



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**PETITION NO. 112-116 OF 2018**

**1. GILBERT MURIITHI NJAGI**

**2. LINET GAKII KINYUA**

**3. HUMPHREY MAWIRA MUGAMBI**

**4. EVASIA WANJA NJUE**

**5. EDWIN MAWIRA NJUE.....CLAIMANTS**

**VERSUS**

**MUTHIRU DAIRY**

**FARMERS COOPERATIVE SOCIETY.....RESPONDENT**

**JUDGMENT**

1. The Claimants sued the Respondent asserting that their employer had reduced their pay as well as terminated their services without any justification. The Claimants assert that in the dismissal the Respondents did not adhere to the law and that no notice was given prior to dismissal or payment of their leave not taken made. They thus sought compensation for unlawful termination to the maximum of 12 months wages and general damages emoluments at a rate of 15% of the total amount, damages for lost earnings from October 2016 up to the date of judgment being monthly earnings, 3 months in lieu of leave, unpaid working days of leave, costs of the suit and interest on the compensation and damages until payment in full.

2. The Respondent filed a defence in which it was asserted that the suit was filed contrary to the provisions of Section 90 of the Employment Act as any claim prior to the period prescribed in law was time barred. The Respondent averred that the claim even sought relief for actions preceding the incorporation of Muthiru Dairy Farmers Co-operative Society Limited in 2012. The Respondent averred that the Claimants had breached or repudiated their contracts when they unequivocally and without reasons abandoned their work station. The Respondent averred that at a special general meeting on 17<sup>th</sup> August 2016 the members of the Co-operative decided to downsize its operations by retrenching staff on account of redundancy for sustainability of the dairy and to mitigate and/or avoid the migration of members to other groups where they felt they may be paid better. The Respondent averred that the Claimants were present at the meeting on 17<sup>th</sup> August 2017 and never raised any objections to the proposals to reduce salaries of the staff and trim the number of employees. The Respondent averred that the Claimants without any notice decided to walk out of the Respondent's premises on 27<sup>th</sup> February 2017 and chose never to return to date. The Respondent averred that other than reducing the salary the special general meeting resolved to embark on rescheduling and/or seeking a restructuring of the loans among other steps. The Respondent averred that the claim was unfounded and should be dismissed as it was the Claimants who staged a walkout.

3. The parties opted to dispose the suit relying on Rule 21 of the Court rules 2016 by way of submissions and documents filed. The Claimants submitted that no notice was issued to them about the reduction of salary and that their services were unduly terminated on 3<sup>rd</sup> March 2017 without notice. The Claimants submit they were not accorded a chance to be heard by the Respondent and aver that their dismissal was not only wrong but also unjustified. The Claimants submitted that it was not in doubt that they were employees of the Respondent. They cited Section 2 of the Employment Act and relied on the case of **Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] eKLR** and submitted that the Claimants enjoyed a contract of service and not a contract for service. The Claimants relied on the treatise by **Simon Deakin and Gillian S. Morris, Labour Law, 3<sup>rd</sup> Edition** at pages 146-168 on the tests used by courts in determining employment or service. The Claimants submitted that on the issue as to whether there was unfair termination they were terminated without notice on 3<sup>rd</sup> March 2017. They submitted that their salaries were first unprocedurally reduced then employment terminated. The Claimants cited Section 43 of the Employment Act and submitted that the reason for termination must be genuine. Reliance was placed on the case of

**Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the learned Judge held that for the termination of employment to pass the fairness test there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination and procedural fairness addresses the procedure adopted by the employer in effecting the termination. The Claimants submitted that the Respondent violated Sections 41, 43, 44 and 45 of the Employment Act and they therefore were entitled to the reliefs sought in the claims.

4. The Respondent submitted that the issues for determination were

- i. whether the Claimants absconded their duties by abandoning their work stations
- ii. whether the Claimants absconding of their duties translates to mean unfair termination by the Respondent
- iii. whether the Claimants are entitled to the prayers sought in their respective claims, and
- iv. whether the Respondent is entitled to costs

The Respondent submitted that the Claimants were employees of Muthiru Dairy Farmers Self Help Group between 2006 and 2011 a different entity from the Respondent and that in any event such claims were time barred in terms of Section 90 of the Employment Act. The Respondent submitted that the Claimants had not proved they were terminated or summarily dismissed and that it was the Claimants who abandoned their duties by abandoning their work stations without justification or notice. The Respondent submitted that it was constrained to consider downsizing its operations to try and prevent it from incurring more losses and vide a special general meeting on 17<sup>th</sup> August 2017 obtained consent to reduce staff salaries and the staff compliment. The Respondent submitted that the Claimants were present at the meeting and did not raise any concerns or object. The Respondent submitted that after the Claimants walked out in March 2017 it reported the matter to the District Labour Office Chuka, Tharaka Nithi County. The Respondent submitted that by walking out on the employer the Claimants negatively affected the Respondent's operations and it was the one that had a cause of action against the Claimants in view of the provisions of Section 44(4)(a) of the Employment Act. The Respondent relied on the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR** and submitted that the Claimants had wrongly sued it and in line with the decision should pay costs of the suits to the Respondent.

5. The Claimants were employees of the Respondent. That was proved by their respective claims as well as the concession by the Respondent. However, granted the Respondent was incorporated on 11<sup>th</sup> September 2012, the Claimants were only employees of the Respondent Muthiru Dairy Farmers Co-operative Society Limited from 11<sup>th</sup> September 2012. Any claims relating to the previous period is therefore not capable of being met or even answered by the Respondent as it was not in existence and did not have any relationship with the Claimants prior to incorporation. The Claimants sought unquantified sums of money contrary to the requirements in this court. Only general damages for constitutional abridgement or defamation relative to employment or for contempt are fluid. The rest of the claims made by a party must relate to specific sums since the employment is not one that is at large with indefinite terms of service. The Claimants sought compensation for unlawful termination to the maximum of 12 months wages and general damages emoluments at a rate of 15% of the total amount (whatever this means), damages for lost earnings from October 2016 up to the date of judgment being monthly earnings, 3 months in lieu of leave, unpaid working days of leave, costs of the suit and interest on the compensation and damages until payment in full. No figures were offered at all. In the further list of documents filed it was not clear what sums are alleged to have been paid as opposed to the sums that ought to have been paid. This issue not having been proved on a balance of probabilities fails. In respect to the walkout, no defence was proffered and granted the evidence of a walkout as shown by the letter to the County Labour Office Chuka, the Claimants walked out of their employment and therefore cannot claim dismissal. In sum their suits are unfit for grant and I dismiss the suits with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 28<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**