



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.134 OF 2015

(Before D.K.N.Marete)

KENYA LOCAL GOVERNMENT WORKERS UNION.....CLAIMANT

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

VERSUS

MURANGA COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD, MURANGA COUNTY.....2ND RESPONDENT

JUDGMENT

This matter came to court by way of Claimants Further Amended Statement of Claim further mended on 2nd June, 2016. It does not disclose any issue in dispute on its face.

The Respondent in a Response to Claimant Statement of Claim (DEFENCE) by Respondents dated 27th May 2015 denies the claim and prays that the same be dismissed with costs.

The Claimant's opener case is that she is a trade union duly registered under the Labour Relations Act, 2007. The respondents are the County Government, Murang'a and her County Public Service Board.

The Claimant's further case is that at all material times to this cause, she had a recognition agreement with the Association of Local Government Employers and had a negotiated Collective Bargaining Agreement with herself entered into on 25th March, 1994 and registered by this court under reference known as RCA No.134/1994.

The Claimant's further case is that pursuant to sections 55, 57, 58 and 59 of the Urban Areas and Cities Act, and section 33 of the Six Schedule of the Constitution of Kenya, 2010, the respondents herein are the legal successors of the defunct Local Government Employees Association.

Her other case as premised on the claim is as follows;

i. At all times material to this cause, the Claimant had a Recognition Agreement with the Association of Local Government Employers and had negotiated a Collective Bargaining Agreement with Association, which (CBA) was entered into on 25th March, 1994 and was duly registered by the Industrial Court under the reference RCA No.134 of 1994 for the exclusive terms and conditions of employment for all unionisable employees of the Respondent. (Attached and marked "RD1" is a copy of the CBA)

ii. Pursuant to Section 55, 57 and 58 and 59 of the Urban Areas and Cities Act, 2011 and Section 33 of the sixth Schedule to the Constitution of Kenya, 2010, the Respondents herein are the legal successors of the defunct local government Employer's Association.

iii. The Claimant prefers this suit on behalf of its members numbering One Hundred and Sixty (166), and who are former employees of the Respondent.

(Attached and marked "RD2" is a schedule of all persons represented by the Claimant and their designations.)

iv. By letters of appointment bearing different dates, the members of the Claimant were separately engaged in the employ of the Respondent serving in their respective capacities and designations.

(Attached and marked "RD3" are sample copies of letters of appointment).

v. The Respondent, by various letters addressed to each of the members of the Claimant communicated its intention to downsize its establishment in a redundancy arrangement that would take the forms of: termination, abolition of office and voluntary/age.

(Attached and marked "RD4" are sample copies of letters of termination of employment)

vi. In the aforementioned letter, the Respondent also outlined the dues that would be payable to the Claimant members upon their termination of employment. The Respondent restricted his payment to the following items:

a. Salary arrears; and

b. Three months in lieu of notice

vii. The Redundancy provisions are provided for under Rule 34 of the Collective Bargaining Agreement between the Claimant Union, (the Kenya Local Government Workers Union), and Association of Local Government Employees of 1994, at the time applicable.

viii. Rule 34 of the said Collective Bargaining Agreement provides that Redundancy shall be carried out in accordance with the provisions of the Trade Disputes (Amendment) Act, 1979 and paragraph 15 of the Regulation of Wages (General Order, 1982.

ix. By reason of the Respondent's failure to adhere to the legal requirements for declaration of redundancy, the claimant herein in its representative capacity of the Respondent's employees, reported a labour dispute to the Ministry of Labour and Human Resource Development pursuant to Section 62(1) of the Labour Relations Act vide a letter dated 21st February, 2013. (Attached and marked "RD5" is a true copy of the said letter.)

x. The conciliator Mr.B.M.Mbui convened a conciliation meeting on 6th June, 2013 vide his letter dated 10th May, 2013 and whereas the claimant herein communicated in advance his inability to attend the conciliation meeting, (Attached and marked "RD7" is a true copy of the said letter.), the Respondent remained unresponsive to this invitation for conciliation and to subsequent invitations.

xi. Whereas the Claimant submitted its claims against the Respondent to the conciliator by its letter dated 24th July, 2013, the Respondent made no step to defend itself.

