REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 165 OF 2006

DUNCAN N. NDERITU & 55 OTHERS …… PLAINTIFFS

V E R S U S

TELKOM KENYA LIMITED ……..…….. 1ST DEFENDANT

GILGIL TELECOMS INDUSTRIES LIMITED ……...…… 2ND DEFENDANT

J U D G M E N T

The plaintiffs were on 15th June 2006 terminated from employment. During the period of their employment, the majority plaintiffs were members of Communication Workers Union of Kenya (hereinafter referred as the Union). The Union represented the interests of unionisable employees of the 1st and 2nd defendants. According to the plaint filed herein, the plaintiffs aver that they were employed by the 1st defendant but were deployed to the 2nd defendant to undertaken their duties. It was common ground that the 2nd defendant, at the material time, was a wholly owned subsidiary of the 1st defendant. It was the plaintiffs' case that from the time the 1st defendant came into being in 1999, after the split of the former Kenya Posts and Telecommunications Corporation, to the time the plaintiffs were terminated from their employment, their union entered into several Collective Bargain Agreements (CBA) with the 1st defendant resulting in improvement in their terms of service. The improvement of their terms of service were contained in various circulars which were published by the 1st defendant.

It is the plaintiffs' contention that the first circular which was published i.e. Personnel Circular No. 2B of 2001 had the effect of increasing house allowance for all the employees of the defendants at the rate of 60% of the employee's basic salary. The plaintiffs aver that the said circular created a legitimate expectation on the part of the plaintiffs that they would receive the increment since they were in the category of employees referred to in the said circular. The plaintiffs complained that the said improvement in the terms of service was selectively implemented by the 2nd defendant resulting in the management staff of the 2nd defendant benefitting from the increment while other cadres of employees were left out. It is the plaintiffs' claim therefore that they should be paid salary arrears due and payable to them on account of the said Personnel Circular No. 2B of 2001.

The plaintiffs further averred that on 10th February 2003, the 1st defendant issued Personnel Circular No.1B of 2003 which resulted in the upward revision of salaries of all unionisable employees by 7.5% in accordance with the recognition agreement signed between the Union and the 1st defendant. The plaintiffs explained that just like the previous circular, this circular was selectively implemented to the

employees of the 1st defendant but did not extend to the 1st defendant's employees deployed to work with 2nd defendant. The plaintiffs therefore claim against the defendants is for payment of the salary arrears due and payable to them as a result of the salary increment that was effected pursuant to the said Personnel Circular No.1B of 2003.

The plaintiffs averred that on 5th August 2004, subsequent to an industrial action by the Union, the 1st defendant effected an increment of the salaries of all unionisable employees at the rate of 10%. This increment was to be implemented in two phases each of 5%. The plaintiffs complained that although this salary increment was implemented in respect of the unionisable employees of the 1st defendant, it was not extended to the employees of the 1st defendant deployed to work with the 2nd defendant. The plaintiffs contend that the aforesaid circulars created contracts between themselves and the defendants as result of which the defendants were required to honour their part of their bargain. It is the plaintiffs' case that by selectively implementing the said circulars amongst its employees, the defendants acted discriminatorily against its employees contrary to the principles of natural justice. The plaintiffs averred that the defendants were estopped from denying the validity and existence of the circulars in question.

It is the plaintiffs' further claim that they were entitled to be paid house allowance equivalent to 60% of their basic salaries including salary accruals on account of the unimplemented circulars. The plaintiffs contend that the defendants further unprocedurally retained the sums due to the plaintiffs on account of house allowance net the sum remitted to Teleposta Pension Scheme for the years 2001, 2002, 2003, 2004, 2005 and 2006. The plaintiffs therefore claim against the defendants is for the payment of all salary arrears accrued from the years 2001, 2002, 2003, 2004, 2005 and 2006 (until 15th June) together with the arrears accrued on account of house allowance. In particular, the plaintiffs prayed for judgment to be entered against the defendants, both jointly and severally, directing the defendants to immediately pay to the plaintiffs the accrued salaries and house allowance arrears arising out of Personnel Circulars No.2B of 2001, 1B of 2003, and the 10% increment awarded in the years 2004 and 2005. The plaintiffs further prayed to be awarded costs and interest.

