



Kenya Union of Commercial, Food and Allied Workers v Gikanda Farmers Cooperative Society Limited (Cause E003 of 2020) [2022] KEELRC 3902 (KLR) (16 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3902 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E003 OF 2020
DKN MARETE, J
SEPTEMBER 16, 2022**

BETWEEN

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

AND

GIKANDA FARMERS COOPERATIVE SOCIETY LIMITED ... RESPONDENT

RULING

1. This is an application by way of Notice of Motion dated July 19, 2021 and seeks the following orders of court;
 1. That this application be certified urgent, service thereof be dispensed and same be heard ex parte in the first instance.
 2. That the honourable court do and hereby finds that its judgment dated June 30, 2021 from page 4 paragraph two has changed its chronology from the issue in dispute to redundancy, an issue which was not in the claim.
 3. That this honourable court finds that the inclusion of the issue of redundancy and issued for determination from page four to page six of the judgment are inconsistent with the issue in dispute which was “failure to pay terminal benefits to Jackson Kanyi Wanjohi, James Wanjohi Kinyua, James Wachira Mwangi and Atanasio Macharia Gichine which the court is invited to correct.
 4. That this honourable court finds the error at page four last paragraph where it states “Overall this entitles the claimants to terminal benefits at the rate of 25% of the basic salary in the last month of employment and for every completed year of service” is inconsistent with the collective bargaining agreement which reads “the service gratuity for any employee whose service are either terminated, resigns, retrenched, retired or declared redundant shall be



calculated at the rate of 25% one current basic monthly salary earning at the month of leaving employment for every complete month of service.”

5. That the claimant in their Memorandum of Claim at page five paragraph 23 clearly states “the service gratuity for any employee whose service are either terminated, resigns, retrenched, retired or declared redundant shall be calculated at the rate of 25% one current basic monthly salary earning at the month of leaving employment for every complete month of service.”
 6. That the respondent has also reiterated and confirmed the same in their response dated December 16, 2020 at paragraph two.
 7. That the honourable court is invited to find that the two major errors in its judgment affected the final determination and that this ought to be and correct so that the chronology can be in order as per the claim and also that the judgment can deal with the issues as per the claim and the response.
 8. That the honourable court do issue any other order it deems fit to address the ends of justice.
 9. That each party to bear its own costs in regard to this application.
2. It is grounded as follows;
1. That on June 30, 2021 the honourable court delivered a judgment in regards to the claim placed before it which was “failure to pay terminal benefits to Jackson Kanyi Wanjohi, James Wanjohi Kinyua, James Wachira Mwangi and Atanasio Macharia Gichine”
 2. That in its judgment at page four, the honourable court included the issue of redundancy which was not in the claim, which inclusion has affected the entire of judgment of the court.
 3. That in the claim the claimant’s prayers was payment of terminal benefits balances as per the collective bargaining agreement but not wrongful, unfair, and unlawful termination as indicated in the judgment under caption on issued for determination in page 4.
 4. That out of the four grievants herein two had attained retirement age, one of them terminated his services under medical ground and the last one resigned, none of them was declared redundant.
 5. That three out of the four grievants were paid their terminal benefits but not as per the collective bargaining agreement and one of them was not paid anything at all hence the claim.
 6. That in the claim the claimant had captured clause 15 (b) as it reads in the collective bargaining agreement but the court stated it differently “terminal benefits at the rate of 25% of the basic salary in the last month of employment and for every completed year of service”, the claimant invite the court to correct this caption to read as per the collective bargaining agreement. Refer to page 25 of the main claim.
 7. That the claimant/applicant invites the honourable court to correct the judgment and issue final orders as per the correct issued in the claim which is “failure to pay terminal benefits to Jackson Kanyi Wanjohi, James Wanjohi Kinyua, James Wachira Mwangi and Atanasio Macharia Gichine” but not redundancy and unlawful termination as it is in the judgment.
 8. That under the circumstances it is only fair and reasonable that the honourable court reviews the judgment so that the conclusion of the judgment to be in line with the issue in the claim.



