

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 251 OF 2018

KENYA UNION OF COMMERCIAL FOOD &

ALLIED WORKERS (KUCFAW).....CLAIMANT

VERSUS

KAMUGA/GIACHANJIRU FCS.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for relief in respect of 28 Grievants alleged to have been employees of the Respondent. The 28 Grievants were John Kamande, John Mungai Njuguna, John Njoroge, Charles Nyuto Chege, Samuel Mwaura Njuguna, Wanyoike Mwaura, Samuel Ndung'u, Paul Wainaina, Eanclas Kimani Gitau, Gabriel Njoroge, Patrick Ndung'u, Alice Njeri, Bernard Munyua, Michael Kiiga, James Kiarie, Claudio Kamau, James Waithaka, Joaninah Njeri, Anne Wanja Gitau, Nancy Wangui, Mary Wanjiru Muiruri, David Muiruri Kanoro, Mburu Kimani, Margaret Mugure, Kangethe Mwangi, Paul Ndung'u, Samuel Mungai and Rosemary Wanjiru. The Claimant averred that the parties had a valid recognition agreement pursuant to which a collective bargaining agreement (CBA) had been concluded. It averred that the CBA expired on 30th September 2017 though it was still in force until the parties conclude a new CBA. It averred that the 1st Grievant John Kamande was employed on 5th May 2006 as a general labourer and earned Kshs. 6,000/- a month and was dismissed on 29th November 2014. The Claimant averred that the 1st Grievant was paid his terminal benefits amounting to Kshs. 49,919/- leaving a balance of Kshs. 199,772/- which the Claimant claimed on behalf of the 1st Grievant. The Claimant averred that in respect of the 2nd Grievant, the employment was in June 2013 as a night watchman earning Kshs. 6,000/- a month and that his termination was in January 2014. It was averred that the terminal dues were calculated to be Kshs. 54,650/- out of which the Respondent paid Kshs. 10,930/- leaving a balance of Kshs. 43,720/-. The Claimant averred that the 3rd Grievant John Njoroge was employed on 29th September 2012 as a night watchman earning Kshs. 6,000/- a month. It averred that he worked for the Respondent until 30th February 2014 (sic) when his services were terminated by the Respondent, and his terminal dues calculated by the Respondent as Kshs. 138,328/-. The Claimant averred that the 3rd Grievant was paid part of his terminal benefits amounting to Kshs. 27,666/- leaving a balance of Kshs. 110,662/- which he claimed. The 4th Grievant Charles Nyuto was employed on 4th December 2012 as a general labourer earning Kshs. 4,800/- a month and was terminated in March 2013. It was averred that at the time of termination his salary was Kshs. 6,000/- a month and that his terminal dues were calculated. The Claimant averred that the Respondent made a part payment of the terminal dues amounting to Kshs. 3,990/- leaving a balance of Kshs. 15,955/-. The Claimant averred that Samuel Mwaura the 5th Grievant was employed in 2003 as a cherry clerk earning Kshs. 6,000/- a month. The Claimant averred that he was dismissed in April 2014 after 8 years of continuous service. He was paid Kshs. 120,275/- being part of his terminal dues and the Claimant averred he was owed a sum of Kshs. 481,099.40 being the balance of the terminal dues calculated by the Respondent. The Claimant averred that the 6th Grievant Wanyoike Mwaura was employed in January 2006 as a night watchman with a starting salary of Kshs. 6,000/-. It was averred that the 6th Grievant worked till November 2014 when his services were terminated and that at the time earned Kshs. 6,000/- all inclusive. The Claimant averred that Respondent paid part of the 6th Grievant's terminal dues amounting to Kshs. 77,120/- leaving a balance of Kshs. 308,480/-. The 7th Grievant Samuel Ndung'u was said to have been employed in 2008 as a night watchman earning Kshs. 6,000/- a month. It was averred that he was dismissed in November 2013 and after termination his terminal dues were calculated. The Claimant averred that the Respondent paid Kshs. 37,445/- being part of his terminal dues and that there was a balance of Kshs. 149,778/- owed to the 7th Grievant. The Claimant averred that Paul Wainaina the 8th Grievant was employed as a night watchman in June 2012. The Claimant averred that he worked until 29th November 2014 when his services were terminated. The Claimant averred that the Respondent paid Kshs. 28,244/- being part of his terminal dues and that there was a balance of Kshs. 113,512/- owed to the 8th Grievant. The 9th Grievant Kimani Gitau was stated to have been employed as a general labourer earning Kshs. 6,000/- a month and that he was terminated in May 2014. It was averred that his terminal benefits were calculated and a part thereof paid being Kshs. 29,368/- and that the Respondent still owed him Kshs. 117,468/-. The Claimant averred that the 10th Grievant Gabriel Njoroge was employed as a night watchman in July 2012. The Claimant averred that he worked for the Respondent until 29th November 2014 when his services were terminated. It averred that his terminal benefits amounting to Kshs. 120,138/- remained unpaid after Kshs. 30,035/- was paid on 18th December 2015. The 11th Grievant Patrick Ndung'u was stated to be a watchman employed in 2006 earning Kshs. 6,000/- a month. It was averred that he was dismissed in March 2013 and his terminal dues calculated and part thereof paid leaving a balance of Kshs. 201,743/- after the payment of Kshs. 50,436/-. The Claimant averred that the 12th Grievant Alice Njeri was employed as general labourer in February 2012 earning Kshs. 6,000/- a month. The Claimant averred that she was dismissed in January 2014 and her terminal benefits calculated and partly paid. The Claimant sought payment of Kshs. 92,920/- being a balance of the terminal dues after payment of Kshs. 23,230/-. The Claimant averred that the 13th Grievant was employed as a factory manager. The Claimant averred that Bernard Munyua was stationed in one of the Respondent's factory and earned Kshs. 5,000/- a month until December 2014 when his services were terminated. The Claimant averred that the terminal benefits due to the 13th Grievant were calculated and part thereof paid leaving a balance of Kshs. 605,742/- unpaid after payment of Kshs. 29,870/-. The Claimant averred that the 14th Grievant Michael Kiiga was employed a general labourer in 2006 earning Kshs. 6,000/- and worked till September 2013 when his services were terminated. The Claimant averred that the Respondent calculated his terminal dues and paid a part thereof being Kshs. 11,330/- leaving a balance of Kshs. 225,602.50 unpaid. The 15th Grievant James Kiarie was stated to have been employed in April 2007 as a general labourer earning Kshs. 6,000/- a month. The Claimant averred that the 15th Grievant worked until

