



**Muchiri v Anti-Counterfeit Authority; Law Society of Kenya (Interested Party)
(Cause E127 of 2022) [2023] KEELRC 1534 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1534 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E127 OF 2022
BOM MANANI, J
JUNE 15, 2023**

BETWEEN

CHARLES MUCHIRI CLAIMANT

AND

ANTI-COUNTERFEIT AUTHORITY RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY

JUDGMENT

Introduction

1. The dispute in this claim relates to the manner in which the contract of employment between the Claimant and Respondent was implemented before it came to a close. The Claimant asserts that the Respondent failed to honour some of its obligations under the contract including those on payment of non-practice allowance and annual subscriptions to the Law Society of Kenya.
2. It is the Claimant’s contention that the Respondent’s actions resulted in the Claimant being subjected to differential treatment in violation of his right against discrimination. The Claimant also pleads violation of his rights to fair labour practice and fair administrative action.
3. The Respondent has filed a defense denying the claim. It is the Respondent’s case that the Claimant was not entitled to the benefits that he now claims. Further, the Respondent has asserted that the claim is bad in law having been filed long after the employer-employee relationship between the parties had come to a close.
4. The interested party did not file any pleadings in the matter. And neither did it participate in the trial.



Claimant's Case

5. From the pleadings and evidence on record, the Claimant contends that he was employed by the Respondent on 15th February 2019. This was after a rigorous interview process that commenced towards the close of 2018. The Claimant was hired as an Anti-Counterfeit Inspector II.
6. It is the Claimant's case that prior to his appointment, he was asked to supply documents evidencing his professional qualifications. In compliance with this requirement, the Claimant states that he supplied the Respondent with his law degree certificate and as well a certificate from the Kenya School of Law to demonstrate that he had qualified to practice as an Advocate. In the Claimant's view, he expected that these documents would influence the Respondent in determining his terms and conditions of service.
7. The Claimant further contends that his letter of appointment incorporated the Respondent's regulations that were in force at the time and as amended from time to time. These included the Respondent's Human Resource Policy and Procedures Manual, 2016 (HR Manual).
8. It is the Claimant's case that he was shortly gazetted as an Anti-Counterfeit Inspector and inducted into his new job. He was also furnished with his job description.
9. The Claimant argues that as a practicing Advocate, he was entitled to be paid non-practicing allowance once he was recruited by the Respondent. It is his case that both the Respondent's HR Manual and a circular by the Salaries and Remuneration Commission sanctioned this payment.
10. To the Claimant's astonishment, the Respondent failed to make good this payment. This is notwithstanding that some officers recruited at the same time as him and who held the same job title as the Claimant were allegedly receiving the payment.
11. The Claimant also contends that the Respondent was obligated to pay for his continuous professional improvement trainings and also settle annual subscription charges towards the Claimant's professional body. That this was sanctioned by the Respondent's HR Manual.
12. To the Claimant's astonishment, the Respondent allegedly declined to settle these obligations. This was despite the fact that the Respondent was allegedly making these payments for other colleagues holding similar position as the Claimant.
13. It is the Claimant's case that in addition to failing to pay for his annual practicing certificates and continuous professional training, the Respondent also refused to allow him time off to attend to the trainings. Consequently, the Claimant was forced to utilize his leave days to attend these trainings. The Claimant states that he raised concern with the Respondent over these violations but the Respondent failed to act on the matter.
14. In the face of the foregoing, it is the Claimant's case that he was subjected to differential treatment at work. He claims that his rights to fair labour practice and fair administrative action were violated.

Respondent's Case

15. The Respondent filed a bare statement of defense. In the defense, the Respondent asserts that the Claimant was hired as an Anti-Counterfeit Inspector II and not a Legal Officer. That these two positions are distinct and the benefits and responsibilities that accrue to them are different.
16. According to the defense, the benefit of non-practicing allowance is payable to Legal Officers only. The Respondent contends that this fact is clearly stipulated in its HR Manual. That the benefit accrues to one by virtue of the position he holds within the organization as opposed to his professional training.