When the defendants were served, they duly entered appearance and filed their separate defences. The 1st defendant averred that it was then a state corporation established under the **State Corporations Act**. It denied the averments made by the plaintiffs to the effect that they were employees of the 1st defendant deployed to work with the 2nd defendant. The 1st defendant put the plaintiffs to strict proof thereof in that regard. The 1st defendant stated that the Personnel Circulars it issued, particularly Personnel Circular No.2B of 2001 and Personnel Circular No.1B of 2003, were in regard exclusively to its own employees and not employees of the 2nd defendant or any of its other subsidiaries. The 1st defendant therefore stated that the issuance of the said Personnel Circulars could not have created any legitimate expectation in the plaintiffs who were not its employees but were infact in the employment of the 2nd defendant. The 1st defendant further denied that the plaintiffs were entitled to a 10% pay hike which it had agreed with its own employees pursuant to a return to work settlement. The 1st defendant reiterated that if there was any settlement reached, it was with its own unionisable employees and not for the benefit of the 2nd defendant's employees or any of its other subsidiaries.

The 1st defendant further denied that the plaintiffs were entitled to be paid any increments in salaries or house allowances that were due to its own employees. In that regard, it put the plaintiffs to strict proof thereof. The 1st defendant denied the allegation made by the plaintiffs that it had issued certificates of service upon termination of the plaintiffs from employment. It explained that the said certificates of service were issued in error, and further, in any event it was ultra-vires the powers of the 1st defendant hence its subsequent correction. It was the 1st defendant's case that the plaintiffs did not have any sustainable claim against it in law because the plaintiffs were employees of the 2nd defendant and not of the 1st defendant. The 1st defendant denied all allegations made against it by the plaintiffs in their plaint and consequently put the plaintiffs to strict proof thereof. The 1st defendant further pleaded that the plaintiffs' suit against it was incompetent since it ought to have been filed in the first place in the Industrial Court because it was a dispute falling under the then **Trade Disputes Act**. The 1st defendant

therefore urged the court to dismiss the plaintiffs' suit with costs.

On its part, the 2nd defendant in its defence denied in toto the plaintiffs' claim. The 2nd defendant averred that it was a limited liability company incorporated in Kenya with the principle object of carrying out the business of manufacturing telecommunications apparatus and goods as a subsidiary of the 1st defendant. The 2nd defendant averred that the plaintiffs were therefore at all the material times its employees who were legitimately terminated from employment on 15th June 2006. The 2nd defendant explained that it neither issued the personnel circulars referred to in the plaint nor was it bound by the effect of the said circulars. The 2nd defendant reiterated that the terms of service of its employees were determined by its own board of directors and its management. The 2nd defendant was of the view that the plaintiffs were attempting to unjustly enrich themselves by claiming salary arrears that was not part of their employment contract with the 2nd defendant.

In particular, the 2nd defendant denied that the plaintiffs' terms of service were governed by Personnel Circulars Nos. 2B of 2001 and 1B of 2003 that were published by the 1st defendant. The 2nd defendant further denied that the allegation that the plaintiffs were entitled to 10% salary increment that was negotiated by the Union with the 1st defendant in respect of the 1st defendant's employees. The 2nd defendant further denied that the plaintiffs were entitled to be paid any house allowances other than the house allowance that they were paid when they were employees of the 2nd defendant. The 2nd defendant denied that it ever entered into a Collective Bargain Agreement with the Union in regard to the terms of service of the plaintiffs. In that regard, the 2nd defendant reiterated that it had not entered into any recognition agreement with the Union to entitle the Union to agitate any labour issue on behalf of the plaintiffs and especially in regard to what the Union had negotiated and agreed with the 1st defendant.

The 2nd defendant was of the view that the plaintiffs' claim was outrageous, an afterthought, untenable and fictitious. In the circumstances therefore, the 2nd defendant formed the view that the plaintiffs' case was premised on misrepresentation by the plaintiffs. In particular, the 2nd defendant averred that the plaintiffs misrepresented themselves as concurrently being in the employment of the 1st defendant and of the 2nd defendant. The 2nd defendant further stated that the plaintiffs were basing their claim on circulars issued by the 1st defendant yet during the material period they were employees of the 2nd defendant. The 2nd defendant took issue with the fact that the plaintiffs were claiming arrears accrued on account of salaries and house allowance when none were due to them upon termination of their employment. The 2nd defendant was irked that the plaintiffs had falsely claimed to be employees of the 1st defendant on deployment to undertake duties with the 2nd defendant. The 2nd defendant was of the opinion that the present suit was a scheme by the plaintiffs to unjustly enrich themselves from the 2nd defendant. It was the 2nd defendant's case that the plaintiffs' suit was incompetent because they did not disclose any cause of action against the 2nd defendant. The 2nd defendant urged the court to dismiss the plaintiffs' suit with costs.