November 2013 when his services were terminated and part of his terminal dues paid leaving a balance of Kshs. 140,328/-. The Claimant averred that the 16th Grievant was Claudio Kamau who was employed in January 2013 as a general labourer. The Claimant averred that the 16th Grievant was dismissed in January 2014 after which the Respondent calculated the terminal benefits amounting to Kshs. 105,846/- and part payment of Kshs. 12,170/- made. The 16th Grievant sought payment of the balance amounting to Kshs. 84,676/-. The Claimant averred that the 17th Grievant James Waitthaka was employed as a night watchman in January 2006. It was averred that his services were terminated after 7 years of continuous service. The Claimant averred that the terminal dues were calculated and part payment of Kshs. 32,930/- thereof made leaving a balance amounting to Kshs. 131,679/- unpaid. The Claimant averred that the 18th Grievant was Joaninah Njeri Ngotho employed in January 2006 as a cherry recorder. It was averred that she was dismissed in April 2014 and terminal benefits of Kshs. 407,832/- calculated to be her dues out of which a part payment was made totalling to Kshs. 81,567/-. The Claimant thus sought the sum of Kshs. 326,265/- which remained unpaid. The 19th Grievant Ann Wanja was stated to have been employed in January 2012 as a general labourer. It was averred that her monthly salary was Kshs. 6,000/- and that she was terminated in August 2012. Her terminal dues were calculated as Kshs. 40,000/- and were not paid. She thus sought her terminal dues amounting to Kshs. 40,000/-. The 20th Grievant was stated to be Nancy Wangui a general labourer employed in January 2012. Her services were terminated in August 2012 and the Claimant averred that her terminal benefits amounting to Kshs. 29,110/- were calculated but not paid. She thus sought payment of her terminal benefits. The Claimant averred that the 21st Grievant Mary Wanjiru Muiruri was employed in March 2006 as a general labourer earning Kshs. 6,000/- a month. It was averred that she was terminated in August 2014 and her terminal dues calculated amounting to Kshs. 11,784/- but were not paid. She thus sought payment of the sums due to her. The Claimant averred that the 22nd Grievant was employed as a night watchman in January 2006 and that he worked for 8 continuous years of service until termination in July 2014. The Claimant averred that his terminal dues were calculated and not paid. The 22nd Grievant thus sought the payment of Kshs. 263,556.35 as his terminal benefits. The 23rd Grievant was stated to have been employed as a night watchman in January 2006. The Claimant averred that he worked until termination of his services in May 2008 and that his terminal dues were calculated as Kshs. 155,341.85 and remained unpaid. The Claimant thus sought payment of the terminal dues. The 24th Grievant was Margaret Mugure and it was averred that she was employed in 2006 as a general labourer earning Kshs. 6,000/- a month. The Claimant averred that she was terminated in December 2015 and her terminal dues of Kshs. 228,984/- remained unpaid. The Claimant thus sought payment of the terminal dues on behalf of the 24th Grievant. The Claimant averred that the 25th Grievant was Kangethe Mwangi employed as a night watchman in 2006. It was averred that he worked as such till October 2016 when his services were terminated. The Claimant averred that his terminal dues amounting to Kshs. 263,556.35 remained unpaid. The 26th Grievant Paul Ndung'u was stated to be a former night watchman employed in January 2006. It was averred he worked as such until December 2016 and his terminal dues of Kshs. 337,662/- remained unpaid. The 27th Grievant Samuel Mungai was a night watchman from January 2006 till termination in February 2016. He was earning Kshs. 6,000/- at the time of termination. The Claimant averred his terminal dues were calculated and remained unpaid. It sought payment of Kshs. 518,517.40 as terminal dues for the 27th Grievant. The Claimant averred that the 28th Grievant Rosemary Wanjiru was employed in May 2012 as a general labourer earning Kshs. 2012 and worked till May 2013. She claims her terminal benefits of Kshs. 121,998/- which remained unpaid. The Claimant averred that it addressed the Respondent on 3rd and 11th September 2014, 13th and 14th October 2014 and 2nd December 2015 seeking terminal benefits for the first 18 Grievants while it addressed the Respondent on 4th and 11th February 2016 in respect of the remaining 10 Grievants. The Claimant averred that the Respondent ignored the letters concerning the terminal benefits and that it reported a trade dispute on 23rd February 2016 and on 11th March 2016 Mr. E. C. Mwangudza of the Murang'a Labour Office appointed as conciliator. It was averred that the parties attended the conciliation meeting on 29th April 2016 and after several meetings concluded the calculations of terminal benefits. The Claimant averred that the parties met at the Conciliator's office and signed an agreement witnessed by the Conciliator on 5th September 2016. Payment was agreed to be made on or before 24th December 2016. The Claimant thus sought the payment of the sums agreed for each of the Grievants as well as costs of the suit.

