



REPUBLIC OF KENYA



**Kenya Union of Domestic Hotels, Educational Institutions, Hospitals & Allied Workers (KUDHEIHA) & 35 others v Nairobi Club (Trade Dispute 77 (N) of 2009) [2022] KEELRC 13384 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13384 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**TRADE DISPUTE 77 (N) OF 2009**  
**JK GAKERI, J**  
**DECEMBER 6, 2022**

**BETWEEN**

**KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS & ALLIED WORKERS (KUDHEIHA) ..... 1<sup>ST</sup> DECREE HOLDER**  
**GEORGE CHESIRE ..... 2<sup>ND</sup> DECREE HOLDER**  
**LEONARD ANYANGO ..... 3<sup>RD</sup> DECREE HOLDER**  
**JAMES AFANDE ..... 4<sup>TH</sup> DECREE HOLDER**  
**JACKSON AMBEZA ..... 5<sup>TH</sup> DECREE HOLDER**  
**JOSEPH KANGETHE ..... 6<sup>TH</sup> DECREE HOLDER**  
**BENSON MWIKYA ..... 7<sup>TH</sup> DECREE HOLDER**  
**PETER KOOME ..... 8<sup>TH</sup> DECREE HOLDER**  
**PRESCILLA WANGUI ..... 9<sup>TH</sup> DECREE HOLDER**  
**LILIAN LOGONGO ..... 10<sup>TH</sup> DECREE HOLDER**  
**BERNARD MWITHI ..... 11<sup>TH</sup> DECREE HOLDER**  
**NAFTALI NDEGWA ..... 12<sup>TH</sup> DECREE HOLDER**  
**ENJIAH WANJIRU ..... 13<sup>TH</sup> DECREE HOLDER**  
**KENNEDY ODHIAMBO ..... 14<sup>TH</sup> DECREE HOLDER**  
**MILLICENT OWITI ..... 15<sup>TH</sup> DECREE HOLDER**  
**JOHN WAHTIGO ..... 16<sup>TH</sup> DECREE HOLDER**  
**GEOFFREY GITAU ..... 17<sup>TH</sup> DECREE HOLDER**  
**LUCY W. MWANGI ..... 18<sup>TH</sup> DECREE HOLDER**



ANTONY ODARI .....	19 <sup>TH</sup> DECREE HOLDER
HIDAYA HASSAN .....	20 <sup>TH</sup> DECREE HOLDER
PHILIP NZIOKA .....	21 <sup>ST</sup> DECREE HOLDER
VERONICA MAINA .....	22 <sup>ND</sup> DECREE HOLDER
OSUMBA MORRIS .....	23 <sup>RD</sup> DECREE HOLDER
MAINGI MUTEMI .....	24 <sup>TH</sup> DECREE HOLDER
PETER GITHAE .....	25 <sup>TH</sup> DECREE HOLDER
DANIEL CHEGE .....	26 <sup>TH</sup> DECREE HOLDER
VITALIS OOKO .....	27 <sup>TH</sup> DECREE HOLDER
FRANICS MAINA .....	28 <sup>TH</sup> DECREE HOLDER
ZACKARIA MUGALA .....	29 <sup>TH</sup> DECREE HOLDER
PATROBA OGAGA .....	30 <sup>TH</sup> DECREE HOLDER
HARRISON MUTINDA .....	31 <sup>ST</sup> DECREE HOLDER
NICK HEHU .....	32 <sup>ND</sup> DECREE HOLDER
HUMPHREY KAMBINI .....	33 <sup>RD</sup> DECREE HOLDER
NEWTON MAINA .....	34 <sup>TH</sup> DECREE HOLDER
KENNEDY MASUMBUKO .....	35 <sup>TH</sup> DECREE HOLDER
ROBERT GITOBU .....	36 <sup>TH</sup> DECREE HOLDER

AND

NAIROBI CLUB ..... JUDGMENT DEBTOR

### RULING

1. This Ruling determines the Applicants' Notice of Motion dated 2<sup>nd</sup> August, 2021 brought under Article 41 and 159(2) of *the Constitution* of Kenya, Section 1A, 1B, 3A and 26 of the *Civil Procedure Act*, Order 9 Rule 9, Order 21, Rule 17, Order 50 Rule 1 of the Civil Procedure Rules, Section 49 and 50 of the *Employment Act* and all other enabling provisions of law.
2. The Applicants seek the following Orders That;
  - i. Spent.
  - ii. This court be pleased to adopt the attached computation of 9 months back wages due to the Applicants herein totalling Kenya Shillings Twenty One Million Two Hundred and Sixty Four Thousand Three Hundred and Ninety Seven and Eight Cents (21,264,397.08) calculated from 20<sup>th</sup> of January, 2009 to 24<sup>th</sup> September, 2009 both dates inclusive in line with the ruling and orders of this court dated 24<sup>th</sup> September, 2009.