That consequently, the Claimant was not entitled to the benefit merely on account of the fact that he is a qualified Advocate. He could only claim the benefit if he had been employed as a Legal Officer.

17. The Respondent also states that the claim was filed after the employer-employee relation between the parties had come to a close. As such it was an afterthought.
18. There is not clear response to the alleged obligation on the Respondent to pay for the Claimant's annual subscriptions to his professional body. Neither is there a categorical response to the alleged obligation to settle the Claimant's fee for continuous professional training. All that the defense asserts in this respect is that the opportunity for training was availed to the Claimant and it was his duty to apply for the professional training that suited him but he never did so. There is also no categorical response to the assertion that the Claimant was not allowed days off to attend continuous professional trainings and that he had to utilize his leave days to attain this goal.

Issues for Determination

19. The parties have framed their individual issues in their final submissions. An analysis of the pleadings and evidence on record yields the following as the issues for determination:-
 - a. Whether the action by the Claimant is maintainable having been filed after the contract of service between the parties had come to a close.
 - b. Whether the Claimant was entitled to the benefits that he alludes to including: non-practice allowance: and payment of fees for continuous professional training, renewal of practicing certificates and annual subscription to his professional body.
 - c. Whether the Claimant's rights to fair labour practices, fair administrative action and the right against discrimination were violated.
 - d. What final orders ought to issue in the cause?

Analysis

20. The analysis will begin with the consequence of the Respondent's failure to tender evidence in the cause. This will be followed by the other issues as indicated above.

a) Failure to provide evidence

21. As the record shows, apart from filing its statement of defense and closing submissions, the Respondent did not file anything else. In particular, the Respondent failed to tender evidence in support of the averments made in its statement of defense.
22. In *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR, it is suggested that if a party files a statement of defense but fails to substantiate it through evidence, such statement of defense remains a mere assertion that has not been established. In *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* [1978]eKLR, it is suggested that unless there is an admission of the averments in the opponent's pleadings, they do not constitute evidence since pleadings are not averments that are made on oath.
23. The net effect of the above is that the Respondent's statement of defense does not constitute evidence in the cause. To the extent that the Respondent did not lead evidence to establish its claims as set out in the defense, the averments in the document remain mere assertions.



24. That said, it is appreciated that the defense did cross examine the Claimant. In this context, it is right to state that the Respondent is entitled to rely on the evidence yielded in the cross examination as its evidence. To the extent that such evidence addresses some aspects of the defense, it may be referred to as tending to establish the position expressed by the Respondent in its statement of defense.
25. Importantly, the fact that the defense did not call evidence in the usual manner does not suggest that the obligation on the Claimant to establish his case was thereby waived. As was observed in *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR, the Claimant still retains the burden to establish his case on a balance of probabilities. It is in this context that I propose to analyze the dispute before me.

a) Whether the action by the Claimant is maintainable having been filed after the contract of service between the parties had come to a close

26. The Respondent has pleaded that this action was filed long after the employment relation between the parties had come to a close. This position was maintained during cross examination of the Claimant. The matter has also been raised in the final submissions by counsel for the Respondent.
27. It is however not clear what the Respondent's intention was when raising the matter. The Respondent did not explicitly plead what it considered to be the consequence of such filing.
28. The court is left to imagine what was on the Respondent's mind in this respect. The Respondent may perhaps have intended to question the legitimacy of maintaining a cause of action outside the employment relation under the current legal regime on employment in Kenya. It appears to me that the Respondent's position may be that since the Claimant filed the case long after the employment relation between the parties had come to an end he lacked the requisite locus standi to institute the proceedings. Put differently, the Respondent may by this averment be contending that the court lacks jurisdiction to entertain the cause as it was filed when there was no subsisting employer-employee relation between the parties.
29. I have considered this matter against the applicable law. Assuming that I have correctly picked the Respondent's mind on the issue, I think that the answer to the question can be inferred from the import of section 90 of the *Employment Act*. In determining the legitimacy of a claim such as the current one, the question to consider is not whether it was presented after the close of the employment relation. Indeed, some of actions for redress in employment disputes including claims for unlawful termination usually crystallize after the close of the relation.
30. What is critical in this respect is that the cause of action (the reason for instituting the suit) arose during the currency of the employment relation. Section 90 of the *Employment Act* permits the filing of these claims so long as they are filed within three years of the cause of action arising or the employment relation coming to a close whichever is earlier. So long as the three-year period falls within the period when the cause of action accrued, it does not matter that the suit was presented after the close of the employment relation.

