



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 216 OF 2007

(CONSOLIDATED WITH HCCC NOs. 219 AND 255 OF 2007)

JOHN OCHANDA (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd).....PLAINTIFF

VERSUS

TELKOM KENYA LIMITED..... DEFENDANT

R U L I N G

1. The Plaintiffs in these three consolidated suits were former employees of the Defendant. They sought the following main reliefs in their amended plaint dated 16th May 2007 –

- (i) A declaration that the terminal/severance benefits paid to the Plaintiffs by the Defendants are grossly undervalued, contrary to law, the terms of the Retrenchment Agreement, the guidelines laid down in the Civil Service Reform Program published in June 2000 and the Defendant's Human Resources Policy Manual.
- (ii) A mandatory injunction to compel the Defendant to calculate the Plaintiffs terminal and severance pay using the laid down regulations, relevant laws and using the 'basic salary' as the basis of such calculation as required by law.
- (iii) A declaration that the Plaintiffs are entitled to severance pay at the rate of 2½ months pay for each year worked calculated using the basic salary (and not consolidated salary) last appearing in the Plaintiffs' April pay-slips as opposed to the one month pay for each outstanding year of service.
- (iv) A mandatory injunction to compel the Defendant to pay to the Plaintiffs severance pay at the rate of 2½ months' salary for every year worked as prescribed by employment laws and the Civil Service Reform Program published in June 2000.
- (v) A declaration that the Plaintiffs are entitled to **golden handshake** as prescribed in employment laws and the Civil Service Reform Program published in June 2000.
- (vi) A declaration that the payment of **golden handshake** to one group to the exclusion of the other retrenched amounts to deferential treatment of the same set of employees and is unconscionable, discriminatory and unfair.

(vii) A mandatory injunction to compel the Defendant to review and pay the **golden handshake**, unpaid house allowances, transport, medical allowances and three months basic salary in lieu of notice due to the Plaintiffs.

(viii) A declaration that the Plaintiffs who had worked continuously for periods exceeding fifteen years are entitled to long service awards/bonus as per the Defendant's Human Resources Policy Manual.

(ix) A declaration that the Plaintiffs are entitled to unpaid leave, and that their accumulated leave days should be paid as provided for under the Employment Act, Cap 226.

(x) A mandatory injunction to compel the Defendant to pay unpaid and accumulated leave allowances as provided in the Plaintiffs' employment contracts and Human Resource Policy Manual.

(xi) A permanent injunction restraining the Defendant ... from privatizing its services, selling its assets or shares to a 3rd party, or dealing with the company's assets in any manner likely to compromise its financial position until the Plaintiffs' severance/terminal benefits, salary in lieu of notice, golden handshake, unpaid house allowances, unpaid leave allowances, allowances for accumulated leave days, transport and medical allowances are properly determined and paid.

(xii) General damages.

2. The Defendant filed defence denying liability, and the suit was heard.

3. In a judgment delivered on 28th September 2011 (Mwera, J) the court granted reliefs as follows -

(i) The Plaintiffs be paid severance pay based on 2½ months' salary for each year of completed service.

(ii) The Plaintiffs be paid golden handshake on the same scale as what was paid to the retrenchees in Phase II.

(iii) The Plaintiffs to get costs and interest.

A decree was issued in the above terms.

All the other claims of the Plaintiffs were dismissed or presumed dismissed.

4. The Defendant was not satisfied with the judgment and it apparently lodged notice of appeal. Record of appeal is yet to be lodged at the Court of Appeal. But an application for stay of execution was lodged in that court.

5. It appears that based on certain calculations the Plaintiffs themselves made, they moved to execute the decree. Indeed execution commenced by proclamation of certain goods of the Defendant.

6. In response the Defendant applied by **notice of motion dated 6th December 2011** seeking the following main orders –

(i) Pending the hearing and determination of the application dated 14/10/2011 filed in the Court of Appeal in Civil Application No. 237 of 2011 (UR/151/2011), there be stay of execution of the (judgment) delivered on 28/9/2011.

(ii) The application for execution, warrants of attachment and warrants of sale of property be and are hereby declared null and void, quashed and expunged from the record.

The application is brought under **Order 42, rule 6** of the Civil Procedure Rules (the Rules). **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Cap 21** are also cited.

