



**Kenya Union of Commercial, Food and Allied Workers v Gikanda Farmers Cooperative Society Limited; Ndaroini Coffee Growers PLC (Third party) (Employment and Labour Relations Cause E006 of 2020) [2023] KEELRC 1753 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1753 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E006 OF 2020**  
**ON MAKAU, J**  
**JULY 14, 2023**

**BETWEEN**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS ..... CLAIMANT**

**AND**

**GIKANDA FARMERS COOPERATIVE SOCIETY LIMITED ..... RESPONDENT**

**AND**

**NDAROINI COFFEE GROWERS PLC ..... THIRD PARTY**

**JUDGMENT**

1. The claimant's suit is contained in the Amended Memorandum of Claim dated 8<sup>th</sup> September, 2022. The claimant is a registered trade union and brings the suit on behalf of its ten (10) members (herein after called "the grievants"). The claimant contends that the grievants were employed by the respondent from diverse dates until they received letters terminating their employment on account of redundancy. The redundancy resulted from the decision by the Third Party to separate itself from the respondent. It also released all the employees who hitherto were working at the factory back to the respondent.
2. The claimant avers that the termination of the grievants employment by the respondent on account of redundancy was done in breach of Section 40 of the *Employment Act* and was therefore unlawful and unfair. Efforts to salvage the grievants' employment through conciliation failed and it brought this suit seeking the following reliefs:
  - i. The respondent's action of declaring ten (10) employees redundant is unfair and unlawful.



- ii. That the redundancy letters dated 24<sup>th</sup> June, 2019 and 29<sup>th</sup> July, 2019 which were issued to the ten employees be and are hereby withdrawn.
  - iii. That the ten employees to be reinstated back to their positions and to continue working without loss of benefit.
  - iv. That the ten employees to be paid their salaries from the date of the unlawful redundancy to the date of the judgment hereof.
  - v. The cost of this suit be provided in favour of the claimant.
3. In the alternative to the reinstatement then the claimant prays for judgment against the respondent and the Third Party jointly to pay the ten employees the following as their terminal dues:
- i. Notice.
  - ii. Service gratuity.
  - iii. Compensation for unlawful redundancy.
    1. James Muchangi Muritu - 1<sup>st</sup> Grievant
      - i. One month notice= 14,126.00
      - ii. Service gratuity= 10,939.00 x 25% x 28 months= 76,573.00
      - iii. Maximum compensation 14,126.00 x 12 months= 169,512.00
      - Total= 260,211.00
    2. Julius Maina Gichuru – 3<sup>rd</sup> Grievant
      - i. One month notice= 49,352.00
      - ii. Service gratuity= 40,294 x 25% x 271 months= 2,729,918.50
      - iii. Maximum compensation 49,352.00 x 12 months= 592,224.00
      - Total= 3,371,494.50
    3. Agata Wangechi Karige – 4<sup>th</sup> Grievant
      - i. One month notice= 32,776.00
      - ii. Service gratuity 26,840 x 25% x 271 months= 1,794,020.00
      - iii. Maximum compensation 32,776.00 x 12 months= 393,312.00
      - Total= 2,220,108.00
    4. Diana Wandia Njau – 5<sup>th</sup> Grievant
      - i. One month notice= 17,866.00
      - ii. Service gratuity 14,055 x 25% x 271 months= 952,226.25
      - iii. Maximum compensation 17,866 x 12 months= 214,392.00
      - Total= 1,184,484.25
    5. Hannah Wambui Mbute – 6<sup>th</sup> Grievant



