



Gachau & another v County Government of Nyandarua & another (Cause 492 & 493 of 2016 (Consolidated)) [2022] KEELRC 1555 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1555 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 492 & 493 OF 2016 (CONSOLIDATED)**

**HS WASILWA, J
JULY 28, 2022**

BETWEEN

ZABLON GICHUKI GACHAU 1ST CLAIMANT

JOHN THIARI KIMANI 2ND CLAIMANT

AND

COUNTY GOVERNMENT OF NYANDARUA 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

1. The Claimants filed their separate suit on December 9, 2016, both through the firm of Wambua Musembi and company Advocates, alleging to have been unfairly terminated, having been retired early before their retirement age. They sought for compensation for the unfair termination.
2. The files have been placed together by the Registry, and have in the past, been dealt with together by the Court.
3. The Respondents, through the firm of Kangethe Gitogo, entered appearance in the separate files on the April 25, 2017. Before the matter could be mentioned for pre-trial directions, the parties negotiated the matter out of Court and by consent filed on March 22, 2017 the parties agreed to settle the suits in the following terms; -
 1. That the county government of Nyandarua, the 1st Respondent herein shall pay the Claimant for days/months worked beyond the date of retirement.
 2. That the county government of Nyandarua, the 1st Respondent herein shall pay the Claimant Twelve (12) months' salary, which salary shall be basic pay, as compensation.



3. That the county government of Nyandarua, the 1st Respondent herein, shall pay to the Claimant, if any, any other legal terminal benefits due to him.
 4. That the County Government of Nyandarua, the 1st Respondent herein shall bear the costs of this suit.
 5. That in default of compliance of any Order above any party herein shall be at liberty to move this Honourable Court for further Orders.
4. This consent judgement was duplicated in both files and adopted by the Court as a judgement of the Court, the same day on the April 25, 2017 and an Order issued on even date.
 5. After the claims were settled, the parties began negotiation of the party to party costs and by a consent dated May 16, 2017 and filed on the May 22, 2017, the parties agreed in the following terms; -
 1. That the Respondent herein shall pay the sum of Kenya shillings Three Hundred and Fifty Thousand (Kshs.350,000) to the advocate for the Claimant being the party to party costs for this matter.
 2. That the Claimant's advocates shall not have any further claim against the Respondent.
 3. That in default of compliance of any orders above any party herein shall be at liberty to move this Honourable Court for further Orders.
 6. This Consent Orders in the separate files were also adopted by the Court and Orders issued on the May 22, 2017.
 7. It is alleged that the Respondents failed to comply with the Orders of the Court and two notices to show cause dated November 16, 2018 and 30th February, 2019, were issued by the Claimant and served upon the Respondents. No action was however taken with regard to these Notices though they were all served upon the Respondent as evidenced in the Affidavit of Service filed herein.
 8. On July 16, 2019, the 1st Respondent replied to both notices to show cause, by filing a replying affidavit deposed upon on the July 8, 2019 by Nyambura Macharia, the Director of legal Services at the 1st Respondent's employ.
 9. The affiant herein avers that the consent judgement was fully complied with by the 1st Respondent in that Zablon Gichuki (Claimant in 492 of 2016) was paid salary arrears for one month and 10 days being Kshs 72,148 and 12 months basic salary as compensation of Kshs 423,600. While John Thiari (Claimant in 493 of 2016) was paid 4 months' salary arrears and eleven days worked adding up to Kshs 260,292, together with 12 months compensation of Kshs 524, 400, which in effect settled the decretal sums as per the consent judgement of March 22, 2017. Further that, to satisfy the consent on party to party costs, the firm of Wambua Musembi and company advocates were paid their cost of Kshs 700,000, being Kshs 350,000 for each of the files in full and final settlement of the issue in dispute in these causes.
 10. It is contended that the notice to show cause was premised on allegation of failure to comply with consent order number 3 of the Consent judgement which read as follows;

“That the county government of Nyandarua, the 1st Respondent herein, shall pay to the Claimant, if any, any other legal terminal benefits due to him.”
 11. According to the Respondents the said paragraph did not specify, first if the Claimants were entitled to any further benefits and if they were entitled to any then the same ought to have been specified by the Claimant and their advocates. It is the Respondent's view that the said paragraph as drafted is not



