



REPUBLIC OF KENYA



**Chongwony v County Government of Bungoma (Cause
14 of 2019) [2022] KEELRC 3833 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3833 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 14 OF 2019**

**JW KELI, J
JULY 7, 2022**

BETWEEN

HILLARY CHONGWONY CLAIMANT

AND

COUNTY GOVERNMENT OF BUNGOMA RESPONDENT

JUDGMENT

1. The claimant, a former Deputy Governor of the Respondent lodged a claim for payment of housing allowance in arrears vide statement of claim dated December 19, 2019 and received in court seeking the following reliefs:-
 - (a) Kshs 5,400,000/-
 - (b) Interest thereon at court rates from date of suit till payment .
 - (c) Costs of this suit herein.
 - (d) Any other and further relief that this court may deem appropriate.
2. Together with his Claim the claimant filed his witness statement dated December 19, 2019 and list of exhibits dated December 19, 2019 together with the bundle of the said exhibits.
3. The Respondent delayed to enter appearance and the Claimant vide Notice of Motion Application dated January 31, 2020 sought for entry of judgment. The application was abandoned upon filing of defence.
4. The respondent entered appearance and filed a memorandum of defence dated February 10, 2020.
5. The claimant filed reply to the defence dated February 18, 2020 and received in court on the February 27, 2020.



6. The Claimant filed another application dated January 8, 2021 praying for summary judgment on grounds *inter alia* that the defence did not disclose a reasonable defence. The said Application was determined and dismissed by Justice Radido in his ruling dated October 7, 2021.
7. On the March 21, 2022 when Counsel for both parties appeared before me they indicated that the parties had agreed to canvass the suit by way of written submissions. The Claimant is represented by Mr Kapten of BS Advocates LLP. The Respondent is represented by Mr Makokha of Makokha, Wattang'a & Luyali Associates.
8. The court gave timelines for filing submissions .
9. The claimant complied with the directions and filed his submissions received in court on the April 1, 2022. On the April 27, 2022 the court gave judgment date in court. Respondent filed submissions later on June 30, 2022. The court considered both submissions in decision making.

Claimant's Case

10. The claimant states he is a former Deputy Governor of the respondent having served in the term between 2013 and 2017 . That he was entitled to housing benefit of kshs 90,000/- per month which was not paid during the entire tenure of office. He claims housing benefit for the entire period of service for 5 years amounting to kshs 5,400,000/-. He also claims interest and costs.

The Respondent's Case

11. As per its Memorandum of defence the respondent admits the claimant was its Deputy Governor for the period 2013 to 2017. The respondent admits that the claimant was entitled to a housing benefit of kshs 90,000/- per month where the employer (County Government) does provide a house to the officer. The respondent contends that the claimant was provided with housing facility at the expenses of the respondent throughout period of service at Webuye Guest house.
12. The respondent states that they rely on the spirit and tenure of the Constitution Petition No 328 of 2016 between the Council of Governors and the Salaries and Remuneration Commission where the Honourable court declined to grant a declaration that the salaries and Remuneration do pay the office holders of the County Deputy Governors Housing Allowances from the date of taking office until the determination of the Petition.
13. The respondent further stated that the Claim is time barred in accordance with the provisions of the [Employment Act](#). The Respondent admits being served with demand Notice but failed to act on the same due to failure of the Claimant to supply supporting documents to his Claim.

Claimant's Reply to defence

14. The claimant reiterates his claim is for his entitlement by law of Kshs 90,000/- per month being housing allowance from the date of employment till time he left service.
15. The Claimant denies that in the Constitution Petition No 328 of 2016, the court declined to grant a declaration as sought for payment of the Deputy Governors' housing allowance from the date of taking office until determination of Petition and takes the position that it was not SRC (Salaries and Remuneration Commission) to pay them but the employer (the respondent).
16. The Claimant stated that the Claim is within time limits under section 87 of the [Employment Act](#).



Determination

Issues for determination.

