



**Kaguthi & 11 others v Principal Secretary Ministry of Interior and  
Coordination of National Government (PS Interior) & another (Petition  
E084 of 2020) [2022] KEELRC 14642 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14642 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E084 OF 2020  
NZIOKI WA MAKAU, J  
OCTOBER 27, 2022**

**BETWEEN**

**JOSEPH KAGUTHI & 11 OTHERS ..... PETITIONER**

**AND**

**PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND COORDINATION  
OF NATIONAL GOVERNMENT (PS INTERIOR) ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners have in the Petition dated June 3, 2020 filed suit against the Principal Secretary Ministry of Interior and Coordination of National Government (PS Interior) and the Attorney General seeking for the following reliefs:
  - i. A declaration that the petitioners' Constitutional rights have been violated by the respondents
  - ii. A declaration that the respondents had no constitutional and/or Statutory right to unlawfully withhold the payment of the Petitioners' accrued payment as set out in the attached schedule hereto without proven valid reasons for so doing.
  - iii. An order directed to the respondents to pay the petitioners payments as set out in the Schedule annexed hereto.
  - iv. A declaration that the petitioners are entitled to damages to be paid by the respondents to be assessed by the honourable court.
  - v. Any other favourable order that the court may grant.



2. The petitioners aver they were appointed by the 1<sup>st</sup> respondent on November 7, 2015, on specified terms as members of the National Committee on the Implementation of Citizen Participation in Security for the period 2016 to 2018. It is the petitioners' averment that the President of Kenya appointed them into various positions of the said Committee on diverse dates as set out in Kenya Gazette Notice No. 9272 of December 18, 2015 and gazette notice No. 2700 of April 22, 2016. That they diligently carried out their duties with devotion and received partial payments towards their approved remuneration over the said period i.e. Kshs. 465,000/- per month for the Chairman (1<sup>st</sup> petitioner) and Kshs. 425,000/- per month for the members (2<sup>nd</sup> to 12<sup>th</sup> petitioners). That they were willing to continue with such service were it not for the term of the Committee coming to end on November 18, 2018 and that the respondents released them without payment of their accrued dues.
3. It is the petitioners' averment that the respondents were bound by the petitioners' terms of engagement with regard to their payments as approved vide the Internal Memo of March 23, 2017 but which was not implemented. That the respondents' denial and/or refusal to pay their dues was a violation of the Constitutional and the petitioners' legitimate expectation to receive salaries and allowances for services rendered. They aver that the illegal withholding of their lawful payments deprived them of the full benefit of the law as set out under article 27(1) of the Constitution of Kenya which provides that "Every person is equal before the law and has the right to equal protection and equal benefit of the law." They aver that the respondents' actions and conduct of withholding their payment further offends articles 40, 41 and 48 of the Constitution and is discriminatory.
4. The Petitioners further aver that the respondents as State Organs are obliged to comply with articles 10, 27, 40, 41, 43, 47 and 48 of the Constitution which embody national values and principles of good governance. That these values include inter alia the rule of law, human dignity, equality, human rights, equity and social justice. The Petitioners contend that article 20 of the Constitution permits every person to enjoy the Bill of Rights to the greatest extent and mandates courts to adopt the interpretation that mostly favours the enforcement of a right or fundamental freedom. It is the petitioners' averment that the respondents' administrative actions are unlawful, unreasonable and procedurally unfair.
5. In response, the respondents filed a replying affidavit sworn on March 30, 2021 by Mr. Wilson Njega, EBS, OGW. The deponent avers that the Petition herein should be dismissed in limine for being frivolous, scandalous and mischievous and an abuse of this honourable court process because the respondents have proof that the petitioners were paid all their dues for the period of their engagement with the respondents. He further avers that whereas the emoluments terms for the defunct Taskforce were guided by a Salaries and Remuneration Commission (SRC) Circular No. MSPS.2/1A.VOL.XL VOL.III (119) dated August 2, 2013 which informed their earnings for the entire period of the taskforce, the new outfit of the National Committee on the Implementation of Citizen Participation in Security (CICPS) had no clear definition on their remuneration terms. He states that the CICPS membership thus forwarded their request for better terms to the SRC for consideration and guidance and continued with its work of establishing Nyumba Kumi clusters and training cluster officials across the country; whilst only being paid per diem allowances for activities outside Nairobi for the entire year 2016. That the rates were tabulated with a presumed civil service job group "U" for all members as inherited from the previous Taskforce with the exception of the month of March 2016 when members were paid as per the said SRC Circular of August 2, 2013.
6. The deponent further avers that the SRC later addressed the Chief of Staff & Head of Public Service giving clear direction on calculation of members' allowances and facilitation and stating that the CICPS was only entitled to a maximum sitting of four (4) days per month. That an Internal Memo OP/PA/3/17/2A dated March 23, 2017 was addressed to the PS Interior outlining the guidelines on remuneration of the Committee Members but had an apparent error to the extent that it allowed for a