8. The main grounds for the application are as follows–

- (i) That the judgment (and decree) is a declaratory one, hence the Plaintiffs ought to file fresh suits and prove their entitlements pursuant to the judgment and decree of the court.
- (ii) That the Plaintiffs demand for KShs 1.2 billion as being due upon the decree is misconceived as the same was not awarded.
- (iii) That the Plaintiffs have in any event issued a statutory notice to wind up the Defendant for failure to pay the alleged decretal sums; they cannot petition for winding up of the Defendant and at the same time execute against its property as this would amount to an abuse of the process of the court.
- (iv) That in any event the appeal pending before the Court of Appeal for stay of execution pending appeal should be disposed of first.
- (v) That the amounts stated as being due upon the decree in the warrants of attachment is KShs 3 billion-odd, another erroneous sum that was not awarded in the decree.
- (vi) That the Plaintiffs' calculations of the sums allegedly due upon the decree is based upon documents that were not produced at the hearing of the action, and which have been introduced into the court record unlawfully.
- (vii) That the court never ordered in the judgment for the Defendant to calculate, or provide documents to enable the Plaintiffs to establish, their claims.
- (viii) That by allowing the calculations made by the Plaintiffs to form the basis for execution proceedings against the Defendant, the Deputy Registrar in effect purported to review or vary the judgment and decree of the court.
- (ix) That determination of the actual amounts due to each and every Plaintiff upon the declarations made by the court in its judgment is a judicial function and not an administrative one, and must be performed by the court itself upon being appropriately moved.
- (x) That in any event the Plaintiffs' costs that were awarded in the decree have not been taxed or agreed, and no execution of decree can issue without leave of the court, which leave was not sought or obtained prior to purporting to execute.

There is a supporting affidavit sworn by one CAROLINE NDINDI, a legal counsel of the Defendant.

9. The Plaintiffs opposed the Defendant' application by grounds of opposition dated 9th December 2011. Those grounds are–

- (i) That the application is an abuse of the process of the court and brought in bad faith with a view to delaying the Plaintiffs from realising the fruits of their judgment.
- (ii) That the Defendant having applied for stay of execution in the Court of Appeal, it is an abuse of this court's process to make a parallel application.
- (iii) That in any event this court would have no jurisdiction as the matter of stay of execution is now before the Court of Appeal.
- (iv) That the Defendant is acting in bad faith as it has refused to avail to the Plaintiffs records of their employment to facilitate calculation of the amounts due to each of them in accordance with the decree of the court. The Defendant should therefore be compelled by an order of this court to make available the said records.

(v) That execution of decree by a petition for winding-up and execution of decree by attachment and sale of properties are not mutually exclusively of each other, and that both can go hand in hand.

10. Subsequently the Plaintiffs filed **notice of motion dated 31st January 2012**. They sought the following main orders -

(i) That the judgment and decree be amended to reflect the following:

(a) The Plaintiffs be paid severance pay based on 2½ months' salary for each year of completed service, and the Defendant be compelled to calculate the said benefits based on employment records at its disposal, or avail the same to court within 14 days.

(b) The Plaintiffs be paid **golden handshake** on the same scale as what was paid the retrenchees in Phase 2 amounting to KShs 150,000/00 each.

(c) The Plaintiffs do get costs and interest at commercial rates or such rates as the court shall deem fit to award, and the same be calculated as from the date of filing till payment in full.

(ii) That the Defendant be ordered to furnish security in the sum of KShs. 2.9 billion or such sum as the court deems just in the event that the court is inclined to grant an order of stay of execution.

In the alternative the Plaintiffs seek orders that are not any different from the main orders.

11. The main grounds for the application are as follows –

(i) That the judgment by omission or mistake failed to make provision on how the 2½ months salary for every completed year in severance pay would be calculated and/or arrived at.

(ii) That the Plaintiffs in the plaint had sought a mandatory order to compel the Defendant to calculate the Plaintiff's severance benefits in accordance with employment laws in force, and which prayer was neither considered nor granted. This was an omission or mistake correctable or amenable to amendment under **section 99** of the Civil Procedure Act.

(iii) That the Defendant has in spite of repeated requests refused to provide the Plaintiff's employment records in its possession. The Plaintiffs are thus faced with danger of having a judgment in their favour which they cannot execute.

(iv) That the Plaintiffs are entitled to the fruits of their judgment, and in the event that the Court is inclined to grant stay of execution, the Defendant should be ordered to deposit security in the sum of KShs 2.9 billion or such sum as the court deems just and expedient in the circumstances.

(v) That it is in the interests of justice that the court either amends the judgment and decree or reviews the same to ensure the same is capable of being executed.

There is a supporting affidavit sworn by the 1st Plaintiff.

12. The Defendant has opposed the Plaintiffs' application by grounds of opposition filed on 9th February 2012. Those grounds include the following–

(i) That the orders sought by the Plaintiffs will fundamentally and radically alter the judgment to include orders that the trial court did not make.

(ii) That the application intends to reopen a final decision on hotly contested issues that were before the trial court.

- (iii) That the application seeks to have the trial court sit in appeal on its own judgment.
- (iv) That the application is an abuse of the process of the court.
- (v) That the application is made after an unreasonable delay.
- (vi) That the failure of a trial court to award prayers sought in a plaint at the conclusion of a case is not a ground for review of the judgment but is a ground for appeal of the same.
- (vii) That the omission(s) which the Plaintiffs allege to be in the judgment are not self-evident and require elaborate argument to be established.
- (viii) That there is neither provision in the law for amendment of judgments, nor have the Plaintiffs established grounds for review of the judgment.

13. The two applications (notice of motion dated 6th December 2011 and notice of motion dated 31st January 2012) were canvassed together by way of written submissions. I have considered the submissions filed on behalf of each party, including the cases cited.