Counsel for the parties herein agreed by consent that the present suit shall constitute a test suit in respect of the issue in regard to whether or not the defendants are liable to pay the former employees of the defendants. In that regard the 263 suits which had been filed by other former employees before the subordinate court were stayed pending the hearing and determination of this suit. Counsel for the parties to this suit further agreed and indeed exchanged documents that they intended to rely on during the hearing of the case. The said documents were produced as exhibits during the hearing of the case. The plaintiffs and the defendants were unable to agree on what constitutes issues for determination by the court. Separate issues for determination were therefore filed.

During the hearing of the case, the plaintiffs called three witnesses i.e. PW1 Duncan Ndegwa Nderitu who adduced evidence on his own behalf and on behalf of the other plaintiffs, PW2 Benson Okwaro Okumu, the Secretary General of Communication Workers Union of Kenya (formerly known as Union of Post and Telecommunication Employees), (the Union) and PW3 Ezekiel Maisori, who worked as a

personnel officer in the Human Resource Department of the 2nd defendant before he was terminated from employment on 15th June 2006. On its part, the 1st defendant called two witnesses. The first witness (DW1) was Khadija Mire, who was the Chief Human Resource Officer of the 1st defendant during the material period that is in issue in this case. The 2nd witness (DW2) was Paul Bongo Jilani, the Company Secretary of the 1st defendant. On its part, the 2nd defendant called one witness (2nd defendant's DW1) Bernard Otwori Momanyi, the Manager of the 2nd defendant.

This court carefully considered the evidence adduced by these witnesses. It also considered the written closing submissions filed by the respective counsel for the parties herein. The facts of this case as this court was able to evaluate are as follows:

The genesis of the dispute between the plaintiffs and the defendants can be traced from the incorporation of the 1st defendant after the split of the former Kenya Posts and Telecommunication Corporation (the corporation). According to the evidence adduced in court, the split was necessitated by the need to separate the various functions that were then performed by the said corporation. The split was initiated by the government and secured parliamentary approval. An Act, the **Kenya Communication Act 1998**, was enacted to formalize the split. The split resulted in the creation of three entities known as The Communication Commission of Kenya (which essentially took over the mandate of regulating the telecommunication industry), the Postal Corporation of Kenya (which took over the mandate of postal services in Kenya) and the 1st defendant, Telkom Kenya Limited, which took over telecommunication functions of the former corporation. An important player during this split were the trustees of Telposta Pension Scheme. The Pension Scheme was involved because some of the assets which were previously owned to the corporation were transferred to the Pension Scheme. During this split, the 1st defendant took over the management of the 2nd defendant and of the Kenya Communication College of Technology (KCCT). The 2nd defendant and KCCT were incorporated as separate entities but were fully owned subsidiaries of the 1st defendant. Prior to the split, it was apparent from the evidence adduced, that the corporation had a policy of freely transferring its employees from one of its numerous entities to any other. The terms of service of the said employees were the same provided that they were in the same job scale. Infact, the payroll of the employees of the corporation was centrally managed from Nairobi. The only department of the corporation whose employees enjoyed different terms of service was the then Extelecoms.

After the split, the 1st defendant continued paying its employees working for the 2nd defendant from a central payroll. The only difference was that employees working for the 2nd defendant were identified by a code in the payroll. It is the plaintiffs' case that they were the employees of the 1st defendant who were deployed to work for the 2nd defendant. The plaintiffs produced some of the payslips that were issued to them in the year 2000 in their bid to establish that they were indeed employees of the 1st defendant who had been deployed to work for the 2nd defendant.

The defendants disputed this fact. It is their contention that the 2nd defendant is a completely different legal entity having its own memorandum and articles of association with its own board of directors and management. The 1st defendant explained that during the transition period after the split of the corporation, the 1st defendant managed the payroll of the 2nd defendant for a period of six months before the 2nd defendant established its own payroll. Although the defendants conceded that the 2nd defendant was a wholly owned subsidiary of the 1st defendant, it was its case that the 2nd defendant had its own employees who were not at all connected with the 1st defendant.

