



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

**Civil Case 102 of 2002**

**ELIUD I. MWENDA.....1<sup>ST</sup> PLAINTIFF**

**MARK MUKUNDI.....2<sup>ND</sup> PLAINTIFF**

**JAMES NDUNGU.....3<sup>RD</sup> PLAINTIFF**

**MARY NYAMBURA.....4<sup>TH</sup> PLAINTIFF**

**MARY WALUMBE.....5<sup>TH</sup> PLAINTIFF**

**JAMES NJOROGE.....6<sup>TH</sup> PLAINTIFF**

**TOM WAMBUA.....7<sup>TH</sup> PLAINTIFF**

**STEPHEN N. KAMAU.....8<sup>TH</sup> PLAINTIFF**

**VERSUS**

**EGERTON UNIVERSITY .....DEFENDANT**

**JUDGMENT**

The plaintiffs were employees of the defendant. In a plaint filed in court on 16<sup>th</sup> April, 2002 they stated that by a letter dated 15<sup>th</sup> August, 1997 directed to the Finance Officer of the defendant and copied to them, the then Deputy Vice Chancellor of the defendant institution approved owner occupier house allowance for all the plaintiffs among other employees of the defendant from 1<sup>st</sup> July 1997. The same was effected and some of the plaintiffs applied for and obtained house purchase loans. However, on or about 31<sup>st</sup> September 2001, the defendant, without any justification or notice to the plaintiffs and without giving the plaintiffs any hearing, stopped paying the said owner occupier house allowance and started paying ordinary house allowance which was lower than owner occupier allowance. The plaintiffs claimed that as a result they were adversely affected. They averred that the defendant’s act as aforesaid was inhuman and contrary to the principles of natural justice. They urged the court to issue a declaration that the reduction of their emoluments without consultation was contrary to the principles of natural justice and a further declaration that any alteration of the owner occupier house allowance to mere house allowance be implemented upon consultation with them. They further sought a declaration that the defendant’s action of interfering with their owner occupier house allowance was punitive and contrary to a directive that had been issued by the Permanent Secretary and Head of Public Service regarding payment of the said allowance. The plaintiffs also sought a permanent injunction to restrain the defendant from reducing and/or interfering with the owner occupier house allowance. And lastly, they sought an

order that the defendant do pay to them the sums which it had already deducted from their owner occupier house allowances.

In its defence, the defendant denied that it approved payment of owner occupier house allowance to the plaintiffs but added that if any approval was given through its Deputy Vice Chancellor or any other officer, the same was without any legal basis. It further admitted that it stopped payment of owner occupier house allowance but added that it was lawfully empowered to do so without any reference to the plaintiffs. The defendant stated that the plaintiffs were given adequate and sufficient notice prior to the stoppage of the said allowance. It denied that the plaintiffs were entitled to any hearing as alleged. The defendant denied that this court had jurisdiction to hear and determine this suit and averred that the matter could only be dealt with by the Industrial Court.

The plaintiffs' claims were more or less the same except that there were differences in their earnings. The evidence of the first plaintiff was therefore representative of that of the others who testified. The first plaintiff testified that he started earning owner occupier house allowance in 1998 and continued earning the same until October 2001 when it was stopped. He was earning Kshs.11,750/- as owner occupier house allowance but when the same was scrapped he started earning only Kshs 5,500/= as ordinary house allowance. He was, however, not given any pay change advice. He referred to a memorandum of agreement between the defendant and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers' whose preamble stated as follows:

*“No employee covered by this Agreement already in service shall receive terms and conditions of service less favourable than what is contained in this agreement, subsequent to the signing of this Agreement.”*

The said agreement was dated 16/8/99, he said. The collective bargaining agreement referred to hereinabove (P. Exhibit 3) at page 10 paragraph 15(b) stated that:

*“A member of staff living in his/her own house will be entitled to monthly owner occupier house allowance at the rate of 1 - 1/4% of the actual capital value of the house and land upto one acre provided that the value of one third of the value of the land taken into consideration will not exceed one third of the value of the property to be considered for purpose and will be subject to a maximum of Kshs 434,000/= for grade I and II and Kshs 708,000/= for grades III and IV.”*

The first plaintiff further referred to a circular dated 23<sup>rd</sup> July 1992 from the Permanent Secretary, Ministry of Education (P. Exhibit 4) which was addressed to the Vice-chancellors of all Public universities regarding terms and conditions of service for staff of the Public universities. The same set out capital cost ceilings of owner occupier house allowances payable to different categories of staff.

