



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NYERI**

**CAUSE NO.62OF 2014**

**GERVASIO MURIIRA.....1<sup>ST</sup> CLAIMANT**  
**ISABELLA NKATHA.....2<sup>ND</sup> CLAIMANT**  
**KAIRITHIA IBURI.....3<sup>RD</sup> CLAIMANT**  
**JOSEPH KAMENCHU.....4<sup>TH</sup> CLAIMANT**  
**STEPHEN MURUNGI.....5<sup>TH</sup> CLAIMANT**  
**GEOFFREY KAUGIRIA.....6<sup>TH</sup> CLAIMANT**  
**PARTRICK IRUKI.....7<sup>TH</sup> CLAIMANT**  
**NAFTALY MUNENE.....8<sup>TH</sup> CLAIMANT**  
**LEONARD MIRITI.....9<sup>TH</sup> CLAIMANT**

**-VERSUS-**

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

(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> December, 2014)

**JUDGMENT**

The claimants were employed by the respondent on diverse dates and designations. Each of the claimants received a letter dated 9.01.2014 stating that the special general meeting of 3.01.2014 had considered the respective claimant's employment in the respondent society but due to low production and market prices, the meeting had resolved that the claimant proceeds on unpaid leave. The letter stated that the respective claimant would be recalled back during the processing period. The letter was signed by the respondent's manager.

The 8<sup>th</sup> claimant withdrew his claim and did not therefore participate in the hearing.

The claimants' case was that the respondent had not paid their salaries for 15 months from November 2012 to January 2014. They further claimed that the respondent had not paid their respective house allowance throughout their period of service; and the respondent had not granted leave for three years.

Each of the claimants testified to support their respective cases except the 2<sup>nd</sup> claimant who was on maternity leave on the hearing date but she filed an affidavit, by order of the court, to support her case.

In the memorandum of claim filed in person on 20.05.2014, the claimants prayed for judgment against the respondent for:

- a. An order for nullification of the letters sending them on unpaid leave and their reinstatement back in employment.
- b. An order that their salaries are paid within 7 days from the date of the court's decision.
- c. An order for payment of house allowance.
- d. An order for payment of leave days due but not granted in annual leave.
- e. Interest.
- f. Costs.

The respondent filed the defence on 25.07.2014 through Mithega & Kariuki Advocates. The respondent prayed for dismissal of the claim with costs. The respondent admitted that there were unpaid salaries but differed with the claimants on the number of months of the unpaid salaries. The respondent further pleaded that the claimants had been surcharged with respect to gross negligence, misappropriation and fraudulent transactions particularised in the defence but which the claimants denied in their evidence.

The court has considered the pleadings, the evidence and submissions and makes determinations on the issues in dispute as follows:

The **1<sup>st</sup> issue** for determination is whether the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 9<sup>th</sup> claimants were casual employees. The claimants have submitted that a casual employee under section 2 of the Employment Act, 2007 means a person whose engagement provides for his payment at the end of each day and whose engagement is not for a longer period 24 hours at a time. First, the court finds that the claimants were paid at a monthly rate and not a daily rate. Secondly, the respondent's evidence is that the claimants were to be paid on monthly basis. Thirdly, the respondent pleaded and it was the evidence that advances could be given to the claimants. Finally, the unpaid leave granted to the claimants was clearly inconsistent with the respondent's alleged casual status of those claimants. Accordingly, the court finds that none of the claimants was a casual worker.

The **2<sup>nd</sup> issue** for determination is whether the claimants were liable for surcharge on account of salary advances, gross negligence or misappropriation that occasioned the respondent losses. The claimants denied receiving salary advances as alleged and the court finds that salary advances were inconsistent with the respondent's admission that the respondent owed the claimants unpaid salaries for several months as set out in the defence and the least admitted being 5.5 months. The court finds that in such circumstances whereby the respondent had failed to pay salaries, it was inconceivable that the claimants were paid advance salaries. Further, the court finds that in absence of administrative disciplinary proceedings against the claimants and at all material times, the alleged misappropriation or gross negligence occasioning the respondent losses as alleged was not established. The minutes relied on by the respondent are for the meeting held on 12.07.2014, long after the claimants had left employment and the suit having been filed on 20.05.2014. The proceedings of that meeting were a clear afterthought and did not serve to establish the claimants' culpability because there was no due process of justice in the circumstances of the case. To answer the 2<sup>nd</sup> issue, the court finds that the respondent has failed to establish liability against any of the claimants on account of salary advances, misappropriation or gross negligence.