14. I have borne in mind the provisions of **sections 1A and 1B** of the **Civil Procedure Act** which provide as follows: -

“1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims –

- (a) the just determination of the proceedings;**
- (b) the efficient disposal of the business of the court;**
- (c) the efficient use of the available judicial and administrative resources;**
- (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and**
- (e) the use of suitable technology.”**

15. I have also borne in mind the provision of **Article 159 (2) (d)** of the **Constitution** which states:

“159. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(d) justice shall be administered without undue regard to procedural technicalities.”

16. It is clear from the judgment of the court that the Plaintiffs were awarded fair **severance pay** and fair **golden handshake** due to them after termination of their services by their employer, the Defendant. The court specifically ordered that the Plaintiffs be paid –

- (a) **Severance pay** based on 2½ months' salary for each completed year of service.
- (b) **Golden handshake** "on the same scale as what was paid the retrenchees in Phase 2".

17. There is no difficulty or ambiguity about either of these two awards. What is due to each Plaintiff for **severance pay** will be easily calculated from their employment records kept by the Defendant. These records will show the number of completed years of service of each Plaintiff and what his or her monthly salary was at the time of retrenchment. Should the Defendant no longer have these records, surely each Plaintiff will know how many completed years of service he or she worked for the Defendant, and what his or her monthly salary was at the time he or she was retrenched.

18. With regard to the **golden handshake**, the court dealt with this issue at page 40 of the judgment. It concluded as follows-

"While those retrenched in Phase 2 got (the golden handshake), the Plaintiffs in Phase 1 were denied (it). There is no reason (for this), given (that) the staff in Phase 2 (had) no different feature from the other(s). In fact ... the Defendant does not claim that it did not pay the Plaintiffs due to age factor, or any other factor. This court finds that they were entitled to KShs 150,000/00 each that their mates in Phase 2 enjoyed."

So, each Plaintiff is entitled to a **golden handshake** of 150,000/00 as decreed in the judgment.

19. It appears that there were 997 Plaintiffs. Each one being entitled to a **golden handshake** of KShs 150,000/00, the total sum of **golden handshake** due upon the decree is **KShs 149,550,000/00**.

20. The Plaintiffs claim for general damages was specifically denied for lack of evidence and therefore dismissed. None of their other claims were allowed, and they are therefore presumed dismissed. If the Plaintiffs were dissatisfied with the decision of the court regarding those claims that were not granted, they ought to have appealed against that part of the judgment and the decree. They cannot get what they were unable to get at the trial by seeking to litigate the same issues again by their present application.

21. This court cannot and will not vary the judgment of the court as sought by the Plaintiffs. The only thing it can lawfully do, in so far as **severance pay** is concerned, is to give such directions as will enable the Plaintiffs to realize what was clearly granted to them in the judgment, and that is, 2½ months' salary for each completed year of service.

22. Regarding interest, the court did not specify at what rate it would be charged. The presumption is that it would be at court rates. There is no justification for the Plaintiffs to claim interest at commercial rates. As the Plaintiffs claims were in the nature of special damages, interest would apply from the date of filing suit until payment in full.

23. The notice of motion dated 31st January 2012 must therefore be refused, but with no order as to costs.

24. With regard to the application for stay of execution, the Defendant has an undoubted right of appeal. It is entitled to exercise that right. It will be able to do so because, for reasons to appear shortly below, the decree cannot be executed at this stage.

25. The Plaintiffs were awarded costs of the suit and interest. Such costs are subject to taxation or agreement. There has been neither. 26. **Section 94** of the Civil Procedure Act provides as follows –

"Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation."

27. No order under this provision appears to have been sought or made, and none was brought to the attention of the court. This is a statutory provision, and it cannot be brushed aside. The decree was not due for execution before taxation of (or agreement on) the Plaintiffs costs. The execution of decree commenced by the Plaintiff was therefore premature and unlawful. It must be set aside. It is hereby set aside.

28. As the decree cannot be lawfully executed at this stage, as held above, the Defendant is not under any imminent danger of execution. The prayer of stay for execution of decree is thus premature and will be held in abeyance until such time as the decree will be ready for execution, that is, after taxation of (or agreement on) the Plaintiffs costs of the suit, and also after the directions regarding severance pay that I shall now give are met.

29. Those directions will be as follows –

(i) The Defendant shall file and serve within 30 days of today an affidavit setting out in respect to each Plaintiff the number of completed years of service and their monthly salary at the time they were retrenched. This shall be accompanied by a calculation of the severance pay due to each Plaintiff at the rate awarded in the judgment of 2½ months' salary for each completed year of service.

(ii) In default the Plaintiffs may file one or several affidavits setting out the facts and details in (i) above. They may similarly file an affidavit or affidavits if they do not agree with the facts or details given by the Defendant in its affidavit filed under (i) above.

(iii) This matter shall be mentioned on a date to be given at the time of delivery of this ruling for further directions or orders.

(iv) Costs shall be in the cause.

DATED AT NAIROBI THIS 22ND DAY OF MARCH 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2012