(Attached and marked "RD8" is a copy of the Memorandum submitted to the conciliator by the Claimant.)

xii. The Respondent's conduct of failing to attend the conciliation meetings and failing to give any or valid reason for the failure is a clear manifestation of an employer that does not uphold goodlabour relations and an affront to labour relations laws. Indeed by a letter dated 30th May, 2014, the Ministry of Labour and Human Resource Development communicated to both the Claimant and the Respondent the difficulty in resolving the dispute and issued a certificate declaring the dispute unresolved pursuant to Section 69 (a) of the Labour Relations Act, reason whereof this matter has escalated to an industrial action.

(Attached and marked "RD9" is a true copy of the said certificate.)

xiii. The Claimant avers that Respondent, by the unlawful and wrongful redundancy of the members of the Claimant's union, has breached the law and the parties' collective bargaining Agreement.

She tabulates the particulars of the breach as follows;

a. Failure to disclose the full details of the redundancy to the Claimant union and to involve the Claimant union in the redundancy arrangements.

b. Failing to have due regard to seniority in time and skill, ability and reliability of each employee of the particular class of its employees before declaring them redundant.

c. Failure to determine and to pay all leave due to the Claimant's members.

d. Failure to have due regard of the collective Bargaining Agreement between the Claimant and the Respondent with regard to terminal payments payable upon redundancy and upholding its terms.

e. Failure to determine and to pay all severance pay due to the claimant's members.

The Claimant's other case and submissions on Law is as follows;

a. By failing to notify the union to which the employee is a member and the labour officer in charge of the area where the employees were employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy, the Respondent is in breach of Section 40 of the Employment Act.

b. By failing to determine and pay the claimant's members severance pay, the Respondent actions are in breach of Section 40 of the Employment Act.

She prays as follows;

a. Declare that the members of the claimant have suffered unfair and wrongful redundancy.

b. An order directing that the respondent to unconditionally reinstate the claimant to their employment services and former position with the respondent without any loss of benefits or seniority and without any conditionality.

c. In the alternative and without any prejudice to the forgoing, the employees be paid actual pecuniary loss suffered since the date of termination, including salary and allowances as would have been earned, housing allowance and all accruing allowances.

d. Damages for unlawful redundancy.

e. Severance pay at the rate of 10 days for each complete year of service.

f. Interest at court rates on the above prayers.

g. The costs of this suit.

h. Any other award that this Honourable Court deems fit.

The Respondents case is a total denial of the Claim. This comes out thus;

4. The respondent deny the content of paragraph 2 (iv) (vii) of the claim and avers that

a. All the claimant cited in the claim chose to be awarded benefits popularly known as "Golden handshake" and we paid all their dues.

b. Those who refused or denied to take the golden hand shake filed a civil case which decided their dues and they were settled.

6. The respondent denies the contents of paragraph 2 (xii) of the claim and avers that the said sendoff was voluntarily by the claimants without any undue influence or pressure and the claimant cannot now turn back on their own consents.

7. The respondent further in response state that consents between the parties overrides any other Agreements representative or otherwise.

8. The respondent in reply to paragraph 3 of the claim aver that there was no breach of section 40 of the Employment act as the said act was not in force at the material time.

Again, the Respondents in a Reply to Claimants Further Amended Statement of Claim dated 8th June, 2016 associate with their earlier Response to Claim deny the claim *in toto*.

It is their case that the claimants have not approached the court with clean hands as these claims were settled amicably. This was in court and others outside of court. They are now misusing this court by taking advantage of a lacuna in the former local authorities failure to maintain proper records and also infiltration of records by other parties.

The claimants aver and threaten to raise a preliminary objection that the prayers sought are expressly barred by the Limitation of Actions Act and the Employment Act, 2007 and should be struck out.