The **3<sup>rd</sup> issue** for determination is whether the claimants are entitled to salaries as prayed for. The respondent has admitted to owing the salaries and has failed by evidence to establish the period and amounts of salaries it might have paid. In the circumstances and on a balance of probability, each of the claimants is awarded salary for 15 months as prayed for with an advisory to the respondents to keep proper employee records in the future and as provided for in the Employment Act, 2007. The court finds that the muster roll filed for the respondent did not provide serious evidential value as clear discrepancies

set out in the claimant's submissions were established and the primary record, the check in and out register, was not filed. For example, the month of February 2013 showed 31 days worked when in fact the month had only 28 days; the months of April, June and September 2013 showed some employees worked for 31 days whereas the 3 months had 30 days; that it was only for the claimants that it showed that they did not work all days of the month for some of the months. Accordingly, the court finds that the claimants validly established that the muster roll was a fabricated piece of record calculated to mislead the court and could not be reliably used to defeat the claimant's claim for unpaid salaries.

The 4<sup>th</sup> issue for determination is whether the claimants are entitled to house allowance. The claimants have submitted that they were not provided with housing accommodation and they were not paid the 15% house allowance as provided for in the wage orders. The respondent opposed the claim on account that some of the claimants were casual workers but the court has found that none was such casual worker. The court finds that the claimants are entitled to house allowance as prayed for in the claim. Similarly, there is no evidence that the respondent granted the claimants due annual leave and the court finds that the claimants are entitled to be paid in lieu of leave as prayed for.

The respondent was throughout the proceedings willing to reinstate the claimants and the court finds that the claimants are entitled to reinstatement. The court has considered all the circumstances of the case including the respondent's operations based on crop production and fluctuating market prices and find that an order for reengagement in that regard will meet the ends of justice more proportionately than the order of reinstatement.

Thus, the court finds that the respondent will pay the claimants respectively as follows:

- a. 1<sup>st</sup> claimant salary being Kshs. 7,000.00 to be paid unpaid salary of Kshs.105, 000.00; house allowance of Kshs. 37, 800.00; pay in lieu of annual leave Kshs. 24, 230.75 total **Kshs.167,030.75**.
- b. 2<sup>nd</sup> claimant salary being Kshs. 6,000.00 to be paid unpaid salary of Kshs.90, 000.00; house allowance of Kshs. 32, 400.00; pay in lieu of annual leave Kshs. 20, 769.25 total **Kshs.143,169.25**.
- c. 3<sup>rd</sup> claimant salary being Kshs. 7,000.00 to be paid unpaid salary of Kshs.105, 000.00; house allowance of Kshs. 37, 800.00; pay in lieu of annual leave Kshs. 24, 230.75 total **Kshs.167,030.75**.
- d. 4<sup>th</sup> claimant salary being Kshs. 3,700.00 to be paid unpaid salary of Kshs.55, 500.00; house allowance of Kshs. 19, 980.00; pay in lieu of annual leave Kshs. 12, 807.70 total **Kshs.88,287.70**.
- e. 5<sup>th</sup> claimant salary being Kshs. 3,700.00 to be paid unpaid salary of Kshs.55, 500.00; house allowance of Kshs. 19, 980.00; pay in lieu of annual leave Kshs. 12, 807.70 total **Kshs.88,287.70**.
- f. 6<sup>th</sup> claimant salary being Kshs. 5,600.00 to be paid unpaid salary of Kshs.84, 000.00; house allowance of Kshs. 30, 240.00; pay in lieu of annual leave Kshs. 19, 384.60 total **Kshs.133,624.60**.
- g. 7<sup>th</sup> claimant salary being Kshs. 7,500.00 to be paid unpaid salary of Kshs.112, 500.00; house allowance of Kshs. 40, 500.00; pay in lieu of annual leave Kshs. 25, 961.50 total **Kshs.178, 961.50**.
- h. 9<sup>th</sup> claimant salary being Kshs. 5,000.00 to be paid unpaid salary of Kshs.75, 000.00; house allowance of Kshs. 27, 000.00; pay in lieu of annual leave Kshs. 17, 307.70 total **Kshs.119,307.70**.
- i. Sub-Total payable to the claimants **Kshs. 1,085,699.95**.

The claimants are awarded costs of the suit fixed at **Kshs. 35,000.00** for each making a sum of **Kshs.280, 000.00**.

In conclusion, judgment is entered for the claimants against the respondent for:

1. **The declaration that the letter for unpaid leave dated 9.01.2014 issued to 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 9<sup>th</sup> claimants by the respondent is null.**

2. **The respondent to pay each claimant the sum of money as found due in this judgment being a sum of Kshs.1, 365,699.95 and to pay by 1.02.2015 in default interest to be payable at court rates from the date of the suit being 20.05.2014 till the full payment.**
3. **The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 9<sup>th</sup> claimants are each reengaged in employment with effect from 1.01.2015 in their respective positions and to report to the secretary-manager of the respondent on 2.01.2015 for assignment of duties with full prevailing and lawful benefits including house allowance and salary unless lawfully terminated from employment.**

**Signed, dated and delivered in court at Nyeri this Friday, 19<sup>th</sup> December, 2014.**

**BYRAM ONGAYA**

**JUDGE**