



**Chepkwony v James Ogwae, Governor Kisii County & 2 others (Cause 91 of 2018) [2022] KEELRC 3983 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3983 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
CAUSE 91 OF 2018  
ON MAKAU, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**WILLIAM KIPCHIRCHIR CHEPKWONY ..... CLAIMANT**

**AND**

**JAMES OGWAE, GOVERNOR KISII COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISII ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY PUBLIC SERVICES BOARD, KISII COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The claimant brought this suit on September 10, 2018 alleging that he took an early retirement through his notice dated July 19, 2017 for two months but the respondents declined to pay his terminal dues even upon demand. Therefore, by this suit he seeks the following reliefs: -
  - a. That the respondents jointly and severally be ordered to pay the claimant in full all unpaid salary arrears, leave allowance, payment in lieu of leave days that were due but not taken, Employer's Provident Fund Contribution, National Social Security Fund (NSSF) contribution, house allowance and any other benefits due to the claimant.
  - b. Payment of costs to the claimant.
2. On October 3, 2018, the 1<sup>st</sup> respondent entered appearance through the County Attorney Mr Kennedy Chweya Onsembe advocate. On December 13, 2018, the said counsel filed a joint defence for all the respondents. The respondents admit that they lawfully interdicted him but he was reinstated by the court. They further aver that the claimant failed to report to work and terminated his services through desertion. Therefore, they aver that he is not entitled to the reliefs sought and pray for the suit to be dismissed with costs.
3. The suit went to full hearing, both parties gave evidence and thereafter filed written submissions.



## Evidence

4. The claimant testified as CW1, he adopted his written statement dated September 5, 2018 and produced a bundle of documents in the list dated February 27, 2019 as his evidence in chief.
5. In brief he stated that he was interdicted by the respondent jointly vide the letter dated May 21, 2013 but he challenged the decision by filing Kericho ELRC No 107 of 2015. The court nullified the interdiction vide the judgment delivered on July 19, 2016 and directed him to report back to work on July 20, 2016 at 8.00 am
6. A decree was then issued on September 13, 2016 and vide a letter dated July 17, 2017, he gave notice of early retirement to the respondents. The notice was to take effect on September 19, 2017. However, the respondents declined to pay his terminal dues even upon demand through an advocate prompting the filing of this suit. Therefore, he prayed for the reliefs sought in the suit.
7. On cross-examination, he reiterated that the court, in cause 107 of 2015, ordered him to resume his duties. He further stated that he reported to the CEO of the 3<sup>rd</sup> respondent Mr Nyakeri who told him to wait until he saw the judgment by the court. He further contended that even after his lawyer served a copy of the judgment, the CEO declined and insisted on waiting for respondents' lawyer to serve him with a copy.
8. CW1 testified that on his third attempt, the CEO gave him a letter informing him that the 3<sup>rd</sup> respondent had accepted to have him resume duty effective July 20, 2016. However, he filed contempt proceedings against the respondents. He also contended that the letter by the CEO suggested he should drop any back claims.
9. He denied that he was served with a show cause letter and a reminder for his failure to report back to work. He admitted that after serving the retirement notice he never received any response. However, he contended that he had the right to retire and denied that he abandoned work.
10. On re-examination, he reiterated that he was ordered to report back to work on July 20, 2016 by the court and he complied but the respondents did not receive him back. As a result, he filed contempt proceedings in cause 107 of 2015 but the application was not prosecuted after the respondents indicated willingness to receive him back to work. In the meanwhile, he took an early retirement.
11. The respondents called their Director of HR who testified as RW1. He also adopted his written statement dated March 10, 2022 and produced 8 documents in the respondents' list dated even date as exhibits. He admitted that the claimant was interdicted by the respondents vide the letter dated May 21, 2013 and thereafter he was removed from the payroll after he failed to turn up for a staff head count undertaken between July 31, 2013 and August 2, 2013.
12. However, he admitted that the claimant filed case No 107 of 2015 and on July 19, 2016, the court ordered him to report back to work on July 20, 2016 at 8.00 am but he failed to comply. By the letter dated October 24, 2016, the County Secretary called the claimant back to work but he failed to do so and therefore he was subsequently dismissed. RW1 maintains that in the circumstances of their case the claimant is not entitled to any terminal benefits and his suit ought to be dismissed with costs.
13. On cross-examination, RW1 testified that the respondents County Secretary was Mr Ndege but he left and Mr Patrick Lumumba took over. He further stated that Mr Nyakeri was replaced as the 3<sup>rd</sup> respondent's CEO/Secretary by Mr Mirera. He testified that the role of the HR Director includes keeping records of staff, payroll, welfare and implementations of employees matters passed by the 3<sup>rd</sup> respondent.



