



Gikama & 15 others v County Government of Laikipia & 2 others (Cause 62 & 46-71 of 2016 (Consolidated)) [2023] KEELRC 2313 (KLR) (3 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2313 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 62 & 46-71 OF 2016 (CONSOLIDATED)
HS WASILWA, J
OCTOBER 3, 2023**

BETWEEN

EUNICE WANJIRU GIKAMA & 15 OTHERS CLAIMANT

AND

COUNTY GOVERNMENT OF LAIKIPIA 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

**COUNTY SECRETARY, COUNTY PUBLIC SERVICE BOARD OF
LAIKIPIA 3RD RESPONDENT**

JUDGMENT

Background

1. The claimants herein all filed separate memorandum of claim on 19th February, 2016, which were all amended on 14th December, 2017 and Further Amended on 8th March, 2022. In all the Memoranda of claims, the claimants are agitating the issues of payment of salary arrears, allowances and for the jobs to be confirmed on permanent and pensionable terms. All the 16 claims herein were consolidated by consent of the parties on the 21st May, 2018 with ELRC Cause number 62 of 2016 marked as the lead file.

Claimants' case.

2. The claimants herein allege that they are employees of the County Government of Laikipia under the department of Public Health. That they were initially employed by the defunct Municipal Council of Nyahururu on various dates between the year 2002 and 2014 to serve in various capacities such as cleaners, garbage collectors, guards and cemetery attendant, with majority being cleaners. They earned salary ranging from Kshs 11,000 to Kshs 30,452 which, they stated, did not include house allowance.



3. It is stated that during their employment, the claimants herein were engaged on periodic contracts which expired from time to time and received new contract of three months each for the several years they served the Respondents. That they were referred as casual employees for all the years they serve the Respondents with the oldest serving continuously for 12 years and the youngest for 3 years at the time of filing this suit.
4. That they were paid on monthly basis, however were not issued with any payslip, showing the breakdown of the said pay.
5. The claimants state that they engaged the Respondent seeking for their employment to be converted to permanent and Pensionable terms, however the Respondents refused and in turn frustrated their employment by refusing to allocate them any work and in effect refused to pay them their dues from 1st January, 2017.
6. It is stated that when the Respondent is short staffed, it usually calls upon them to fill in for a day or so but fail to pay them for the services rendered.
7. They contend that since they have always received employment from the Respondent on continuous basis, their employment should be converted to permanent and pensionable terms.
8. They also stated that they were only paid salary without any allowance such as House allowance that is provided for under the law. Further that they were not granted any leave or paid in lieu, which they urged this Court to award them in this claim.
9. The claimants took issue with the fact that their employment remained on contract and on casual basis without any benefits when they had worked for the Respondent for years. They prayed for their employment to be confirmed on permanent basis, be paid House allowance for the period served and to be paid annual leave allowance for the period worked.
10. During hearing the claimants called three witness, the first on being Joseph Kimani Njuguna, who testified as CW-1 on authority given by the claimants and stated that he works for the Respondent on casual basis, he adopted his statement of 31.1.2022 and produced the documents filed therein.
11. Upon cross examination, he testified that he does casual jobs. That he reports to work at the Respondents to seek for work but when he is denied work, he goes to look for other odd jobs. That he started working for the Respondent in 2010 as a casual when it was a municipality. That he was given a contract of 90 days and on completion he was issued with a termination letter. He stated that he has been going to work but was not allocated any duties.
12. The second witness is Boniface Mwenda Wamboi, He adopted his witness statement of 31.1.2022 and upon cross examination, he stated that he currently engaged in odd jobs such as carrying luggage at the stage but that he had been employed by the Respondent in 2010 as a cleaner and in 2013 he was deployed to do loading, fend flowers and grave digging in the county cemetery. That he was also given duties to drive County vehicles when such task was available. He testified that the Respondents has frustrated them by not giving them duties and not paying them. He indicated that they were not given any payslips and also that they were not paid any house allowance.
13. The third claimants' witness was Ndirangu Mwangi who testified as CW-3. In his testimony, he adopted his witness statement of 15.3.2023 and on cross examination testified that he works for the Respondent as an electrician though the letter stated that he employment was on casual basis, even though their salary was paid on monthly basis. He clarified that though his daily wage was 386 and at times 359, the consolidated sum was paid on a monthly basis. That he worked continuously for



the Respondent. He urged this Court to compel the Respondent to pay him House allowance for the period worked and confirm the employment on permanent basis. He stated that he was not issued with any payslip.