The first plaintiff further referred to a circular dated 18<sup>th</sup> June, 2001 from the head of Public Service addressed to *inter alia* vice chancellors of public universities. It was regarding harmonization of terms and conditions of service in the public service with specific reference to housing. He emphasised a provision in page 5 of the said circular, which stated:

*“Officers and Teachers currently drawing House Allowance which is higher than the regional rates indicated against their grades will retain the higher rates.”*

The first plaintiff complained that the defendant did the opposite of the above provision in that it reduced his house allowance from Kshs 11,750/= to Kshs 5,500/= per month. He complained that the defendant unlawfully abolished the owner-occupier house allowance, which he was previously earning which was contrary to what the said circular stated.

The first plaintiff further referred to a memorandum dated September 11, 2001 from the defendant's Acting Registrar addressed to all the members of staff of the defendant which tabulated the monthly house allowances payable to the defendant's members of staff – Plaintiff Exhibit 13. The said memorandum made reference to the circular from the head of the public service aforesaid. Page 2 paragraph (d) of the memorandum read:

*“(d) abolition of further approval of owner occupier house allowance with effect from July 1, 2001.”*

He said that the abolishment of owner occupier house allowance was intended to affect new applicants but not those who were already enjoying the said allowance.

Thereafter the plaintiffs tried to engage the defendant in dialogue but the defendant was unwilling to discuss the issue.

On 4<sup>th</sup> July, 2003 the Permanent Secretary, Ministry of Education, Science and Technology wrote to the Vice Chancellor of the defendant (P Exhibit 15) and conveyed the authority from the Directorate of Personnel Management to pay owner occupier house allowance to the officers who were in the defendant’s payroll before the Harmonised Housing Policy was effected. The letter further stated that any financial implication of the above payment was to be met from the defendant’s current budget without reference to treasury for additional funds.

The defendant’s Finance and General Purposes Committee met on 5<sup>th</sup> March 2004 and resolved that owner occupier house allowances be reinstated for the defendant’s employees whose allowances were reduced after issuance of the circular on Harmonization of House allowances. The implementation of the above resolution was to be from July 2003. The defendant’s finance officer issued a memorandum to that effect and the same was dated 9<sup>th</sup> March 2004. A copy thereof was produced in court as Plaintiff Exhibit No. 16. Thereafter the defendant implemented the said resolution.

On the strength of the above memorandum, the plaintiffs prayed that their respective owner occupier house allowances which were not paid between October 2001 and June 2003 be paid together with interest accrued thereon. They further sought damages because of the suffering that they went through as a result of the defendant’s act of reducing their earnings. The first plaintiff claimed that he was unable to take his daughter to university because of the financial position he was put into by the defendant. Some of the plaintiffs claimed that they had taken loans from Housing Finance Company of Kenya and were unable to service them when their earnings were unlawfully reviewed downwards.

It was unfortunate that the defendant and its advocates did not take keen interest in defending this suit and that can be attested to by the fact that they failed to attend court on a number of occasions when the matter was listed for hearing. Even after the plaintiffs closed their case on 6<sup>th</sup> September, 2005, in the absence of the defendant’s representative and their advocate, the court decided, in the interest of justice, not to proceed to close the hearing but directed that the matter be mentioned on 7<sup>th</sup> October, 2005 with a view to fixing a hearing date for the defence case. It further ordered the plaintiff’s advocates to serve a mention notice upon the defendant’s advocate. That was done and an affidavit of service was filed showing that the defendant’s advocates were duly served and acknowledged service by stamping and signing on the duplicate of the mention notice. However, they did not attend court on the 7<sup>th</sup> October 2005 and the court set the date for the defence case to be on 29<sup>th</sup> November 2005 and ordered that a hearing notice be served upon them.

