



**Moturi v National Social Security Fund (Employment and Labour Relations Cause E6518 of 2020) [2023] KEELRC 1463 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1463 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6518 OF 2020**

**MN NDUMA, J**

**JUNE 8, 2023**

**BETWEEN**

**EVANS NYANGARESI MOTURI ..... CLAIMANT**

**AND**

**NATIONAL SOCIAL SECURITY FUND ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on December 3, 2020 seeking the following reliefs:-
  - i. Determination that the claimant became the substantive holder of the position of the Finance Manager upon acting for more than six (6) months from the date of appointment on December 1, 2013.
  - ii. An order compelling the Respondent to pay the Claimant full salary as the substantive holder of the position of Finance Manager taking into account annual salary increments less the acting allowance paid during that period totaling to Kshs 10,200,111.00/= (Ten Million Two hundred thousand and one hundred and eleven only) together with the Respondent portion of pension contribution of Kenya Shillings 1,316.576.00/= (one million three hundred and sixteen thousand, five hundred and sixteen only).
  - iii. Determination that the Claimant was entitled to acting allowance equivalent to the difference between his salary as at November 30, 2013 (Grade 5) and the lower limit salary for Grade 3.
  - iv. An order compelling the Respondent to pay the claimant acting allowance for six months with effect from December 1, 2013 equivalent to the difference between his salary as at November 30, 2013 (Grade 5) and the lower limit salary for Grade 3 less the acting allowance that he had been paid for that period.
  - v. General Damages, cost of the suit and interest from the date of filing this suit.



vi. In the alternative

An Order compelling the Respondent to pay the Claimant acting allowance for the six (6) years he was acting as the Finance Manager with effect from December 1, 2013 equivalent to the difference between his salary as at November 30, 2013 (Grade 5) and the lower limit salary for Grade 3 taking into account annual increments less the acting allowance that he had been paid for that period equivalent to Kshs 2,459,277/= (two million four hundred and fifty-nine thousand, two hundred and seventy-seven only) totaling to Kshs 10,200,111.00/= (Ten Million two hundred thousand and one hundred and eleven only.)

2. Upon a careful consideration of the Memorandum of Claim, the Court has suo moto decided to determine at the first instance in line with the guidance in Lilian 'Ss' Case in which Nyarangi J held:-

' By jurisdiction is meant, the authority which a Court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limbs of this authority are imposed by statute, charter, or commission under which the Court is constituted and may be extended or restricted by the like means: -

'Where the Court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before judgment is given jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a confirmation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

3. In the memorandum of claim at paragraph 8, the claimant pleaded that he was appointed verbally in the position of Acting Finance Manager (Grade 3) on December 1, 2013. The Acting appointment was confirmed in writing on January 26, 2015. That the claimant ought to have been confirmed to the position upon expiry of six (6) months in terms of the Human Resource Policies and Procedure Manual of the respondent. However, the claimant continued to be Acting Finance Manager until the date of retirement. The claimant pleads that he was underpaid Acting allowance from the date of appointment on December 1, 2013 up to the date of retirement in that he was paid 15% and 20% respectively acting allowance of his consolidated pay instead of the lawful acting allowance of the difference between the remuneration of his Acting position and that of the substantive position held by him.
4. The claimant states that the Board of Trustees changed the acting allowance for the Acting Managing Trustee to be the difference between his current monthly salary and the minimum scale salary of the Managing Trustee on January 27, 2016. The claimant pleads that he was discriminated because the respondent continued to pay him acting allowance at 20% of his consolidated salary.
5. The claimant further pleads that on June 6, 2018, he was sent home by a Presidential proclamation on fresh vetting of Public Finance officers. The claimant went on compulsory leave upto November 9, 2018 when he was recalled. The claimant pleads that he was not paid acting allowance while he was on leave and claims the same.
6. The claimant testified before Court in support of the aforesaid pleadings stating that he was entitled to be confirmed as substantive Finance Manager upon expiry of six (6) months from January 26, 2015 and the Court should declare him as so confirmed from that date. That the Court should then direct payment of the difference in the unpaid acting allowance from February 1, 2013 to date of retirement



including payment of unpaid acting allowance for the period June 6, 2018 to November 9, 2018 when the claimant was on compulsory leave and not paid any acting allowance.

7. The court will determine both the preliminary and substantive issues raised before Court.
8. The claimant seeks payment of acting allowance in the sum of Kshs 10,200,111.00 being the difference between total entitlement of Kshs 12,659,389 and paid acting allowance in the sum of Kshs 2,459,277.00.
9. The claimant prays further that the Court declare that he become substantive holder of the position of Finance Manager upon expiry of six (6) months from February 1, 2013 and declare that the lawful acting allowance payable for the entire period from December 1, 2013 to retirement date was the difference between the salary of the substantive position he held and the salary of a Finance director and compel the respondent to pay accordingly. In addition, the Court to award the claimant General damages for discrimination and unfair treatment.