Respondent's case.

14. The Respondents herein entered appearance and filed individual responses to the various further Amended memoranda of claims on 22 April, 2022, denying each of the claim and putting the claimants to strict proof thereof.
15. The Respondents stated that they have never issued the claimants with any letter at any given date, neither have they worked for them. Therefore, that the claims herein do not disclose any course of action against them as such they are scandalous, vexatious, frivolous and aimed at misleading this Court. They urged this Court to dismiss the suits herein with costs.
16. During hearing, the 1st Respondent summoned its in charge, Human Resource Development, Jelant Mwangi Muturi, as RW-1. He adopted his witness statement of 15.3.2023 and added that all the claimant's herein are not employees of the Respondents but that they had been employed by the defunct Laikipia Town Council on casual basis. That upon the promulgation of *the Constitution* and the creation of the Devolved County Government, the Respondents herein employed them on casual basis on periodic intervals of three months. That on expiry of the contract majority left the Respondent willingly on account of there being no job available for them. He stated that casual employees are only paid wages and not allowances.
17. On cross examination, he testified that he does not have the records of the casual employees however that the employees of the county are on permanent and Pensionable terms, including those that were on permanent terms when in Laikipia Town Council.

Claimants' Submissions.

18. The claimant submitted on three issues; whether the claimants were employees of the Respondent, whether the claimants are entitled to the reliefs sought and who should bear costs of the suit.
19. On the first issue, it was submitted that all the claimants herein were employed by the defunct Municipal council of Nyahururu which was dissolved as a result of devolution and consequently absorbed by the County Government of Laikipia within the Public Health Department. Therefore, that they are employees of the County Government of Laikipia, the Respondents herein. To support this argument they relied on the case of Patrick Kariithi Wahome & 114 Others V County Government of Laikipia & Another; Transitional Authority and another (Interested parties) [2021] eKLR where the Court cited the case of Timothy Omollo & 79 Others V Kakamega County Government and another [2013] eKLR and held that;-

“Local Authorities were abolished when the Local Government Act was repealed, on the announcement of the final results of the County election. The function of Local Authorities are function of the County Governments. Staff of Local Authorities, who are public servants appointed by or under delegation from the PSC automatically become County Government staff”.

20. Accordingly, that the claimant herein ought to be employed on permanent basis, having served the defunct Municipal Council, which is now the County Government of Laikipia.



21. On the second issue, it was submitted that a casual employee is defined under section 35 of the [Employment Act](#) as an employee engaged for 24 hours at a time and since the claimant herein had been employed for several years by the defunct Municipal Council and absorbed by the Respondent on casual basis for a continuous duration of 3 months each, their contract ought to convert to regular employment as provided for under Section 37 of the [Employment Act](#), in order for them to benefit from the safeguards given under the law for all other regular employees. To support this, they relied on the case of Empire feeds Ltd V Kingou (Appeal 6 of 2020) [2022] KEELRC 1501 KLR where Justice Stella Ruto affirmed that

“The Appellant(Employer) was under an obligation to prove by way of evidence that the Respondent(Employee) was engaged intermittently and not for a continuous period exceeding three months. In absence of proof to the contrary, the contract of service of the Respondent assume permanency and was deemed to be one where wages are paid monthly”

22. A similar view was stated by the Court of Appeal in the case of Nanyuki Water and Sewage Company Limited V Benson Mwiti Ntiritu& 4 others [2018] eklr, which was cited by the court in Empire Feeds Ltd V Kingou (Supra) that;-

“Section 37 of the [Employment Act](#), 2007 applies to the employment of the respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies.The respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.

