



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 19 OF 2012

(Originally Nairobi Cause No. 614 of 2011)

FLORENCE WACHIRA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF LAIKIPIA.....1st RESPONDENT

TRANSITION AUTHORITY.....2nd RESPONDENT

PUBLIC SERVICE COMMISSION.....3rd RESPONDENT

consolidated with

1. Cause No. 201 of 2014 – Hussein Aliyow
2. Cause No. 198 of 2014 – Maria Nyambura
3. Cause No. 212 of 2014 – Lucy Njoki
4. Cause No. 199 of 2014 – Beatrice Ndegwa
5. Cause No. 196 of 2014 – Onesmus Mwangi Maina
6. Cause No. 209 of 2014 – Franco Gachomba
7. Cause No. 208 of 2014 – Lawrence Miano
8. Cause No. 211 of 2014 – Douglas Gathuma
9. Cause No. 268 of 2014 – Cecilia Malakwen
10. Cause No. 206 of 2014 – Stephen Theuri
11. Cause No. 204 of 2014- Fridah Gituku
12. Cause No. 203 of 2014 – Simon Njau
13. Cause No. 197 of 2014 – Margaret Mugo
14. Cause No. 200 of 2014 – Lydia Wairimu Njire
15. Cause No. 213 of 2014 – Jacob Gachara
16. Cause No. 210 of 2014 – Kamau Chege
17. Cause No. 216 of 2014 – Peninah Rongoi

18. Cause No. 215 of 2014 – Christopher Kimondo

19. Cause No. 205 of 2014 – Virginia Mugure

20. Cause No. 207 of 2014 – Mary Wangari Mathenge

21. Cause No. 243 of 2014 – Mary Waruru

22. Cause No. 214 of 2014 - Venazio Maina

23. Cause No. 202 of 2014 – Rose Maina

JUDGMENT

1. When the hearing of the Cause herein was closed on 17 October 2017, the Court directed the parties to file and exchange submissions within agreed timelines. Mention was scheduled for 14 December 2017 to confirm compliance and to give a judgment date.

2. I got transferred in the interlude but due to unknown reasons, the parties did not file the submissions or follow up on the delivery of judgment and it was only around 17 December 2018 that the Deputy Registrar Nakuru stumbled upon the file during an audit.

3. The delay in delivery of judgment is therefore regretted.

4. Florence Wachira moved the Court in Nairobi in 2011 against the Municipal Council of Nyahururu and she stated the Issues in Dispute as

? Failure by the Respondent to pay gratuity as required by Rule 3 of the Local Government (Town Council of Nyahururu) Gratuity Rules, 1977 (published in Legal Notice No. 290 of 1977 and the provisions of Rule 7 of the Local Government (Municipal Council of Nyahururu (Gratuity) (Amendment) Rules 2008 (published in Legal Notice No. 112 of 2008) amounting to Kshs 915,796.

? Failure by the Respondent to effect salary increments as awarded under the Collective Bargaining Agreement of 1993, the 1997 *Job Appeals* and the Collective Bargaining Agreements of 2002 & 2005 entered into with the Kenya Local Government Workers Union in which the Claimant was a member, amounting to Kshs 350,045.

5. On 29 August 2011, the Respondent filed a *Notice of Preliminary Objection* contending that the Cause was statute barred by virtue of the Employment Act, 2007, incompetent, fatally defective and an abuse of the court process.

6. On 27 April 2012, the Claimant filed an *Amended Memorandum of Claim*.

7. When the Cause came up for hearing on 30 July 2012, the parties sought for time to attempt out of court settlement and the Court granted them time. On 27 November 2012, the parties informed the Court that they were still negotiating.

8. On 16 May 2013, the Court upon the consent of the advocates for the Claimants and the Respondent directed that

Cause No. 920 of 2011, Mary Muthoni Nguyo

Cause No. 921 of 2011, Rose Maina

Cause No. 927 of 2011, Christopher Kimondo

Cause No. 928 of 2011, Peninah Rongoi

Cause No. 929 of 2011, Lydia Wairimu Njire

Cause with Cause No. 930 of 2011, Virginia Mugure

Cause No. 931 of 2011, Kamau Chege

Cause No. 932 of 2011, Jacob Gachara

Cause No. 933 of 2011, Fridah Gituku v Municipal Council of Nyahururu,

Cause No. 934 of 2011, Hussein Aliyow

Cause No. 935 of 2011, Stephen Theuri v Municipal Council of Nyahururu,

Cause No. 936 of 2011, Maria Nyambura
Cause No. 612 of 2011, Lucy Njoki
Cause No. 613 of 2011, Mary Mugo
Cause No. 615 of 2011, Mary Wanjiru Waruru
Cause No. 616 of 2011, Venazio Maina
Cause No. 617 of 2011, Beatrice Wairimu Ndegwa
Cause No. 618 of 2011 Lawrence Miano v Municipal Council of Nyahururu,
Cause No. 619 of 2011, Manasseh Githinji v Municipal Council of Nyahururu,
Cause No. 620 of 2011, Mary Wangari
Cause No. 621 of 2011, Douglas Gathuma
Cause No. 622 of 2011, Cecilia Wangeci Malakwen
Cause No. 915 of 2011, Franco Gachomba
Cause No. 929 of 2011,
Franco Gachomba v Municipal Council of Nyahururu,
Cause No. 1097 of 2011, Onesmus Mwangi Maina

be consolidated with this Cause. The Court also directed that the files be transferred to Nakuru for hearing and determination.