### **Defence**

- 10 RW 1 Caroline Onyango testified that she was the Human Resource Manager of the respondent. That she knew the claimant well as an employee of the respondent. That the claimant was employed on June 21, 1991 as Senior Accounts Assistant and was promoted severally including as an Accountant in 2003; Branch Accountant Homabay on September 23, 2011 and Section Head on February 12, 2012. That this was the claimant's last substantive appointment.
11. That on December 1, 2013 he was verbally appointed Acting Finance Manager which position was confirmed in writing by a letter dated January 26, 2015. That the substantive position held by the claimant as Section Head was at Grade 5 whereas the position of Finance Manager was Grade 3.
12. That the claimant was paid house allowance in terms of Regulation 3.1 of the Human Resource Manual, 2011 at 15% of officer's consolidated salary.
13. That the payslip shows the claimant received the housing allowance at 15%. That the allowance was revised in a circular dated October 31, 2016 to 20% of the officer's basic salary. This was done with the approval of National Social Security Fund Board and was applicable to all persons who acted then.
14. That the claimant acted together with other eleven (11) officers. They were contained in bundle 'A' page 3 before Court. That none was discriminated upon. They received acting allowance accordingly. That the Human Resource Manual of 2011 had no time limit on acting period. That in 2015, National Social Security Fund tried to fill all acting positions but the process was not concluded due to a Court case that was filed opposing the process which is Central Organisation of Trade Unions (COTU) -vs- National Social Security Fund (NSSF) – Employment and Labour Relations Cause No 15 of 2015. That an injunction was issued on February 13, 2015. That public Service Regulations relied upon by the claimant for the alleged (6) months maximum acting position limit do not apply to National Social Security Fund staff. That National Social Security Fund is an independent parastatal with own Human Resource Manual and Staff Policies and Regulations.
15. That the Public Service Commission regulations only acted as a guide in the formulation of NSSF policies and Regulations but Internal Regulations and Policies were applicable to NSSF staff.
16. RW 1 referred to a letter from office of the President stating that the Public Service Commission had no direct role in the running of state corporations other than setting of values and norms applicable internationally as per decisions of superior Courts.



17. That the claimant referred to the respondent as per his substantive position held until then and not in his acting position. That this was the correct and applicable policy position.
18. RW 1 stated that the claimant was not paid any acting allowance when he was on 6 months compulsory leave for vetting of public officers since another officer was appointed to act in the position of the Finance Officer during his absence and two officers could not be paid acting allowance for the same position at the same time.
19. Under cross-examination, RW 1 stated that she was Human Resource Manager of the respondent for a period of 11 years. RW 1 confirmed that the claimant started to act as Finance Manager on February 1, 2013 and acted in that position for a period of 6 ½ years. That this was caused by the inability of NSSF to recruit due to pending Court case. RW 1 stated that the claimant started receiving acting allowance after the acting position was confirmed by the letter dated January 26, 2015. That acting allowance was paid retroactively from December 1, 2013.
20. RW 1 stated that claimant was qualified to hold the position of Finance Director and delivered appropriately while he acted. That senior staff comprise Grade 2, 3 and 4 at NSSF. That other positions are middle and lower level. That the Chief Executive Officer was paid full acting allowance upon decision by NSSF Board. That this did not apply to other eleven (11) acting positions including that of the claimant. That this did not amount to discrimination since the Board determines terms and conditions of service of Chief Executive Officers. Other managers' terms are as per the Human Resource policies and Regulations manual.
21. RW 1 confirmed that the claimant was paid per diem applicable to a substantive Finance Manager or the Public Service Commission Procedure Manual which NSSF was allowed to refer to as and when appropriate.
22. The respondent prays that the suit be dismissed with costs.

### **Determination**

23. The issues for determination are:-
  - a. Whether part of the claim is time barred.
  - b. Whether the claimant has proved the claims to the satisfaction of the Court.
  - c. What reliefs if any is the claimant entitled to.
24. The parties filed written submissions and list of authorities which the Court has carefully considered together with the evidence adduced by the parties.
25. The claimant referred the Court to the decision of the Court in [\*Silas Kaumbuthu Mbutura –vs- Meru Central Dairy Co-operative Union Limited \[2015\] eKLR\*](#) where the Court held that:-

'The court finds that the claimant was subjected to unfair labour practice by constantly being held on acting capacity in the post of the production supervisor. The claimant's claim to substantive appointment is valid and for the unfair labour practice in contravention of Article 41 of the [\*Constitution\*](#), the court finds that a compensation of Kshs 300, 000.00 under Article 21(3) (e) of the [\*Constitution\*](#) will meet the ends of justice. While making that finding, the court finds that for over 18 years of service the claimant was required by the respondent to serve in an acting capacity for unexplained reasons of failure to be appointed substantively as a production supervisor or any other suitable position in the respondent's establishment. Such conduct on the part of the respondent, in the opinion of the court,



was a gross violation of the claimant's entitlement to fair labour practices as provided for in Article 41 of the Constitution.

