



Republic v Lake Basin Development Authority; Chere (Exparte Applicant) (Judicial Review E015 of 2022) [2024] KEELRC 2038 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2038 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E015 OF 2022**

**CN BAARI, J
JULY 25, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

LAKE BASIN DEVELOPMENT AUTHORITY RESPONDENT

AND

FREDRICK ONYANGO CHERE EXPARTE APPLICANT

RULING

1. Before Court is the *ex parte* Applicant’s motion application dated May 14, 2024, wherein, the Applicant seeks adoption of computation of unpaid withheld salaries amounting to Kshs. 636,000/- and liberty to execute for the amount.
2. The application is support by the grounds on the face of the motion and the affidavit sworn by the Applicant. The crux of the application is that the Court ordered the Respondent to pay the Applicant his withheld salaries, but the Respondent declined to pay arguing that allowances do not constitute salaries.
3. It is the Applicant’s position that under section 3 of the *Employment Act*, 2007, salary is defined to include all payments in money or kind paid or owed to an employee. It is the Applicant’s assertion that the Blacks Law Dictionary defines salary as the total income from all sources before deductions, exemptions and other tax deductions.
4. It is his further submission that salary means monthly basic salary and allowances per contract of service given to an employee. The Applicant had reliance in the case of *Mary Chepgeno Kiptui v. Kenya Pipeline Co. Ltd* to buttress this position.



5. It is submitted further that there is no justification in law for the Respondent to continue withholding the applicant's allowances, and pray that the court adopts the computation in the Sum of Kshs. 636,000/- and allow the Applicant to execute.
6. The Respondent opposed the motion vide a replying affidavit sworn by one Wycliffe Ochiaga on June 14, 2024. The Respondent avers that the orders issued by this Court on March 16, 2023, related only to payment of salary and that there was no specific order on payment of allowances. It avers further that it has since paid the Applicant's salary.
7. The Respondent states that this Court having delivered its judgment on the matter, is now *functus officio* and that the only proceedings it can entertain in relation to the matter is in regard to execution. The Respondent argues that for this reason, this Court lacks jurisdiction to entertain this application as the motion introduces new issues likely to alter the decree of this Court.
8. It is the Respondent's position that the allowances sought include commuter, responsibility and airtime allowances which are only payable to an employee who is actively engaged. It argues further that the Applicant was under suspension and was thus not actively engaged and paying him the allowances in the circumstances, is not prudent use of public funds.
9. It is the Respondent's prayer that the motion be dismissed with costs for lacking in merit.

Determination

10. I have considered the motion, the replying affidavit and the oral submissions by both Counsels. The issues for determination are:
 - i. Whether salary includes allowances; and
 - ii. Whether the court is *functus officio*.

Whether salary includes allowances

11. In a judgment delivered by this court on March 16, 2023, the Court issued the following order and which forms the subject of the instant motion:

“That an order of judicial review by way of Mandamus be and is hereby issued compelling the Respondent , its agents or any other person acting pursuant to the decision to dismiss the Applicant, to reinstate the Applicant to the previous position held before the letter dismissing him from employment was issued, and to compute and release the Ex parte Applicant's salary which was unlawfully withheld between 15th March, 2022, being the date he was placed on suspension with no pay and 9th September, 2022, being the date of his summary dismissal.”
12. The *Black's Law Dictionary* defines salary as the total income from all sources before deductions, exemptions and other tax deductions. Further, although the *Employment Act* does not define salary, it defines “remuneration” to mean the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee.
13. It is also clear from the order of March 16, 2023, that the Court ordered computation and payment of salary, and not basic salary as to allow the Respondent to differentiate and chose what aspect of the salary it should and should not pay.
14. It then follows that salary withheld per the order of the Court, meant gross salary and not basic salary.



Whether the Court is *functus officio*

15. The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter (See [Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others](#) [2013] eKLR).
16. The doctrine dictates that once a court has settled a matter and issued its final decision, the court must down its tools. The Court of Appeal in [Telkom Kenya limited v John Ochanda \(suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited\)](#) [2014] eKLR, held that –

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”
17. There are however exceptions to the doctrine of *functus officio* such as where Courts issue supervisory orders to ensure implementation of its final orders.
18. Section 34 of the [Civil Procedure Act](#) provides thus: -

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
19. The question of computation and adoption and/or clarification of the decree of the Court issued *vide* the judgment of March 16, 2023, is in my view a matter relating to execution and/or satisfaction of the decree, which by dint of section 34 of the [Civil Procedure Act](#), is a matter that lies within the jurisdiction of this court.
20. In the end, I reach the conclusion, that firstly, and for the reasons foregone, this Court has the jurisdiction to entertain the motion, and secondly, a finding that the motion has merit and is allowed as follows: -
 - a. That the computation of unpaid withheld salaries amounting to Kshs. 636,000/- be and is hereby adopted.
 - b. That the Applicant is at liberty to execute for the amount in the manner applicable to public agencies.
 - c. That in the interest of bringing this matter to a close, I make no orders on costs.
21. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF JULY, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Okelloh present for the Ex-Parte Applicant.

Mr. Barasa h/b for Mr. Nyamodi for the Respondent

Ms. Anjeline & Debra – C/As

