



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

**CAUSE NO. 75 OF 2014**

**(Originally Nakuru CMCC No. 1063 of 2003)**

**DAVID MURIUKI NGARE**

**CLAIMANT**

**v**

**SPIN KNIT LIMITED**

**RESPONDENT**

**JUDGMENT**

1. David Muriuki Ngare (Claimant) through Mirugi Kariuki & Co. Advocates commenced legal proceedings against Spin Knit Limited (Respondent) before the subordinate Court in Nakuru on 14 May 2003 alleging termination of employment without cause, and seeking accrued leave allowances and damages for breach of contract.
2. The Respondent filed a Defence on 16 June 2003.
3. On 17 January 2005, the Claimant changed advocates, and the firm of Mungai Mbugua & Co. Advocates came on record.
4. The Claimant did not prosecute the case and on 14 May 2009, the Respondent applied to have the suit dismissed for want of prosecution.
5. On 20 July 2009, the Claimant again changed advocates and the firm of Mirugi Kariuki & Co. came on record (for the second time).
6. The dismissal application was never prosecuted.
7. However, the hearing commenced before the subordinate Court on 6 August 2010, but it was not concluded.
8. On 21 March 2014, the parties consented that the suit be transferred to this Court for hearing and determination.
9. On 30 June 2014, the Cause was fixed for hearing on 4 December 2014.
10. When the Cause was called out for hearing on 4 December 2014, the parties informed the Court that they had reached settlement and sought for a mention which was set for 18 December 2014.
11. The Claimant and his advocate did not attend Court on 18 December 2014, and the Court directed that a written consent be filed with a mention set for 6 February 2015 to confirm settlement.

12. No consent was filed, and in the event the Court fixed hearing for 18 March 2015. Because the Cause could not be reached, the hearing was rescheduled to 19 March 2015. The hearing did not take off even on this date.
13. On 24 March 2015, the parties informed the Court that they had agreed the Cause start *de novo*, and the Court so directed, with hearing fixed for 14 April 2015.
14. On 14 April 2015, the Claimant orally applied to amend the Statement of Claim, and the Court allowed the amendments and the hearing commenced and the Claimant's case was taken and closed.
15. Because the Respondent was not ready, its case was fixed for 20 April 2015.
16. Come 20 April 2015, the parties informed the Court that they were negotiating settlement and the Court allowed them time up to 24 April 2015.
17. However, on 24 April 2015, the Claimant's advocate on record applied to withdraw and the application was allowed and the Claimant was given 30 days to instruct another advocate. The Respondent's case was fixed for 8 June 2015.
18. By 8 June 2015, the Claimant had not instructed a new advocate and the Court gave him more time to instruct an advocate.
19. On 15 December 2015, the Claimant informed the Court that his advocate was before Court No. 8 but there was nothing on record to indicate an advocate had come on record. Despite the Court placing the file aside, the said advocate never turned up in Court.
20. When the file was called out at 10.50am, the Claimant was not in Court, and the Respondent sought to have the Cause dismissed.
21. The Court reserved ruling to 26 February 2016.
22. In the ruling, the Court noted that the Claimant had caused the delay in the conclusion of the Cause and fixed the Respondent's case for hearing on 13 July 2016.
23. The Court further directed that the Respondent's case would be taken whether the Claimant had instructed an advocate or not.
24. On 3 March 2016, the firm of Munene Chege & Co. Advocates filed a Notice of Change of advocate to come on record for the Claimant.
25. When the Cause was first called out for hearing on 13 July 2016, the Claimant was present (advocate was not in Court), while the Respondent was not represented.
26. The Court placed the file aside, but when it was called out later at 10.35 am, none of the parties was in Court.
27. The Court therefore directed that it would deliver a ruling on 22 July 2016 considering the state of affairs prevailing.
28. In the circumstances, the Court ruled in the presence of the parties legal counsels that the Respondent's case as closed, and therefore a judgment is to be delivered on the basis of the record.
29. Although the Court directed, at the request of the parties that submissions be filed within set deadlines, no submissions were on record by this morning.
30. The issue in dispute, in the view of the Court, is whether the Respondent was in *breach in contract*

and if so, appropriate remedies.

### ***Applicable law in 1999***

31. The Claimant alleged that his employment was terminated without justifiable cause in 1999, and therefore founded his action on breach of contract.

32. The statutory legal framework in place then allowed an employer to terminate an employment contract without cause but on notice as provided for in a contract, failure to which payment equivalent to the contractual notice period would be payable on account of damages.

### ***Whether Respondent was in breach of contract***

33. The Claimant was issued with a written contract dated 11 May 1998 which did not provide for the giving of notice of termination after completion of probationary period.

34. However, the Respondent had also entered into a collective bargaining agreement with the Tailors and Textile Workers Union running for the period 1997 to 1999.

35. The collective bargaining agreement provide for notice of termination at clause 15.

36. The Claimant served the Respondent from 1996 to 1999 (3 years) and in terms of clause 15(a)(i) of the collective bargaining agreement, should have been given 1 month notice.

37. The Claimant's testimony that no notice of termination (letter) was given was not challenged or controverted, and the Court therefore finds that the termination of employment was in breach of contract.

### ***Appropriate remedies***

#### ***Pay in lieu of notice/damages***

38. The contract provided for payment of wages on a monthly basis.

39. In terms of clause 15 of the collective bargaining agreement, the Court finds that the Claimant is entitled to the equivalent of 1 month pay in lieu of notice, as damages for breach of contract.

40. The Claimant testified that he was a loom operator and therefore for purposes of wages outlined in the collective bargaining agreement he was in Group 2 (Kshs 2,844/- basic wage per month).

#### ***Accrued leave allowance***

41. The Claimant's testimony that he did not go on leave during the 3 years of employment is unchallenged.

42. In terms of clause 4 of the collective bargaining agreement, the Court finds he is entitled to the equivalent of 3 months wages in lieu of the untaken leave computed as Kshs 8,532/-.

#### ***Unpaid wages***

43. The Claimant further testified that he was not paid wages for May, June and July 1999 when he was absent on medical grounds (medical certificate produced).

44. In terms of clause 8 of the collective bargaining agreement, the Court finds that the Claimant was entitled to full wages for the first 45 days and half monthly wages for the next 45 days.

45. The Court would compute the wages as Kshs 8,532/-.

## **Conclusion and Orders**

46. The Court finds and holds that the termination of the Claimant's employment was in breach of contract and awards him and orders the Respondent to pay him

(a) 1 month pay in lieu of notice	Kshs 2,844/-
(b) Untaken leave	Kshs 8,532/-
(c) Unpaid wages	Kshs 8,532/-
<b>TOTAL</b>	<b>Kshs 19,908/-</b>

47. Because submissions were not filed as directed and the delay occasioned by the Claimant, the Court orders that each party bears its own costs.

**Delivered, dated and signed in Nakuru on this 2<sup>nd</sup> day of September 2016.**

**Radido Stephen**

**Judge**

### **Appearances**

Claimant	Munene Chege & Co. Advocates
Respondent	Mukite Musangi & Co. Advocates
Court Assistant	Nixon