



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.397 OF 1998

GEORGE OCHIENG’ & OTHERS.....PLAINTIFFS

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANTS

JUDGMENT

From the plaint filed herein on 23rd September, 1998 there are 121 plaintiffs listed in a separate sheet of paper in addition to the six who have brought this action on their behalf making a total of 127 plaintiffs. Learned counsel for the defendant has submitted that the action has been brought by 1171 plaintiff, while in cross-examination, the 1st plaintiff said there are 376 plaintiffs. I have not seen another list in this file apart from that containing 121 names and six others as explained above. Whatever the number of the plaintiffs, suffice though to state that they are numerous, they claim from the defendant who was their employer until their retrenchment the following:

“a) a mandatory injunction compelling the defendant, its agents, servants and/or employees to pay the effect the plaintiff (sic) in accordance to (sic) the terms of the collective bargaining agreement of the general Joint Council agreement of 10th – 14th November, 1997.

b) A mandatory injunction compelling the defendant by agent (sic) servant and/or employee compelling the defendant (sic) to pay the plaintiffs overtime and night shifts allowances difference resulting from Industrial Court Cause No.72 of 1998, 25% award to locomotive drivers as per Kenya Gazette No. Vol.51 of 28th August, 1998 Notice No.4750.

c) A mandatory injunction compelling the defendant by itself, agents and or servant or employees to remit auxiliary deductions from the applicants’ salaries towards insurance premiums and Save As You Earn (SAYE).

d) A permanent injunction against the defendant restraining by itself, agents, servants and/or employees from unlawfully evicting and/or interfering with the plaintiffs’ quiet possession and enjoyment of the tenancies and continued retention of the defendant’s leased houses until the plaintiffs are fully settled in accordance with the Central Joint Council Agreement Clause b, c and d of 16/1/1998 and General Circular letter Ref. No. EST.19/14/1/e of 30th March, 1995 respectively or howsoever threatening, harassing or intimidating the plaintiffs.....”

They also asked for costs of the suit.

An interlocutory judgment was entered in default of appearance and defence. It is not clear what became of the defendant's applications to set aside the *ex parte* judgment. What is clear, however, is the fact that parties resolved to proceed to hearing. The plaintiffs rely on the evidence presented on their behalf by the 1st plaintiff, George Ochieng' Ododa (1st plaintiff) an employee of the defendant and **P.W.1, John Kisiu Kaunga (Kaunga)**, the Deputy Secretary General of Railways and Allied Workers Union of Kenya (the Union).

The latter's evidence was to confirm five things:

- i) that all the plaintiffs were members of the union;
- ii) that the defendant and the Union entered into two Collective Bargaining Agreements (CBAs) following meetings in Nanyuki and Railways Headquarters;
- iii) that the Union was sidelined by the defendant in the retrenchment exercise in violation of the two CBAs;
- iv) that some of Union members did not receive their severance pay contrary to the CBA of 16th January, 1998 and;
- v) that members complained of
 - delayed payment of retrenchment package and
 - taxation on severance pay contrary to the CBA of 16th January, 1998.

The 1st plaintiff, on the other hand testified that the plaintiffs were all retrenched in 1998; that the union and the defendant had entered into the two CBAs; that the defendant failed to involve both the retrenched and the union. He further confirmed the terms of the two CBAs and that the terms allowing the retrenched to retain the defendant's residential quarters until fully paid was violated; that locomotive drivers were not paid the 25% salary increase award by the Industrial Court; that the pensionable staff and those entitled to receive gratuity were not retained in the payroll in breach of the CBA of 16th January, 1998.

The defendant having failed to file a defence, presented no evidence

I have considered the pleadings, the evidence presented by plaintiffs and the submissions filed by counsel as well as authorities they have relied on. It is common ground that the plaintiffs were employees of the defendant and that they were affected by the retrenchment of 1998. It is also not denied that the defendant and the union on behalf of the plaintiffs entered into two agreements. The broad question raised in this claim is whether the defendant violated the agreements by:

- i) failing to pay the plaintiffs the difference of overtime and night shift allowances in terms of the Industrial Court award in Cause No.72 of 1998;
- ii) failing to pay 25% salary award to locomotive drivers in accordance with Kenya Gazette No.Vol.51 of 28th August, 1998
- iii) failing to remit auxiliary deductions from the plaintiffs' salaries towards insurance premiums and Save As You Earn (SAYE);
- iv) threatening to evict or evicting the plaintiffs from its (the defendant's) residential quarters.

