



**Njihia v Nairobi Power Engineering Limited (Cause 1657 of 2017)
[2022] KEELRC 3891 (KLR) (16 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3891 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1657 OF 2017
SC RUTTO, J
SEPTEMBER 16, 2022**

BETWEEN

WILSON KAGI NJIHIA CLAIMANT

AND

NAIROBI POWER ENGINEERING LIMITED RESPONDENT

JUDGMENT

1. Through a letter of appointment dated 21st July, 2008, the claimant was employed by the respondent, as a welder/mechanic fitter. Vide a letter dated 22nd November, 2016, the claimant informed the respondent of his intention to retire with effect from 31st December, 2016, at the age of 57 years old. It was subsequent to the claimant's retirement that the dispute commenced.
2. The claimant avers that the respondent failed to remit his terminal dues being severance pay pay for 11 years amounting to Kshs 160,534/=, leave due for three years amounting to Kshs 87,564/= and savings through the respondent's Savings and Credit Cooperative Society (sacco) known as Nairobi Power Sacco amounting to Kshs 107,000/=.
3. Opposing the claim, the respondent avers that the claimant's allegation is wholly misleading and erroneous as he was paid all his terminal dues and benefits, which he received. Consequently, it has asked the Court to dismiss the claim with costs.
4. The matter proceeded by way of Affidavit evidence pursuant to Rule 21 of the Employment and Labour Relations Court Rules (2016).

Claimant's case

5. The claimant depones through his Affidavit sworn 19th April, 2022, that he received a letter on 23rd December, 2016, from the respondent, in acknowledgement of his notice to retire. That through the said letter, the respondent notified him that all his dues will be paid at the expiry of the notice. That



however, the respondent failed to remit his severance pay, leave dues for three years and savings with the respondent's Sacco.

6. That prior to his retirement, he had served the respondent faithfully and had neither been a subject of any disciplinary process nor a warning notice. That the respondent has no justification for refusing and/or withholding his terminal dues. That despite his request and good faith correspondences, the respondent refused, ignored and/or neglected to make good his claim.

Respondent's case

7. The respondent's evidence was presented through the affidavit of Alphonse Mwangi Gitonga who described himself as its Managing Director. He swore that upon the claimant's employment, he was incorporated into the respondent's retirement benefits scheme held with Madison Insurance Company. That the claimant also joined the respondent's Sacco known as Nairobi Power Engineering Savings & Credit Cooperative Society. That the respondent wrote to Madison Insurance notifying them that the claimant had retired and instructed them to proceed and process his pension dues.
8. He further deponed that at the time of his retirement, the claimant had an outstanding loan of Kshs 287,490.00 with Nairobi Powering Sacco society while his savings with the said Sacco society was Kshs 118,148.85. That upon the Sacco reducing the claimant's outstanding loan of Kshs 287,490.00 from his total savings of Kshs 118,148.85, the claimant still had an outstanding loan of Kshs 169,341.15 which incurred interest of Kshs 8,040.00 totalling Kshs 177,381.00.
9. That Madison Insurance computed the claimant's dues and established that he was entitled to Kshs 262,239.00. That the claimant wrote to Madison Insurance on 24th April, 2017, instructing them to deduct the sum of Kshs 177,381.00 from his benefits by drawing a cheque for the same amount in favour of the said Nairobi Power Sacco, to clear his outstanding loan. That acting on the claimant's instructions, Madison Insurance processed the claimant's dues of Kshs 262,239.00 and paid Kshs 177,381.00 to the Sacco to settle the claimant's loan arrears and paid him Kshs 83,897.00 being the balance of his retirement benefits.
10. He further deponed that the claimant is not eligible for severance pay as he was a member of a retirement benefit scheme. He further stated in his Affidavit that the claimant's prayer for leave allowance for the years 2005,2006 and 2007 is time barred in accordance with Section 90 of the *Employment Act*. He concluded by stating that the respondent does not owe the claimant any money.

Submissions

11. The claimant submitted that despite working for the respondent for a period of eleven years, he was not paid severance pay. Placing reliance on the case of *Rajab Barasa & 4 others v Kenya meat commission* [2016] eKLR, the claimant further submitted that it is the employer's duty to ensure that every employee has taken annual leave as and when due. The claimant further submitted that the respondent has not disputed that he had a savings account with its Sacco.
12. On the other hand, the respondent submitted that the claimant's claim is in the nature of a continuing injury hence in terms of section 90 of the *Employment Act*, it ought to have been instituted within 12 months of cessation of employment, which was on 22nd November, 2016. That the suit herein was lodged more than 12 months after the separation hence the claim, is statute barred. On this score, the respondent cited the cases of *Joseph Kamau Nyakarura & 3 others vs Mubugu Farm Limited* [2017] eKLR and *Samuel Otiende Lukoko v Shiners Girls High School* [2015] eKLR.