17. In the ruling of the court by Justice Radido dated October 7, 2021 the parties were ordered to file agreed issues before November 30, 2021 and in default of agreement, the Claimant's proposed issues will be adopted as the trial issues.
18. The court having perused the record did not find agreed issues. The default position was for the claimant's issues to be adopted as the trial issues. The claimant's proposed issues for determination are dated October 18, 2021 and received in court on the October 21, 2021. The issues are as follows:-
 - (a) Whether the respondent provided the claimant with housing facility at the expense of the respondent at all.
 - (b) Whether the claimant is entitled to Ksh 5,400,000/-
 - (c) Whether in Nairobi Constitution Petition No 328 of 2018, Council of governors vs Salaries and Remuneration Commission, the court declined to grant a declaration that the salaries and Remuneration Commission pay the office holders of the county Deputy governors housing allowances.
 - (d) Whether it was the duty of the salaries and Remuneration Commission to pay the Claimant.
 - (e) Whether the claimants claim is incompetent, bad in law and otherwise an abuse of the due process of the court.
 - (f) Whether the claimant's claim is time barred in terms of *Employment Act*.
 - (g) Who bears the costs of the suit?
19. The court will comply with the court directions under the said Ruling and apply the proposed issues by the Claimant as outlined in the preceding paragraph not necessary in that order.

Whether the Claim is time barred?

20. The Respondent states that the claimant's claim is time barred in accordance with the provisions of the *Employment Act*. This is a jurisdiction issue hence addressed first.
21. The claimant submits that the claim is not time barred. That the claimant's services ended in August 2017. This Claim was instituted on December 19, 2019. That according to section 90 of the *Employment Act*, an action of this nature shall be instituted within 3 years. That the Claim was instituted within 2 years and 4 months.
22. The Respondent submits that based on the evidence provided by the claimant, he argues that he wants payment of housing allowance with effect from 2013. Accordingly, based on the provisions of section 90 of the *Employment Act*, the Claimant ought to have filed his suit or claim within three (3) years that is on or before 2016 or alternatively within twelve months after cessation thereof which will imply that he ought to have filed his claim within 12 months of cessation of contract of service with the Respondent which was September 2017. This shows that he ought to have filed his claim in December 2019, he was time barred and therefore the entire suit is a non-starter and therefore the claim is incompetent, bad in law and is otherwise an abuse of the due process of the court.



23. Section 90 of the [Employment Act](#) provides for Limitation as follows:-

“Notwithstanding the provisions of section 4 (1) of the Limitations of Actions Act (cap 22) no civil action or proceedings based or arising out of his 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 12 months next after the cessation thereof.”

24. The respondent submits that claim is time barred as ought to have been filed in 2016 or in case of continuous injury in 12 months of cessation being date of end of service. A continuous injury has been defined under the [Black Law Dictionary](#)(10th edition, Editor Bryan Garner) ‘as an injury that is still in process of being committed. An example is the constant smoke or noise factory’ also termed as continuing harm. The Respondent in its submissions appears not to be sure whether it was a time limit of three years or a case of continuous injury. In the pleadings the Respondent simply stated it will plead the claim is time barred. The court is then left to determine whether the claim is time barred under the provisions of section 90 of the [Employment Act](#).

25. The court is guided by precedent and the law in interpretation and application of section 90 of the [Employment Act](#) with respect to the instant claim. Housing allowance or provision of housing is a statutory entitlement under section 31 of the [Employment Act](#). My brother Justice Rika in [Mtawali Kedenge Mramba v Nyati Auto Spares](#) [2017] eKLR on a claim for failure to provide for housing under section 31 of the [Employment Act](#) held as follows:- “The Respondent was in continuous breach of a statutory provision. It is similarly an offence under the [Employment Act](#) and the [Labour Institutions Act](#), not to pay an Employee his statutory dues. Payment can be enforced through the wage offence mechanism under the [Labour Institutions Act](#), or enforced through a Cause such as filed by the Claimant herein. Such dues have accrued to the Claimant, and as long as his Claim in general is not affected by limitation of time, disparate claims accrued over the period of service, which were not honoured by the Employer during service, cannot be defeated by the statute of limitation. Respondent’s submission that the prayer for arrears of house allowance is time-barred under Section 90 of the [Employment Act](#) has no merit. Every month the Respondent failed pay house allowance, there was a renewal in the cause of action.” The court finds this decision to be persuasive in the instant case.