I will consider each question separately. The relevance to this case of the Gazette Notice No.4570 in respect of the Industrial Court Cause No.72 of 1995 is the award of 25% salary increase to locomotive drivers. That award was granted to all locomotive drivers "*across the board*" for the period 1st January, 1996 to 31st December, 1997. It is the plaintiffs' contention that the award was not effected in the retrenchment package. In support of that claim the plaintiffs rely on the single pay slip of the 1st plaintiff

for the month of February, 1998. The 1st plaintiff confirmed in his evidence that he was (and still is) a train driver, which I believe is the same occupation as a locomotive driver.

There is evidence, however, that the payments were subject to availability of funds from the government and no time line for payment was imposed. The single pay slip for one month for only one plaintiff cannot be proof that the 25% salary increase for locomotive drivers was not effected. The plaintiffs ought to have demonstrated that they were all locomotive drivers or only some of them were and specify those who were; each ought to have shown by exhibiting pay slips from the period of June, 1998, the month following the award until the month of retrenchment,

I have already observed that the 1st plaintiff's pay slip exhibited in this case relate to the month of February, 1998, some three months before the Industrial Court award. It cannot therefore form a basis for the first claim enumerated in the previous paragraphs. Furthermore, it is clear from a memo addressed by the Regional Manager, Central to various defendant's regional offices dated 18th December, 1998 (Annexed to Plaintiffs' exhibit 4) that the terminal benefits for the retrenched locomotive drivers would be adjusted by 25% in accordance with the Industrial Court award and that the resultant arrears would be paid separately. That is also the same message reiterated in the Staff and General Notice No.12 of 23rd December, 1998 (Plaintiff Exhibit 5). It is clear from this that the award was not expected to be reflected in the pay slips.

The second claim relates to payment of overtime and night shifts allowances. According to the plaint this claim is said to arise from the award in Industrial Court Cause No.,72 of 1998. Two issues emerge. The award of that court was, according to the gazette notice, in respect only of salaries of locomotive drivers, mileage allowance, also for locomotive drivers, housing as well as disturbance and separation allowance. There is no mention of overtime and night shift allowance. Secondly each of the plaintiffs were expected, indeed required to demonstrate by presenting evidence of the days each one of them worked over and above the normal official working hours and the nights each one of them worked. Not even the 1st plaintiff has provided evidence in support of this claim. It also fails.

Similarly, there was no evidence as to how many of the plaintiffs are in occupation of the defendant's residential quarters, in order to qualify for an injunction as sought in prayer (d) of the plaint. It was incumbent upon the plaintiffs to identify those among them who are in occupation of the defendant's quarters. The agreement of 16th January, 1998 at Clause (ii)(b) is clear that staff who were to be retrenched would be allowed to retain Railways houses/leased houses if in occupation of any until they are fully settled.

In a nutshell, the plaintiffs have not proved on a balance of probability that the defendant violated any of the terms of the two CBAs.. In this regard, I wish to reiterate what the Court of Appeal said in **Anthony Francis Wareham and other Vs. Kenya Post Office Savings Bank**, Civil Appeal Nos. 5 and 48 of 2002 (Consolidated). The court said:

**“.....we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings.....
.And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue.”**

The plaintiffs' evidence was produced by the 1st plaintiff. It is now established that the plaintiff's case can be proved by evidence adduced on his behalf by someone else and his claim will succeed or fail depending on the strength of that evidence.

In **Julianne Ulrike Stamm Vs. Tiwi Beach Hotel Limited**, Civil Appeal No..57 of 1996 (consolidated with Civil Appeal No.56 of 1996) the Court of Appeal said:

“If a plaintiff can prove his case by the evidence of someone else, he does not have to be present at the hearing of the suit..... In short, according to Order 17 rule 2(1). a plaintiff can prove his case by the evidence of a witness or witnesses other than himself.....”

The evidence of the 1st plaintiff on his own behalf and on behalf of the rest of the plaintiffs is below the threshold of a balance of probabilities.

In the result, the suit fails and is dismissed with costs.

Dated,, Delivered and Signed at Nakuru this 9th day of May, 2011

**W. OUKO
JUDGE**