



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 27 OF 2017

(Before Hon. Justice Mathews N. Nduma)

KENYA NATIONAL FARMERS FEDERATION (Suing through its Registered Officials Namely
Hon. Nduati Kariuki (Chairman) Prof Kaburu M'Ribu (Secretary) and Grace Ngambi (Treasurer)
suing on its own behalf and in the interest of the 23 Petitioners listed herein.....1ST PETITIONER

GEORGE NYAMU.....2ND PETITIONER

BENARD M. MULANDI.....3RD PETITIONER

COLLINS ODHIAMBO ONDIEK.....4TH PETITIONER

DORCAS ATIENO WAMBIA.....5TH PETITIONER

MUGAMBI EDWARD NKUBIRI.....6TH PETITIONER

FAITH NZESE MAITHYA.....7TH PETITIONER

BEN RONO.....8TH PETITIONER

GILBERT KIPKORIR TANUI.....9TH PETITIONER

ISAAC THURANIRA.....10TH PETITIONER

JOHN OKARI OKIOGA.....11TH PETITIONER

KELVIN MURITHI NJERU.....12TH PETITIONER

LABAN KAARA MWANIKI.....13TH PETITIONER

MISHECK KIOGORA.....14TH PETITIONER

NANCY NTINYARI MWONGELA.....15TH PETITIONER

PERVINCE ONYANGO OGUTU.....16TH PETITIONER

PETER KAHENI.....17TH PETITIONER

PETER MWANGI GAKUU.....18TH PETITIONER

PHILIPS OWITI MINUDI.....19TH PETITIONER

RODA MBANDI KILONZI.....20TH PETITIONER
ROBERT KAMAU.....21ST PETITIONER
ROSE KAMBURA NJILU.....22ND PETITIONER
TOM OCHIENG.....23RD PETITIONER
MUTAVA XAVIER MASILA.....24TH PETITIONER

AND

HUMANIST INSTITUTE FOR CO-OPERATION

WITH DEVELOPING COUNTRIES (HIVOS).....1ST RESPONDENT

SNV NETHERLANDS DEVELOPMENT ORGANIZATION IN KENYA.....2ND RESPONDENT

J U D G M E N T

1. On or about October 2015, the 1st Respondent wrote to the 1st Petitioner purporting to terminate the tripartite programme implementation Agreement for the KENDBIP Programme.
2. The effect of the purported termination was that KENAFF ceased being the National Implementing Agency (NIA) for KENBDIP. This Petition is strictly confined to the rights of the 23 employees working for KENDBIP. Disputes between the parties to the tripartite agreement are not included as they do not concern the 23 employees.
3. In terminating the NIA, the 1st Respondent failed, refused and/or neglected to pay regard to the provisions of the Constitution and Kenya Employment Laws in that:
 - a) The 1st Respondent made no provision for the transition or continued engagement of the 23 programme employees as was required by law yet it has continued to run the remainder of the programme under different auspices.
 - b) The 1st Respondent adopted, and has continued to adopt unfair labour practices by refusing and/or neglecting to communicate the fate of the 23 KENDBIP employees despite the request by the 1st Petitioner for it to do so.
 - c) The 1st respondent has withheld and has continued to withhold the salaries and emoluments payable to the 23 programme employees.
 - d) The 1st Respondent has failed to adhere to the requirement of Fair Administrative Action Act of affording a hearing and providing reasons for their decisions to the 23 affected staff even when the 1st Respondent's decision clearly affected the legal rights and interests of the 23 programme employees.
4. The tripartite agreement provides that any differences in opinion regarding the implementation and interpretation of the agreement shall be settled in good faith by mutual agreement of the parties.
5. The 1st Petitioner, in a bid to resolve the issue of employees has engaged the 1st Respondent on several occasions but no resolution has been reached and the discussions have broken down. On 8th March, 2017 the 1st Respondent wrote to the 1st petitioner stating that it was not willing to settle the issue of the 23 employees.
6. As a result, the fate of the 23 employees has remained in limbo as the employees have neither been terminated and/or declared redundant under the provisions of the Employment Act and their salaries and emoluments have been withheld since October 2015 and as at the time of filing this Petition, the 23 employees do not know their fate.
7. Over the period following the purported termination, the 1st Respondent has continued to require the 23 employees to provide support and services in respect of attending meetings, providing information, reports and accounts and documents that are allegedly required for purpose of programme closure audit as well as the statutory audit.
8. The programme is coming to an end in December, 2017 and the Petitioners are apprehensive that the programme funds will be depleted and the programme will be wound up and there will be no funds to meet the employees' outstanding claims.
9. The 1st Petitioner has no means of meeting the employees' claims. That 1st Petitioner was purely involved in the tripartite agreement as a National Implementing Agency (NIA) whose role was limited to hosting and managing KENBDIP. It is the 1st Respondent who has always paid the employees' salaries and emoluments of the 23 programme staff for the last 7 years and has the duty of settling any pending or future

dues.