2. The Respondent filed a response to claim and denied the particulars of the claim in respect of each of the Grievants. It was averred that the figures quoted are grossly miscalculated and do not tally with the collective bargaining agreement and was backdated to a period when the minimum wage was not as reflected. The Respondent averred that payment was made of some of the claims and that the prevailing policy was for payment of 80% of coffee sale proceeds directly to farmers and 20% to pay disbursements and other expenses. The Respondent averred that in this case the 20% is not sufficient to satisfy the claim and that it could not pay what it did not have. It averred that in order to benefit from the CBA the employees who wished to rely on the CBA had to have letters of appointment which the Claimant lacked. The Respondent averred that the agreement had disintegrated and was not sustainable. The Respondent averred that there was no cause of action and the suit should be dismissed with costs.

3. The 5th and 21st Grievants testified as did the chairman of the Respondent Mr. Francis Mwangi Gathuiya and Mr. Samuel Kariuki the society manager of the Respondent. The 2 Grievants testified on their own behalf and on behalf of the other Grievants and stated that the Respondent made partial payment of the sums sought after the conciliation. The 1st Respondent's witness testified that it had not been the Respondent's intention not to pay but for lack of funds due to poor coffee production. He stated that per the circular from Commissioner of Co-operatives the proceeds are to be disbursed in the ratio 80-20 with 80% going directly to farmers and 20% being applied to expenses and liabilities. He testified that Mr. Samuel Mwaura the 5th Grievant, Mr. Bernard Ngugi the 13th Grievant and Ms. Joanina Njeri the 18th Grievant were permanent employees and the others were casuals called when there was a harvest in the 2 seasons. He stated that once done they were no longer required they left. The 2nd Respondent's witness reiterated his statement and stated that the Grievants were not paid because there was no money. He stated that the sums applied in calculation of the dues were not correct. He testified that production had declined.

4. The parties were to file submissions and the Claimant submitted that the sums claimed were in accordance with the CBA and that due to the annual increments the wages had risen to the sums applied in the calculation of terminal dues. The Claimant submitted that the agreement entered into was not denied and urge the grant of the prayers sought in the claim. The Respondent on its part submitted that the Claimant cannot rely on the dead CBA which was not renewed. It submitted that the court cannot rubber stamp the agreement of the parties which the Claimant relied upon and that the court of equity and justice would look at all the factors surrounding. The Respondent urged the dismissal of the claims as they cannot rely on the CBA.

5. This dispute ought not have come to court for the simple reason that the parties entered into an agreement at conciliation level and signed an agreement dated 18th April 2016. Absent any evidence of fraud, mistake or any factor that can vitiate a contract executed by willing parties, the court cannot impose its decision on the contract of parties. The Conciliator having brought parties together and having worked

out the deal between them was not in a position to refer the dispute to court. It was resolved at conciliation and therefore the Claimant's members being the 28 Grievants are to be paid the outstanding dues amounting to Kshs. 4,739,443.85 as claimed under paragraph 4 of the Claim. Each of the 28 Grievants is to receive the balance owed as part payment was made in respect of a majority of them. As the Claimant delayed in procuring the services of the Ministry in resolving the dispute there will be no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 25th day of November 2019

Nzioki wa Makau

JUDGE