The plaintiff’s advocates served the defendant’s advocates with a hearing notice on 31<sup>st</sup> October, 2005 and filed an affidavit of service to that effect. Come the 29<sup>th</sup> November, 2005, neither the defendant’s representative nor their advocate attended court. The matter was first called out for hearing shortly after 9.00 a.m. and again at 11.00 a.m. when Mr. Kahiga for the plaintiffs urged the court to close the proceedings as the defendant had chosen not to defend the suit.

The plaintiffs’ evidence was therefore unchallenged. I have carefully considered the pleadings filed by the parties, the evidence tendered by the plaintiffs and in particular the various documentary exhibits that the plaintiffs produced. It is not in dispute that all the plaintiffs were lawfully receiving from the defendant owner-occupier house allowance upto September 2001. Upto that time, their respective monthly allowances were as follows:

1<sup>st</sup> plaintiff - Kshs 11,750/=

2<sup>nd</sup> plaintiff - Kshs 19,875/=

3<sup>rd</sup> plaintiff – Kshs 14,000/=

4<sup>th</sup> plaintiff – Kshs 12,250/=

6<sup>th</sup> plaintiff – Kshs 8,850/=

8<sup>th</sup> plaintiff – Kshs 6,350/=

The fifth and the seventh plaintiffs did not testify.

The plaintiffs' disagreement with their employer arose as a result of the circular from the head of Public Service dated 18<sup>th</sup> June, 2001 (*Exhibit 10*). I carefully studied the said document. The same was on harmonization of terms and conditions of service in the public service with specific reference to housing. It introduced regional house allowance rates and it applied to public servants as shown in page 2 thereof, including employees of public universities. One of its underlying objectives was to improve terms and conditions of service for all public servants.

The plaintiffs drew the court's attention to a provision in page 5 of the said circular which clearly stated that officers and teachers who were currently drawing house allowance which was higher than the regional rates indicated against their grades were to retain the higher rates. My understanding of that provision was that it was not the intention of the Government that the house allowances of such officers be reduced as a result of implementation of a scheme which was intended to improve terms and conditions of service of public servants. Any reasonable employer would not ordinarily reduce its employees' earnings without affecting their morale and performance and in particular when the employees have not been given any advance notice. No pay change advice was given to the plaintiffs. My reading and appreciation of Exhibit 10 is that it did not abolish payment of owner occupier house allowance to the plaintiffs and other employees who were entitled the same. The memorandum that was issued by the defendant to all its members of staff and dated 11<sup>th</sup> September, 2001 (P. Exhibit 13) abolished "*further approval of owner occupier house allowance with effect from July 1, 2001*" but did not affect those employees whose owner occupier house allowance had been approved and was already being paid.

I believe the letter dated 4<sup>th</sup> July, 2003 from the Permanent Secretary, Ministry of Education, Science and Technology addressed to the vice chancellor of the defendant (P. Exhibit 15) confirmed the above stated position since it expressly stated that the defendant ought to pay owner occupier house allowance to the officers who were in the defendant's payroll and were earning higher rates than those stated in plaintiff's exhibit No. 10.

I therefore believe that the plaintiffs have on a balance of probabilities proved that the defendant's action of stopping payment of owner occupier house allowance to them between October 2001 and June 2003 was unlawful and/or irregular and hereby declare as such. The defendant should therefore pay to the first, second, third, fourth, sixth and eighth plaintiffs all the arrears of the said allowances accrued over the said period together with interest thereon at court rates. The defendant shall also bear the costs of this suit.

DATED, SIGNED AND DELIVERED at Nakuru this 5<sup>th</sup> day of May 2006.

D. MUSINGA

JUDGE

5/5/2006