10. The Petitioners' claim against the Respondents is for withheld salaries, leave allowance, untaken leave days, medical allowance, notice pay, damages, cost of the suit and interest. The claim is made up as follows:

Item No.	Particulars	Amount in Kshs.
1	November 2015 Salaries for 23 employees	2,316,368
2.	December 2015 Salaries for 23 employees	2,316,368
3.	Salaries for 2016 for 23 employees	27,796,415
4.	Salaries for 2017 for 23 employees	27,796,415
5.	Unpaid leave allowance for 2015, 2016 and 2017	2,105,789
6.	Accrued leave days for 2015	2,105,789
7.	Accrued leave days for 2016	2,105,789
8.	Accrued leave days for 2016	2,105,789
9.	Medical allowance in lieu of medical cover 2016 and 2017	8,280,000
10.	12 months' compensation for constructive dismissal	27,796,415
	TOTAL	104,635,137

11. The Respondents' willful actions in the circumstances of this case are malicious, violent, oppressive, fraudulent, wanton or grossly reckless. They are an affront to the constitution and Kenyan employment law as well as international conventions and protocols. They cannot be allowed in any civilized and proper society. The Petitioners seek this Honourable Court to award exemplary and/or punitive damages.

12. The Petitioners pray for Judgment against the 1st and 2nd Respondents jointly and severally as set out in prayer 1 to 15 of the Petition dated 20th March, 2017 and filed on 29th March, 2017.

Response

1st Respondent

13. The 1st Respondent maintains that it has never been an employer of the Petitioners. There exists no employer – employee relationship. The petition be dismissed as against the 1st Respondent. The 1st Respondent insists that the court has no jurisdiction on the matter therefore as it relates to the 1st Respondent.

14. The 1st Respondent denies all the claims set out in the petition.

15. The 1st Respondent adds that all documents of employment indicate that the 2nd Respondent is the employer of the 23 petitioners. A contract cannot confer rights or impose obligations arising under it to a third party except to the parties to the contract. This is the doctrine of privity of contract as it is known in Law. That the 1st Respondent is wrongly enjoined in the suit and it be struck out.

2nd Respondent

16. Mr. George Nyamu swore the replying affidavit by the 2nd Respondent on 19th May, 2017 and filed on 22nd May, 2017.

17. 2nd Respondent states that the 1st Respondent, 2nd Respondent and the 1st Petitioner entered into a tripartite agreement in 2014 marked 'GW 1' for the implementation of KENDBIP Programme in terms of the Programme Implementation Document, annual operational plans and budgets as approved by the 1st Respondent.

18. That the 2nd to 24th Petitioners were employees of the KENBIP Programme. Responsibility of the parties are set out at clause 3 of the tripartite agreement and in the Programme Implementation Document.

19. The 1st Petitioner was designated the National Implementation Agency (NIA) and was responsible for hosting and managing KENDBIP Programme in Kenya by establishing an organizational and administrative set up. KENDBIP was required to be autonomous or separate from the 1st Petitioner.

20. 1st Petitioner was however to provide finance, administration, human resource, monitoring and evaluation. 1st Petitioner was paid NIA fees by the 1st Respondent.

21. Under clause 3.2 of the tripartite agreement, the 1st Respondent was responsible for making available funding for the implementation of KENDBIP Programme as outlined in the Programme Implementation Document. The 1st Respondent met the budget for human resource costs and remitted staff wages, medical insurance, pension entitlement and others through the Petitioner.

22. The human resource and management budget for the KENDBIP Programme was Kshs.200,812,500 (Euro 1,912,500). The 1st Respondent always fulfilled this responsibility of meeting the staff salaries and emoluments from the inception of the KENDBIP Programme until the termination on 22nd October, 2015.

23. The 1st Respondent in addition always exercised management responsibility and control over the programme by providing regular guidance, review and approval of annual work plans, programme activities, programme reports and financial plans on reports of funds management.