3. The respondent in her Grounds of opposition dated February 10, 2022 opposes the application on the following grounds;
 1. That this honourable court having rendered itself in its judgment delivered on June 30, 2021, it has become *functus officio* in this matter.
 2. That the claimant/applicant if dissatisfied/aggrieved by the court's judgment delivered on June 30, 2021 it should lodge an appeal to the Kenya Court of Appeal.
 3. That the defendant/respondent supports the judgment of this honourable court delivered on June 30, 2021.
 4. That the present application is therefore incompetent, misconceived and an abuse of the court process.
 5. That the application ought to be dismissed with costs.
4. The claimant/applicant in her written submissions dated April 7, 2022 reiterates her case and prays that a review of judgment be had. It is her case that the inclusion of the subject of redundancy was not part of the claim and therefore only adds confusion to the issues raised by the claim.
5. Again, the judgment of court misquoted the rate of payment of terminal benefits which is 25% of each complete month of service and substituted this for complete year of service.
6. The respondent submits a case of *functus officio* on the part of this court and a disability to proceed. On this she relied on the authority of *ICEA Lion Insurance Co Ltd vs Julius Nyaga Chomba* (2020) eKLR, where the court held thus;

“The Supreme Court of Kenya expounding on the doctrine of *functus officio* in Election Petitions Nos 3,4 and 5 Raila Odinga & 5 others vs IEBC & others (2013) eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the *functus officio* doctrine, with specific reference to its Application in Administrative Law.” (2005) 122 SALJ 832:

“The *functus officio* is one of the mechanisms by means of which the law gives expression of the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker.”

7. She further seeks to rely on the authority of *Jersey Evening Post Limited vs Al Thani* (2002) JLR 542 at 550, where the court observed thus;

“A court is *functus officio* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”



8. This matter was lost by the claimant/applicant and therefore this application for review.
9. I agree with the applicant that from the onset, this matter was not an issue of unlawful termination of employment. It was one on failure to pay terminal benefits to the grievants as set out in the claim.
10. The respondent however brought in a defence of lawful redundancy of the grievants and therefore a case of lawful termination of employment. This must have carried the court away and far from the actual issue for determination. It therefore is an error apparent on the record and must be addressed in a case for review like we have here.
11. This matter was dismissed but the dismissal was based on the wrong premises. It was based on non-issues and in ignorance of the salient issue(s) for determination. It therefore calls for rectification in the circumstances.
12. Going back to the pleadings and proceedings before this court, it is clear that the claimant established a case of underpayment of the grievant's terminal benefit as set out in the collective bargaining agreement.
13. This court's citation of the provision of the collective bargaining agreement on the subject of service gratuity was also erroneous. It should have come out thus;

“The service gratuity for any employee whose service is either terminated, resigns, retrenched, retired or declared redundant shall be calculated at the rate of 25% on current basic monthly salary earning at the month of leaving employment for every complete month of service.”
14. In view of the discrepancies and apparent errors on the face of record and judgment of this court, it comes out clear that injustice occurred on the part of the claimant. The grievants stand to lose extensively.
15. This application becomes sustainable on the premises of the errors now established by the application for review. It must succeed. This is the view to rectifying the apparent errors and returning the matter to the fore of justice to the parties.
16. I am therefore inclined to allow the application and order relief as follows;
 - i. The respondent be and is hereby ordered to pay to the grievants service gratuity as follows; Jackson Kanyi – 1st grievant – kshs 492,282.00. James Wachira Wanjohi – 2nd grievant – kshs 1,135,510.00. James Wachira Mwangi – 3rd grievant – kshs 678,745.00. Atanasio Macharia – 4th grievant – Kshs 127,521.00.
 - ii. Each party shall bear their cost of the application.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.

D K Njagi Marete

JUDGE

Appearances

1. Miss Macharia for the claimant union/applicant

2. Mr Maina Karingithi instructed by Maina Karingithi & Advocates for the respondent.