maximum of fifteen (15) days sittings in a month which was different from the directions by the SRC. That this is the basis of the respondents' Counterclaim against the petitioners hereinafter for the extra eleven (11) days that was paid to them effective from January 2017, contrary to recommendation by SRC. He avers that this error was not intentional and the Respondents became aware of the same after expiry of the term of the Committee Members. That in the years 2017 and 2018, Members were paid all their dues with effect from January 2017 to November 2018 directly to their bank accounts less 30% statutory tax. The deponent further avers that the Petition does not evidence any constitutional violations and the petitioners have also not pleaded with particularity the alleged violated articles of the Constitution. In short, it is asserted that this court has no jurisdiction to hear and determine the matter against the respondents and that the Petition should be dismissed with costs.

7. In the Counterclaim/Cross Petition against the Petitioners, the Respondents without prejudice to the foregoing averments claim: Two-thirds of their total earning for the year 2017 and 2018 being overpayments as tabulated; costs of the counterclaim; and such further and other relief as counsel may advise and this honourable court may permit. The respondents further pray to this honourable court for orders against the petitioners for:
  - i. A declaration that the petitioners in the years 2017 and 2018 received an overpayment of 11 days sittings in a month contrary to SRC recommendation of a Maximum of Four days sitting in a month.
  - ii. An order directing the respondents to recover the said overpayments from the petitioners.
  - iii. An order directing that the petitioners were paid all their dues and nothing is pending with the respondents as their arrears.
  - iv. Any other relief that this honourable court may deem fit and just to grant.
  - v. Costs of the suit.
8. In a Further replying affidavit sworn on April 22, 2021, the Respondents' Mr. Wilson Njega annexed various copies of payment vouchers for allowances and payments made to the Chairman and Members of the Secretariat and to Committee Members for stated months in 2016, 2017 up to November 2018 as WN-1 to WN-33. He reiterates that the Committee was not permanently based but was paid allowances based on the activity carried out and that the Petitioners' dues were fully paid, with no amount pending.
9. The petitioners then filed a supplementary affidavit sworn on June 9, 2021 by the 2<sup>nd</sup> petitioner with authority from the other co-petitioners. He avers that they only received part payment due to them and not the full payment as stated in the Respondents' replying affidavits and that the payments set out in annexures WN-1 to WN-33 at paragraphs 8, 9, 10, 12, 13, 14, 16, 19, 22, 23, 26, 30, 32, 33 and 34 are for the Secretariat Staff to the Taskforce and not for the Members (petitioners herein), hence the description of the payees as secretaries, clerks, drivers and the support staff. That the payments set out at paragraphs 7, 11, 15, 17, 18, 20, 21, 24, 25, 27, 28, 29, 31, 33, 34, 35 and 36 are part payment to the petitioners as Committee members, being their per diem and not the monthly allowances that have remained unpaid to date. That, the payment for the per diem allowances was not in respect of the sitting allowance fixed by the SRC in their letter of February 14, 2017 at the rate of Kshs. 605,000/- and not Kshs. 425,000/- as indicated by the respondent's deponent. It is the 2<sup>nd</sup> petitioner's averment that the subject of their claim is the non-payment of their sitting allowance which is a violation of their constitutional right of lawful expectation. He contends that Mr. Njega's Further Affidavit is intended to mislead the Court to confuse the monthly sitting allowance with the payment of daily allowance (per diem) and to consequently deny them their lawful dues.



