



**Sum v Agriculture and Food Authority (Cause E019 of 2021)
[2022] KEELRC 1413 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1413 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E019 OF 2021**

**HS WASILWA, J
MAY 17, 2022**

BETWEEN

KEFA STANLEY ORWA SUM CLAIMANT

AND

AGRICULTURE AND FOOD AUTHORITY RESPONDENT

JUDGMENT

1. The Claimant filed his Memorandum of Claim dated 22nd April, 2021 on 23rd April, 2021, claiming the following reliefs: -
 - a) A declaration that the Claimant is entitled to payment of ex-gratia in the sum of Kshs. 924,000.
 - b) Costs of the cause.
2. The summary of the facts of this case is that the Claimant was at all material times an employee of the Respondent as the Interim Manager Market Research and Product Development at Pyrethrum and other industrial crops directorate.
3. Before his deployment to Pyrethrum and other industrial crops directorate, the Claimant was initially employed by Pyrethrum Board of Kenya on the 22nd September, 1997 as a Research Officer II, then promoted the same year to the position of Research Officer earning a basic salary of Kshs 132,000 between 1997 and 2015.
4. It is stated that sometimes in the year 2013, there were reforms in the Agricultural sector which birthed the *Crops Act* no 16 of 2013 whose purpose was to reduce duplication and overlap of functions among institutions involved in regulations of crops in Kenya. As a result, the *Pyrethrum Act* cap 340 that created the Pyrethrum Board of Kenya was repealed among other Acts of parliament.
5. *Agriculture and Food Authority Act* no. 13 of 2013 established Agriculture, Fisheries and Food authority that was later named Agriculture and Food Authority which abolished all other authorities



such as Kenya Coconut Development Authority, Coffee Board of Kenya, Cotton Development Authority, Horticulture Crops development Authority, Kenya sisal Board, Kenya sugar Board, Pyrethrum Board of Kenya and Tea Board of Kenya and converted it to directorates under Agriculture and Food Authority, the Respondent herein.

6. The pyrethrum Board of Kenya was separated into two, the processing and regulatory department. The regulatory functions were taken up by the Respondent while the processing/commercial function was taken up by Pyrethrum Processing Company of Kenya a separate entity with its own management.
7. The Claimant avers that he was retained by the Respondent under Pyrethrum and other industrial crops directorate between 25th February, 2015 and 2nd August, 2020 when he retired on age ground. Upon retirement he was not paid his ex-gratia benefits when the same was due.
8. The basis upon which the Claimant prays for the said payment was that all employees of the Pyrethrum Board of Kenya were entitled to ex-gratia pay upon exit from employment either on retirement, resignation or otherwise.
9. He contends that his terms and conditions on redeployment from Pyrethrum Board of Kenya to Pyrethrum and other industrial crops Directorate remain the same and therefore he was entitled to ex-gratia pay which was not paid. He added that section 43 of the Crops Act and clause 6 of the Transition clauses demonstrate his entitlement to the said pay.
10. He further stated that he is entitled to 7 months' pay as Ex-Gratia as per the circular given to them at the Pyrethrum Board of Kenya.
11. In response to the claim, the Respondent filed a Memorandum of response dated 23rd June, 2021 on even date denying all the contents of the claim and putting the Claimant to strict proof. In addition, the Respondent states that at the time of transition from Pyrethrum Board of Kenya to the Respondent there was no policy document from the Board on payment of Ex-gratia benefits. It was stated in addition that all terms and conditions that were subsisting as at 1st July, 2014 during the transition ceased to apply and the Respondent adopted new human resource policies and guidelines which applied to all staff deployed from various authorities.
12. The Respondent then prayed for the claim to be dismissed with costs.
13. The parties agreed to have the matter disposed of by way of documentary evidence and the matter proceeded for submissions.

Claimant's Submissions.