26. The claimant also referred the Court to the Human Resource Manual Policies and Procedure Manual for Public Service which provides:-

Acting Allowance

C.

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- (1) When an officer is eligible for appointment to a higher post and is called upon to act in that post pending advertisement of the post, he is eligible for payment of acting allowance at the rate of twenty percent (20%) of his substantive basic salary. Acting allowance will not be payable to an officer for more than six (6) months.

27. The Court was further referred to the decision of the Court in *Steve -vs- Kenya Ports Authority Cause No E008 of 2020* [2022] KEELRC 1471 (KLR) as follows:-

' On the third issue, the Respondent did not tell this Court why it would refuse to confirm the Claimant's posting to a higher job grade and at the same time hold him to that position in acting capacity without paying him salary and allowances that come with such higher office for a period of six years and ten months. If this is not unfair labour practice, then what is? It is my finding that the Claimant was subjected to unfair labour practice by the Respondent, and was therefore a victim of such practice. He is entitled to be paid for the work he did on the higher job grade in acting capacity.'

28. The claimant referred to other similar cases including *Ednah Cherono Maiywa -vs- University of Nairobi Enterprises and Services Limited* [2020] eKLR where the Court held:-

' 51. In view of the observations and finding herein above, I am satisfied that the claimant has proved on a balance of probability that her prolonged appointment as the SHRAO in acting capacity for over 3 years, without being given the substantive appointment was inordinate and amounted to discrimination and unfair labour practices on the part of the Respondent.'

29. The claimant further referred the Court to the decision in *Oyatsi -vs- Judicial Service Commission* (Petition No E111 of 2021) [2022] KEELRC 3 (KLR) (10 March, 2022) where the Court held:-

'The respondent has by its acts of commission and omission grossly violated the petitioner's right to fair labour practices ordained by article 41(1) of the Constitution and has exacerbated the situation by denying the petitioner her right to fair remuneration payable to a holder of the position of Director of Finance of the Judiciary and in violation of article 41(2) (a) of the Constitution.'

It is the court's considered finding that the omission by the respondent for an inordinate period of more than six (6) years not only perpetrated violation of the petitioners right to fair Labour practices and the right to fair remuneration under article 41, this conduct also



violated the petitioner's right to equal protection and equal benefits of the law protected under article 27(1) of the Constitution and that omission constituted direct discrimination against the petitioner as against her male peers for failure to pay her equal remuneration for work of equal value mandated by section 5(5) of the Employment Act, 2007 in violation of Article 27(2), (3) and 4 of the Constitution.

133. Article 41(2)(b) of the Constitution speaks to this situation by guaranteeing every person the right to:-(b)reasonable working conditions.'

134. It is the court's conclusion and finding that by continuing to hold the petitioner in the position of Director Finance, for a period of more than six (6) years, while refusing to appoint her substantively to the position, the petitioner had a right to be given reasons why she could not be appointed and remunerated correctly.'

30. The Court has also considered counter submissions by the respondent including the key submissions relying on the case of Oyatsi –vs- Judicial Service Commission (supra) that this Court confirmed the prime position of a Human Resource Manual in the life and relationship of an employee with the employer. That the Court held thus:-

106. It is the Court's finding that the Human Resource Policies and Procedures Manual of the Judiciary is an employment policy or Labour practice recognized under section 5(7) (c) of the Employment Act, 2007; which provides that:-

'An employment policy or practice includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointment, and the appointment process, job classification and grading, remuneration, employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, termination of employment and disciplinary measures.'

106. The manual therefore is an internal mandatory guide, with statutory underpinnings and is in the court's judgment a kingpin of good corporate governance in any organization worth its salt. The court finds without any hesitation that the respondent is bound by its own Human Resource Policies and Procedures Manual, the same way, the employees are bound to abide by its terms in their daily work disposition and behavior. Indeed, employees of the Judiciary who fall foul of the provisions of the Human Resource Policies and Procedure Manuals would be subjected to disciplinary action in terms of the manual. Equally, the respondent cannot be heard to say that they are at liberty to cherry pick what to adhere to and what not to respect in the manual.