- i. One month notice= 32,776.00
    - ii. Service gratuity  $26,480 \times 25\% \times 271$  months= 1,794,020.00
    - iii. Maximum compensation  $32,776 \times 12$  months= 393,312.00
    - Total= 2,220,108.00
  - 6. Charles Muriuki Thitu – 7<sup>th</sup> Grievant
    - i. One month notice= 19,722.00
    - ii. Service gratuity  $15,610.00 \times 25\% \times 204$  months= 795,651.00
    - iii. Maximum compensation  $19,722 \times 12$  months= 236,664.00
    - Total= 1,052,037.00
  - 7. Rose Wangui Mwangi – 9<sup>th</sup> Grievant
    - i. One month notice= 17,866.00
    - ii. Service gratuity  $14,055.00 \times 25\% \times 78$  months= 274,072.50
    - iii. Maximum compensation  $17,866 \times 12$  months= 214,392.00
    - Total= 506,330.00
  - 8. Charles Githuri Maina – 10<sup>th</sup> Grievant
    - i. One month notice= 17,407.00
    - ii. Service gratuity  $14,055.00 \times 25\% \times 66$  months= 231,907.50
    - iii. Maximum compensation  $17,407.00 \times 12$  months= 208,884.00
    - Total= 458,198.50
  - 9. Nancy Nyawira Ngatia – 11<sup>th</sup> Grievant
    - i. One month notice= 39,312.00
    - ii. Service gratuity  $31,935.00 \times 25\% \times 244$  months= 1,948,035.00
    - iii. Maximum compensation  $17,866 \times 12$  months= 471,744.00
    - Total= 2,459,091.00
  - 10. Anthony Wanjohi Gichango – 12<sup>th</sup> Grievant
    - i. One month notice= 35,776.00
    - ii. Service gratuity  $26,480 \times 25\% \times 232$  months= 1,535,840.00
    - iii. Maximum compensation  $35,776.00 \times 12$  months= 429,312.00
    - Total= 2,000,928.00
  - iv. Cost of the suit in favour of the claimant.
4. The respondent admits that it employed the grievants until it terminated their services on account of redundancy vide the letters dated 24<sup>th</sup> June, 2019 and 29<sup>th</sup> July, 2019. It avers that it complied with the



redundancy procedure set out by Section 40 of the *Employment Act* and denied that the termination was unfair and unlawful. Further it avers that it paid the grievants all their dues and as such the said redundancy letters should not be withdrawn and grievants reinstated.

5. The respondent further avers that the redundancy was occasioned by the Third Party when it delinked from the respondent and voluntarily signed an agreement on 29<sup>th</sup> January, 2020 undertaking to pay gratuity to the staff of the factory who were rendered redundant as a result of the delinking. On that basis, the respondent instituted and obtained court orders to enjoin the Third Party to the suit herein.
6. The Third Party filed a response to the suit admitting that it was a member of the respondent together with two other factories before it split from the Cooperative Society. It further admits that the grievants were working in its factory before the split but contended that they were employees of the respondent for the years of service pleaded in the Amended Claim. Therefore it averred that it is a total stranger to contract between the respondents and the grievants, and as such the claim made against it is without merits.
7. The Third Party further avers that the agreement dated 29<sup>th</sup> January, 2020 which forms the basis of the Third Party Proceedings herein, was entered into through coercion and/or undue influence. That permit to process, market and sell coffee had been withheld forcing it to file case in Nyeri Law Court being R v County Government of Nyeri, Exparte Ndaroini Coffee Growers PLC to get it.
8. On without prejudice basis, the Third party avers that as at the time of signing the said agreement, all the terminal benefits including gratuities, compensation and salary in lieu of notice due to the grievants had been paid. Further, if the respondent failed to comply with Section 40 of the *Employment Act*, it should bear the consequences alone.

#### **Evidence**

9. The claimant filed a written statement by the second grievant one Julius Maina Gichuru dated 9<sup>th</sup> September, 2022 and produced a bundle of documents in the list dated 8<sup>th</sup> September, 2022.
10. The respondent filed a written statement by its Chairman one John Ngure Maina dated 25<sup>th</sup> January, 2021 and a bundle of 5 documents in the list dated 25<sup>th</sup> January, 2021. On the other hand the Third Party filed a written statement by the Chairman of its Board of Directors one Joseph Mukuha Chiera dated 8<sup>th</sup> August, 2022 and a bundle of 3 documents in the list dated 8<sup>th</sup> August, 2020.