26. The Court of Appeal had opportunity to consider unpaid allowances in the case of [G4s Security Services \(K\) Limited vs Joseph Kamaur & 468 others](#) (2018) eKLR where unpaid benefits accrued over several years of payment which benefits included accrued leave, and overtime payment. The court held that a suit for recovery of such benefits ought to be filed within 3 years of termination of the employment contract they relate to. In this case the Court of Appeal upheld claims of unpaid benefits of more than 4 years. Applying the said decision of the Court of Appeal it appears that Claim for or unpaid housing allowance can be filed in this court as long as the cause of action is within 3 years of termination of contract. The court interprets the decision of the Court of Appeal to be to effect that unpaid statutory benefits are not a case of continuing injury Limitation of 12 months on cessation under Section 90 of the [Employment Act](#).

27. The Court of Appeal upheld the foregoing position in [Ol Pejeta Ranching Limited v David Wanjau Muhoro](#) [2017] eKLR where it upheld holding of this court (as it was previously known)in [Industrial Cause No. 849 of 2011, Justus Atulo Ashioya v Akshar Team security Ltd](#) (UR) where that court had held as follows, “The period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of termination, the Employee should be accorded all benefits arising under the contract of employment.



The event that triggered this Claim happened on or about 26th January 2011, and the Claim to enforce the full range of benefits was filed on 11th August 2011, well within the period created under section 90 [of the *Employment act* 2007].”(emphasis given)

28. The Court of Appeal decisions are binding on this court and the emerging jurisprudence from the cited decisions is that a claim for accrued housing allowance during employment is not limited as long as the claim is filed within 3 years of termination of the employment service.
29. Consequently, the court finds and determines the instant claim for unpaid housing allowance during entire period of service is valid the Claimant having terminated services in September 2017 and filed claim on 19th December 2019 which falls within the 3 years limitation under section 90 of the *Employment Act*.

Whether in Nairobi Constitution Petition No 328 of 2018, Council of governors vs Salaries and Remuneration Commission, the court declined to grant a declaration that the salaries and Remuneration Commission pay the office holders of the county Deputy governors housing allowances.

30. The claimant submits that the court did not decline to grant the order sought and its declarations were self-explanatory.
31. The Respondent submits that the said judgment was delivered on October 5, 2018 when the claimant had already vacated office. That the judgment has been presented as exhibit in court but there was no order directing the County Governments that they should backdate the payment of the Deputy Governors housing benefits from the year 2013 when they took office. The Respondent submits that the law does not operate retrospectively and hence the Claimant herein cannot claim a benefit that was not there when he took office.
32. The court finds and determines that housing is a statutory benefit under section 31 of the *Employment Act*. This court has the original jurisdiction on all employment and labour disputes under Article 162(2)(b) of the *Constitution* of Kenya. The High Court found discrimination against Deputy Governors for lack of provision of housing and the court has no argument with that. The issue of whether the decision would apply retrospectively is neither here nor there as this court still has to decide on the merit of the instant claim independently.

Whether it was the duty of the salaries and Remuneration Commission to pay the Claimant?

33. The Claimant submits that once the court pronounced itself on the issues the Salaries and Remuneration Commission issued a circular to the Respondent herein discharging its obligation. The Respondent did not submit on this issue.
34. The Court finds and determines that this was not an issue in dispute having not been raised in the defence. Indeed in paragraph 9 of the memorandum of defence the Respondent states the failure to act on demand notice was due to failure of the Claimant to supply supporting documents to the claim.

Whether the Respondent provided the Claimant with housing facility at the expense of the Respondent or at all.

35. The Respondent in paragraph 4 and 5 of its statement of defence claim that it provided the Claimant with accommodation at Webuye guest house at its expense throughout the term of service. This Claim is denied by the Claimant in his reply to memorandum of defence dated February 18,2020.