23. To emphasize on the fact that the employment contracts of the claimants converted to permanent employment, the claimants cited the case of Kenya County Government Workers Union Bungoma County Branch V Bungoma County Public Service Board & Another [2020] eklr where the Court stated that

“The court declares that the continued employment of the listed 463 grievant/members of the petitioner by the respondents on casual basis is in violation of Sections 5, 35 and 37 of the [Employment Act](#), NO. 11 of 2007 and violates Articles 27, 28, 41 and 232 of [the constitution](#) of Kenya 2010. The court directs the respondents to place all the affected employees, referred to above on payroll and apply to each one of them the minimum terms and conditions of service provided under parts II, III, IV, V and VI of the [Employment Act](#), 2007.”

24. On costs, it was submitted that costs follow event and urged this Court to grant them costs of the claims herein.

Respondents' Submissions.

25. The Respondent submitted on two issues; what was the nature of the employment relationship between the parties herein and whether the claimants are entitled to the prayers sought in the memoranda of claims.

26. On the first issue, it was submitted that the claimants herein were engaged by the Respondent for a period less than 3 months at a time, therefore their employment did not convert as per the provisions of section 37 of the [Employment Act](#). He added that the evidence before court are letter tendered by the claimants showing the employment period that the claimants were engaged in and it ranged between one and three months in each of the said letters. Also, that the claimants being casual employees were



- paid a daily wage. Furthermore, that no bank statements have been annexed to the claim to support the allegation that they were paid on monthly basis to ascertain the allegations that their employment was continuous.
27. The Respondent submitted that based on the evidence before court, its clear that the claimant were employed on less than three months at a time and the employment was not continuous to convert it to permanent employment as contemplated under section, 37. He thus urged this Court to finds as such and declare the claimants were casual employees.
28. On the reliefs sought, it was submitted with regard to permanent injunction that CW-1 testified that, he reports to work on daily basis but the Respondent did not assign him work, that they were at times forced to carry out odd jobs such as carrying luggage at the stage to earn a living but reiterated that since they were not terminated by the Respondents, they remained employees of the Respondents. The Respondent argued that from the said testimony by CW-1, Its clear that the claimants do not get any employment from the respondent, secondly that their previous roles are obsolete and thirdly that the claimant have already sought employment elsewhere. On that basis, the Respondent submitted that the prayer for an injunction in not tenable in the circumstances and relied on the case of Kalya Soi Farmers Cooperatives Society V Paul Kirui & Another [2013] eKLR where the Court relied on the Court of Appeal at Nairobi decision in Eric V.J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No.20 of 1994 (12/94 UR) where the Honourable Judge addressed itself to the issue of grant of an injunction where the action sought to be restrained has already taken place and the application of the equitable principle that equity does not act in vain as follows-
- “An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.”
29. On the prayer for employment on permanent basis, it was submitted that the relief sought is superfluous, because, the claimants herein have not been in the Respondent’s employment since 2017. He argued that, the mostly probably prayer would have been for reinstatement first then conversion of employment to permanent terms, which move will be against the law because, the reinstatement, has been caught up by time since it can only be ordered within 3 years of termination as stated under section 12 (3)(vii) of the *Employment and Labour Relations Court Act*.
30. On the claim for salary arrears, unpaid house allowance and Unpaid leave, it was submitted that no evidence has been tabled before Court in support of these reliefs; first to show how much the claimants were earning and secondly the arrears sought and for what duration the same is being sought. Further, that with regard to the issues of salary arrears being sought for the period between January, and July, 2017, no contract of Appointment has been tabled before this Court to affirm that the claimants had been engaged by the Respondents in the said period.
31. On the claim for House allowance, it was submitted that the salaries paid to the claimants was a consolidated sum as admitted by the claimants in their pleadings which they termed it as compounded salary, affirming that indeed the pay given included any statutory allowances as indicated under section 31(2) of the *Employment Act*.