24. The KENDBIP Programme and staff have always reported to the 1st Respondent regularly and directly including submission of quarterly and annual reports in the format required by the 1st Respondent. The 1st Respondent has exercised direction, control and evaluation of the programme staff since inception of the programme.

25. The 2nd Respondent provided capacity building for the Programme staff and also funded the programme. The 2nd Respondent submits that the 2nd to 24th Petitioners are employees of the KENDBIP Programme which is a product of the tripartite agreement.

26. The Respondents therefore being parties to the tripartite agreement are therefore well suited to address the claim by the 2nd to 24th Petitioners for withheld salaries and emoluments.

27. The court has jurisdiction to resolve this dispute which is an employment and labour dispute.

28. The deponent is the Programme Co-ordinator of the KENDBIP Programme. He deposes that the 1st Respondent was involved in the recruitment of employees to the KENDBIP Programme as demonstrated in the interview minutes signed by them. See GN5 at page 54 – 60.

29. The 1st Respondent terminated the role of the 1st Petitioner as the NIA on 22nd October, 2015. This terminated the tripartite agreement and the 1st Respondent has since continued to run the KENDBIP Programme. That the 1st and 2nd Respondents have jointly continued to run the KENDBIP Programme. Under the guise of a somewhat new name of 'KENYA BIOGAS PROGRAMME' only dropping initial names of 'NATIONAL and DOMESTIC'. The Programme remains the same with its operations and functions as seen from GN-6, obtained from their website.

30. After terminating the 1st Petitioner as the NIA, the 1st Respondent has proceeded to recruit a programme manager, Biogas Technicians and other staff, which are positions previously held by the 2nd – 24th Petitioners. The 2nd to 24th Petitioners are innocent third parties. They are employees of KENDBIP. The 1st Respondent has no basis or justification of unilaterally withholding the Petitioners salaries and emoluments. This is an unfair labour practice and should be stopped.

31. The 1st and 2nd Respondents have since advertised disposal of their assets. A well orchestrated plan to defeat the Petitioners claims.

32. The Petitioners seek payment of arrear salaries and emoluments and claim compensation and damages for breach of their fundamental rights and freedom set out in the petition.

Determination

33. The issue for determination are as follows:-

- (i) Whether the court has jurisdiction over the matter.
- (ii) Who between the 1st and 2nd Respondent should be held liable for the claims made by the petitioners.
- (iii) What reliefs ought to be granted to the Petitioners.

Issue 1

34. From the facts before court and in particular the Tripartite Agreement before the Kenya National Domestic Biogas Implementation Programme (KENDBIP), Kenya National Farmers federation (KENAFF), the petitioner and Humanist Institute for Co-operation with

Developing Countries (HIVOC), the 1st Respondent and SNV – Netherlands Development Organisation in Kenya, 2nd Respondent, it is apparent the twenty three (23) Petitioners were recruited by the 1st and 2nd Respondents jointly for the benefit of programme KENDBIP. The 1st and 2nd Respondents paid the remuneration of the Petitioners. The 1st and 2nd Respondents managed, and controlled the petitioners. The 1st and 2nd Respondents are the employers of the 2nd to 24th Petitioners. The two cannot run away from the responsibility.

35. In terms of sections 12 of the Employment and labour Relations court Act Cap 234 B Laws of Kenya as read with Article 162(2)(a) of the constitution of Kenya 2010, this court has jurisdiction over this matter. The 1st and 2nd Respondents have an employee and employer relationship with the 2nd to 24th Petitioners and the court finds accordingly.

Issue ii

36. There is a dispute between the 1st and 2nd Respondent as to who bears responsibility in respect of the claims made by the Petitioners.

37. From page 7 of the agreement at part 2 headed – “The parties to the Agreement,” the 1st and 2nd Respondents are parties to the agreement including KENAFF.

38. Under part 3 at page 8 titled “Purpose of the Agreement” the respective roles of KENAFF, HIVOS and SNV are set out clearly. The parties are joined in the hip and the programme could not function without either of them. In terms thereof, KENAFF is to carry out activities needed to implement the KENDBIP for the period 2014-2017. Hivos was to make available funds necessary for implementation of the programme. Funds were to be made available and accessed for the financing of the programme to KENAFF Bank account specific for the implementation of the KENDBIP, SNV was to provide technical assistance, capacity building services to the programme.

39. A plain interpretation of the tripartite agreement places full responsibility for the full implementation of the programme including its operations, recruitment and retention of staff, financing of staff remuneration and the operations on the 1st and 2nd Respondent.

