



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 560 OF 1998

KEPHA NYABERA AND 189 OTHERS.....PLAINTIFF

VERSUS

KENYA FARMERS ASS. CO-OP LTD.....DEFENDANT

JUDGMENT

The Plaintiffs, whose number at the time the suit was filed was one hundred and ninety, filed suit against the Defendant seeking the following prayers:-

(i) A declaration that the Defendant has acted in breach of contract of employment with the Plaintiffs in failing to pay arrears of salary since December 1997 and failing to remit deductions made on the Plaintiffs salaries by the Defendant to third parties to whom the Plaintiffs were obliged to pay.

(ii) An order to compel the Defendant to provide a full account of the unpaid salaries and allowance and the unremitted deductions to various bodies and organisations to the tune of Kshs 44,253,820/= as tabulated in paragraph 8A and a further order for the payment of the same with interest from the date they fell due.

(iii) Arrears of unpaid salaries from December 1997 to November 1999 with interest.

(iv) Costs of the suit.

The Defendant filed a defence where it admitted being aware of its obligations to the Plaintiffs. The Defendant further admitted that it undertook to pay all the accrued payments due to the Plaintiffs and had paid the same to the Plaintiffs and therefore owed nothing to the Plaintiffs. The Defendant prayed that Plaintiffs' suit be struck out with costs as the Court did not have jurisdiction to hear and determine this case, as the Defendant was a co-operative society.

After the suit was filed, there followed protracted litigation where applications upon applications were filed leading finally to this case being listed for substantive hearing before this Court.

The Plaintiffs called one witness, Kepha Nyabera Nyambane (PW 1) who testified on his own behalf and on behalf of the other Plaintiffs. He testified that the Plaintiffs were at the material time the employees of the Defendant. It was his testimony that from May 1998 to November 1999 they were never paid their salaries, neither were the statutory deductions remitted to the Retirement Benefits Scheme, National Hospital Insurance Fund (N.H.I.F.) and National Social Security Fund (N.S.S.F.). The witness

testified that the Defendant owed the Plaintiffs outstanding salaries to the sum of Kshs 30,624,408/=. PW 1 further testified that the said amount was arrived at after calculating the gross salary due to each employee multiplied by the nineteen months that they were not paid. The amount included taxes and advance payments made to some employees. PW 1 stated that no reconciliation had been done to reconcile the amounts due to each employee after the deductions of taxes and the advance payments made by the Defendant. PW 1 further testified that he had seen figures which were stated to be owed to the Plaintiffs by the Defendant in an affidavit sworn by the then General Manager, Mr Simon Kipchumba Cherogony. The affidavit had been sworn on the 8th of May 2000.

In the said affidavit, the General Manager admitted owing the Plaintiffs the sum of Kshs 20,985,763/85. A statement was annexed to the said affidavit. PW 1 produced the said statement and the same was marked as Plaintiffs Exhibit No. 1. He further testified that the said printout gave details of the salary advances made to some employees. PW 1 further testified that the net amount of Kshs 20,985,763/45 did not include the collective bargain agreement (CBA) of Kshs 2,573,645/=. This amount was put as a separate item in the said print out. The unremitted amount to the provident fund was acknowledged to be Kshs. 2,549,743/00. The unremitted retirement payment was Kshs 1,018,296/=. The amount which was not remitted to the NHIF was Kshs 2,305,320/=. The witness testified that since the said amount was deducted from their salary and not remitted, they would be entitled to the said unremitted amount. The witness further testified that the Defendant had paid all the amount due in respect of each employee's contribution to the National Social Security Fund (N.S.S.F.).

PW 1 further testified that the Plaintiffs were abandoning the claim of the amount which was to be remitted to their Savings and Credit Co-operative Society (SACCO) as the Defendant had made separate arrangements with their SACCO. PW 1 stated that the Plaintiffs were therefore claiming their salary arrears, the CBA increment, the unremitted NHIF deductions and the unremitted Provident Fund deductions. The Plaintiff produced the affidavit of Simon Kipchumba Cherogony together with the annexures thereto as Plaintiffs Exhibit No. 2. PW 1 prayed for judgment to be entered against the Defendant for the sum of Kshs 27,127,447/45 plus the unremitted NHIF deductions of Kshs 2,305,320/=. The Plaintiffs admitted that they were paid Kshs 5.8 million out of the above amount. They were claiming the balance plus interest and costs.