- iii. This honourable court be pleased to adopt the attached computation of the salary arrears due to the Applicants herein totalling to Kenya Shillings Four Hundred and Seventeen Million Five Hundred and Forty One Thousand One Hundred and Thirty Six and Thirty cents (Kshs.417,541,136.30) calculated from 24<sup>th</sup> October, 2009 to date in line with the ruling and orders of this court dated 24<sup>th</sup> September, 2009.
  - iv. This honourable court be pleased to award interest on prayers 2 and 3 above.
  - v. The final Decree do issue incorporating the adopted computation in prayers 2, 3 and 4 above.
  - vi. Costs of and incidental to this application be borne by the Respondent.
3. The Application is based on the grounds set out on its face and the Supporting Affidavit sworn by George Chesire on 25<sup>th</sup> August, 2021.
  4. The affiant states that he was a former employee of the Respondent and a representative of the Decree holders/Applicants.
  5. The affiant states that sometime in 2009, the Applicants who were former employees of the Respondent filed an action against the Respondent for unfair termination of employment and on 24<sup>th</sup> September 2009, the court ordered the Respondent to reinstate the Applicants to their former employment with all back wages or salaries, privileges and other benefits within 30 days from the date of judgement and the Respondent should have done so by 30<sup>th</sup> October, 2009 but did not entitling the Applicants to salaries and other privileges from the said date and the judgement remained unsatisfied.
  6. That besides reinstatement, the Applicants claim for Kshs.21,264,397.08 due in back wages and salary arrears of Kshs.417,541,136.30.
  7. That the Respondent engaged in forum shopping in an endeavour to defeat the judgement and in particular filed Judicial Review No. 605 of 2009 which the High Court dismissed and Civil Application No. 287 of 2011 also dismissed.
  8. That after the Respondent failed to have the judgement overturned, it attempted an out of court settlement in 2012 (36 months later) where it offered the employees 9 months back wages.
  9. That the employers insisted on 18 months pay to be paid by instalments and would discharge the Respondent's liability to the Applicants and 50 of the Employees accepted the offer and extinguished their rights articulated in the judgement. Only a total of 35 employees remain unpaid and were not reinstated and thus claim Kshs.21,109,185.67 as back wages and salary arrears.
  10. The affiant further states that by letter dated 8<sup>th</sup> March, 2012, the Applicants wrote to the Respondent's club secretary threatening contempt proceedings but the Applicants later learnt that the Respondent had published an advertisement dated 19<sup>th</sup> April, 2012 purporting to reinstate all the 35 Applicants.
  11. That the advertisement was not proper since the reinstatement was pegged on negotiations being carried out to determine any benefits and salary arrears due to the Applicants.
  12. Moreover, the Respondent opted to communicate with the Applicants directly yet they had an advocate on record.
  13. That the purported reinstatement through a newspaper advertisement was not a reinstatement.
  14. That despite demands, the Respondent had neglected or refused to pay.



15. Finally, that 3 of the Applicants had since died.

### **Respondent's case**

16. In its Replying Affidavit dated 8<sup>th</sup> October, 2021 sworn by Walter Nyandiko, the Respondent's Secretary General/CEO states that the Application herein sought the adoption of the purported computation of the back wages allegedly due to the Applicants as well as salary arrears.
17. That the Application is incompetent because the law firm of Ligami Onani Associate Advocates is improperly on record for not seeking leave to come on record after judgement had been delivered since the firm of Sang Chambers was on record for the decree-holders.
18. The affiant relies on Order 9 Rule 9 of the Civil Procedure Rules, 2010.
19. The affiant states that the judgement in Cause No. 77 (N) of 2009 ordered the Respondent to reinstate all the 85 Claimants with all back wages or salaries and other benefits and the Respondent had substantially complied with the Order by reinstating 49 employees while 35 declined to resume work and the Applicants were to blame for non-compliance with the court order.
20. That the Applicants had applied to the court for a review and clarification of the award and the same was heard on 30<sup>th</sup> April, 2013 and a ruling delivered on 10<sup>th</sup> May, 2013 and the Applicants were awarded back wages from the date of dismissal on 20<sup>th</sup> January, 2009 to the date of the award, 24<sup>th</sup> September, 2009 both days inclusive.
21. That the court directed the Respondent to table a schedule of dues payable to the Applicants for the duration within 14 days and the Applicants within 7 days and the Respondent complied while the Applicants did not.
22. The affiant states that the computation by the Applicants was an afterthought and a misguided attempt to mislead the court as they had an opportunity to do so in 2013.
23. That in February 2013, the court had directed the parties to negotiate a settlement for adoption by the court.
24. That the Applicants sought extension of time to file a Notice of Appeal but the application was dismissed on 17<sup>th</sup> March, 2013 and a further application in the Court of Appeal filed on 26<sup>th</sup> September, 2014 was dismissed on 14<sup>th</sup> November, 2014.
25. That subsequently, the Applicants filed contempt proceedings against the Respondents for failure to reinstate them and the same was dismissed on 8<sup>th</sup> September, 2016.
26. That the Respondent filed Bills of Costs and was awarded Kshs.171,442.00 and the same is yet to be paid and the Respondent will set off the same from monies payable to the Applicants.
27. That the Respondent had made several payments towards settlement of the decree through Sang Chambers and Partners and the final balance of Kshs.2,832,237.00 was cleared vide cheque numbers 58271, 58410, 58550, 58619, 58711 and 58876 over the period of December 2020 to June 2021 as per the bank statement attached.
28. The affiant states that the claim for salary arrears was baseless and misguided since the Applicants were offered but declined reinstatement. That they cannot ask for salaries for work not done.
29. The affiant prays that the Applicants Notice of Motion Application dated 2<sup>nd</sup> August, 2021 be dismissed with costs as it is incompetent and an abuse of court process.



