



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

**AT NYERI**

**CAUSE NO.37 OF 2015**

**PHILIP IRUNGU WAGANAH.....CLAIMANT**

**VERSUS**

**RWAIKAMBA FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> December, 2016)**

**JUDGMENT**

The claimant filed the statement of claim on 04.03.2015 through his union, the Kenya Union of Commercial Food and Allied Workers. The claimant prayed for judgment against the respondent for:

- a. Unpaid salary for 33 months Kshs.1, 366, 155.00.
- b. Accumulated annual leaves Kshs. 153, 096.00.
- c. Travelling allowances as per CBA Kshs.110, 958.00.
- d. Gratuity per CBA Kshs.1, 684, 320.00.
- e. Total claim Kshs.3, 314, 529.00.
- f. Costs of the suit in favour of the claimant.

The respondent filed a defence and counterclaim on 17.04.2015 through Sichangi and Partners. The respondent prayed that the claimant's suit be dismissed and judgment be entered for the respondent for:

- a. Kshs.1, 421, 818.75 with interest at court rates from June 2013.
- b. Costs of the suit with interest at court rates.

The facts of the case are not in dispute and are as follows. The respondent and the union are in a collective and recognition agreement. The claimant is a member of the union. The respondent employed the claimant as a factory manager and later promoted him to the position of secretary manager. The claimant was put on compulsory leave by the respondent's letter dated 07.11.2012. The compulsory leave was imposed pending investigations into the financial status of the respondent. The claimant's union demanded the pay of the claimant's withheld salaries for 33 months as per the letter dated 08.01.2013.

The letter demanded that the claimant be paid withheld pay for 33 months because other staff had been paid. The dispute was reported for statutory conciliation. On 28.08.2013 the respondent summarily dismissed the claimant on account of making use of the respondent's funds for the claimant's own use and as per the inquiry report which had implicated the claimant and surcharged him. The dismissal was effective 07.08.2012, the date of the compulsory leave.

The conciliator issued the certificate of unresolved dispute on 04.04.2014.

The only issue for determination is whether the parties are entitled to the remedies as prayed for. The court makes findings as follows:

- a. The claimant prays for unpaid salary for 33 months Kshs.1, 366, 155.00. The record shows that the claim is for unpaid salaries for February 2010 to August 2013 being the period before and after the compulsory leave. The claimant also prayed for accumulated annual leaves Kshs. 153, 096.00 and travelling allowances as per CBA Kshs.110, 958.00. The court considers that the prayers are for continuing injury for which the claimant ought to have filed the suit within 12 months from the date of the cause of action as per section 90 of the Employment Act, 2007. The claimant was put on compulsory leave on 07.11.2012 and 12 months ended on or about 07.11.2013; and was dismissed on 30.08.2013 and 12 months ended on 30.08.2014. The court finds that the suit was filed on 04.03.2015 outside the period of limitation for claims about continuing injury and the prayers will fail. The court further finds that the claimant would not be entitled to the pay during the period of compulsory leave in view of the otherwise valid termination that he has not challenged.,
- b. The claimant prayed for gratuity per CBA Kshs.1, 684, 320.00. Clause 4 of the CBA is clear that gratuity would not be payable if the employee is dismissed on account of gross misconduct. The claimant was summarily dismissed on account of gross misconduct and the court returns that gratuity will not be available as prayed for.
- c. The respondent prayed for Kshs.1, 421, 818.75 with interest at court rates from June 2013. It is said that the claim is based on an inquiry report of June 2013 and a surcharge order dated 31.03.2014 against the claimant for the sum of Kshs.1, 421, 818.75. The report and order were not filed or exhibited in these proceedings. The court returns that the counterclaim will fail.

In conclusion the claimant's suit and the respondent's counterclaim are hereby dismissed with no orders on costs.

**Signed, dated and delivered in court at Nyeri this Friday, 16<sup>th</sup> December, 2016.**

**BYRAM ONGAYA**

**JUDGE**