b) Whether the Claimant was entitled to the benefits that he alludes to including: non-practice allowance: and payment of fees for continuous professional training, renewal of practicing certificates and annual subscription to his professional body.

31. The Claimant has asserted that he was entitled to be paid non practicing allowance. This position is contested by the Respondent.



32. Although the Respondent did not call witnesses in the cause, it nevertheless cross examined the Claimant on the matter. From the cross examination, the Claimant concedes that he was employed as an Anti-Counterfeit Inspector II. He was not engaged as a Legal Officer.
33. Clause 4.13 of the HR Manual which applies to the Claimant's contract provides as follows:-
- “ Non-Practicing Allowance
- This shall be payable to Legal Officers working in the Agency who by virtue of their work are not able to carry out private practice and shall be paid in accordance with the approved Government rates.” Emphasis added by underlining.
34. It is clear from this provision that non practicing allowance was available to Legal Officers only. The Claimant may be a qualified lawyer as are those serving as Legal Officers. However, he was not a holder of the position of “Legal Officer” in the Respondent organization. He was therefore not eligible to earn this allowance.
35. The Claimant's contract did not provide for this allowance. It is therefore not permissible for him to import other instruments which have not been specifically incorporated into his contract such as the circulars by the Salaries and Remuneration Commission to seek to alter his contract to reflect the benefit. This goes against the basic principles of the law of contract.
36. The court notes that the circulars that the Claimant seeks to rely on to claim this allowance issued in 2012. This was long before the Respondent's HR Manual was issued in 2016. If it was the intention of the Respondent that these circulars form part of its general human resource policies, nothing would have prevented the Respondent from making this indication in the Manual. Similarly, if the parties desired that the circulars form part of their contract, this would have been indicated in the contract.
37. Importantly, the two circulars are clear that they were interim pending revision of job descriptions of the affected officers. There is no evidence that they were still in force at the time the Claimant entered into his contract with the Respondent.
38. With respect to payment for practicing certificates and other related matters to the Claimant's professional body, this is covered by clause 9.26 of the applicable HR Manual. The clause provides as follows:-
- “ 9.26 Subscription to Professional Bodies
- “9.26.1 The Agency will support employees to become members of relevant and approved professional associations.
- “9.26.2 The employee will meet the cost of the registration and the initial subscription. Thereafter, the Agency will meet the subscriptions, practicing certificate and cost of continuing professional development training.”
39. This provision is clear in its tenor and import. By it, the Respondent is obligated to assist its employees who are eligible to be members of approved professional bodies to gain membership of such bodies. Through this clause, the Respondent committed to assist such employees to join and maintain their membership in professional bodies by paying for their annual subscription and practicing certificates. In addition, the Respondent committed to meet the cost of continuing professional development for the employees as may be required by the respective professional bodies.
40. The Claimant has provided evidence showing that he is a member of the Interested Party, a professional body in the legal sector. It is the requirement of this body that its members maintain membership by



paying for practicing certificates. The body also requires members to attend a series of professional trainings in a year in order to take out the practicing certificates.