107. In Cause No 273 of 2019 Edah Cherono Maiywa versus University of Nairobi Enterprises & Services Limited, Onesmus Makau J had the following to say as regards employer policy document:-

'The above provision of the Human Resource Policy and Procedures manual cannot be wished away as it is founded on the law and it is incorporated into the contract of service of every employee of the respondent. Cw2, RW1 and Rw2 confirmed in their testimonies that the claimant was an efficient HR professional who had no performance issues in the HR docket. She had acted for fairly long period as the SHRAO and as such, nothing prevented the employer from conducting internal



recruitment under Clause 2.6 (iv) of the HR Policy and Procedures Manual as she did to RW2.'

108. In *Civil Appeal No 114 of 2016 - Heritage Insurance Company Limited -vs- Christopher Onyango & 23 Others [2018] eKLR*, the Court of Appeal observed that:-
- ' It is axiomatic that companies as employers do from time to time come up with new Staff Handbooks or Staff Manuals to reflect new regulations in the area of employment of their own staff. In practice, employment contracts do make reference to staff manuals or staff Handbooks as forming part of the terms of employment.'
109. It cannot be gainsaid therefore, that the provisions of the Judiciary Human Resource Policies and Procedures Manual are impliedly incorporated in the contractual terms and conditions of service of all Judiciary staff, including the petitioner.
110. The respondent has submitted that it was bound to appoint a Director of Finance upon a competitive recruitment process in terms of the mandate given to it under article 172 of the *Constitution* and that confirming the Director, Finance to a substantive position would violate this mandate under Article 172(1) (ii) and (2) (a) and (b) of the *Constitution*.
113. That indeed the Human Resource Manual does not only find its anchor in the *Employment Act*, but it is also well founded in the *Constitution* and thus it is an authoritative policy and procedure documents for proper management of Human Resource in the Judiciary.
31. In this regard, the respondent emphasized that Chapter 3 Clause 3(g) of the Human Resource Manual of NSSF was applicable to the acting position of the claimant. That the provisions placed no upper limit on the acting period. That the respondent was not bound as in the case of Oyatsi (supra) to place the claimant on a limited period.
32. The Court has considered the rival submissions herein and holds the respondent not only bound by its own Human Resource Manual but also bound and guided by decision of the superior Courts on the issue at hand. The superior Courts as seen above have overtime pronounced themselves on the issue of inordinate acting periods and held that to be unfair labour practice in violation of Article 41 of the *Constitution* of Kenya, 2010. However, an employee who is held in an acting position for an inordinate long period ought to bring suit before Court while that position is still persistent so that it be deemed a continuous injury within the meaning of Section 90 of the *Employment Act*, 2007 which reads:-
- ' [90] 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.'
- To avoid being shut out by the three (3) years limitation period.
32. In the present case, the cause of action arose after expiry of six (6) months from December 1, 2013 the date the appointment of acting Finance Manager position commenced according to the pleadings and evidence adduced by the claimant.



33. Accordingly, the claimant ought to have filed this suit appropriately, within three (3) years from May 1, 2014, six (6) months from December 1, 2013 which should have been on or before May 1, 2017. However, where the injury is continuous, that is, while the employee still holds the acting position, which in the Court's considered view falls within the proviso to Section 90 of the Employment Act, the suit may be filed after expiry of the three (3) years as a continuous injury. This is not the case herein. The employment of the claimant had ceased at the time of filing this suit on December 3, 2020.
34. This suit is therefore time-barred in respect of the claim by the claimant to be deemed to have been the substantive holder of the position of Finance Manager for six (6) months from date of appointment on December 1, 2013, the claimant having left service on 30<sup>th</sup> June, 2020 before filing suit on December 8, 2020. Furthermore, the claim for payment is also time barred by dint of Section 90 of the Employment Act, 2007.
35. With respect to the specific claim for payment of unpaid acting allowance during the period the claimant was on compulsory leave from June 6, 2018 to November 9, 2019, though the specific claim is not time barred by dint of Section 90 of the Employment Act, 2007, having occurred within 3 years from the date the suit was filed on December 8, 2020, the claimant did not satisfy the Court that he was entitled to payment of acting allowance at a time when he was on compulsory leave and not rendering service to the respondent. The rebuttal by RW 1 that the respondent paid acting allowance to another officer during that period and so could not pay acting allowance to different officers in respect of the same position at the same time, suffices as a reasonable defence to that specific claim. The specific claim for payment of acting allowance for that period is also dismissed.
36. Accordingly, the suit is legally time-barred and partly without merit as determined above and same is struck out for want of jurisdiction in respect of the main claim aforesaid and dismissed in respect of the specific claim for payment of allowance during the period claimant was on compulsory leave.
37. The Court deems this an appropriate case for each party to bear their own costs of the suit.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8<sup>TH</sup> DAY OF JUNE, 2023.**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Onyony for claimant

Mr. Ouma for Respondent

Ekale – Court Assistant