10. The petitioners testified through Dr. Salim Ndemo and Dr. Francis Sang while the respondents availed Mr. Linus Ouma. Each of the parties sustained their line of arguments in the testimony which the Court need not rehash as it mirrored the pleadings aptly captured above.

### **Petitioners' Submissions**

11. The petitioners submit that it is not disputed that their terms of engagement were set out in the letter of February 14, 2017 and that their working plans were approved by the Ministry on a 30-days working program basis as the programs were never limited to any number of days in a month. That the respondents through RW1 also conceded to the fact that the petitioners were only paid per-diems and not their sitting allowances which are part of the outstanding amounts set out in their schedule of claim. That evidence before court (page 91 of the petitioners' bundle of documents attached to the Petition at page 9) demonstrates that the respondents indeed failed to pay the 2<sup>nd</sup> to 12<sup>th</sup> petitioners their respective Sitting Allowances as directed in the letter of February 14, 2017. They assert that their unpaid allowances amount to Kshs. 180,000/- per person for a period of 22 months - being the underpayment, while the sitting allowance which was not at all paid to them for 14 months (Kshs. 605,000/- per month x 14 months for each petitioner) amount to Kshs. 8,470,000/-. It is the petitioners' submission that they have placed uncontroverted evidence before this honourable court to the effect that they were paid Kshs. 405,000/- per month instead of Kshs. 605,000/- per month as set out in the Schedule attached to the Petition. That they are therefore justified to seek the prayers set out in the Petition which they urge the court to find as being merited and as well award.
12. The petitioners submit that they have relied on constitutional provisions on national values, good governance, fair labour practices, and sound protection principles of lawful expectation - which rights were violated by the respondents. That the respondents discriminated against the 2<sup>nd</sup> to 12<sup>th</sup> petitioners by not paying them their Sitting Allowances but opted to pay the Chairman and the Secretariat Staff all their sitting allowances in addition to their per diems. They further submit that the purported deduction of 30% tax on their payment was not supported by any evidence of such remittance made on their behalf to the relevant tax authority body, for this honourable court to verify and consider.
13. The Petitioners rely on the case of *Judicial Service Commission v Salaries and Remuneration Commission & another* [2018] eKLR where the court granted prayers to the JSC by declaring that the role of SRC under Article 230 of the *Constitution* was only limited to setting the remuneration and benefits of State Officers serving in the Judicial Service Commission and not to determine the number of remunerable meetings the Judicial Service Commission may hold in discharging their mandate. The court went on to declare the capping of JSC meetings at 8 meetings as being ultra vires its power and a violation of the provisions of the *Constitution* and the JSC Act. The petitioners also cite the case of *Julius Nyarotho v Nzoia Sugar Co. Ltd & The Attorney General* [2014] eKLR where the court awarded judgment in favour of the petitioner following a violation of his rights to lawful expectation as under the *Constitution* by the President who purported to revoke his appointment without basis.