From the evidence adduced, it was clear that from the time the corporation was split, the 2nd defendant, as a business entity, did not make any profit. Infact, the 2nd defendant made losses. This was because the telecommunication equipment manufactured by the 2nd defendant was meant to be sold to the 1st defendant. Due market dynamics and technological advances, some of the equipment did not get ready market. The 2nd defendant survived by periodic advances that were made to it by the 1st defendant.

There was evidence that during the period in issue, some of the management staff of the 2nd defendant were moved to and from the 1st defendant depending on the need assessment of the 2nd defendant. For instance, Mr. Momanyi, the current manager of the 2nd defendant, in the material period alternately worked for the 1st defendant and for the 2nd defendant. From the evidence adduced, it was apparent that the terms of service of the 1st defendant's employees and those of the 2nd defendant were the same soon after the split. However, disparity in the remuneration of employees of the 1st defendant and those of its subsidiary, the 2nd defendant started with the publication of Personnel Circular No.2B of 2001.

The majority of the plaintiffs in this case are members of the union. Evidence was adduced during the hearing of the case which confirmed that upon the split of the then Kenya Posts and Telecommunication Corporation, the salaries and terms of service of the employees of the 1st defendant and its two subsidiaries i.e. the 2nd defendant and KCCT were harmonized. The effect of which was that the terms of service of all the employees were similar or more or less at par depending on the level of the respective employee. This was evident from Personnel Circular No. 1B of 1999. As the representative of the unionisable employees of the 1st defendant, the Communication Workers Union signed a recognition agreement with the 1st defendant. In the said recognition agreement (which was produced as an exhibit in evidence), the party which entered into the recognition agreement was stated to be the 1st defendant. The recognition agreement did not specifically mention the subsidiaries of the 1st defendant. The Union entered into a separate recognition agreement with KCCT.

However, the management of the 1st defendant did not allow the Union to enter into a separate recognition agreement with the 2nd defendant. According to PW2, it was understood that any negotiations resulting into a collective bargain agreement between the 1st defendant and the Union, would also cover the 2nd defendant's employees. This was because the 2nd defendant allowed its employees to members of the Union. In fact, union dues were deducted from the salaries of the 2nd defendant's employees by the 2nd defendant and remitted to the Union. It was the 1st defendant's case that the recognition agreement it had signed with the Union only covered its employees and not those of any of its subsidiaries including the 2nd defendant. The 1st defendant was adamant that the improvement in the terms of service as contained in the collective bargain agreements between itself and the Union only related to its employees and not the employees of its subsidiary, the 2nd defendant. The 1st defendant was however unable to give any explanation why it declined to allow the 2nd defendant to enter into a recognition agreement with the Union yet it facilitated the employees of the 2nd defendant to pay union dues to the Union.

It was the defendants' case that the 2nd defendant was a separate legal entity with its separate board and management. During the hearing of the case, it emerged that the members of the board of directors of the 2nd defendant constituted the following: the managing director of the 1st defendant as the chairman of the board, the chief finance officer of the 1st defendant, the company secretary of the 1st defendant, the general manager of the 2nd defendant and two representatives appointed by the Treasury and the Ministry of Information. It was clear from the composition of the board of directors of the 2nd defendant that infact the management of the 1st defendant had control over the affairs of the 2nd defendant. Therefore when PW2 testified that the 1st defendant refused the 2nd defendant to sign a separate recognition agreement with the Union because the affairs of the 2nd defendant were catered for by the 1st defendant, this court holds the view that that was a probable scenario.

It was clear from the evidence adduced that the 1st defendant had effective managerial control over the 2nd defendant. The assertion by the plaintiffs that the 2nd defendant was effectively managed and controlled by the 1st defendant therefore is not without foundation. The claim by the defendants that the 2nd defendant was a separate legal entity with its own separate management does not hold when it is considered that it was the top management of the 1st defendant that effectively directed the operations of

the 2nd defendant. Evidence was adduced how for instance another subsidiary of the 1st defendant i.e. KCCT was allowed by the 1st defendant's management to execute a separate recognition agreement with the Union. KCCT was able to negotiate and enter into a separate collective bargain agreement with the Union. This was not the case with the 2nd defendant which the 1st defendant refused to relinquish control when it came to negotiations with the Union as provided for under the law. It was apparent from the evidence adduced that the operations of the 2nd defendant were essentially managed and controlled by the 1st defendant. This was evident from the audit report prepared by the Kenya National Audit Office which considered the operations of the 1st defendant and that of its subsidiaries as being in respect of one entity.