30. On 2<sup>nd</sup> June, 2022, when the parties appeared in court for the hearing of the Application herein, counsels for both parties applied for and were accorded 21 days to file and serve submissions.
31. On 19<sup>th</sup> July, 2022, none of the parties had complied on account that counsel for the Applicants had filed an Application dated 11<sup>th</sup> July, 2022 to have the law firm of Ligami Onani Associates Advocates come on record for the Applicants in lieu of Sang Chambers and Partners. The Respondent's counsel had no objection and the Application was granted.
32. Parties were again accorded 14 days a piece to file and serve submissions.
33. On 27<sup>th</sup> September, 2022, none of the parties had filed.
34. The Applicants' counsel sought an extension upto closure of business while the Respondents counsel applied for 14 days and both request were granted and a ruling date set.
35. By 2<sup>nd</sup> November, 2022 when the court retired to prepare this ruling, none of the parties had filed submissions.
36. Regrettably, the court has not benefited from the insights and perspectives of counsel for both sides.

### **Determination**

37. The singular issue for determination is whether the Applicants' Notice of Motion dated 2<sup>nd</sup> August, 2021 is merited.
38. A brief history of the Application before the court is that the Applicants who were employees of the Respondent were summarily dismissed on 20<sup>th</sup> January, 2009 and filed a suit at the Industrial Courts (Precursor to this court) and a judgement was delivered on 24<sup>th</sup> September, 2009.
39. The court ordered reinstatement of all the Applicants "with all back wages or salaries, privileges and other benefits within thirty (30) days from the date of this award."
40. Thereafter, both parties engaged in frantic activities to enhance their position by way of court actions. The Respondent filed Misc. Application No. 605 of 2009 which was dismissed on 15<sup>th</sup> December, 2011.
41. The Respondent sought a stay on 19<sup>th</sup> December, 2011 at the Court of Appeal and it was dismissed on 15<sup>th</sup> March, 2013.
42. On their part, the Applicants filed an application for extension of time to appeal, but the same was dismissed as was the application for leave to file a Notice of Appeal out of time and contempt proceedings.
43. In the meantime, about 50 employees were reinstated by the Respondent but the Applicants stood their ground.
44. It is the Applicants case that they were reinstated by operation of law on 24<sup>th</sup> October, 2009 and were claiming salary arrears to date for unrendered services.
45. Needless to emphasize, disobedience of court orders amounts contempt of court and the Applicants suit for contempt was dismissed by this court and the Court of Appeal. It is unclear why the Applicants were not reinstated as there is no evidence on record to demonstrate that attempts to resume duty was frustrated by the Respondents.