The matter came to court variously until the 16th February, 2020 when in the absence of the respondent, albeit served, it was ordered that a disposal be had on written submissions.

The issues for determination therefore are;

1. Whether the termination of the employment of the grievant was unlawful, unfair and unprocedural.
2. Whether the termination of the employment of the grievants met the content of a termination on redundancy.
3. Is the claim time barred in view of the Limitation of Actions Act?
4. Whether the claimant is entitled to the relief sought.

5. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the grievant was unlawful, unfair and unprocedural. The parties throughout their respective cases and submissions had no quarrel or dispute with the method of termination of employment by the respondents. The respondents indeed aver that the termination was mutual *inter partes* and agreed on. It was a golden handshake where employees left and were compensated and paid as agreed. A case of unprocedural, unfair and unlawful termination of employment therefore does not lie in the circumstances. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the termination of the employment of the grievants met the content of a termination on redundancy. This is the bone of contention. The parties hold diametrically opposed position on this.

The claimants in their written submissions dated 2nd February, 2021 submit that the inaction of the respondent amounted to unlawful and unfair redundancy. On this they seek to rely on the provision of section 2 of the Trade Disputes Act, Cap 234 of the laws of Kenya (now repealed), which provides thus;

“redundancy” means 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 due to the Kenyanization of a business, but it does not include any such loss of employment by a domestic servant.”

They further seek to rely on section 16A of the Employment Act, Cap 226 (now repealed) which sets out the following conditions precedent to be met by an employer before termination on account of redundancy.

“A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:-

- a. the union of which the employee is a member and the Labour Officer in charge of the area the employee is employed shall be notified of the reasons for, , and the extent of, the intended redundancy;*
- b. the employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.*
- c. No employee shall be placed at a disadvantage for being or not being a member of the trade union.*
- d. Any leave due to any employee who is declared redundant shall be paid off in cash:*
- e. An employee declared redundant shall be entitled to one month’s notice or one month’s wages in lieu of notice;*
- f. An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.”*

It is the claimants’ case that the law provides procedural safeguards required on a termination on redundancy. This requires that the employer is mandated to prove the reasons for redundancy are valid and fair and that these reasons are based on the operational requirements of the employer.

The claimants’ further seek to rely on the authority of the Regulation of wages and conditions of the Employment Act, Cap 229 (now repealed) which at paragraph 15 provides for redundancy as follows;

“15.Redundancy

Where the employment of an employee is to be terminated on account of redundancy, the following principles shall apply;

- a. the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;*
- b. the employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*
- c. No employee shall be placed at a disadvantage for being or not being a member of the trade union;*
- d. Any leave due to any employee who is declared redundant shall be paid off in cash;*
- e. An employee declared redundant shall be entitled to one month’s notice or one month’s wages in lieu of notice;*

She again employs section 16 (A) of the act to highlight the law applicable with regard to issuance of notice to an employee. This provides as follows;

“a. the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy”

In further buttressing their case, the claimants’ seek to rely on the authority of **Peter G.Gathoro v Kenya Tea Development Agency Limited (2018) eKLR**, where the court observed thus;

“I find and hold that the redundancy was done without compliance with the mandatory procedure set out by section 16A of the repealed Act and as such, it was unlawful. In addition, the redundancy was done in breach of clause 17(c) of the CBA, which required that a notice of 60 days be served on the employee before redundancy. In this case, the plaintiff was served with 6 days only redundancy notice.”

In their rebuttal written submissions dated 14th June, 2021, the Respondents reiterate their case as pleaded and prosecuted. They submit that the issues in contention is a claim for repayment for workers allegedly employment by the 1st Respondent and were terminated in the year 2001.

The Respondents’ case and further submission is that the claimants sued them (then county council of Murang’a) in a court of competent jurisdiction namely, the Principal Magistrate court at Murang’a in the year 2006. These comprised of joint claims and the matters were concluded and the outstanding dues settled.