9. On 3 July 2013, upon another consent of the parties, the Court directed that

Nyeri Cause No. 8 of 2012,

Nyeri Cause No. 9 of 2012,

Nyeri Cause No. 15 of 2012,

Nyeri Cause No. 16 of 2012,

Nyeri Cause No. 17 of 2012 and

Nyeri Cause No. 18 of 2012 be transferred to Nakuru. It took time for the files to be transferred to Nakuru.

10. On 2 May 2013, the Claimants filed written submissions.

11. On 25 June 2014, the Claimants filed a *Further Amended Memorandum of Claim* in which the current Respondents were introduced. This was after Court gave leave on 6 May 2014.

12. The 1st Respondent filed a *Response to the Amended Memorandum of Claim* and a *Notice of Preliminary Objection* on 14 August 2014. The objection related to limitation (Public Authorities Limitation Act and Limitation of Actions Act).

13. On 3 September 2014, the Attorney General came on record for the 2nd and 3rd Respondents, and on 5 November 2014, the 1st Respondent filed submissions on the objection.

14. The Claimants filed grounds of opposition to the Preliminary Objection.

15. The 2nd and 3rd Respondents filed a *Notice of Preliminary Objection* to the Cause on 28 July 2015.

16. The preliminary objections were partly canvassed on 5 November 2014, and on 16 March 2015 the 1st Respondent proposed that the objection be taken as part of the hearing on merits.

17. The hearing on the merits started on 16 December 2015 and continued on 9 March 2016 and 17 October 2017 when the Claimants closed their case.

18. Although the Respondents were present on 13 July 2017 when the hearing date of 17 October 2017 was agreed, they did not attend the hearing and therefore the Court deemed their cases as closed.

19. The Court gave directions as to the filing of submissions, but none was on file as the time of preparing this judgment.

Limitation

Public Authorities Limitation Act

20. According to the *Further Amended Memorandum of Claim*, and more so Schedule of Claims filed by the Claimants in Court on 30 September 2016, the Claimants separated with the Municipal Council of Nyahururu from 31 December 2004 to 31 December 2008.

21. The Claimants also advanced heads of claim alleging contractual breaches in respect of periods prior to the separations.

22. It was not disputed that the Claimants were all employees of Municipal Council of Nyahururu, a local authority/public authority as envisaged under the *Public Authorities Limitation Act*.

23. In terms of section 3(2) of the *Public Authorities Limitation Act*, such contractually anchored causes of action should be instituted with the Court within 3 years.

24. The consolidated Causes here were all lodged with the Court between 2011 and 2012.

25. Taking 31 December 2008 as the utmost deadline, the Claimants who retired by that date should have moved the Court by 30 December 2011.

26. In this respect, logic with a little arithmetic would show that all the Causes filed after 30 December 2011 were caught up by the limitation prescription of section 3(2) of the *Public Authorities Limitation Act*.

27. In other words, all the Causes which were transferred from Nyeri were statute barred having been instituted more than 3 years after the accrual of the cause(s) of action.

28. For the other Claimants, the individual dates of retirement become material in determining whether they moved the Court within the prescribed 3 years.

29. Jacob Gachara, Peninah Rongoi and Christine Kimondo retired with effect from 31 December 2004 and therefore should have moved the Court by 30 December 2007.

30. For Hussein Aliyow, Lucy Njoki, Fridah, Lydia Wairimu and Rose Maina they retired on 31 December 2005 and should have lodged their claims on or before 30 December 2008.

31. Maria Nyambura, Beatrice Ndegwa, Virginia Mugure, Mary Wangari Mathenge and Mary Waruru were retired on 31 December 2006 and therefore should have instituted legal proceedings by 30 December 2009.

32. Those who retired on 31 December 2007 were Onesmus Mwangi, Douglas Gathuma, Cecilia Malakwen, Simon Njau, Margaret Mugo, Kamau Chege and Venazio Maina.

33. They should have commenced legal proceedings by 30 December 2010.

34. The Court therefore has no hesitation in finding that the claims by these Claimants mentioned in paragraph 32 hereinbefore were statute barred as they were lodged with the Court outside the 3 year window.

35. Having gone through the analysis, the Court holds that the only Causes which survive the limitation prescription are the Causes by **Florence Wachira, Franco Gachomba, Lawrence Miano and Stephen Theuri** as they retired on 31 December 2008 and lodged their Causes on 19 April 2011, 19 June 2011, 19 April 2011 and 15 June 2011 respectively.

36. The Court will now address the questions of gratuity and salary arrears in terms of the legislation in place and the collective bargaining agreement.