On cross-examination the witness admitted that some of the original one hundred and ninety Plaintiffs had withdrawn from the suit. PW 1 admitted that fifteen of the said Plaintiffs had withdrawn as at the 6th of April 2001. The witness admitted that the Plaintiffs who had withdrawn their suit had been included in the claim filed by the Plaintiffs. The witness further stated that twelve of the original Plaintiffs had died;- they were Plaintiffs number 28, 31, 44, 61, 65, 72, 87, 107, 124, 143, 154 and 159. He further testified that the families of the deceased had filed letters of administration for the deceased persons estates. PW 1 stated that the sum of Kshs 5.8 million was paid in the year 2000. The witness further stated that Plaintiff No. 131 had filed another suit after the present suit had been filed. The witness denied that the Defendant owed the Plaintiffs the sum of Kshs 20,373,081/=. It was his evidence that the Plaintiffs were owed a higher sum as tabulated in his evidence-in-chief. PW 1 conceded that the Defendant could only pay the Plaintiffs the said amount claimed less the figures of the claimants who had withdrawn their cases or had died.

In re-examination the witness stated that the Plaintiffs who withdrew their cases were Plaintiffs Nos. 6, 14, 16, 37, 57, 60 (who is also deceased), 94, 129, 149, 150 and 164. These claimants names were deleted when the Plaint was amended. PW 1 prayed that judgment be entered for the Plaintiffs as claimed in his evidence. The Defendant did not offer any evidence in its defence.

The parties agreed by consent to file written submissions. However, only the Plaintiffs filed their written submissions. I have considered the evidence adduced on behalf of the Plaintiffs including the submissions made on their behalf. It is not disputed that the Plaintiffs were employees of the Defendant. The issue for determination by this Court is what amount, if any, is owed to the Plaintiffs by the Defendant. From the outset, this Court will exclude the Plaintiffs who either withdrew their cases against the Defendant or have since died. The Plaintiffs who withdrew their cases or have since died and therefore not included in the award to be made by this Court are Plaintiffs No. 6 Aketch Oriko, No. 14

Violet Chemutai, No.16 Everlyne G. Ongoma, No. 22 Nicholas A. Anyumba, No. 57 Bonventure W. Wasike, No. 37 Milton Abura, No. 61 James O. Osambo, No. 94 Oyugi J. Wilson, No. 129 John Kipkulei Chebet, No. 144 Nelly J. Siror, No. 149 Jeremiah Wainaina, No. 150 Evans N. Makori, No.154 Jane R. A. Apiyo, No. 158 Milka Kessei and No. 164 Karilus Onya. The Defendant admitted that it was owed the Plaintiffs salaries due to them for a period of nineteen months. The Defendant denies that it owed the Plaintiffs the sum Kshs 27,127,447/45. The Defendant however admits owing the Plaintiffs the sum of Kshs 20,373,087/= only.

I have considered the evidence adduced by PW 1. I do find that the Plaintiffs have proved their case on a balance of probabilities. The evidence that the Plaintiffs relied on were basically the documents which the Defendant produced in Court as Exhibits in an interlocutory application which was filed in this suit. The Plaintiffs produced the statement of accounts as Plaintiffs Exhibit No. 1 and the affidavit sworn by the former General Manager of the Defendant as Plaintiffs' Exhibit No. 2. In the face of this documentary evidence the Defendant could not possibly offer any defence to the Plaintiffs' claim. The evidence offered by the Plaintiffs was therefore uncontroverted.

The difference between the sum admitted by the Defendant and that which is claimed by the Plaintiffs is the unremitted sum of Kshs 2,305,320/= which was to be paid to the National Hospital Insurance Fund (N.H.I.F.) and the sum of Kshs. 5.8 million which was paid in advance. I do find that the Plaintiffs are entitled to the amount which was not remitted to the National Hospital Insurance Fund (N.H.I.F.). This is due to the fact that the Plaintiffs did not enjoy the benefit of the services offered by the National Hospital Insurance Fund (N.H.I.F.) due to non remittance of the said funds.

I will consequently enter judgment for the Plaintiffs as hereunder:

(i) The sum of	Kshs 27 127 447/45
(ii) Unremitted NHIF amount of	Kshs <u>2 305 320/00</u>
Subtotal	Kshs 29 432 767/45
<i>less deductions of the amount</i>	
<i>due to deceased Plaintiffs and</i>	
<i>the Plaintiffs who withdrew their cases</i>	
	Kshs 2 466 949/00
<i>less the amount paid in advance</i>	
<i>by the Defendant to the Plaintiffs</i>	Kshs <u>5 800 000/00</u>
TOTAL owed	Kshs. 21165 818/00

Judgment is therefore entered for the Plaintiffs severally as per the schedule produced as Plaintiffs Exhibit No. 1 for the sum of Kshs. 21165 818/00. The Plaintiffs shall jointly and severally have the costs of the suit. Interest shall be applied at the Court rates from the date the suit was filed.

It is so ordered.

DATED at NAKURU this day of 2004.

L. KIMARU

AG. JUDGE