#### **Submissions**

11. The claimant submitted that the redundancy of the grievants was unlawful and unfair since the procedure provided by Section 40 of the *Employment Act* was not followed. Specifically the grievants' trade union and the Labour Officer were not served with one month notice before the date of redundancy; and that they were not paid all their redundancy dues as required by Section 40 of the Act and clause 15 of the CBA. It was further submitted that most of the grievants served the respondent for over twenty (20) years before the said redundancy.
12. As a consequence of the foregoing matters, the court was urged to declare the redundancy of the grievants as unfair and unlawful and order reinstatement of the grievants to the positions without loss of benefit. In the alternative the court was urged to order the respondent and the Third Party to jointly pay the grievants salary in lieu of notice, service gratuity, compensation for unlawful redundancy and costs.
13. On the other hand, it was submitted for the respondent that the redundancy was fair and lawful; that it was occasioned by the Third Party; that Third Party committed itself to pay the gratuity to the



discharged employees; that the employees were duly paid and if anything is still outstanding, the Third Party should pay them plus costs of the suit, and that the order for reinstatement is not merited.

14. The Third Party maintained that there is no privity of contract between it and the grievants. It maintained that it was a stranger to the grievants' employment contract. For that reason it was submitted that the claimant has no contract capable of being enforced against it.
15. As regards the agreement to pay gratuity to the grievants, it was submitted that the same was not voluntary as it was signed under duress and undue influence. Consequently it was submitted that the said agreement was voidable and enforceable. Reliance was placed on the case of Ottoman Bank v Gawami [1965] EA 464 and Kabansora Millers v New Salama Wholesalers & 2 others [2001] 1 KLR 451.
16. Finally it was submitted that the procedure under Order 1 Rule 22 of the Civil Procedure Rules on directions after Entry of Appearance by Third Party was not followed. Consequently, it was submitted that the claim should be dismissed with costs.

### **Issues for Determination**

17. The issues for determination are:
  - a. Whether the redundancy of the grievants was unfair and unlawful.
  - b. Whether the claimant is entitled to the reliefs sought.
  - c. Who should pay the reliefs sought by the claimant?

### **Unlawful Redundancy**

18. It is common ground that the grievants were formerly employed by the respondent at its Ndaroini factory until they were laid off in June and July 2019. The reason for the redundancy was the delinking of the factory where they were working to become Ndaroini Coffee Growers PLC (Third Party) in January 2019. The termination letter to the first grievant dated 24<sup>th</sup> June, 2019 stated as follows:-

“Dear Sir

RE: NOTIFICATION OF TERMINATION FROM EMPLOYMENT IN GIKANDA F.C.S. ON REDUNDANCY/RETRENCHMENT BASIS

In reference to what transpired in due course during January 2019 on which one of the Society coffee factories split from Gikanda F.C.S. Ltd, thereon registered itself as a company by name Ndaroini Coffee Growers PLC – inevitability arose of reducing work force on basis of redundancy/retrenchment.

Services you have offered to the Society are very much appreciated and recognized by the Society which commenced from 1<sup>st</sup> March, 2017.

However due to the above mentioned split which affected the Society negatively in terms of inevitable need of reducing its workforce, you are notified that you are terminated from employment in Gikanda FCS Ltd effective 26<sup>th</sup> June, 2019 on redundancy/retrenchment basis.

Since the termination notice duration did not meet one month's notification you are entitled to receive one month pay in lieu which will be channeled through your payroll pay point.



Arrangement for receipt of termination/gratuities benefits are in due course on process.

You are wished prosperity in your future endeavor(s)/undertaking(s).

Yours faithfully

For: Gikanda Fcs Ltd

James N. Wanjohi

Secretary Manager

Signed by:

Chairman .....

Treasurer .....

Hon. Secretary .....

CC:

Chairman's File – Gikanda Fcs Ltd

Sub-county Coop Officer – Mathira East Sub-county

Kenya Commercial Food And Allied Workers – Nyeri Branch Secretary”

19. All the grievants received letters similar to the above save for insignificant modification to suit each individual employment particulars and the effective date of the redundancy. There is no doubt that the respondent acknowledged in the said letters that the notice period given before the redundancy was shorter than the required one month prior notice and offered to pay the grievants salary in lieu of notice. The said admission per se rendered the redundancy unlawful since Section 40 of the [Employment Act](#) provides for a notice of one month prior to a redundancy.
20. The notice is to be served upon the employees' trade union (if members) and the area Labour Officer. In this case, the notice was never served upon the trade union and the area Labour Officer. Consequently, the court finds that the redundancy was unlawful as it violated Section 40 of the Act.