37. The Claimants called 3 witnesses (one Claimant and 2 Union officials at the material time).

Gratuity

38. The claim for gratuity is principally based on the provisions of Legal Notice No. 112 of 2004, the Local Government (Municipal Council of Nyahururu (Gratuity) (Amendment) Rules, 2008 as read with Legal Notice No. 290 of 1977, the Local Government (Municipal Council of

Nyahururu (Gratuity) Rules.

39. The Respondents resisted the validity of the Legal Notice because of its retrospective application.

40. The rule in contention is Rule 7 which provided that If at any time an employee becomes a member of a provident fund, superannuation fund or any other fund established or approved by the Council, a gratuity shall be paid under this rule at the time of his/her retirement in respect of any period of his/her service prior to and after his commencing to contribute, to those other funds, where had he not commenced so to contribute, he would by reason of any provision contained in these rules, have been entitled to gratuity or other payment.

41. In the view of the Court, the provision is clear and does not lend itself to any difficulties of application or interpretation. It is also in tandem with the commencement date of statutes as contemplated by the Interpretation and General Provisions Act.

42. What the Court understands the provision to say is that a retired employee of the Council was entitled to gratuity up to the time he joined a provident fund or superannuation fund.

43. The only question therefore would be, at what point did the 4 Claimants join a provident fund or superannuation fund approved by the Municipal Council, and when they started making contributions.

44. Florence Wachira testified that she was seeking gratuity of Kshs 915,796/-. She admitted that she was making contributions to National Social Security Fund until she joined and started making contributions to *Laptrust*.

45. Unfortunately, she did not disclose when she joined *Laptrust*, because that would have been the relevant and material cut off period for assessment of payment of gratuity. However, the date can easily be ascertained with precision and therefore computation of the gratuity should not be difficult (the other 2 witnesses did not testify on gratuity but restricted their evidence to salary arrears under the collective bargaining agreement).

46. On the material on record and in consideration that the Respondents did not mount any challenge to the computation of gratuity as pleaded during cross examination, the Court is satisfied that the 4 Claimants are entitled to gratuity up to the point they joined *Laptrust* or any other provident or superannuation fund.

Salary arrears

47. The Respondents had challenged the head of claim for salary arrears on the ground of limitation.

48. The arrears related to collective bargaining agreements for the years 1993, 2002 and 2005.

49. The Union, of which the Claimants were members, the Municipal Council of Nyahururu, the Ministry of Local Government and the Ministry of Labour held long running consultations on the implementation of the various collective bargaining agreements.

50. There were issues of implementation, conversion of salary groups and computations of the arrears outstanding.

51. During a Staff Committee meeting held on 7 May 2009, it was resolved that the report of a Task Force which had been formed to examine the issue of arrears be accepted and be forwarded to the Finance and General Purposes Committee and Full Council, and the Ministry of Local Government for further action.

52. The Full Council met on 29 May 2009 and adopted the recommendation by the Finance and General Purposes Committee on the question of arrears.

53. The Court is of the view therefore that time started running in May 2009, and because the Causes were filed before end of May 2012 (within 3 years of adoption of arrears), they were not caught up by limitation.

54. The Court also notes that the Council had expressed a willingness to pay the arrears as demonstrated by the letters of 11 April 2012 and 15 January 2013.

55. However the point of contention appears to be the formula to be used to compute the conversion/arrears.

56. The Respondents did not appear in Court to lead any evidence to rebut the evidence presented by the Claimants and the Court will therefore adopt the computations by the Claimants.

Conclusion and Orders

57. The Court finds and holds that

(a) Save for the 4 Claimants listed in paragraph 34 above, all the other Causes advanced are statute barred.

(b) The 4 Claimants are entitled to payment of gratuity and salary arrears.

53. The Claimants are awarded gratuity and salary arrears as hereunder

(i) **Florence Wachira**

Gratuity Kshs 915,796/-
Salary arrears Kshs 350,045/-
TOTAL **Kshs 1,268,841/-**

(ii) **Franco Gachomba**

Gratuity Kshs 707,000/-
Salary arrears Kshs 156,245/-
TOTAL **Kshs 863,245/-**

(iii) **Lawrence Miano**

Gratuity Kshs 800,625/-
Salary arrears Kshs 126,200/-
TOTAL **Kshs 926,825/-**

(iv) **Stephen Theuri**

Gratuity Kshs 454,610
Salary arrears Kshs 250,150/-
TOTA **Kshs 704,760/-**

58. The Claimants are denied costs and interest for having failed to file/serve submissions.

59. This file to be transferred to Nakuru after delivery of this judgment.

Dated and signed in Nairobi on this 5th day of February 2019.

Radido Stephen

Judge

Appearances

For Claimants Ms. Kathambi instructed by Janet G. Mathiu & Co. Advocates

For 1st Respondent Mr. Mwangi instructed by J. M. Mwangi & Co. Advocates

For 2nd & 3rd Respondent Mr. Kirui, State Counsel, Office of the Attorney General

Court Assistant Nixon/Martin