IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, M'INOTI & OUKO, JJ.A.)

CIVIL APPEAL NO. 53 OF 2015

BETWEEN

WYCLIFFE LISALITSA..... APPELLANT

AND

THE CHIEF EXECUTIVE OFFICER

KENYATTA NATIONAL HOSPITAL.....1 ST RESPONDENT

THE MINISTER FOR MEDICAL SERVICES..... 2ND RESPONDENT

MINISTER FOR PUBLIC HEALTH..... 3RD RESPONDENT

THE MINISTER FOR PUBLIC SERVICE..... 4TH RESPONDENT

THE MINISTER FOR LABOUR..... 5TH RESPONDENT

KENYATTA NATIONAL HOSPITAL..... 6TH RESPONDENT

(Appeal from the judgment of the Industrial Court of Kenya at Nairobi (Onyango, J.) delivered on 12th May, 2014

in

Industrial Cause No. 1566 of 2012)

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JUDGMENT OF THE COURT

The genesis of this dispute are three letters from the Government dated 19th December, 2011, 12th January, 2012 and 27th January, 2012 respectively.

The first letter was in these terms:

"Ref. MSPS.7/1A/VOL.IV/22 19th December, 2011

Ms. Mary W. Ngari, CBS

Permanent Secretary

Ministry of Public Health and Sanitation

NAIROBI.

Dear Mary

ALLOWANCES FOR PUBLIC HEALTH WORKERS

Following successful negotiations between the Government and the Kenya Medical Practitioners, Pharmacists and Dentists Union on 10th December, 2011, the allowances indicated here below will be payable to Public Service Health Workers.

(i) Extraneous Allowance: Payable in Two Phases

The recognition of the fact that for Health Institutions to operate, they require the integrated support of various categories of Health Personnel, Extraneous Allowance will be paid as follows from 1st December, 2011 and 1st July, 2012:

Category	*Job Group*	*Rate P.M*	*Rate P.M*
		1st December, 2011	*1st July, 2012*
Medical Officers/Dentists/Pharmacists	*L&N*	*15,000*	*15,000*
	N-Q	*17,500*	*17,500*
	R&S	*20,000*	*20,000*
Clinical Officers, Nurses, Technologists and Technicians	*G-J*	*7,500*	*7,500*
	K-M	*10,000*	*10,000*
	N-P	*12,500*	*12,500*
	Q-R	*15,000*	*15,000*
Mortuary Attendants	*K13/12*	*5,000*	*5,000*
Drivers deployed in Hospitals	*K14*	*3,000*	*4,000*
Patient Attendants (Hospital Wards/Dispensaries/Health Centres)	*K15/17*	*2,000*	*3 ,000*

(ii) Emergency Call Allowance : One Phase

This allowance will be payable to Medical Officers deployed in hospitals only at the rate of Kshs.30,000

per month for all grades with effect from 1st December, 2011.

These two allowances will also be applicable to Medical Officers and other Health Personnel working in Kenyatta National Hospital and Moi Referral and Teaching Hospital as specified.

All other issues that the Union tabled as grievances will be handled through a Committee as agreed during the meeting of 12th December, 2011.

Please ensure that the allowances are restricted to the specified categories for the cost to be within the budgetary commitments made by the Ministry of Finance and also ensure that they are factored during the budgetary process. The allowances should be stopped in all cases where common cadre support services staff are transferred out of Health Facilities.

Please take necessary action.

Yours sincerely

Titus M. Ndambuki, CBS

Permanent Secretary

c.c. Amb. Francis K. Muthaura, EGH Permanent Secretary, Secretary

to the Cabinet and Head of the Public

Service Office of the President

Nairobi.

Mr. Joseph K. Kinyua,

CBS Permanent Secretary

Office of Deputy Prime Minister

and Ministry of Finance

Nairobi."

And the 2nd letter was in terms *interalia*:

"Ref. No. MSPS/2/1/3A Vol. III/(77) Date: 12th January, 2012

Mr. Mark Bor, CBS

Permanent Secretary

Ministry of Public Health and Sanitation

Nairobi.