14. He reiterated that the claimant never reported back to work after his reinstatement by the court and even after being served with a letter by the respondents to resume work. He denied that the letter dated October 24, 2016 re-wrote the judgment of the court.
15. He further stated that the claimant was never reinstated to the payroll after he failed to report back to work as directed by the court. In his view there is no way the claimant would have been retired before reporting back to work.

### **Submissions**

16. The claimant submitted that he has proved his case on a balance of probability and therefore urged the court to award him the reliefs sought plus costs. He contended that he was reinstated to his employment by the court in a judgment delivered in case No 107 of 2015. He further submitted that the respondents have not proved that he was served with any show cause for absconding duty.
17. Finally, he submitted that he had the right to take early retirement after attaining the age of 50 years but the employer has failed to pay his terminal benefits. Therefore, he prayed for the reliefs sought in his suit plus costs.
18. The respondents, on the other hand, submitted that the claimant is not entitled to the reliefs sought because he did not resume duty after being ordered by the court to do so. They maintain that since the claimant failed to report back to work after the court ordered him to do so, he was never reinstated to employment and as such, they are not liable to pay him any terminal dues. Therefore, in their view, the claimant has not proved his case on balance of probability and the suit should be dismissed with costs.

### **Analysis and Determination**

19. I have carefully considered the pleadings, evidence, and submissions. There is no dispute that the claimant was employed by the respondents until May 21, 2013 when he was interdicted and subsequently removed from the payroll after failing to turn up for staff head count in July and August 2014. There is further no dispute that by a judgment delivered on July 19, 2016 in cause No 107 of 2015, the said interdiction was declared null and void and the claimant directed to report back to work on July 20, 2016. The issues for determination are: -
  - a. Whether the claimant complied with the judgment by reporting back to work on July 20, 2016 or any other date thereafter.
  - b. Whether the claimant lawfully retired or he deserted employment.
  - c. Whether he is entitled to the reliefs sought.

### **Did the claimant Report back to work on July 20, 2016?**

20. The claimant contends that he reported to work on July 20, 2016 as directed by the court in case No 107 of 2015 but the 3<sup>rd</sup> respondent's CEO, Mr Nyakeri directed him to stay away until he saw the judgment from the court. The CEO still declined to allow the claimant resume work after being served with copy of the judgment by his lawyer and insisted that he would only act on a copy of judgment from the respondents' lawyer. On the claimant's third attempt to resume work, the CEO gave him a letter dated October 24, 2016 informing him that the employer had agreed that he reports back to work effective July 20, 2016.
21. The claimant admitted that instead of reporting back in compliance with the said letter, he commenced contempt proceedings. Admittedly, the proceedings were never prosecuted after the employer showed



willingness to receive him back to work. However, the claimant served an early retirement notice citing toxic working environment.

22. The respondents did not call Mr Nyakeri to rebut the above evidence by the claimant. It follows that the claimant has proved on a balance of probability that he reported back to work on July 20, 2016 as directed by the court in its judgment delivered on July 19, 2016. He has also proved that he was prevented from resuming work by Mr Nyakeri acting as an agent of the respondents.
23. However, it is also clear from the evidence that an attempt was made by the respondents to bring the claimant back to work and have his reporting date backdated to July 20, 2016 but he declined because the employer allegedly wanted to deny him back pay. Then by letter dated July 17, 2017, the claimant gave notice of early retirement before resuming duty citing toxic work environment.