41. By clause 9.26 of the HR Manual, the Claimant was entitled to have matters relating to professional training and membership fees to the Law Society of Kenya settled by the Respondent. This remained the position until 27th January 2021 when the Claimant resigned.
42. I have also looked at the job description of the Claimant. Although he was not engaged by the Respondent as a legal officer, some of his duties required some level of legal knowledge. These include:-
 - a. Preparation of charge sheets;
 - b. Assisting in conducting prosecution of cases; and
 - c. Compiling of prosecution files.
43. These are technical matters which could benefit from continuing professional training from the Interested Party. Clearly, the continuing professional training that the Claimant refers to was to benefit not just him but the Respondent as well.
44. The evidence tendered by the Claimant shows that he was being directly invoiced by the Interested Party. Some of the invoices produced relate to the year 2020 when he was serving as an employee of the Respondent. There is no evidence that the Respondent settled these invoices.
45. The Claimant has produced an internal memo dated 25th November 2020 addressed to the Respondent requesting to be facilitated to attend continuing professional training in order to secure his practicing certificate. He has also produced a second internal memo dated 18th January 2021 addressing several matters relating to his membership to and activities by the Law Society of Kenya. The memo deals with concerns about: facilitation to attend professional trainings; payments of subscriptions to the Law Society of Kenya; payment for the Claimant's practicing certificate; and provision of time off to attend trainings.
46. Despite these internal memos, there is no evidence that the Respondent found it necessary to address the Claimant on the matter. The Respondent has not provided evidence to demonstrate that it addressed the Claimant's concerns one way or the other. The internal memos were met with silence. This conduct by the Respondent flies in the face of article 47 of [the Constitution](#) as read with the [Fair Administrative Action Act](#).
47. The fact that the Claimant was entitled to be facilitated to secure his practicing certificate and attend continuing professional trainings is self evident from clause 9.26 of the Respondent's HR Manual which was incorporated into the Claimant's contract. The Claimant has tendered evidence showing that the Respondent violated this clause of the contract of employment.
48. As pointed out earlier, the Respondent did not tender evidence in the cause. There was no evidence to counter the Claimant's evidence that the Respondent flouted clause 9.26 of its HR Manual and which was a term of the Claimant's contract.
49. In their submissions, the lawyers for the Respondent assert that the Claimant has not presented evidence on the matter. Yet, there is the evidence of the internal memos issued by the Claimant to the Respondent and which appear to have elicited no response.
50. Importantly, under section 112 of the [Evidence Act](#), it is for the Respondent to demonstrate compliance with this clause as evidence on compliance through payment of the requisite fees is ordinarily expected to be within the Respondent's special knowledge. If any payments were made, the records of such



payment will ordinarily be in the custody of the Respondent as the payee. No such evidence was tendered by the Respondent.

51. On the face of the evidence tendered by the Claimant, it is clear that the Respondent had the contractual duty to facilitate the Claimant's continuing professional training by paying for it. It is also clear to me that the Respondent had the contractual duty to assist the Claimant settle subscription fees to his professional body and as well pay for the Claimant's practicing certificate.

d) Whether the Claimant's rights to fair labour practices, fair administrative action and the right against discrimination were violated

52. There is no evidence that the Respondent discharged the foregoing obligation. Absent this evidence, the Respondent's inaction constituted a violation of the Claimant's rights to fair labour practice and fair administrative action.
53. Although the Claimant has demonstrated that there was unfair labour practice by the Respondent on account of its refusal to ensure observance of clause 9.26 of its HR Manual, there is no cogent evidence to prove the assertion that whilst the Claimant was unlawfully deprived of this benefit, other employees at his level were accorded the benefit. In effect, much as there is evidence of breach of the clause, there is no evidence to point at differential treatment directed at the Claimant.

e. Final Orders

54. The court declares that by deliberately failing to ensure compliance with clause 9.26 of the HR Manual which had been expressly incorporated into the Claimant's contract of service, the Respondent subjected the Claimant to unfair labour practice. As a result, the Claimant's right to fair labour practice was infringed however marginally.
55. By failing to address the concerns raised in his internal memos dated 25th November 2020 and 18th January 2021, the Respondent breached the Claimant's right to fair administrative action.
56. I award the Claimant general damages of Ksh. 500,000.00 as compensation for violation of these rights.
57. I award the Claimant interest on this amount at court rates from the date of this decision.
58. As the Claimant acted in person, he is permitted to only recover the actual disbursements incurred in instituting and prosecuting the case.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

..... for Interested Party

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.



B. O. M MANANI