As regard the issue in dispute, it is common ground that when the 1st defendant became a separate entity in 1999, on 31st August 1999 it issued an internal memo to its employees referred to as Personnel Circular No.1B of 1999. There is no dispute that all the employees of the 1st defendant, including employees working with its subsidiary, the 2nd defendant, did benefit from improvement of terms of service contained in the said circular. However, when the Union negotiated for the improved terms of service of its members employed by the defendants, the resultant Personnel Circular No.2B of 2001 issued on 10th December 2001 was implemented only in respect of the 1st defendant's employees and the management staff of the 2nd defendant. The introductory part of the said Personnel Circular No.2B of 2001 stated as follows:

> *"The Board of Directors has approved the revised terms and conditions of service of the company's employees as set out in this circular. The provisions of this Circular has been as a result of an agreement reached between the Union of Posts and Telecommunications Employees (K) and Telkom Kenya Company during their 2nd Central Joint Council Meeting."*
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> *A significant improvement in the terms of service of the employees was contained in paragraph 14. It stated as follows:*
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> *"OWNER OCCUPIER HOUSE ALLOWANCE*
>
> *This allowance has been substituted with 60% of an employee's basic salary and where one is in receipt of a higher allowance, same will be upheld personal to oneself. However, no fresh applications will be processed."*

The union members of the 2nd defendant did not benefit from this improvement in the terms of service. The explanation given the 1st defendant for this discrimination was that the 2nd defendant was not making any profit and therefore its employees would not benefit from any improvement of terms of service. The legal explanation given during the hearing of the case by the defendants' witnesses was that the 2nd defendant being a legally independent entity, it could not benefit from improvement of terms of service that the 1st defendant offered its core employees i.e. employees working for the 1st defendant and not those working for its subsidiary, the 2nd defendant. This court was not able to comprehend the logic of this argument; if the terms of service of the management staff of the 2nd defendant were improved pursuant to the said Personnel Circular No. 2B of 2001, why was it not be extended to the unionisable staff of the 2nd defendant and yet it was the Union which agitated and negotiated for the said improved terms of service?

Similarly too, the introduction of Personnel Circular No.1B of 2003 stated that the salary of unionisable employees of the 1st defendant was to be improved at the rate of 7.5% pursuant to an agreement reached between the Union and the 1st defendant. From the evidence adduced in court, it was clear that this improvement of the terms of service was not implemented in respect of the employees of the 2nd defendant. The explanation that was given by the defendants for failure to implement this Circular in respect of the employees of the 2nd defendant was that the said Personnel Circular No. 1B of 2003 only related to the employees of the 1st defendant. Again, it was the defendants' case that the 2nd defendant

was a separate legal entity from the 1st defendant. They argued that the agreement that was reached between the Union and the 1st defendant only related to the improvement of the terms of service of the 1st defendant's employees.

On 5th August 2004, the Union and the 1st defendant signed a return to work formula after the unionisable employees of the 1st defendant had taken industrial action with a view to securing improved terms of service. Evidence was adduced during the hearing of the case that the industrial action did not involve the employees of the 2nd defendant. It was claimed that for the employees of the 1st defendant to return to work, the 1st defendant agreed as follows:

"2. The parties agreed to increase salary by 10% in two phases as follows:

a. *5% salary increase with effect from 1st September 2003.*
b. *5% salary increase with effect from 1st September 2004.*

c) The salary arrears will be paid with effect from September 2004.

3. That negotiations for the remaining issues in dispute will commence immediately and the meetings to be chaired by the conciliator appointed by the Minister of Labour."

This increase of salary did not extend to the 2nd defendant's employees. It was the plaintiffs' contention that by virtue of the fact that the majority of them were being represented by the Union, they ought to have benefited from the negotiated increment pursuant to the return to work formula. The explanation offered by the defendants was the same. The increment was in respect only of the 1st defendant's employees and not employees working with its subsidiary the 2nd defendant.