32. On the claim for annual leave, the Respondent submitted that since the claimant were engaged intermittently for period less than three months at a time, they are not entitled to leave having not worked continuously for more than a year as is required under section 28 of the [Employment Act](#).
33. In conclusion, the Respondent submitted that Equity does no act in vain and that having entered into short term contracts that was less than three months at a time, the claimants are bound by such terms and the Court should not accede to invitation to rewrite the contract by the parties. Accordingly, that the suit herein should be dismissed with costs.
34. I have examined all evidence and submissions of the parties herein. The claimant's contention is that they were terminated by the respondents after working for them for long periods of time which periods should be considered so that their casual employment is converted to term employment.
35. The claimants further aver that they were never paid house allowance and other allowances due and therefore they pray that the court orders the respondents to pay them these allowances accordingly.
36. The claimants have averred that they were employees of the defunct Municipal Council of Nyahururu between 2002 and 2014 and served in various capacities but were never issued with any payslips.
37. They aver that the respondent refused to pay them their dues from 1st January 2017.
38. In a bid to prove their employment, the claimant Eunice Gikama only produced a contract letter showing she was employed on a 3 months contract by the Laikipia County Government from 12th September, 2013. She also produced her bank statement showing payment of salary from Laikipia West of kshs.13,078/=, 13,078/= & 15,429.15/= respectively for the months of June, July and August 2017.
39. Other claimants Joseph Njuguna Kamau, Sarah Kamau, John Momanyi, Paul Njoroge, Benard Mwendwa, Francis Maina, Jackson Mundia, James Kariuki Wangui, Miriam Wanderi, Jackson Muthomi, James Chege, Mwangi Muchiri, Grace Njoki, Anthony Maina, Ruth Maina, Boniface Wangui, Agnes Kemunto and Joseph Kamau in their pleadings reiterate the same issues.
40. Grace Njoki in a separate plaint indicated that she was employed in 2013 by the respondent. The application letter exhibited shows that she was employed as a casual employee on a 3 month contract with effect from 3/10/2014 to 31/12/2014.
41. This casual employment was terminated on 1/4/2014. All these claimants show that they were employed on a 3 month casual engagement but have no documents to show any engagement beyond the 3 months indicated. Despite indicating that they had been in employment for over 12 years the claimants failed to prove this position.
42. The engagement from the short term contracts displayed was for 3 months and what was payable was indicated. The claimants signed agreeing to the said payment and cannot therefore renege on this indicating that they were not paid any allowances such as house allowances.
43. CW3 when cross-examined indicated that the other co-claimants had been employed on periodic 3 months contracts.
44. The said contracts were never produced in court as exhibits save a few isolated one or two.
45. The claimants have the onus of proving the length of time they worked for the respondent. They have only shown a short engagement of 3 months for some of the claimants.
46. They have not proved any longer periods warranting conversion of the employment to permanent and pensionable as per Section 37 of the [Employment Act](#) 2007.



47. In any case, from 2017 to date a period of 3 years has elapsed and hence reinstatement is not tenable.
48. There are also no employment records produced by the claimants to prove their employment with the respondents.
49. The respondents indicated that the claimants were not their employees and therefore it was the claimant's case to prove this by seeking for production of documents that could be in the respondent's possession.
50. In view of the evidence before me, the claimants have not proved their case as expected to warrant them being reinstated or their employment term if at all converted to permanent and pensionable.
51. The claimant's case falls below the threshold expected and must therefore fail.
52. The claim is dismissed accordingly with no order of costs.

DATED AND DELIVERED IN OPEN COURT THIS 3RD DAY OF OCTOBER, 2023.

**HON. LADY JUSTICE HELLEN WASILWA
JUDGE**

In the presence of:

Wachira for claimants – present

Ndichu for respondents – present

Court Assistant – Fred