### **Reliefs**

21. In view of the foregoing I make declaration that the termination of the grievants' employment through the redundancy was unlawful and unfair.
22. The claimant prays for reinstatement of the grievants but I find the same not practicable because the place of work is not available after the factory was taken over by the Third Party. They have also admitted that they were paid some terminal dues. Consequently, I find and hold that the best remedy is the alternative prayer for damages.

### **Gratuity**

23. The claimant prayed for gratuity for each grievant and in its submissions, it acknowledged that part of the claim had been paid leaving only a balance for each grievant. The said evidence was not rebutted by any records of full settlement as alleged by both the respondent and the Third Party. Therefore I award gratuity to each grievant as summarized in the claimant's written submissions. The said sums are in accordance with the CBA.

1. 1<sup>st</sup> Grievant – James Muchangi Muritu



28 months x Kshs.10,939 x 25% = Kshs.76,573

less paid Kshs.40,048 = Kshs.36,525.

2. 2<sup>nd</sup> Grievant - Julius Maina Gichuru  
Kshs.40,294 x 25% x 271 months = Kshs.2,729,918.50 less paid Kshs.749,791  
= Kshs.1,980,127.50
  3. 3<sup>rd</sup> Grievant – Agata Wangechi Karige  
Kshs.26,840 x 25% x 271 months = 1,794,020  
Less paid Kshs.855,516 = Kshs.938,504
  4. 4<sup>th</sup> Grievant – Diana Wandia Njau  
Kshs.14,055 x 25% x 271 months = Kshs.952,226.25 less paid Kshs.520,806 = Kshs.431,420
  5. 5<sup>th</sup> Grievant – Hannah Wambui Mbutu  
Kshs.26,480 x 25% x 271 months = Kshs.1,794,020 less Kshs.961,732 = Kshs.824,288
  6. 6<sup>th</sup> Grievant – Charles Muriuki Thitu  
Kshs.15,610 x 25% x 204 months = Kshs.795,651 less paid Kshs.298,555 = Kshs.497,096
  7. 7<sup>th</sup> Grievant – Rose Wangui Mwangi  
Kshs.14,055 x 25% x 78 months = Kshs.274,072.50 less paid Kshs.264,460 = Kshs.9,612
  8. 8<sup>th</sup> Grievant – Charles Githuri Maina  
Kshs.14,055 x 25% x 66 months = Kshs.231,907.50 less paid Kshs.112,557 = Kshs.119,350.50
  9. 9<sup>th</sup> Grievant – Nancy Nyawira Ngatia  
Kshs.31,935 x 25% x 244 months = Kshs.1,948,035 less paid Kshs.1,146,438 = Kshs.801,597
  10. 10<sup>th</sup> Grievant – Antony Wanjohi Gichango  
Kshs.26,480 x 25% x 232 months = Kshs.1,535,840 less paid Kshs.895,853 = Kshs.637,987
24. The claimant further prayed for salary in lieu of notice and I see no big issue on that because the respondent admitted that the grievants were entitled to that benefit and offered to pay the same vide the termination letters.
25. As regards the claim for compensation for unfair termination, Section 49 of the [Employment Act](#) entitles the grievants to compensation for unfair termination. The grievants served for periods between two (2) years and twenty-two (22) years. They did not contribute to the termination of their employment through misconduct nor is there any evidence that they were ever served with any warning letter during their tour of duty in the Society.
26. In view of the above considerations and the length of service I award the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup>, 10 (ten) months gross salary as compensation for unfair termination. For the same reasons I award the 7<sup>th</sup> and 8<sup>th</sup> grievant 5 months gross salary as compensation while the 1<sup>st</sup> grievant is awarded 2 months gross salary.