On 2nd March 2006, the then managing director of the 1st defendant wrote to all the employees of the defendants (especially including the 2nd defendant) informing them of the decision that the government had made in regard to the restructuring that was being embarked in respect of the 1st defendant with a view to privatizing it. The restructuring had the effect of having the majority of the employees of the 1st and 2nd defendant being retrenched or terminated from service. It was pertinent that when the decision was made to restructure the 1st defendant, the management of the 1st defendant treated the employees of the 2nd defendant in the same manner as it did treat its own employees. There was no separate resolution passed by the board of directors of the 2nd defendant in regard to how the employees of the 2nd defendant were to be terminated from service as a result of the said restructuring process. It was clear from the evidence adduced that the 1st defendant used the same blueprint in terms of the benefits that the 1st defendant's employees were to enjoy upon their termination from employment to the employees of the 2nd defendant. The letters terminating the plaintiffs from employment were word for word the same letters that were issued to the 1st defendant's employees when they were being terminated from employment.

In fact, all the letters terminating the plaintiffs from employment were signed by 1st defendant's DW1 Khadija Mire. The first batch of letters were in the letterheads of the 1st defendant. When confronted with these letters, the 1st defendant recalled the letters with its letterhead on the explanation that the said letters had been issued in error. However, even the letters issued to some of the plaintiffs in the letterhead of the 2nd defendant were signed by the 1st defendant's DW1, an employee of the 1st defendant. During the hearing of the case, there was no evidence which was adduced by the defendants to suggest that the said DW1 was an employee of the 2nd defendant. It was clear from the evidence that DW1 issued the said letters on instructions of her employer, the 1st defendant. It appeared to the court that the 1st defendant used the veil of incorporation of the 2nd defendant when it suited it. When it did not suit its purpose, it ignored the fact that the 2nd defendant was supposed to be a separate legal entity with its

separate board of directors and separate management.

Another pertinent issue that emerged during the hearing of the case was the issue regarding whether the plaintiffs were entitled to be paid the difference in the house allowance that they were entitled to, and the rent which was assessed as payable for those plaintiffs that were occupying houses within the 2nd defendant's GTI complex. As stated earlier in this judgment, after the split of the Kenya Posts and Telecommunication Corporation in 1999, some of the properties that belonged to the corporation were vested and transferred to Telposta Pension Scheme. The residential premises within the GTI complex were transferred to the Telposta Pension Scheme. Initially, it was the 2nd defendant that collected rent from the plaintiffs who occupied the houses within the complex. Telposta Pension Scheme had determined the rent that was to be paid in respect of the said residential premises. It was the plaintiffs' case that they ought to be paid the difference between the house allowance which was paid to Telposta Pension Scheme and the amount which the 2nd defendant unlawfully withheld. In that regard, it was the plaintiffs' case that the amount they ought to be refunded should be equivalent to 60% of their salaries as provided under Personnel Circular No.2B of 2001. The defendants of course were of the view that the plaintiffs had been paid all their dues and therefore they (plaintiffs) had no further claim against the defendants, either jointly or severally.

After setting out the facts of this case as the court was able to evaluate, there are several issues for determination by this court. In this court's considered opinion the issues for determination are as follows:

i. Whether the plaintiffs were employees of the 1st defendant deployed to work for the 2nd defendant?
ii. Whether the terms of service negotiated by the Union in respect of the 1st defendant's employees in 2001, 2003 and 2004 also covered the plaintiffs?
iii. Whether the plaintiffs are entitled to be paid arrears of salaries and house allowance as pleaded in their plaint?
iv. Who is entitled to be paid costs?

As regard issue (i), it was apparent from the evidence adduced that the 1st defendant following the split, took over the mandate of owning and therefore managing the 2nd defendant and KCCT. According to the evidence adduced, KCCT and the 2nd defendant were fully owned subsidiaries of the 1st defendant. It was evident that there was free movement of management staff from the 1st defendant to the 2nd defendant and vice versa. However, most of the unionisable employees of the 2nd defendant, once deployed to the 2nd defendant, did have an option of returning back to the 1st defendant. Soon after the split, the terms of service of all the employees of the 1st defendant and its two subsidiaries, KCCT and the 2nd defendant were harmonized. This was contained in Personnel Circular No.1B issued the 1st defendant in 1999.