36. The Court its ruling by Justice Radido of October 7, 2020 in paragraph 13 stated, “the question whether the county Government facilitated the Claimant with such housing is one which requires the production and proof of facts such as leases and payment of receipts with the guest house (Webuye guest house)”.
37. The Respondent did not file any evidence to support its allegations of housing facility despite being guided by the Court in the said ruling. The burden of proof of provision of the housing facility lay with the Respondent. It is trite law that he who alleges proves consistent with the provisions of Section 107 of the *Evidence Act*.
38. Consequently, the court finds and determines that the Respondent did not provide housing facility in lieu of payment of housing allowance to the Claimant during his period of service.

Whether the Claimant is entitled to reliefs sought.

39. The court has consolidated all the other issues to be addressed as hereunder.
40. The Claimant laid the legal basis of the claim for unpaid housing allowance being the pronouncement of the court in Judgment in Nairobi Connotational & Human Rights Petition No 328 Council of Governors vs Salaries and Remuneration Commission and Kenya Gazette Vol CXX - NO. 6518 of July 7, 2017 which provided for official residence for Deputy Governors and the circular by the Salaries and Remuneration Commission on Housing Benefits for Deputy Governors dated August 25, 2017 RefNo. SRC/TS/CGOVT/3/61 VOL IV95). A reading of the circular appears to implement Gazette Notice No. 6518 (*supra*) by providing for leasing of houses for Deputy Governors and capping rent to Kshs. 90,000 per month for counties outside Nairobi Mombasa and Kisumu.
41. The court then finds that Kshs. 90,000 was not a payable housing allowance but capped payable rent. Indeed the circular states so to wit, ‘the benefit is not provided in the form of house allowance but as a housing benefit (official residence)’
42. In the instant case it is undisputed that the Claimant did not receive housing allowance nor is there evidence the Respondent provided housing facility .
43. The Respondent submits that the Claimant ought to have provided receipt for indicating he was paying rent. That the Claimant has not denied he was staying at Webuye Guest Housing during his tenure of office. The court notes that in paragraph 3 of reply to memorandum of defence the Claimant denied he was provided with housing facility and called for strict proof. The burden was on the Respondent to provide evidence that the Claimant was provided with housing facility. On this question the court finds the Claimant met his burden of alleging and laying basis of the claim. The burden then shifted to the Respondent to prove its claim that the Claimant was provided with housing facility. The Respondent did not discharge the burden.
44. The court finds that Kshs 90,000 was the capped rent which the Respondent could have used to pay rent for the Claimant. That amount is not equivalent to housing allowance. The court is guided by the *Employment Act* and the *Employment and Labour Relations Court Act* and the general wages order. Section 31 of the *Employment Act* provides for payment of sufficient sum as rent. The Respondent admits in its paragraph 4 of its memorandum of defence that the Kshs. 90,000 was payable if housing facility was not provided. The Court found no evidence of housing facility accorded to the Claimant by the Respondent. The court finds that Kshs. 90,000 per month as claimed was sufficient rent for residence befitting the status of a Deputy Governor within Bungoma County or its environs.



45. In conclusion, the court finds and determines that provision of housing is statutory obligation and the Claimant is entitled to payment in arrears of housing allowance at Kshs 90,000 per month for the entire 60 months of service from 2013 to 2017 as a Deputy Governor of the Respondent for the sum amount of Kshs 5,400,000/-

Conclusion and disposition

46. The Court having found merit in the claim enters judgment for the Claimant against the Respondent as follows:-

a. The Claimant is awarded the sum of Kenya shillings five million and four hundred thousand (Kshs 5,400,000/-) as housing allowance arrears for the 60 months of service to be paid by the Respondent.

(The award amount is subject to statutory deductions)

b. Interest thereon from date of this judgment until payment in full.

c. The Respondent to bear costs of the suit.

JUDGMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 7TH DAY OF JULY 2022.

J W KELI,

JUDGE.

In the presence of:-

Court Assistant:- Brenda Wesonga

For Claimant :- Jeremiah Akhonya holding brief for Bulimo

For Respondent:- Absent