#### **Whether the claimant deserted employment or he retired?**

24. The court considers letter dated October 24, 2015 very crucial here because it was written soon after a decree was issued on September 13, 2016. The letter stated: -

“Mr Chepkwony William Kipchirchir,

Re: Reinstatement

This is to convey the decision of the County Public Service Board Kisii County vide their letter Ref:KCPSB/APP.22/09/16 dated 20<sup>th</sup> September, 2016 that you be reinstated to the County Government Service with effect from 20<sup>th</sup> July 2016 pursuant to court decision Cause No 107 of 2015 in response to your interdiction from the service vide Ref. letter KSI/C/2/15(1) dated 21<sup>st</sup> May, 2013.

You are required to signify acceptance of this reinstatement in writing and are further requested to report to Chief Officer Administration for deployment.

Signed.....”

Johnstone O Ndege

County Secretary and Head of Public Service

Kisii County Government”

25. The letter shows that the respondents were ready to comply with the court decree by backdating the reporting date for the claimant to the date ordered by the court but he declined and in my view, became a deserter. However, the employer never dismissed the claimant but kept engaging him until the claimant served the notice of early retirement on July 17, 2017. The reason cited for the early retirement as stated above, was toxic work environment.
26. The said notice according to the claimant was within the four corners of the law and the HR Policy Manual which grants right to to early retirement upon attaining the age of 50 years. A copy of the HR Policy was produced as exhibit and it is proof that the claimant was entitled to early retirement because he was 51 years.
27. The question that arises is whether that right is absolute or subject to the employer’s discretion. Clause L 6 of the HR Policy Manual 2013 states that: -

“Retirement under the ‘50 Year’ rule

1. An officer on attaining the age of 50 years may opt to retire any time thereafter.



2. An officer whose pension is determined under the *Pensions Act* has completed ten (10) years' service, will be eligible for pension should the officer opt to retire under '50 Year' rule. However, if the officer has less than ten years' service, he will be eligible only for a gratuity in accordance with regulation 5 of the Pension Regulation.
  3. An officer will be required to give two (2) months' notice of his intention to retire under the '50 year' rule.
  4. An officer whose pension is determined under the *Public Service Superannuation Scheme* and opts to retire under the '50 year' rule will be eligible as provided for in the *Public Service Commission Superannuation Act, 2012*.
  5. Application from officers to retire under the '50 year' rule will be approved by their respective Chief Officers.”
28. In view of the above, I find that the contract between the parties herein did not give the claimant absolute right to early retirement. Such retirement is to be sought by an application by the employee and it is subject to approval by the Chief officer of his department. In this case the claimant has not produced any documentary evidence to confirm that his early retirement was approved as required by the employer's HR Policy. Therefore, I agree with the respondents that the claimant did not lawfully retire from service but he deserted.
29. In my view, if the request for early retirement was declined, the claimant should have tendered a resignation voluntarily or involuntarily and deemed himself as constructively dismissed on grounds of toxic work environment. I will say no more on that issue.

**Whether claimant is entitled to relief**

30. In view of the judgment of the court in cause 107 of 2015, the claimant was to report back to work on July 20, 2016 after his interdiction was nullified. The judgment did not award the claimant any other reliefs save for costs of the suit. The only reasonable inference to draw from that judgment is that the claimant did not seek any other relief.
31. The only place to turn to in the circumstances is the law and the contract of employment between the parties and see whether the claimant is entitled to any relief like back pay. That was not shown to the court either by pleadings, evidence or even submissions. In addition, the claimant has not given particulars of the reliefs sought or even quantified the same in the pleadings. Therefore, I decline to award the blanket relief sought. The court cannot aid any party by granting what is not pleaded. Parties are bound by their pleadings.
- Consequently, I dismiss the suit with no order as to costs.
32. However, this does not mean that the claimant loses his duly earned benefits under his contract of employment. He can still pursue, if any like pension and salary.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022.

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 April 15, 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.

ONESMUS N MAKAU

JUDGE

