMUS N MAKAU



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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