### **Respondents' Submissions**

14. The respondents submit that the petitioners were not entitled to salaries as informed by Circulars from Ministry of Devolution dated August 2, 2013 and SRC Circular dated April 6, 2014 (both attached to the Respondents' submission). That the two documents affirmed that Task Force Members and committee members were only entitled to payments based on activities carried out and to a maximum of 15 sittings in a month. They submit that it is therefore erroneous for the Petitioners to plead that they had legitimate expectation to be paid full salary and not per diem in the years 2015- 2016 contrary to the said Circulars that clearly stipulated their mode of payment. That the aforementioned Circulars



are clear provisions of the law and the petitioners could not therefore have had any valid legitimate expectation to be paid salaries. They rely on the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where the Supreme Court of Kenya held that for legitimate expectation to arise:

- i. there must be an express, clear and unambiguous promise given by a public authority;
  - ii. the expectation itself must be reasonable;
  - iii. the representation must be one which it was competent and lawful for the decision-maker to make; and
  - iv. there cannot be a legitimate expectation against clear provisions of the law or the *Constitution*.
15. The respondents further submit that as regards the petitioners' claim for alleged underpayments during the referenced period, the petitioners have not attached any single document demonstrating that they were entitled to 30 days payment per month. Similarly, the petitioners did not produce any proof showing that they carried out activities for 30 days in a month or more during the period in reference. That the Petitioners' contention is that they were entitled to payment of 30 days in a month instead of the 15 days that were paid to them and which the respondents submit that 15 days' sittings pay were made in line with the Approved Internal memo dated March 23, 2017. That the petitioners' witnesses also informed this court that the 1<sup>st</sup> petitioner herein, Joseph Kaguthi, was paid all his remunerations from 2015 to 2018 and the same is thus not in contention. It is the respondents' submission that since the Petitioners have failed to duly prove that they served 30 days in a month beyond the 15 days paid to them, they are bound by their pleadings and the court should not believe them.
16. As to whether the petitioners are entitled to a refund of 30% tax deduction made from their earnings, the Respondents submit that such tax is delineated under section 3(1) of the *Income Tax Act*. That the Petitioners have also failed to produce any documentation to demonstrate that this tax deduction was not submitted by the respondents to KRA. Considering that the monies were deducted by the employer and sent to KRA, the same became the property of KRA and the petitioners cannot claim a refund of the same and that this court can only direct parties to KRA for purposes of resolving the issue. They rely on the case of *Kioko Joseph (Suing as the legal representative of the Estate of Joseph Kilinda) v Bamburi Cement Ltd* [2017] eKLR where the Court of Appeal held that the learned Judge correctly directed parties to involve the KRA having appreciated that they disagreed on the assessment of P.A.Y.E and that KRA is well suited to assist and guide in the assessment of the tax payable. The Respondents submit that under article 230 (1) and (4) of the *Constitution* 2010, SRC is constitutionally mandated with the setting and reviewing, whether upwards or downwards, of the remunerations and benefits of Public and State officers. That this position was reaffirmed in the High Court decision in *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* [2020] eKLR where the Judges made a finding that the action of the Parliamentary Service Commission to approve payment of accommodation and house allowance to Members of Parliament contrary to communication and recommendation by SRC was ultra vires. The High Court Judges additionally issued an order of *Mandamus* directing the Clerks of the Senate and of the National Assembly to recover in full the said monies from the salaries and allowances of every MP within a period of twelve calendar months from the date of the order. The respondents submit that it is against this background that they have made a Counter Claim against the petitioners herein for remuneration that was made against the recommendations of SRC and they persuade you Lordship to find merit in their arguments and authority relied upon.
17. The respondents submit that the petitioners have not demonstrated at all any constitutional violation in the case at hand. Furthermore, that the alleged violated rights are framed in general terms and as