46. In fact, on 19<sup>th</sup> April, 2012, the Respondent published an advertisement in the Daily Nation Newspaper reinstating the Claimants. The Applicants ignored the gesture. In its ruling on 10<sup>th</sup> May, 2013, the court gave very clear directions on how to compute back wages from 20<sup>th</sup> January, 2009 to 24<sup>th</sup> September, 2009 both days inclusive.
47. The Respondent was directed to use the formula given by the court to prepare a schedule of back wages within 14 days and the Claimants were to file and serve their version within 7 days of service and a mention was slated within 30 days to confirm compliance and directions on payment. The claimed amounts were based on the assumption that the Claimants stood reinstated automatically, a claim the Respondent rejected.
48. In her ruling on the contempt proceedings, the learned judge observed as follows;
- “On this basis, the Claimants cannot be heard to say that they were not aware of the terms on their reinstatement or that the Respondent has failed to comply with the orders of the court. The Claimants chose to keep out of work and engage the Respondent outside of work. Therefore, the Respondent cannot be said to be in default or in contempt of orders of 30<sup>th</sup> September, 2009.”
49. In its judgement in Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers, George Chesire & 84 others V Nairobi Club, Civil Appeal No. 306 of 2016, the Court of Appeal stated as follows;
- “In this appeal, there is no dispute that after the award of 24<sup>th</sup> September, 2009 directing the Respondent to reinstate its former employees, the majority in number returned to work. The appellants herein did not and on 19<sup>th</sup> April, 2012, the Respondent published an advertisement in the Daily Nation Newspaper reinstating the appellants. Somehow, the Appellants took umbrage at the manner of reinstatement and declined to report to work.
- In the ruling of 10<sup>th</sup> May, 2013, the Employment and Labour Relations Court directed both appellants and the respondent to file their computations of the appellants’ back wages for the 9 months that the court found they were entitled to, but whilst the respondent complied to date, the appellants have never complied with that order. Instead, the appellants defiantly and obstinately devised a Machiavellian scheme in which they hoped to reap a windfall by being paid full wages and benefits backdated to 24<sup>th</sup> October, 2009 when they alleged they were reinstated by operation of the law. For all that period, the appellants, unlike most of their colleagues, refused to return to work and have not worked for the respondent. They never satisfied the trial court nor ourselves, that they were not aware of the newspaper advertisement that reinstated them. We agree with the learned judge that the appellants were to blame for their predicament. They did not demonstrate, deliberate and wilful disobedience of the award of the Employment and Labour Relations Court by the Respondent . . .
- Having found that it was the appellants themselves who obstructed the full implementation of the award, there would have been no basis to issue a mandatory injunction in their favour. Again, an injunction being a discretionary and equitable remedy, the conduct of the appellants in the dispute and in particular their refusal to submit their computations as directed by the court did not entitle them to an equitable remedy . . .”

50. The court dismissed the appeal with costs for want of merit.



51. The decision of the trial court and Court of Appeal make it abundantly clear that the Applicants frustrated the Industrial Court Orders made on 24<sup>th</sup> September, 2009 by refusal to take up reinstatement and submit their computation of back wages as directed by the Court, conduct the Court of Appeal found inequitable.
52. In the Application before the court, the Applicants seek adoption of their computation of 9 months back wages of Kshs.21,264,397.08 and salary arrears of Kshs.417,541,136.30 calculated from 24<sup>th</sup> October, 2009 to date.
53. Strangely, the issue of whether the Applicants were reinstated automatically by operation of law was not litigated by the Applicants in any court and no determination has been made on the issue. In their judgement, both the Industrial Court and the Employment and Labour Relations Court addressed back wages and the latter directed both parties to participate in the computation for adoption by the court.
54. The non-reinstatement of the Applicants for which they blamed the Respondent but both the Employment and Labour Relations Court and the Court of Appeal found the Applicants blameworthy, did not elicit any orders or awards to the Applicants for salary arrears and is to that extent misplaced. It was not part of the remit given by the court on 10<sup>th</sup> May, 2013.
55. Even assuming that the Applicants were reinstated by operation of law, would they justifiably be entitled to salary arrears yet they were not rendering services to the Respondent.
56. Black's Law Dictionary, 10<sup>th</sup> Edition Page 477 defines reinstatement as "To place again in a former state or position; to restore."
57. Automatic reinstatement would appear to mean that the Applicants would be working not by the Respondent's desire or wish but by operation of law.
58. To urge that the Applicants were reinstated by operation of law and were not rendering services would in the court's view be a contradiction in terms.
59. Bearing in mind that the Applicants did not comply with court orders issued on 10<sup>th</sup> May, 2013, in the courts view, they cannot purport to file computations for back wages and salary arrears without involvement of the Respondent as evidenced by the current Application filed under Certificate of Urgency.
60. This matter can only be concluded through active engagement and participation of both parties. Unilateral actions cannot.
61. This court will not adopt computations of back wages or salary arrears, if any, outside the directions of the Employment and Labour Relations Court in its ruling dated 10<sup>th</sup> May, 2013. It is not the trial court and no application for review has been made.
62. Flowing directly from the foregoing, it is clear that the Application herein is for dismissal and is accordingly dismissed with costs to the Respondent.
63. The parties are directed to revisit the directions given by the court on 10<sup>th</sup> May, 2013 and endeavour to arrive at mutually agreed computations for adoption by the court.
64. Mention on 30<sup>th</sup> January, 2023 to confirm status.
65. Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF  
DECEMBER 2022**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**DR. JACOB GAKERI**

**JUDGE**