### **Who should pay the above damages**

27. The respondent brought into the proceedings the Third Party on the basis of an agreement dated 29<sup>th</sup> January, 2020 in which the Third Party agreed to pay gratuity to the employees who were laid off as result of the Third Party factory separating from the respondent.
28. The Third Party has denied liability contending that it signed the agreement through coercion and undue influence. No evidence of such coercion or undue influence was adduced. Further the Third Party has not shown what effort it took to dislodge the agreement if at all it was not entered into voluntarily. Having said so, I find that the agreement was signed voluntarily by the Third Party fully aware that it caused the redundancy of the grievants.
29. As regards apportionment of liability, I agree with the Third Party that it is not liable for claims founded on breach of procedure of redundancy by the respondent. Whereas it is clear that the Third Party undertook to pay gratuity for discharged employees of the factory, it never agreed to compensate the employees for the wrongs of the respondent. Consequently, I must hold that the Third Party will only pay the gratuities and salary in lieu of notice because those are payable even when redundancy is done in strict compliance with Section 40 of the *Employment Act*, while the respondent will pay the grievants the compensation for unfair termination awarded above.
30. The Third Party alleged that Order 1 Rule 22 of the Civil Procedure was not followed after it entered appearance. In my view that sounds like a procedural technicality being raised too late in the day. The Third Party overlooked that procedural question and it is therefore estopped from raising it now to defeat the course of justice. Further, the ELRC Procedure Rules 2016, are silent about Third Party Rules. Consequently the court is free to either refer to the Civil Procedures Rules or regulate its own procedure on the matter. In this case the matter of Third Party directions was not raised before my predecessor or before myself and therefore I will apportion liability as I have done above and I see no prejudice that arises from the same.

### **Conclusion**

31. I have found that the redundancy of the grievants was unfair and unlawful. I have also found that the claimant is entitled to gratuity, salary in lieu of notice and compensation for unfair termination. Finally, I have apportioned liability between the respondent and Third Party so that the respondent will pay the claim for compensation for unfair termination, while the Third Party will pay the claim for gratuity and salary in lieu of notice. Accordingly I enter judgment for the claimant as follows;-

1. James Muchangi Muritu  
Notice Kshs.14,126  
Service gratuity Kshs.36,527  
Compensation Kshs.28,252  
Kshs.78,903
2. Julius Maina Gichuru  
Notice Kshs. 49,352.00  
Service gratuity Kshs.1,980,127.50  
Compensation Kshs. 493,520.00  
Kshs.2,522,999.50



3. Agata Wangechi Karige  
Notice Kshs. 32,776  
Service gratuity Kshs. 938,504  
Compensation Kshs. 327,760  
Kshs.1,299,040
4. Diana Wandia Njau  
Notice Kshs. 17,866  
Service gratuity Kshs.431,420  
Compensation Kshs.178,660  
Kshs.627,946
5. Hannah Wambui Mbuta  
Notice Kshs. 32,776  
Service gratuity Kshs. 824,288  
Compensation Kshs. 327,760  
Kshs.1,184,824
6. Charles Muriuki Thitu  
Notice Kshs. 19,722  
Service gratuity Kshs.497,096  
Compensation Kshs.197,220  
Kshs.714,038
7. Rose Wangui Mwangi  
Notice Kshs. 17,866  
Service gratuity Kshs. 9,612  
Compensation Kshs. 89,330  
Kshs.116,808
8. Charles Githuri Maina  
Notice Kshs. 17,407.00  
Service gratuity Kshs.119,350.50  
Compensation Kshs. 87,035.00  
Kshs.223,792.50
9. Nancy Nyawira Ngatia  
Notice Kshs. 39,312  
Service gratuity Kshs. 801,597



Compensation Kshs. 393,120

Kshs.1,234,029

10. Antony Wanjohi Gichango

Notice Kshs. 35,776

Service gratuity Kshs. 637,987

Compensation Kshs. 357,760

Kshs.1,031,523

32. The awards to the claimant is subject to statutory deductions. The claimant is further awarded costs plus interest at court rate from the date hereof.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 14TH DAY OF JULY, 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 15<sup>th</sup> 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.

