



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT 1293 OF 93**

**BARNABAS EMBUKHANE & 9 OTHERS.....PLAINTIFF**

**-VERSUS-**

**GENERAL PLASTICS LIMITED.....DEFENDANT**

**JUDGEMENT**

Background

1. The Plaintiffs filed this suit in 1993 against their employer General Plastics Limited.
2. In their plaint the 10 plaintiffs claimed that they are employees of the Defendant working in various categories of jobs. The defendant makes plastic products. They claimed that the defendant had failed to effect increments of their salaries, house allowances according to their agreements of employment. They therefore claimed a total of Ksh.10,921,478.90 on behalf of themselves and others all numbering 91 employees.
3. The defendant defence denies all the allegations made against it adding that the suit was fatally defective in law for reasons of misjoinders.
4. Some applications were made in the course of waiting for the main suit to be heard. The last of such application and which was relevant was the application dated 16.6.94 in which the applicants who are the plaintiffs were asking for leave that the 10 plaintiffs be allowed to file the suit on behalf of the 181 employees of the defendants and that these other employees be deemed to be plaintiffs in the suit. This application was not heard and on 18.5.2000 the counsels informed the court that they had agreed to go on with the case without hearing this application. In other words the application was abandoned which meant that there were only 10 plaintiffs.
5. There were 9 agreed issues and in my judgment I will answer them as per the evidence which was presented to the court. The statement of agreed issue was filed on 17.11.99 and I shall refer to them later.

Evidence

The plaintiffs called five witnesses most of them among the plaintiffs who gave evidence that they were either machine operators, machine attendants and store keepers. All said that they were claiming what they were not paid under the agreements.

The Defence called one witness the Personnel Manager of the Defendant Company who said that the

company had entered into a collective agreements with the Union on behalf of its members. All the employees were members of the Union. One Agreement ran from 1.8.89 to 31.12.92 and another prior to this from 12.11.1987 to 31.7.89. He said according to the agreements there was no automatic promotions based on the years one had worked. They were paid in accordance with their grades. Promotion was purely by the management (Company) depending on ones' performance. There were no salary arrears.

## **Findings**

6:1 Returning to the Agreed issues the first was whether the plaintiff has loci stand to the institute the present suit. The answer is in the affirmative. The plaintiffs have the right to file the suit on their behalf. The suit is not a representative suit since they did not make an application to make it a representative suit under the Civil Procedure Rules.

6.2: The second issue is whether the suit is defective on grounds of misjoinder of parties and if so to what extent. I find the evidence before the court that there is no misjoinder, the 10 plaintiffs are entitled to bring the suit as they did on their behalf's.

6.3: As to whether the plaintiffs and the defendant entered into an Agreement touching on review of their monthly salaries. If so what were its terms and how were they to be implemented? The answer to this question shall be in the affirmative. The plaintiffs did enter into collective agreements. The Agreements were signed by the Union on behalf of the plaintiffs who were members of the Union. These agreements were produced as evidence and there was no dispute about their existence. The appendix to the agreement gives in details job descriptions from grade 1 to grade IV. These two agreements which were identical was registered under the Trade Disputes Act and entered into the register of collective agreements maintained by the court under the entry RCA No. 79 of 1991 on the 10.4.91. Examination of these two agreements do no show any provision for automatic promotions based on the period worked by an employee. The clear impression one gets on reading the agreements is that the appendix gives the grades and that an employee would be paid as per that grade. The body of the agreement gives details of the other entitlements of the employees. Clause 24 of the agreement summaries the wages and House allowance. In all after reading the collective agreements I find that the plaintiffs claim are not based on this agreement. There are no provisions in the agreements, which could give rise to unpaid arrears or unpaid overtime. This is because in the absence of a provision for automatic promotion, an employee would be paid under the grade he was put it in. This appears to have been the case.

6.4: As to whether the defendants have implemented the agreement fully and if not to what extent has it been implemented? The answer to this issue must of necessity be in the affirmative. This answer goes for issue number 5 which asks whether the defendant had breached the Agreement with the plaintiffs. As far as the provisions of the Agreements are is concerned there is no breach of the same by the Defendant. It is possible that the plaintiffs were right to expect that promotion should have been in accordance to the period one has worked but this was not included in the Agreements. The other claims by the plaintiffs owe their existence to this one claim and in its absence the other claims are bound to fail. I find that there was no breach of the agreements by the Defendant neither had the Defendant failed to implement the agreement. Consequently the plaintiffs did not suffer any damages, as there was no breach. This answers issue number 6 of the agreed issues. 6:5 As to whether the Defendant owes the plaintiffs the sum of Shs.10 million, as claimed. On this issue I agree with Mrs. Guserwa in her submission that the plaintiffs did not show that there was a Breach of the Agreement; neither did they show that there was a provision for automatic promotion.

I have considered the two cases cited by Mr. Mbugua in support of the plaintiff's case. I find that these cases are not relevant to the present situation. In the case of David Mwangi of University of Nairobi, the Court found that there was a provision of these agreement which had not been complied with namely Clause 34 (a) (V) and (g) and in the case of Konig Kanjee the court held that the employee even though dismissed summarily was entitled to a pay for the days he had worked for before the dismissal.

Clearly these cases are of no assistance to the plaintiffs. What seems to have happened is that the plaintiffs appear to have disagreed with their Union on some aspects, which they did not tell the court.

They left the Union and filed the present suit feeling that the Union did not represent adequately their interest. Little did they seem to know that the case would turn on the provisions of the Agreements which were already there. I got the impression that the plaintiffs felt frustrated and helpless which drove them to file the suit and unfortunately without proper guidance. They felt let down by the Union which had failed to ensure that the question of grading and promotions were adequately provided for in the agreements which was later to form basis of their case.

### **Judgment**

Having reviewed the evidence above I come to the conclusion that the plaintiffs have failed to prove their case as filed. The suit is dismissed but each party shall bear its costs of the suit. It is regrettable that the suit took such a long time to find audience in the court. In my opinion the suit arose out of misunderstanding between the employees and their employer. In the course of the hearing I was told that most of the plaintiffs are still working although some had left the company. This is a matter, which in my view could have been handled, in another way without resulting to this protracted litigation.

I think the parties should strain to heal their past now that they have returned to the Union. It is to be hoped that the Union has also learned a lesson out of this litigation. It is for these reasons that I have ordered that each party bears its costs of the litigation.

I thank both the counsels for their cooperation in bringing this matter into an end.

Delivered and dated this 21st day of July, 2000.

KASANGA MULWA

JUDGE