14. The Claimant submitted that vide the circular (filed as Claimant's exhibit 9) issued by the Pyrethrum Board of Kenya his initial employer in the year 2012, all employees were notified of the ex-gratia pay for long service which was payable to them upon exit from employment. It was argued that the said Ex-gratia pay was given to the Respondents employees as evidence by the letter of 28th April, 2015 by the Respondent herein which confirmed payment of Ex-gratia pay to one of its employees, John Asiuva who was working in the same department with the Claimant herein and the further decision of this Court in Nairobi ELRC Cause no. 19 of 2014 between Kenya Chemical and Allied workers Union Versus Pyrethrum Board of Kenya produced as exhibit 10. In the orders of the Court, the Claimant submitted that, one of the Respondent's employee, Peter Ouma Ohany, who worked with him in the Pyrethrum Board of Kenya was granted Ex-gratia pay and therefore that it would be discriminatory to deny him pay which all employees who were absorbed from pyrethrum Board of Kenya were paid.



15. The Claimant challenged the allegation by the Respondent that the terms of condition subsisting prior to 2014 were abolished. He instead argued that the Respondent failed to demonstrate in form of evidence the alleged change and that the human resource manual produced did not have any clause which abolished the terms and condition prevailing in the authorities before the merger. Further that the two employees mentioned were all paid Ex-gratia in the year 2015 long after the transition.
16. The Claimant also added that his letter of redeployment was clear to the fact that his terms and conditions would remain the same and if indeed the Respondent wanted to omit the payment of the ex-gratia pay, it could have expressly provided for the same in the said letter. Furthermore, that section 43 of the Crops Act and clause 6 of the Act maintained the need to preserve the terms and conditions of operation exiting prior to enactment of the Crops Act.

Respondent's Submissions.

17. The Respondent submitted that the Claimant has failed to prove as provided for under Section 107 of the Evidence Act that he is entitled to the Ex-gratia pay he is claiming. It was argued that the three documents relied upon by the Claimant being the letter dated 28th April, 2015 addressed to John Asiuva, the consent judgment in cause 19 of 2015 have no nexus to the Claimant's claim. It was submitted that there is no basis that has been demonstrated by the Claimant that affirm indeed that he is entitled to the said ex-gratia benefits. With regard to the undated document titled, 'EX-Gratia For long services' with Pyrethrum Board of Kenya letter head, it was submitted that the same does not demonstrate in any way the Claimant's entitlement to the claim herein for the reason that the same is undated, not signed and without any policy generating the said document therefore that the same is not genuine.
18. The Respondent also submitted that the Claimant has already been paid all his terminal benefits including pension and to allow payment of ex-gratia without any supporting evidence could amount to double enrichment and that ex-gratia being an award of long service is not legally binding on any employer. In support of this the Respondent cited the case of Gaye Madiodop V Societe internationale DE Tele Communication Aerornautiques (SITA) [2021]eKLR, where the Court regarding the position on ex-gratia in the case of Nicolas Wachira Koiga V NCR Kenya Limited [2013] eKLR held that;-

“The fact that an intended benefit is called ex-gratia means it is not a right. The Court in this case dismissed a claim for over 9 years as ex-gratia since the Claimant could not have legitimately expected that which was not a normal payment by the company.”
19. The Respondent in conclusion maintained that the Claimant has not proved his case and urged this Court to dismiss the claim with costs to the Respondent.
20. I have examined the evidence and submissions of the parties herein. The Claimant herein produced his letter of appointment dated 22/9/1997 from the Pyrethrum Board of Kenya. He also produced a letter dated 1/11/2010 deploying him to position of Product Development and Market Manager.
21. He was later appointed on 25/2/2015 as Intern Manager Market Research & Product Development with the Respondent. The appointment letter indicated that the Terms & Conditions of appointment remained the same.
22. He also produced a document from Pyrethrum Board of Kenya on Ex-Gratia for long service which indicated that employees who had served for over 21 years were entitled to 7 months basic salary as Ex-gratia payment.



23. This Ex-gratia payment had also been paid to other employees of the Pyrethrum Board of Kenya as demonstrated in Industrial Cause No. 19 of 2014.
24. The Respondents have averred that the Ex gratia payment had been abolished but there is no evidence to demonstrate this.
25. It is therefore my finding that the Claimant is entitled to payment of the Ex-gratia payment as pleaded which I award him being 7 months salary

132,000 x 7 = 924,000/=

Less statutory deductions

The Respondent will pay costs of this suit plus interest at Court rates.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF MAY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Opar for the Claimant – present

Ms. Kabalika holding brief for Mr. Orege for the Respondent

Court Assistant - Fred