Ms. Mary W. Ngari, CBS

Permanent Secretary

Ministry of Medical Services

Nairobi.

Dear

ALLOWANCES FOR PUBLIC HEALTH WORKERS

Your attention is invited to this office Circular letters No.MSPS.7/1A/VOL.IV/22 of 19th December, 2011 on the above subject which was not in tandem with our earlier circular letter No. MSPS/2/1/3A Vol. III/59 of 11th June, 2010 on the same subject.

In this regard, it has been decided that the provisions of the two circulars be harmonized and the health workers to be paid Extraneous Allowance and Emergency Call Allowance as follows:

(i) Extraneous Allowance: Payable in Two Phases

HEALTH WORKERS IN URBAN AREAS

		Phase 1 – w.e.f. 1.12.2011	*Phase II – w.e.f. 1.7.2012*
Staff Category	*Job Group*	*Rate (Kshs. PM)*	*Rate (Ksh. PM)*
Doctors, Dentists and Pharmacists Doctors, Dentists, Pharmacists And Anesthetists (including Clinical Officer Anesthetists)	*S*	*20,000*	*20,000*
	All	*15,000*	*15,000*
Clinical Officers and Nurses	*All*	*7,500*	*7,500*
Other para-medics	*All*	*3,500*	*3,500*
**Drivers and Mortuary Attendants*	*All*	*2,500*	*2,500*
**Support Staff*	*All*	*2,500*	*2,500*

****The allowance will be applicable to Drivers and Support Staff deployed in hospitals and other health facilities***

HEALTH WORKERS IN RURAL AREAS

		Phase 1 – w.e.f. 1.12.2011	*Phase II – w.e.f. 1.7.2012*
Staff Category	*Job Group*	*Rate (Kshs. PM)*	*Rate (Ksh. PM)*
Doctors, Dentists, Pharmacists And Anesthetists (including Clinical Officer Anesthetists)	*All*	*17,500*	*17,500*
Clinical Officers and Nurses	*All*	*10,000*	*10,000*

Other para-medics	*All*	*5,000*	*5,000*
**Drivers and Mortuary Attendants*	*All*	*3,500*	*3,500*
**Support Staff*	*All*	*2,500*	*2,500*

HEALTH WORKERS IN URBAN AREAS			
		Phase 1 – w.e.f. 1.12.2011	*Phase II – w.e.f. 1.7.2012*
Staff Category	*Job Group*	*Rate (Kshs. PM)*	*Rate (Ksh. PM)*
Doctors, Dentists, Pharmacists and Anesthetists (including Clinical Officer Anesthetists)	*All*	*20,000*	*20,000*
Clinical Officers and Nurses	*All*	*12,500*	*12,500*
Other para-medics	*All*	*7,500*	*7,500*
**Drivers and Mortuary Attendants*	*All*	*5,000*	*5,000*
**Support Staff*	*All*	*4,000*	*4,000*

(ii) Emergency Call Allowances: One Phase

This allowance should be payable to all Doctors (Medical Officers, Dentists and Pharmacists deployed in hospitals at the rate of Kshs.30,000 per month, irrespective of grade, with effect 1st December, 2011. The allowance should, in addition, be paid to Provincial and District Medical Officers.

This Extraneous Allowance and Emergency Call Allowance will also be applicable to Medical officers, Dentists, Pharmacists and other relevant Health Workers in both Kenyatta National Hospital and Moi Teaching and Referral Hospital as specified. The two institutions are required to liaise with Treasury for funding.

This office Circular letters under reference are therefore varied accordingly.

Please take necessary action.

Yours sincerely"

Signed.

And finally the letter dated 27th January, 2012 was along these lines:

"MINISTRY OF MEDICAL SERVICES

Afya House,

Catherdral Road,

P.O. Box 30016 – 00100

Nairobi.

The Chief Executive Officer,

Kenyatta National Hospital,

Nairobi.

The Chief Executive Officer,

Moi Teaching and Referral Hospital,

Eldoret.

