



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 25 OF 2021**

**IN THE MATTER OF CONTRAVENTION OF RIGHT TO FAIR LABOUR RELATIONS, FAIR ADMINISTRATIVE ACTION  
AND RIGHT AGAINST INHUMAN AND DEGRADING TREATMENT**

**BETWEEN**

**NASHON OLIECH OSIEKO** **1<sup>st</sup> PETITIONER**

**RAPHAEL MUYONGA** **2<sup>nd</sup> PETITIONER**

**RACHEL MAYAKA** **3<sup>rd</sup> PETITIONER**

**IMELDA NUBIA** **4<sup>th</sup> PETITIONER**

**v**

**FRANCIS OOKO** **1<sup>st</sup> RESPONDENT**

**HARUN KIRUI** **2<sup>nd</sup> RESPONDENT**

**MUHORONI SUGAR CO LIMITED**

**(In receivership)** **3<sup>rd</sup> RESPONDENT**

**JUDGMENT**

1. Nashon Oliech Osieko, Raphael Muyonga, Rachel Mayaka and Imelda Nubia (the Petitioners) lodged a Petition with the Court on 19 April 2021, alleging that Francis Ooko, Harun Kirui and Muhoroni Sugar Co (under Receivership)(the Respondents) had violated their constitutional rights and were in breach of contract.

2. The Petitioners prayed for orders:

(1) The Honourable Court be pleased to declare that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents action of keeping the Petitioners' labour position in endless limbo and the refusal to remit their salaries without any written communications on the reasons for so doing is a contravention of the Petitioners right to fair labour relations, fair administrative action and right against inhuman and degrading treatment and damages be provided for.

(2) The Honourable Court be pleased to issue an order of injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to place back the Petitioners to their jobs and to provide the Petitioners with all required administrative and financial assistance, support and protection to ensure the Petitioners conduct their duties uninterruptedly.

(3) Costs of the Petition be provided for.

3. On 14 June 2021, the Court directed the Respondents to file and serve their responses to the Petition within set timelines.

4. The Court also granted the Petitioners leave to file and serve a further affidavit and submissions within set timelines. The Respondents were also directed to file and serve their submissions.

5. The 1<sup>st</sup> Respondent filed a replying affidavit in opposition to the Petition on 15 July 2021.
6. On 19 July 2021, the Respondents filed a Motion under a certificate of urgency seeking that the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be struck out.
7. Each of the Petitioners filed a supplementary affidavit on 26 July 2021 and joint submissions on 3 August 2021.
8. The Respondents filed their submissions on 4 October 2021 (should have been filed before 30 September 2021).

#### **Striking out 1<sup>st</sup> and 2<sup>nd</sup> Respondents from the Petition**

9. The Court will strike out the Motion seeking that the suits against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be dismissed because the firm of advocates which filed it did not file either a Notice of Change of Advocate or Notice of Appointment of Advocate to come on record.

#### **Petitioners' case**

10. First, the Petitioners asserted that though still employees of the Respondents, the Respondents had failed to pay their remuneration without assigning any reasons, thus violating their right to fair administrative action.
11. Secondly, the Petitioners contended that the Respondents had failed to create and/or ensure a safe working environment for them, thus infringing their right to fair labour practices.
12. In regard to the 4<sup>th</sup> Petitioner, it was argued that despite her contract having expired on 31 December 2019, the Respondents had kept her in continuous employment and had even paid her May 2020 salary and that, in any case, her fixed-term contract was illegal.

#### **Respondents' case**

13. The Respondents admitted that the 1<sup>st</sup> to 3<sup>rd</sup> Petitioners were still employees, but due to insecurity arising from the conduct of a trade union representing the workers, they could not guarantee their security and thus, they had been asked to keep off work/take leave.
14. On why the 1<sup>st</sup> to 3<sup>rd</sup> Petitioners were not getting their salaries, the Respondents explained that they could not be paid because they were not offering services.
15. As for the 4<sup>th</sup> Petitioner, the Respondents countered that her fixed-term contract had expired on 31 December 2019, but due to the COVID19 public health pandemic and on humanitarian grounds, she had been allowed to retain the accommodation she had been assigned during the contract.
16. With regard to payment of salary in May 2020, the Respondents answered that the same were salary arrears.
17. The Court has considered the Petition, affidavits and submissions.

#### **Breach of contract**

#### **Constitutional dispute**

18. Although the Petitioners clothed the dispute as a Constitutional Petition, in the Court's view, it could have easily been resolved as one on breach of contract.

#### **Payment of wages**

19. The Respondents admitted that the 1<sup>st</sup> to 3<sup>rd</sup> Petitioners were still employees, but due to reasons beyond their (Respondents) control, they could not fulfil their contractual obligations of paying remuneration.
20. These Petitioners could not report to work due to hostility from other employees. It was not of their making that they could not fulfil their contractual obligations. The failure to render contractual services to the Respondents were also beyond their control.
21. Therefore, it is not correct that the 1<sup>st</sup> to 3<sup>rd</sup> Petitioners absented themselves from work without lawful cause to warrant withholding of remuneration.
22. The Respondents did not attempt to explain what steps they had taken to ensure the security of these Petitioners at work. Frustration of contract was also not pleaded or suggested.
23. Under the common law, the general rule is that there is no obligation for the employer to provide work during the contractual relationship. The obligation is to pay wages (see *Beveridge v KLM* (2000) IRLR 675).

24. The Court, therefore, finds that in failing to pay these Petitioners their remuneration, the Respondents were (have) been in breach of contract.

#### **4<sup>th</sup> Petitioner**

25. It is not in dispute that the 4<sup>th</sup> Petitioner was initially employed in 2013.

26. Equally not in dispute is that the 4<sup>th</sup> Petitioner entered into a fixed-term contract with the Respondents on 1 January 2019.

27. The contract expressly provided that it superseded any previous contracts and that it constituted the contract between the parties. The contract had an end date.

28. The argument by the 4<sup>th</sup> Petitioner that the fixed-term contract was sustained beyond the expiry date because she was paid salary in May 2020 was not proved because there was no rebuttal of the deposition by the Respondents that the monies paid were salary arrears (the 4<sup>th</sup> Petitioner indeed deposed that she was owed salary arrears of Kshs 750,000/-).

29. The law envisages fixed-term contracts, and the Court finds nothing illegal or invalid in the contract.

30. The Court, therefore, finds that the contract expired by effluxion of time.

#### **Conclusion and Orders**

31. From the foregoing, the Court makes the following findings:

- (i) The 1<sup>st</sup> to 3<sup>rd</sup> Petitioners are still bona fide employees of the Respondents.
- (ii) The Respondents have been in breach of contract in not paying the 1<sup>st</sup> to 3<sup>rd</sup> Petitioners their remuneration.
- (iii) The 4<sup>th</sup> Petitioners contract expired by effluxion of time on 31 December 2019.

32. The Court orders:

- (i) The Respondents to pay the 1<sup>st</sup> to 3<sup>rd</sup> Petitioners all accumulated remuneration.
- (ii) The case of the 4<sup>th</sup> Petitioner is dismissed with no order on costs.

33. Since there is subsisting contractual relationship between the successful Petitioners and the Respondents, the Court orders each party to bear own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF DECEMBER 2021.**

**RADIDO STEPHEN, MCIArb**

**JUDGE**

#### **Appearances**

For applicant N.E. Mogusu & Co. Advocates

For Respondents The Federation of Kenya Employers

Court Assistant Chrispo Aura