There is an important development which took place prior to the negotiations leading to the Collective Bargain Agreement of 2001 between the 1st defendant and the Communication Workers Union of Kenya (the Union). Whereas the 1st defendant allowed KCCT, its subsidiary to enter into a recognition agreement with the Union, it (the 1st defendant) refused to allow the 2nd defendant to enter into such recognition agreement with the Union. According to PW2, the reason why the 1st defendant refused to allow the 2nd defendant to enter into a separate recognition agreement with the Union, was because the 1st defendant was of the view that during negotiations with the Union, any agreement reached would also cover the employees working for the 2nd defendant. This assertion by PW2 was supported by the evidence which was adduced by the plaintiffs which was to the effect that the 2nd defendant allowed its employees, including the majority of the plaintiffs to remit their union dues through their payroll. As can be expected in the circumstances, the 1st defendant denied that such understanding was reached.

When the time came for the negotiation for Collective Bargain Agreement in 2001 between the Union and the 1st defendant, the Union understood that the agreement in terms of improvement of the conditions

of employment reached pursuant to the said negotiations would also applied to the 2nd defendant's employees. This was not to be. Instead of implementing the improved terms of service negotiated with the Union to all the employees of the 2nd defendant, the 1st defendant selectively implemented it to be applied only to the management staff of the 2nd defendant. This was more so in regard to the increment of the house allowance to constitute 60% of the salary of such an employee. This court asked itself why the 1st defendant denied the 2nd defendant the opportunity to enter into a separate recognition agreement with the Union yet the right for the employees of the 2nd defendant to be represented by a trade union of their choice is guaranteed by the law.

Upon evaluation of the facts of this case, it was evident that the 1st defendant made this decision deliberately to create a vacuum which it subsequently exploited to detriment of the 2nd defendant's employees, and in this particular case, the plaintiffs. Evidence was adduced which supports the conclusion that the telecommunication equipment which was being manufactured by the 2nd defendant was for the exclusive use of the 1st defendant. This was the reason why for a period of more than five years before the plaintiffs were terminated from employment, the 1st defendant kept the 2nd defendant afloat by supporting it financially. Evidence was adduced to the effect that the salaries of the employees of the 2nd defendant was paid by the 1st defendant during this period. It was obvious to the court that the 1st defendant kept the 2nd defendant afloat because it was benefiting from communication and other equipment manufactured by the 2nd defendant.

It was the 1st defendant's case that the 2nd defendant was a complete separate entity and therefore the terms of service of the 2nd defendant's employees was governed by decisions made by its boards of directors and its management. That would have been the case if the 1st defendant adduced evidence to support what actually took place in reality other than the legal fiction that the 2nd defendant was a separate legal entity. The fact that the 2nd defendant had a separate legal existence having been separately incorporated and having its own memorandum and articles of association, did not imply that the 2nd defendant was in actual fact a separate legal entity. From the evidence adduced, it was clear that the majority of the directors of the 2nd defendant were infact the top managers of the 1st defendant. The said directors included the managing director, the chief financial officer and the company secretary of the 1st defendant. It was therefore evident that the 1st defendant managed the affairs of the 2nd defendant as if it was part and parcel of the 1st defendant.

This was the reason why the management of the 2nd defendant (being the same management as the 1st defendant) did not see the need to enter into a separate recognition agreement with the Union, yet in the same breath continued allowing the 2nd defendant's employees to pay union dues. It appeared that the 1st defendant recognized that it would breach the plaintiffs' constitutional right of joining a trade union of their choice hence their decision to allow them to be members of the union. However, in apparent breach of exercise of this right by the plaintiffs, the 1st defendant deliberately failed to allow the 2nd defendant to sign a separate recognition agreement with the Union. This court can in the circumstances deduce finding that the 1st defendant intended that it would represent the interest of the employees of the 2nd defendant in any collective bargain agreement as anticipated under the law. The manner in which the 1st defendant negotiated with the Union in regard to the retrenchment of its employees and those of the 2nd defendant clearly showed that the 1st defendant treated the employees of the 2nd defendant as its own employees and not those of a separate legal entity.

That was the reason why an employee of the 1st defendant (1st defendant's DW2) could without appearing to be acting without authority, write letters terminating the 2nd defendant's employees from employment. This court therefore holds that from the manner in which the operations of the 2nd defendant were being undertaken, it was evident that it was being managed by the 1st defendant. The 2nd defendant, while nominally a separate legal entity, was in actual fact managed as if it was a department of

the 1st defendant. This court therefore holds that the 1st defendant was in actual control and management of the day to day affairs of the 2nd defendant. In regard to the terms of service its employees, the 2nd defendant was not managed as a separate legal entity but as part of the 1st defendant.