40. It is beyond speculation that the 1st Respondent purported to terminate the employment of the 2nd to 24th Petitioners, without any reason given, without any show cause letter given, without opportunity given to explain themselves and without paying their terminal benefits in blatant disregard of sections 36, 41, 43 and 45 of the Employment Act, 2007.

41. No evidence has been placed before court to rebut the evidence by affidavit of the Petitioners concerning the manner in which they were treated by the Respondents. The 1st Respondent simply dropped the employees, purported to change the name of the programme and went ahead to replace the petitioners with new staff.

42. It is the further court’s considered view and finding that, it was unfair practice, contrary to Article 41 of the Constitution of Kenya 2010 and the provisions cited in the Employment Act, to summarily terminate the employment of the 2nd to 24th petitioners for no valid reason and without following a fair procedure.

43. In the final analysis, the court finds that the Petitioners have proved their case on a balance of probabilities. The Petition therefore succeeds as against the 1st and 2nd Respondents jointly and severally.

Issue iii

44. What remedies are the Petitioners entitled to? From the Tripartite Agreement, the 1st Respondent had the responsibility to pay staff salaries and emoluments Under KENDBIP. Accordingly, the court holds the 1st Respondent in particular responsible for the unlawful and unfair termination of employment.

45. The 1st Respondent has gone ahead to divert and sell its assets in a malicious attempt to run away from its responsibilities while continuing to operate under a different, but somewhat similar name to the previous project. This court will not countenance the blatant disregard of the law and equity by the 1st Respondent in particular. Indeed, the 1st Respondent bears the greatest share of blame in the collapse of the initial programme. The 2nd Respondent has however not tried to escape liability since it also has obligations to the Petitioner as set out in the tripartite Agreement.

46. The unfair labour practice is in violation of article 41(1) of the constitution which amounts to infringement of section 45 of the Employment Act, 2007. This entitles the Petitioners to compensation for unlawful and unfair termination of employment in terms of section 49(1)(c) as read with section 49(4) of the Employment Act, 2007.

47. The Petitioners without reason or notice lost their jobs. They lost their means of livelihood suddenly and as a result suffered immense hardship for no reason attributed to them. The petitioners were not paid salary for days worked, were not paid in lieu of notice and were not given any form of compensation for the sudden loss of employment. If the 1st and 2nd Respondents faced financial difficulties, they ought to have declared the Petitioners redundant in terms of section 40 of the Employment Act, and made payment of the statutory requirements under the section which include, one month salary in lieu of notice, severance pay for the period served, and payment of any arrear salary and in lieu of leave days not taken. Instead they chose to escape their responsibilities to the loss and damage of the Petitioners.

48. The Petitioners were to serve at least up to December 2017. They lost their legitimate expectation to work and earn a decent income. They were humiliated, mistreated and their dignity was violated by the 1st Respondent.

49. Following the cases of :-

1. E & LRC Cause No.1583 of 2013

Koki Muia v Samsung Electronics East Africa [2015] eKLR in which the court awarded 12 months compensation for wrongful termination, with aggravated circumstances.

2. E & LRC Cause No. 213 of 2015

Daniel Kiplangat v Smp Deposit Taking Microfinance Limited [2016] eKLR in which the court award 6 months salary in compensation for wrongful termination.

And the guidance under section 49 of the Act, the court awards each of the 2nd to 24th Petitioners five (5) months salary in compensation for the unlawful and unfair termination of employment and the stated violation of their rights by the 1st Respondent in particular.

Notice Pay

50. The Petitioners are entitled by law to one month salary in lieu of notice since their employment was terminated without notice at all. This is also a contractual obligation on the part of the Respondents. The court therefore awards the 2nd to 24th Petitioners one (1) month salary in lieu of notice in addition to the statutory compensation.

Arrear Salaries

51. The Petitioners worked up to 22nd October, 2015 and earned monthly salaries as shown under Appendix '1' to the petition as follows:-

NO.	KENDBIP STAFF	AMOUNT PAYABLE
1.	Ben Rono	55,000
2.	Benard Mulinge	330,000
3.	Collins Ondiek	137,500
4.	Dorcas Wambia	55,000
5.	Edward Nkubiria Mugambi	55,000
6.	Faith Nzese Maithya	165,000
7.	George Nyamu	440,000
8.	Gilbert Kipkorir Tanui	55,000
9.	Isaac Thurania	55,000
10.	John Okioga	55,000
11.	Kelvin Murithi	55,000
12.	Laban Kaara Mwaniki	55,000
13.	Misheck Kiogora	30,800
14.	Nancy Ntinyari Mwonaela	65,768
15.	Pervience Onyango Ogutu	55,000
16.	Peter Kaheni	30,800
17.	Peter Mwangi Gakuo	137,500