- capable of being enforced as worded. He however avers that negotiation on the meaning and intend of the said Orders was established and it was to cover eventualities such as the party and party costs which was consented upon on the May 16, 2017.
12. This case did not proceed till March 31, 2022 when the Claimants filed other notices to show cause seeking to compel the Respondents to comply with the Consent judgement of March 22, 2017 and failure to which the Respondent' officials be held in contempt of Court orders and warrant of arrest be issued against them.
 13. These Notices to show cause was opposed by the Respondent who filed grounds of Opposition that came out as follows; -
 1. On the face of it the aforesaid Notice to show cause is misconceived and does not meet the constitutional threshold for invoking such drastic criminal jurisdiction of the Court.
 2. The Notice does not set out the factual basis for the orders sought and fails to disclose any specific particulars of the alleged contravention of the Court order.
 3. Contrary to what is alleged in the Notice to show cause, the Claimant has not demonstrated that there are any obligations on the part of the Respondent that are still outstanding and due to the Claimant which could warrant further litigation before the Honourable Court.
 4. Contrary to what is alleged in the Notice, the Respondents have fully discharged their obligations to the Claimant and made all the lawful due payments to the Claimant as shown in the attached affidavit and supporting evidence, the record loudly speaketh for itself.
 5. In law, judicial orders for warrants of arrest and imprisonment of a public officer cannot be issued unless the Honourable Court is satisfied by evidence that there are sufficient grounds for such drastic actions. In the present circumstances, the Applicant has not demonstrated the grounds thereof and has not discharged the burden of proof to the criminal standard or at all.
 6. The Notice before this Honourable Court is unmerited, wanting in material particulars and fatally defective. The same should be dismissed with enhanced costs to the Respondents.
 14. In addition to the grounds of opposition, the Respondent filed an affidavit deposed upon on the May 13, 2022 by Muturi Miriam, the Deputy Director, human Resource management services of the 1st Respondent herein. The affiant herein avers that the Zablon Gichuki dues were Kshs 72,148 being salary arrears for the one month and 10 days and Kshs 432,600 being 12 months' basic salary which all add up to Kshs 504,748. This total amount was subjected to 30% income tax bringing the total cost to Kshs 353,324 which was paid out to the Claimant on the 9th August, 2017. In addition, that the Claimant had been paid Kshs 50,000 on December 10, 2014 being the value of the Medallion award for his services to the former Ol Kalou Town Council. John Thiari's dues on the other hand add up to Kshs 784, 692 which after being subjected to income tax of 30% bring the net pay to Kshs. 549,284 which was paid to him on the August 9, 2017. Equally that John Thiari was awarded Kshs 50,000 on October 23, 2014 being the value of Medallion award for services rendered to Ol Kalou Town Council.
 15. It is averred that both Claimants had been issued with three letter on the 26th October, 2013 to access their retirement benefits from NSSF, the LAPFUND and the LAPTRUST. Therefore, that the Claimants have been granted all their lawful dues in satisfaction of clause three of the Consent judgement of March 22, 2017.
 16. In response to the Affidavit, the Claimants filed separate affidavits sworn on the June 6, 2022 and filed on even date. The Claimants admit that the affidavit is a true reflection of what was paid to



them however that the Respondent did not pay them Gratuity when the Respondent's employees on retirement were entitled to gratuity. A fact which they were even advised of by the Public Service Board Secretary through the letter of February 21, 2019.

17. It is therefore contended that the only pay not yet forwarded to them is the gratuity pay which the Respondent have not explained to this Court why it has never been paid to date.
18. The Notices to show cause were disposed of by way of written submissions with the Claimants filing on the June 9, 2022 and Respondent filed theirs on the June 28, 2022.

Claimants' Submissions.

19. The Claimants submitted that the claim herein arose out of the Respondent decision to early retire them and as per the consent judgement of March 22, 2017, they were to be paid all their emoluments including any other legal terminal benefits they were entitled to. It was argued that the Respondent has paid them all their dues save for gratuity which they are entitled to and still pending for payment. They therefore submitted that the notice to show cause was in respect of Gratuity pay and urged this Court to compel the Respondent to pay them their respective gratuity pay.

Respondent's submissions.

20. The Respondent submitted that the Notices to show cause are not properly before this Court for the reason that firstly, the Notice to show cause amount to unlawfully launching execution for gratuity payment before any judgement or decree is issued for such payment had been passed. Secondly, that the payment of Gratuity, that forms the root of the Notices to show cause was relinquished by the Claimants and therefore barred by the statutory rules and Thirdly, that the payments awardable to the Claimants were agreed upon and a consent entered as such the Claimant cannot ask for more outside what was agreed in the consent judgement.
21. It is the Respondent's submissions that there is no judgement or decree entered by this Court on payment of gratuity to warrant the Notice to Show cause herein. It was argued that the Claimants relied on number three of the consent judgement, on other legal benefits due to them to claim for gratuity, when the consent judgement came about as a result of the suit herein and the issues negotiated thereof were those that were raised in the prayers of the claim. Gratuity pay was not one of the prayers in the claim, as such the Claimants do not have any basis to now claim that the Respondent failed to comply with the consent judgment when the said Gratuity was not part of the issues for discussion or consented upon by the parties to warrant the Notice to show cause.
22. The Respondent also submitted that the issues for determination with regard to this cause were negotiated and settled out of Court with a resultant consent judgement signed by both parties and adopted by the Court. After the said consent the parties discharged each other from any further liability upon payment of the agreed sum.
23. It was also submitted that having failed to include gratuity as a prayer in his claim, the Claimant is deemed to have relinquished that prayer as per the provisions of Order 3 Rule 4 of the Civil Procedure Rules. The Respondent therefore urged this Court to strike out the Notices to show cause with costs to them.
24. I have examined the averments and submissions of the parties herein.
25. As submitted by the Claimants, they are still pursuing the Respondents for payment of gratuity which they have not been paid to date.



26. The Respondents on their part aver that gratuity payment was waived by the Court order and there is no Judgment for payment of gratuity.
27. I have considered the submissions. I note that the Court's Judgment stated out what was payable including payment "if any of other legal benefits payable". The applicants aver that they were entitled to payment of gratuity.
28. I have considered the appointment letter of the Claimant Zablon. The letter does not mention that he is entitled to gratuity but states that;

"Nevertheless you will be subject to the terms and conditions of service currently in force and applicable for your employment which may be promulgated from time to time".
29. The letter of appointment of John Kimani on the other hand is silent on payment of gratuity. If indeed there are any terms and conditions of service promulgated that entitles the Claimants to be paid gratuity, then they were expected to exhibit the same in Court.
30. This has not been done by the Claimants. In any case the Claimants were members of their pension scheme which in my view covers whatever terminal dues payable.
31. The judgment that was agreed upon by consent did not also mention gratuity payable and the Claimants have not demonstrated that they are entitled to such payment.
32. I find the new claim for "gratuity" not payable as not being part of the Court Judgment.
33. I therefore find the application not tenable and I dismiss it accordingly.
34. There will be no order of costs.

RULING DELIVERED VIRTUALLY THIS 28TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Musembi for Claimant – present

Respondent – absent

Court Assistant - Fred