such fail to bring out the specific actions or inactions and which lapse should not be interpreted to the detriment of the respondents. They also submit that the petitioners cannot challenge their arrears and underpayments in an employment relationship on grounds of violation of their fundamental rights considering that this is a contractual matter and secondly, the Petition as outlined lacks evidence of breach of any fundamental rights. The respondents cite the case of *East African Community v Railways African Union (Kenya) & others (No. 2)*, Civil Appeal No. 41 of 1974 [1974] EA 425, the East African Court of Appeal held that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. The respondents also rely on the case of *Anarita Karimi Njeru v Republic* (No.1) (1979) K.L.R 154 where the Court stated that a person seeking redress from the High Court on a matter involving a reference to the constitution should set out with a reasonable degree of precision: that which he complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed. The Respondents finally submit that costs should be paid to a party who has succeeded in the main purpose of his suit. That in the case of Supreme Court of Canada in *Vancouver (City) v Ward*, 2010 SCC 2 S.C.R. 28, the court while considering a colossal award for a constitutional violation and section 24 of the Canadian Charter, held that "In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests...". It is the respondents' submission that the petition is frivolous, vexatious and an abuse of the due process of this court and should therefore be dismissed with costs.

18. The dispute herein is on payments due to the petitioners. the long and short of the dispute is that the petitioners assert that the respondent unilaterally determined the rates and amounts payable despite their contracts making provision for payment that was different from what was paid. The respondent on its part asserts the petitioners were paid all their dues and there was no underpayment at all and that there is nothing owed to them. In testimony adduced before the court it was clear that the 1<sup>st</sup> petitioner occupied a different position in terms of payment. He received some payment and this was different from the status of the remaining 11 petitioners.
19. The petitioners were engaged in work that was critical to the healing of the nation after skirmishes related to the 2017 general elections. They also had an impact in re-casting our internal security under the Nyumba Kumi initiative ably led by the 1<sup>st</sup> petitioner to whom we owe a huge debt of gratitude for steering the initiative and leading this team of workers. The 11 petitioners were to receive the following - Kshs. 300,000/- per month for the Chairperson and Kshs. 250,000/- per month for the 10 members. In addition, they were to receive Kshs. 50,000/- (Chairperson) for transport and Kshs. 40,000/- a month for members. They were equally entitled to payment of Kshs. 10,000/- as accommodation allowance. As such, the indication of payment of per diems only shows the 1<sup>st</sup> respondent made payment when the Petitioners were out of town for official duty which they were bound to do anyway. The non-payment of the monthly stipend is what precipitated the claim in court and not per diems. The payment of per diems did not settle the claims by the petitioners and to argue otherwise is to renege on the contracts made as the petitioners had other earnings the 1<sup>st</sup> respondent is keen to sweep under the carpet. The 1<sup>st</sup> Petitioner was excluded from the main part of the matter as it was indicated he had been paid. The 2<sup>nd</sup> to 11<sup>th</sup> Petitioners were entitled to have the legitimate expectation that they all had met. In other words they expected to be paid for work done each month when they were serving the people of Kenya under the 1<sup>st</sup> Respondent and not merely earn per diem for days spent out of station (read Nairobi). The 2<sup>nd</sup> to 11<sup>th</sup> petitioners were underpaid or not paid for a cumulative period of 22 months and as such are entitled to recover the said sums as tabulated for each Petitioner below. In light of the sacrifices made by the Petitioners and in view of the monumental awards each will get, the court will not give any award as compensation for the infringement of their Constitutional rights save for the sum of Kshs.



1,000/- per petitioner as a token award. In the final analysis, the Respondents are jointly and severally liable to the 2<sup>nd</sup> to 11<sup>th</sup> Petitioners as follows:-

- a. Underpayment to 2<sup>nd</sup> to 11<sup>th</sup> petitioners – Kshs. 11,704,000/- each making a total of Kshs. 117,040,000/-.
- b. Kshs. 1,000/- to each petitioner as a token award for the infringement of their Constitutional rights – total of Kshs. 10,000/-.
- c. Gratuity at the rate of 31% of the gross salary for the 22 months of service – to be calculated by the 1<sup>st</sup> respondent and paid within 30 days of the Judgment in default of which interest will accrue on the sums for gratuity at commercial rates of interest from the date of filing suit till payment in full.
- d. Costs of the suit.
- e. Interest on the sums in a) and b) above at court rates from date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2022**

**Nzioki wa Makau**

**JUDGE**