18.	Philips Owiti Minudi	137,500
19.	Rhoda Kilonzi	137,500
20.	Robert Kamau	24,200
21.	Rose Kambura Njilu	77,000
22.	Tom Ochieng	30,800
23.	Xavier Masila Mutava	77,000

52. In the final Analysis judgment is entered in favour of the 2nd to 24th Petitioners as against the 1st and 2nd Respondents jointly and severally as follows:-

A. Compensation

(i)

NO.	KENDBIP STAFF	AMOUNT PAYABLE	AMOUNT PAYABLE FOR 5 MONTHS
1.	Ben Rono	55,000	275,000
2.	Benard Mulinge	330,000	1,650,000
3.	Collins Ondiek	137,500	687,500
4.	Dorcas Wambia	55,000	275,000
5.	Edward Nkubiria Mugambi	55,000	275,000
6.	Faith Nzese Maithya	165,000	825,000
7.	George Nyamu	440,000	2,200,000
8.	Gilbert Kipkorir Tanui	55,000	275,000
9.	Isaac Thurania	55,000	275,000
10.	John Okioga	55,000	275,000
11.	Kelvin Murithi	55,000	275,000
12.	Laban Kaara Mwaniki	55,000	275,000
13.	Misheck Kiogora	30,800	154,000
14.	Nancy Ntinyari Mwonaela	65,768	328,840
15.	Pervience Onyango Ogutu	55,000	275,000
16.	Peter Kaheni	30,800	154,000
17.	Peter Mwangi Gakuo	137,500	687,500

18.	Philips Owiti Minudi	137,500	687,500
19.	Rhoda Kilonzi	137,500	687,500
20.	Robert Kamau	24,200	121,000
21.	Rose Kambura Njilu	77,000	385,000
22.	Tom Ochieng	30,800	154,000
23.	Xavier Masila Mutava	77,000	385,000

(ii) The awards are payable with interest at court rates from date of judgment till payment in full.

B. Notice Pay

The 2nd to 24th Petitioners are each awarded one month salary in lieu of notice as follows:-

NO.	KENDBIP STAFF	AMOUNT PAYABLE
1.	Ben Rono	55,000
2.	Benard Mulinge	330,000
3.	Collins Ondiek	137,500
4.	Dorcas Wambia	55,000
5.	Edward Nkubiria Mugambi	55,000
6.	Faith Nzese Maithya	165,000
7.	George Nyamu	440,000
8.	Gilbert Kipkorir Tanui	55,000
9.	Isaac Thurania	55,000
10.	John Okioga	55,000
11.	Kelvin Murithi	55,000
12.	Laban Kaara Mwaniki	55,000
13.	Misheck Kiogora	30,800
14.	Nancy Ntinyari Mwonaela	65,768
15.	Pervience Onyango Ogutu	55,000
16.	Peter Kaheni	30,800
17.	Peter Mwangi Gakuo	137,500
18.	Philips Owiti Minudi	137,500
19.	Rhoda Kilonzi	137,500
20.	Robert Kamau	24,200

21.	Rose Kambura Njilu	77,000
22.	Tom Ochieng	30,800
23.	Xavier Masila Mutava	77,000

2015. From the evidence before court, the Petitioners were paid for days worked. The Petitioners claim salaries for the unserved term of their contracts. There is no provision in their employment contracts that accords the Petitioners payment of salaries for the unserved term of their contracts, a sample contract for the Petitioners was produced and marked Appendix '4' to the petition.

53. Having awarded five (5) months salary in compensation for the unlawful and unfair termination of employment and the salary in lieu of one months' notice, the claim for payment for the unserved term has no merit and is dismissed.

54. The monthly salaries earned by each of the Petitioners are set out.

C. (iii) The Respondents are to pay the costs of the suit.

Dated and Signed in Kisumu this 20th day of July, 2018

Mathews N. Nduma

Judge

Delivered and Signed in Nairobi this 10th day of August, 2018

Maureen Onyango

Judge

Appearances:

Mr. Munyao, Muthama & Kashindi Advocates for Petitioners t

Mr. Muthaura Mugambi Ayugi & Njonjo Advocate for 1st Respondent

Mr. Okongo Omogeni & Co. advocates for the 2nd Respondent

Anne Njung'e: Court Clerk