



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Appeal 204 of 1994

KENYA PORTS AUTHORITY.....
APPELLANT

AND

SUSAN AYOYI & 8 OTHERS.....
.....RESPONDENTS

(Appeal from the Ruling and subsequent decree of the High Court of Kenya at Mombasa (Justice Wambilyangah, J.) dated 19th January, 1994

IN

H.C.C.C. NO. 805 OF 1991)

JUDGMENT OF THE COURT

The respondents are all female employees of the Kenya Ports Authority (the appellant) and were at all material times. The respondents' complaint in the superior court was that they were wrongly deprived of house allowances on the ground that they were married to employees of the appellant in receipt of such house allowances.

What the appellant did in 1991 was to unilaterally proceed to deduct from the respective salaries of the respondents house allowances earlier paid to them if they were living with their husbands in houses in respect of which such husbands were receiving owner-occupied house allowances. According to the appellant if the husband was receiving owner-occupied house allowance the wife was not entitled to any house allowance at all. It is therefore necessary for us to go into the contracts of employment between the appellant and the respondents in order to determine the correct position with regard to these allowances. The terms and conditions of service for non-unionisable staff of the appellant, in respect of house allowances provide as follows where relevant:

“5.3 Categories of House Allowance:

There are two categories of house allowance i.e.

5.3.1. Standard house allowance

5.3.2. Owner-occupied house allowance.”

After setting our rates of standard house allowance and owner-occupied staff sets out eligibility to house allowances as follows:

“Eligibility is defined as follows:-

5.3.1. An employee of the Authority (the authority meaning the appellant)

5.3.2. In the case where both a husband and wife are Authority employees an election must be made to claim either the husband’s or the wife’s entitlement, at either the standard or the owner-occupier rate, as the case may be.

5.3.3. In the case where a male and female employee live in the same house an election must be made to claim either of the employee’s entitlement at the standard or owner-occupier house allowance, as the case may be.’

In so far as clauses 5.8.1., 5.8.2. and 5.8.3. above stated are concerned the position is clear, that is both husband and wife employed by the appellant cannot get double house allowance, either standard or owner-occupier. They must elect to receive only one, as applicable.

In the case of unionisable staff the house allowances are as follows, where relevant:

“ 7.3. Categories of house allowance

There are two categories of house allowance i.e

7.3.1. Standard house allowance

7.3.2 Owner-occupier house allowance

Eligibility:

Eligibility for house allowance is defined as follows:

7.8.1. An employee of the authority.

7.8.2. In the case where both a husband and wife are Authority employees, an election must be made to claim either the husband’s or the wife’s entitlement at either the standard or owner-occupier rate as the case may be.

7.8.3 In all cases where a male and female employee (who for all Practical purposes are husband and wife) live in the same house, an election must be made to claim either of the employee’s entitlement at either the standard owner-occupier rate, as the case may be.”

Again in so far as the above clauses are concerned it is clear that double house allowance (either standard or owner-occupier) cannot be claimed if the employees are living in the same house as husband and wife.

In May 1991 pursuant to a query from the Ag. Manager, (Financial Accounting of the appellant the Ag. Personnel manager of the appellant pointed out that some 58 employees (of which figure some were retired or dead) were in receipt of owner-occupier house allowance and standard house allowance.

On 31st day of May, 1991 the Industrial Court Ordered that standard house allowance and owner occupier house allowance be paid at certain rates to all unionisable staff of the appellant. The said Court did not make any order with regard to married couples living together.

By their letter of 26th September, 1991 M/s Gikandi & Company Advocates acting for 20 employees

of the appellant informed the appellant that unilateral recovery of already paid house allowance, when the employees involved are entitled to house allowance whether married, divorced, separated or single amounted to breach of the relevant terms of contracts of employment. The appellant responded to this letter by simply saying that it would investigate the matter and revert.

On 10th February, 1993 the Managing Director of the appellant wrote to all concerned as follows:

“All married female officers working in state Corporations will be entitled to payment of house allowance with effect from 1st December, 1992 with exception of following categories of officers:-

- (a). Those female married officers whose husbands are working in the same State Corporations and who are in receipt of house allowance;
- (b). Those female married officers whose husbands are working in the same state corporations and are in occupation of a state corporation house;(c) those female officers who are already in occupation of a state corporation house.”

This letter of 10th February, 1993 further confirmed payment of owner-occupier house allowance as follows:

- (a). Payment of owner-occupier house allowance in respect of house

Owned in either of the following circumstances:-

- (i) Solely by the married female officer.
- (ii) Solely by her husband
- (iii) Jointly by the married female and the husband.”

As regards the issue of payment of standard house allowance to a married female employee of the appellant when her husband, employed by the appellant was in receipt of owner-occupied house allowance the managing director of the appellant clarified the position as follows:

- (a). That the defendant be and is hereby restrained from receiving from the Plaintiff’s salary any sums previously paid to such employee a Standard house allowance.
- (b). That the defendant be and is hereby authorized to deduct from the Plaintiff’s salaries any owner-occupier house allowance paid to such employee if their husbands are in receipt of owner-occupier house allowance, the effective date of such deductions be 1st May, 1993.
- (c). That the defendant do pay to the plaintiffs three quarters costs of the suit.

Orders (b) (c) and (d) in the decree in the superior court were unnecessary and out of place.

Both the counsel for the appellant and for the respondent were not ready to proceed with the hearing of this appeal as they took it for granted that we would allow an adjournment for the asking. It will never be so in this Court. Litigants must be anxious to have their claims to be finalized one way or another and it is wrong for counsel to assume that this Court will grant adjournments as a matter of course.

In all circumstances, we make no orders as to costs of this appeal.

Dated and delivered at Mombasa this 25th day of January, 1995.

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR