



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 945 OF 2003

ELKANA MWESELI MUGODO..... APPELLANT

VERSUS

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

RULING

1. **Elkana Mweseli Mugodo**, the Appellant herein, took out the motion dated 31st March 2015 in which it sought for following orders:

1. ***THAT the motion be heard on priority;***
2. ***THAT County Secretary city council of Nairobi be summoned to show cause why the appellant's salaries, terminal dues and benefits hve not been paid in full to date in terms of the court decree;***
3. ***The court to do order and direct the county secretary, city county of Nairobi to abide with the court decree and make payment to the appellant as calculated and as totalled in schedule 5 of the annexure to the affidavit in support of this motion;***
4. ***In default of the County Secretary, City County of Nairobi making payments shall be ordered herein, the County Secretary be held in contempt of this court's orders and warrants of arrest be issued for his/ her arrest be issued for his/ her arrest and detention for six months or for such period as will be necessary until compliance;***
5. ***The costs of the motion be borne by the respondents in any event.***

2. The motion is supported by the affidavit of **Elkana Mweseli Mugodo** learned advocate for the Appellant. When served with the motion, The City County Council of Nairobi, the Respondent herein, filed a replying affidavit sworn by **Karisa Iha**, its director of legal affairs to oppose the application.

3. I have considered the grounds set out on the motion and the

facts deponed in the affidavit filed in support and against the application. I have further considered the submissions of learned counsels. It is the submission of **Mr. Namada** Learned advocate for the Appellant/Applicant that orders of the court cannot be read exclusive of each other, they must be read in conjunction and inclusivity. He submitted that the appellant earned a salary of kshs 6,510/= per month since the year 2000. He stated that at the time, the CBA that was in place provided that the salary would automatically be reviewed upwards every July which was the commencement of the respondent's financial year. He argued that a new CBA came in place which proposed that Kenya Pounds 132 would be added to the salary annually until the CBA of 2002 came into force. He argued further that this order covered all benefits, pension and due leaves. He added that the respondent should also pay the compound interest of 1% per month for the withheld salaries from the appellant for all the years the salaries would have been invested as per the Employment Act and the Income Tax Act. He referred the court to the letter of employment and calculations of

the payment, which illustrated that the scale of the salary was already progressive in line with the old CBA. In June 2001, the pay was Kshs 6,510 p.m, having escalated from kshs 6,290 p.m in June 2000. He also stated that the PAYE tax charged was erroneous as it was taxed as wholesome instead of on a monthly basis depending on the PAYE guides issued to employers by KRA, and that the same was not remitted. He submitted further that the pension deducted was also erroneous given that the respondent used a constant employees contribution of 12% that was effected from January 2003 to calculate his pension in 2001 instead of the recommended 9% hence wrongly remitting kshs 305,249/=. He added that None of the remissions have been done lately. He concluded that, from the appellant's LAPTRUST statement, that the contributions made to the fund remain constant only between July and June every year prompting change every July due to the changing base pay and house allowance adjusted every year in accordance with the CBA's and contractual terms and using the appropriate rates and not using constant payment throughout the employees life in employment.

4. **Miss. Maina**, learned advocate for the Respondent urged this

court to find that it has fully complied with the court orders in question by paying the appellant all his dues. She stated that the respondent paid the appellant kshs 721,628/= which they arrived at after tabulation, which calculation they arrived at after computing Kshs 6,510/= as the base monthly salary which was not adjustable upwards as claimed by the appellants. She proceeded to highlight how they arrived at the amount that was paid and added that a clearance certificate was issued to enable the appellant claim all his pension contributions for the period served. She argued that the order was not served on the County Secretary as no such evidence has been furnished yet service must be proved before a contemnor is held to be in contempt.