Their other submission is that the claim as it is an abuse of the court process as the claimants want to take advantage and be paid twice for an amount the claimants had fully received and is settled.

Indeed, they further submit, the proceedings give evidence and credence to the same as the claim was first filed by 166 claimants only to be later amended to 122 to prove really that there is lack of certainty.

Further, the Respondent has filed evidence of the said suits some of the claimants filed principal magistrate court Murang’a **civil case No.490 of 2006, Joyce Muthoni Kamau vs County council of Maragua** and various others.

They have also filed execution proceedings in the said matters. The court shall observe the claims in the said suits were as follows;

a. Payment of terminal and legal benefits

b. Interest till settlement.

The Respondents in the penultimate but belatedly bring in a submission of limitation of actions in this cause. It is as follows;

It is also our submissions that this suit was expressly time barred. And indeed, nowhere else does limitation serve better than this suit because due to lapse of time, the claimants have taken advantage of the fact that most of the records of their payments have been displaced, lost or worn- out due to passage of time, as a result the claimants have taken advantage and now seek to be paid twice.

Worse still this claim is unenforceable as there is no individual claim for each member made. So is this court supposed to calculate on behalf of the claimants? This is a million dollar question.

The respective cases of the parties tilts this matter in favour of the respondents. Their case overwhelms that of the claimant. This is because the hallmark of her case, redundancy, ends up not being proven in evidence. The respondents case is that the issues in dispute were agreed on and settlement made by consensus or through court action and decrees thereto. The termination and terms of such termination cannot be revisited as this was consensual.

This scenario ousts a fall back and resort to section 2 and 16A on redundancy as relied on by the claimant. The feasible case as brought out by the respondents is that the claim is an afterthought and is unsustainable. This I find. And this answers the 2nd issue for determination.

The 3rd issue for determination is whether the claim is time barred in view of the Limitation of Actions Act. This issue was never addressed by the claimant. The respondents brought it out peripherally in their defence and written submissions. This, at the risk of repetition, came out thus;

It is also our submissions that this suit was expressly time barred. And indeed, nowhere else does limitation serve better than this suit because due to lapse of time, the claimants have taken advantage of the fact that most of the records of their payments have been displaced, lost or worn- out due to passage of time, as a result the claimants have taken advantage and now seek to be paid twice.

It is the respondents further submission that the terminations of employment the subject matter of this suit occurred in 2001. Most of the court matters were handled in 2006. This suit was filed in court on 18th March, 2015. Obviously, limitation of actions and time bar was an adequate defence from the onset. Unfortunately, the respondents chose to down play this and therefore our current situation. The suit is and was time barred from the onset and I hold as such. This answers the 3rd issue for determination.

The 4th issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on her issue of redundancy and

its antecedent reliefs, the claimant becomes disentitled to the relief sought.

However, as the claim dissipates, this court is bound to look at an issue raised by the respondents in defence. The respondents furnish names of various grievants whose records of payment of final dues are not available to date. These are;

- i. No's 20 to 33
- ii. No 38 to 44
- iii. No 49
- iv. No 54 and 55
- v. No 58 and 59
- vi. No 61 to 69
- vi. No 72 and 73
- vii. No 79 to 92
- vii. No 94 to 97 no 109

These should now be considered, if at all, on the merit and circumstances of their respective cases.

This court orders that, with the involvement of the parties, investigations be had with a view to establishing the position of payment for all these claimants and the same made within one hundred and twenty (120) days with a report to court after such timing.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the claim.

I therefore further order as follows;

- i. That, with the involvement of the parties, investigations be had with a view to establishing the position of payment for all these claimants.
- ii. That such investigations and payments, if at all, be made in one hundred and twenty (120) days.
- iii. Mention on 16th December, 2021 for a report on investigations and payments.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Brian Otieno instructed by Brian Otieno & Company Advocates for the Claimants.
2. Mr. Kimwere instructed by Kimwere & Company Advocates for the Respondents.