13. The respondent further submitted without prejudice to its argument on time bar, that the claimant had failed to prove his entitlement to the prayers sought. That the claimant did not provide any evidence to show that he is entitled to leave allowance. To support its position, the respondent sought to rely on the provisions of section 107 of the *Evidence Act* and the case of *Charles Kariuki Mwangi vs Intersecurity Services Limited* (2018) eKLR. It was further submitted that the claimant was not entitled to severance pay as he was a part of a retirement benefit scheme. That further, the claim in regards to the Sacco was subject to a contract between the claimant and the said Sacco which the respondent is not privy to.

Analysis and determination

14. Flowing from the pleadings on record, the evidence exhibited, and the opposing submissions, the Court is being called to determine the following issues: -
- i. Whether the claimant is entitled to severance pay
 - ii. Whether the claimant is entitled to accrued leave pay from 2005-2007
 - iii. Whether the claimant is entitled to the savings from the Nairobi Power Sacco

Severance Pay

15. The claimant is seeking the sum of Kshs 160,534/= from the respondent being severance pay.
16. Under Section 40 (1) (g) of the *Employment Act*, severance pay is made to an employee who has been declared redundant. In accordance with section 2 of the *Employment Act*, redundancy is defined to mean the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.
17. As such, an employee qualifies for severance pay where the loss of the employment is not attributable to the employee. In the instant case, the claimant exited the respondent's employment on account of retirement, hence it was on his own volition. He was not asked to exit on circumstances that have been identified under the statutory definition of the term "redundancy".
18. Further, it is evident from the record, that the claimant was a member of a pension scheme where he contributing 5% while the respondent contributing another 5%. As such, upon retirement, he was entitled to benefits from the said pension scheme, to which he was a member, a supposed to a severance pay.
19. In light of the foregoing, the claimant is not entitled to severance pay and the claim to that extent fails.

Accrued Leave pay

20. The claimant has prayed for accrued leave pay for the years, 2005, 2006 and 2007. It is notable that the claimant has failed to particularize this claim despite being specific in nature. In this regard, he did not specify the number of leave days outstanding for each particular year and the amount he is seeking in respect of each year. Indeed, it is not clear how the claimant arrived at the global figure he seeks from Court and how the same is to be apportioned between the three years.
21. In the circumstances, the said relief is declined.
- Entitlement to Savings from Nairobi Power Sacco



22. The final claim by the claimant is in regards to his savings with the Nairobi Power (NEP) Sacco, which he avers is in the sum of Kshs 107,000/=.
23. At the outset, it is notable that the Sacco is a different entity from the respondent and despite the claimant being a member thereof by virtue of his employment, it was not and cannot be construed to be the one and the same as the respondent.
24. Coupled with the foregoing, the claimant has not denied that he had an outstanding loan with the NEP Sacco. Indeed, there is on record a letter dated 24th April, 2017, from the claimant addressed to Madison Insurance through which he instructs as follows: -

“Re: Pension Dues Payment Authorization

I Wilson Kagi Njihia holder ID no....and policy No....having retired from Nairobi Power Engineering Ltd wish to request my dues to be paid as follows;

1. Amount of Kshs 177,381: -cheque be drawn to NEP Sacco Society Ltd.
 2. The balance amount cheque be drawn to Wilson Kagi Njihia...”
25. It is therefore apparent that the claimant authorized by his own hand to have Madison Insurance reduce his benefits for purposes of offsetting his outstanding loan with the NEP Sacco.
 26. In light of the foregoing and specifically noting that the claim for savings arose outside the claimant’s employment relationship with the respondent, it constitutes a cause of action between him and the NEP Sacco in its capacity as a savings and credit cooperative society hence is outside this Court’s jurisdiction.
 27. Accordingly, the dispute in regards to the claim for savings falls within the ambit of the Tribunal established under Section 77 of the Co-Operative Societies Act, No. 12 of 1997. For this reason, the claim to that extent collapses.

Orders

28. In the final analysis, I dismiss the claim in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Njengo

For the Respondent Mr. Gaya

Court Assistant Abdimalik Hussein

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