As regard to issue (ii), the plaintiffs' claim that they are entitled to a declaration that they should be paid accrued salaries and house allowance arrears as contained in Personnel Circulars 2B of 2001, 1B of 2003 and 10% salary increment negotiated by the Union on their behalf in 2004. The defendants reiterated that the plaintiffs cannot benefit from the said improved terms of service that was specifically to be enjoyed by the employees of the 1st defendant. Having carefully evaluated the facts of this case, it was clear to this court that the 1st defendant being the actual managers of the 2nd defendant treated the employees of the 2nd defendant in a discriminatory manner. The 1st defendant failed to offer an explanation why it improved the terms of service of the management of the 2nd defendant by implementing Personnel Circular No.1B of 2001 by increasing their house allowance to be equivalent to 60% of their salary yet did not extend the same terms to the unionisable and other employees of the 2nd defendant. This court therefore hold that, on the standard of proof on a balance of probabilities, the plaintiffs established that they are entitled to be paid arrears of house allowance equivalent to 60% of their salary from the time Personnel Circular No. 2B of 2001 came into effect to the time the plaintiffs were terminated from employment on 15th June 2006.

Similarly too, the defendants did not advance any cogent reason why the plaintiffs did not benefit from the improved terms of service as contained in Personnel Circular No. 1B of 2003. The plaintiffs established to the required standard of proof on a balance of probabilities that they are entitled to be paid salary arrears at the rate of 7.5% from the time the said personnel circular was implemented to the time the new improved terms of service of 10% salary increment of 2004 came into effect. The plaintiffs are further entitled to enjoy the 10% salary increment from the time the 2004 increment came into effect to the time the plaintiffs were terminated from employment on 15th June 2006. For those plaintiffs and other employees who were offered accommodation at the GTI complex, the sum that was agreed to be paid as rent to Telposta Pension Scheme shall be deducted from their respective entitlements and the difference thereof shall be paid to the said plaintiffs.

In the circumstances therefore, this court having found in favour of the plaintiffs in regard to issue (ii), the issue that remains for determination is whether the plaintiffs shall be paid arrears of their salaries from the date the said improved terms of service came into effect to the day the plaintiffs were terminated from employment on 15th June 2006. It was argued by the defendants that the plaintiffs had not specifically pleaded the amount they were entitled to and therefore this court cannot enter judgment in their favour in monetary terms. During the hearing of the case, PW3 produced a tabulation of what was calculated as the plaintiffs' entitlement. However, this court noted that the said tabulation included persons who were not plaintiffs in this suit. The tabulation was incomplete because it did not extend to 15th June 2006 when the plaintiffs were terminated from employment.

This court did not find favour with the argument advanced by the defendants. This is because the plaintiffs could not have tabulated in monetary terms what they are claiming as being entitled to in terms of arrears of salary and house allowance in circumstances where the court had made no specific finding in their favour in regard to the issue whether or not they are entitled to be paid such arrears.

In the premises therefore this court holds that the plaintiffs are entitled to be paid salary arrears as per the improved terms of service negotiated on their behalf by the Union and contained in various legal instruments published by the 1st defendant. As a basis calculating the entitlement of each plaintiff, this court holds that the tables produced by PW3 as plaintiffs' exhibit No.8 and plaintiffs' exhibit No.9 shall form the basis on which the salary arrears and house allowance arrears due to the plaintiffs shall be calculated. The plaintiffs shall be paid the said arrears up to 15th June 2006 when they were terminated from employment.

The upshot of the above reasons are that this court finds that the plaintiffs proved their case as against the

defendants, both jointly and severally as prayed in the plaint. For the avoidance of doubt, this court declares that the plaintiffs are entitled to be paid the improved terms of service that were negotiated on their behalf by their Union with the 1st defendant in 2001, 2003 and 2004. In particular, the plaintiffs are entitled to the improved terms of service as contained in Personnel Circular No.2B of 2001, Personnel Circular No.1B of 2003, and the 10% increment that was negotiated and agreed in 2004 pursuant to the return to work formula signed by the 1st defendant and the Union as contained in prayer (b) of the plaint. The plaintiffs shall be paid the costs of this suit. Interest shall be paid on the amount awarded from the date of this judgment until payment in full. It is so ordered.

L. KIMARU

J U D G E

Delivered, dated and countersigned at Nakuru this 13th day of July 2011

W. OUKO

J U D G E