5. Having considered the material placed before this court and the rival written submissions presented by learned counsels, the following issues arose for the determination of this court:

i. *Whether the respondent was served with the Order;*

ii. *Whether or not the appellant is in contempt of the court orders dated 20th September 2011.*

6. I have already considered the arguments put forward by both sides. On the first issue of Lack of service of the Order on the County Secretary as alleged by the respondent. I find the same untruthful. The decree was issued on 20th September 2011. It is clear that it was served vide a letter dated 21st September 2011, from the appellants advocate informing the respondent of the decree issued against it. The letter was received by the respondent on 22nd September 2011. Moreover by a letter dated 18th September 2013, the County responded to a letter dated 30th August, 2013 from the appellant where it opted not to retain him but instead pay him his salary and benefits at the base salary of kshs 6,510/= with effect from February, 2001 to the date of judgement that is September 2011. It is evident that the County was served on time and was aware of the court order. In the premise, this claim of lack of service does not hold water.

7. On the second issue, it is not in dispute that the respondent has paid the appellant some sum of money amounting to kshs. 721, 628/= What is in dispute according to the appellant, is that the amount paid was not computed properly as per the court orders dated 20th September 2011. It is argued by the respondent that the amount payable should be Kshs 721,628/=:, which is calculated based on a constant monthly salary of kshs 6,510/=. The appellant on the other hand argues that the salary payable cannot be calculated with a constant base salary of kshs 6,510/= since the Collective Bargaining Agreement changed its terms of payment couple of times reviewing the salary upwards. He argued that subsequently, the salary increased every financial year.

8. I have looked at the Decree. **Angawa J.** ordered that

a. *"That the defendant's stoppage of the plaintiff's salary and refusal to deploy him was capricious and unlawful.*

b. *That the plaintiff be reinstated on payroll, be paid his unpaid salaries and be deployed to a work station and be assigned duties by the Defendant.*

c. *That alternative to prayer (b) above the plaintiff be paid all his unpaid salary and benefits and*

all his dues from February 2001 to date of the judgement inclusive of all terminal benefits up to date of the court's judgement at a base salary of Kshs 6,510/= plus all the leaves and other benefits."

9. In issuing these orders she set aside the lower courts judgement and derived the orders from the appellants plaint which plaint prayed for orders as laid out above. In this plaint, the appellant did not pray that the base salary be reviewed or computed in accordance with the CBA, he only prayed for judgement against the respondent to be paid all his dues and categorically quoted the base monthly salary amount as Kshs 6,510/=. It is trite law that a party is bound by its pleadings. It is upon this principal that the court issued its orders just as prayed by the appellant.
10. It would therefore be prejudicial to the respondent who categorically through its letter dated 18th September 2013, chose to abide by option (c) of the order, to subject it to the CBA agreement at this time in the day. The appellant must have known that the County's salary scale was reviewed upwards yearly. He should therefore have sought orders to the tune that where the salary base is increased then the same should be taken into account. Failure to do so results in this current position that the appellant has found himself in. In the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** the Court of Appeal held that:

" As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score"

The respondent has clearly indicated in his submissions how he arrived at a figure of kshs 791,628/=. It computed the basic salary that amounted to kshs 807,921/=, house allowance of kshs 322,660/=. and leave allowance of kshs 27,342/= which amounted to a total gross of kshs 1,157,893/=. The same was deducted taxes amounting to kshs 300,199/= giving rise to a total of kshs 721,628/=. Looking at the computations, I am convinced that they are in order and all benefits and allowances payable were factored in. I therefore find that as far as the salaries are concerned the appellant was paid his dues and the pension as remitted at 12% was in accordance with the prayers sought of a constant base salary of kshs 6,510/=. No proof to the contrary has been adduced.

11. On the matter raised by the appellant in his pleadings that the compound interest of 1% per month should be paid. The same was not factored in the prayers sought in the plaint as well as the order itself. He should not expect the respondent to pay that which he had not prayed for.
12. In the end I find the motion dated 31st March 2015 lacks merit and is hereby dismissed. Costs shall abide the outcome of the appeal.

Dated Signed and Delivered in open court this 13th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent