



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO 214 OF 1993**

**ROSE WANGUI KARUGA .....PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION .....DEFENDANT**

**R U L I N G**

1. The Plaintiff's claim in this case was in defamation. She had also filed another case before the lower court, **Nairobi PMCC NO 1925 of 1995**, seeking various reliefs for unlawful termination of her employment with the Defendant and eviction from her residence. That suit was withdrawn from the lower court and transferred to this Court and consolidated with the present suit. Both suits were defended. They were fully heard together as one.

2. In a **judgment dated 15<sup>th</sup> April 1999** (Aluoch, J), the Plaintiff's claim in defamation was dismissed. But she was awarded KShs 200,000/00 for loss and damage to her property in the course of being evicted from the Defendant's house occupied by her, plus costs of the suit. The Court also directed the Defendant

**“to calculate whatever dues were payable to the Plaintiff upon termination of her services, and pay such dues to her immediately”.**

3. The Plaintiff subsequently applied in respect to that directive given by the court. In a **ruling dated and delivered on 6<sup>th</sup> February 2012** the Court (Khaminwa, J) found that the Plaintiff

**“is entitled to be paid the balance of her retirement benefits in full in compliance with the Kenya Railways Regulations and (the) Constitution (of Kenya), section 112”.**

The Court further ordered –

**“The (Defendant” shall certify all amounts due to this court within the next 21 days from the date of this order. Prayer 2 in the application is confirmed that payment of KShs 1,480,031/00 by (Defendant) to the (Plaintiff) was made.”**

It is to be noted that section 112 of the repealed **Constitution of Kenya** dealt with protection of pensions earned before Kenya attained independence on 12<sup>th</sup> December 1963. The Plaintiff was employed by the Defendant in 1967! I therefore do not understand the reference to that section of the repealed Constitution in the order of 6<sup>th</sup> February 2012.

4. The Plaintiff then applied by **notice of motion dated 2<sup>nd</sup> April 2012** for an order of committal to civil jail against the Defendant's Managing Director for such period as the Court may deem fit and just for contempt of the aforesaid order of 6<sup>th</sup> February 2012. That application is the subject of this ruling. The application is brought under **section 5(1)** of the **Judicature Act, Cap 8. Sections 3 and 63(e)** of the **Civil Procedure Act, Cap 21** are also cited.

5. The main ground for the application is that the Defendant has failed or refused to comply with the said order of 6<sup>th</sup> February 2012 despite due service upon it. The application is supported by the Plaintiff's affidavit annexed thereto. There are a number of documents annexed to the affidavit; none of them is an affidavit of service of the order of 6<sup>th</sup> February 2012.

6. The Defendant has opposed the application by replying affidavit filed on 4<sup>th</sup> June 2012 sworn by one NDUVA MULI, the Managing Director of the Defendant. He has deponed, *inter alia*, -

(i) That he has never been personally served with the order of 6<sup>th</sup> February 2012.

(ii) That pursuant to the judgment delivered on 15<sup>th</sup> April 1999 the Plaintiff on her own accord worked out her dues in an affidavit she swore on 25<sup>th</sup> July 2002 and arrived at the figure of KShs 1,480,031/00.

(iii) That the said sum was paid to the Plaintiff and she acknowledged receipt of the same at paragraph 11 of her affidavit dated 12<sup>th</sup> October 2006.

**(Payment of this sum was also acknowledged in the order of 16<sup>th</sup> February 2012).**

(iv) That the decree has been fully satisfied, and the Plaintiff is seeking to re-open a matter that is settled.

(v) That in any event the certificate required by the court in the order of 6<sup>th</sup> February 2012 was duly given by the Defendant. It is dated 27<sup>th</sup> February 2012 and was forwarded to court under cover of a letter dated 27<sup>th</sup> February 2012.

7. In response to the replying affidavit the Plaintiff filed a **supplementary** (wrongly called "replying") **affidavit** on 29<sup>th</sup> June 2012. In it she appears to re-open her original cases all over again. But she acknowledges that she calculated her dues at KShs 1,480,031/00 which was paid. She also says there was a further KShs 6,170/40 which she has not been paid. But she makes no attempt at all to calculate the further dues that she claims the Defendant has not calculated and paid her.

8. The Plaintiff also argues that the certificate dated 27<sup>th</sup> February 2012 by the Defendant is false. She appears particularly irked by it because it alleges overpayment to her of KShs 1,434,326/70.

9. I have read the Plaintiff's affidavit sworn and filed in this matter on 25<sup>th</sup> June 2002. At paragraph 11 of that affidavit she calculated in detail the dues then owed to her by the Defendant. These dues included pension and arrears thereof, communication gratuity, transport allowance, half-salary withheld, house-allowance, salary during sick-leave, medical allowance, etc. All came to a total of KShs 1,480,031/00, which she was paid. All these dues were in the nature of special claims; I am not sure they had been particularly pleaded or proved at the trial; probably not, otherwise the court would not have directed the Defendant "to calculate whatever dues were payable" to her and pay her! If they had been particularly pleaded and specifically proved the court would simply have entered judgment for her in those sums.

10. Anyway, either the Defendant's officers were too lazy to do the calculations or they would not be bothered. The Plaintiff did the calculations, as she ought to have done as she was the one claiming. And

she was paid what she calculated was due to her.

11. The Defendant subsequently certified to the court the amount of KShs 1,480,031/00 as the amount that had been due and paid to her. The Defendant's claim that the Plaintiff had been overpaid by KShs 1,434,326/70 of course came too late. If there was any overpayment it was the Defendant's own fault for not doing the calculations itself.

12. I have already pointed out that the Plaintiff has not in the present application, or in the application that resulted in the order of 6<sup>th</sup> February 2012, attempted to demonstrate whatever further sums (if any) are due to her from the Defendant. The application at hand appears to have been prompted by the Defendant's claim in the certificate dated 27<sup>th</sup> February 2012 that she had been overpaid by KShs 1,434,326/70. She probably feared an action by the Defendant to try and recover it and sought to forestall the same. But such action would probably come too late and would be an insurmountable estoppel.

13. Anyway, I am satisfied from all the material before the court, that the Plaintiff's dues from the Defendant were calculated (by the Plaintiff) and fully paid by the Defendant in accordance with the judgment dated 15<sup>th</sup> April 1999 (Alucoh, J) and the order of 6<sup>th</sup> February 2012 (Khaminwa, J). There is no contempt of the order of 6<sup>th</sup> February 2012 by the Defendant or its Managing Director. This very old matter should now be marked as fully settled. It is so marked. The notice of motion dated 2<sup>nd</sup> April 2012 is dismissed with no order as to costs. Those will be orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF OCTOBER 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF OCTOBER 2013**