PAYMENT OF EXTRANEOUS AND EMERGENCY CALL ALLOWANCES TO HEALTH WORKERS

Attached herewith a letter Ref. No. MSPS/2/1/3A Vol.III/(77) dated 17th January, 2012 from the Ministry of State for Public Service approving payment of Extraneous and Emergency Call Allowances to the Health Workers in your institutions.

I wish to confirm further that the Treasury has allocated funds to cater for phase 1 covering the period between December, 2011 to June, 2012. You are therefore instructed to effect the two allowances and pay the eligible officers for December, 2011 together with January, 2012.

Please ensure that the allowances are paid in accordance with the provisions contained in the attached circular to avoid any audit queries. It is further clarified that "Support Staff" includes Porters, Patient, Attendants, Theatre Attendants,

Cleaners and Laundry Assistants only. You are also required to submit your budgetary requirements for the period between February and June to enable Treasury allocate additional funding under the Revised Budget.

Andres A. Nyachoga

For: Permanent Secretary"

As can be gathered from the first letter, following a strike by doctors called by their union, Kenya Medical Practitioners Pharmacists and Dentists Union, "*the Union*" a return to work formula was signed on 10th December, 2011, between the union and the Government represented by the Permanent Secretary for the 2nd and 5th respondents as well as the Secretary General of the Central Organization of Trade Unions, "*COTU*". The central issue in the return to work formula was the payment of extraneous allowances ranging from Kshs.30,000/= to 40,000/= per month to the members of the union with effect from 1st December, 2011. The three letters aforesaid sought to address and clarify the payment of the said allowances. The 1st and 6th respondent thereafter implemented the Circular. In the execution of the Circular some employees deployed in the various departments of the 6th respondent such as engineering, maintenance, laundry, catering, administration, human resources, finance, salary, security, secretaries, exchange and supplies ranging between Job groups K4 and K13 in respondent's grading system were left out. Feeling that they had been discriminated against in the implementation of the circulars, these

employees by a memorandum of claim dated 3rd September, 2012, and lodged in the Industrial Court on 5th September, 2012 through the appellant, suing on his own behalf and on behalf of close to 1,000 such employees, sought against the respondents:-

> ***1. A declaration that the manner in which the respondents implemented the circulars was discriminatory, null and void;***
>
> ***2. A declaration that the manner in which the respondents executed the circulars contradicted the intendment of the said circulars;***
>
> ***3. An order compelling the respondents to pay the appellants the extraneous allowances backdated to 18th December, 2011;***
>
> ***4. Costs and interest.***

The 1st and 6th respondents filed a joint reply to the memorandum of claim in which they averred that the appellants were not party to the negotiations at which the extraneous allowances was agreed upon and were therefore not entitled to the payment of such allowances. They further averred that they implemented the circulars without discrimination and that the appellants not being party to the agreement, the respondents had no mandate to extend payment of the allowances to them without the authority of the Government.

The 2nd, 3rd, 4th and 5th respondents similarly filed a joint reply. They denied that the appellants negotiated any agreement with them and averred that the allowances claimed were not a preserve of the respondents but based on the recommendation of a constitutional body mandated to structure benefits for all government departments and employees.

With pleadings closed, parties appeared before **Maureen Onyango, J**. on 12th November 2013 who determined that the claim be canvassed by way of written submissions as it hinged on the interpretation and implementation of an agreement, the basis upon which the circulars which the appellants relied on were issued.

Respective written submissions were duly filed and exchanged followed by limited highlights. In a judgment delivered on 12th May, 2014, Maureen Onyango, J dismissed the claim holding that the appellant had not proved that they were covered in the circulars or in any previous or subsequent circulars on the subject. She further held that the appellants had not demonstrated that there was any discrimination against them in the manner in which the circulars were executed.

Unhappy with the result, the appellants lodged the instant appeal on six grounds but which can be collapsed into two broad grounds to wit:-

> **“(i) Whether the learned Judge erred in law and fact in holding that the appellants were not included in the circulars for purposes of payment of extraneous allowances; and,**
>
> **(ii) Whether the learned Judge erred in law and fact in holding that the appellants were not discriminated against by the respondents in the payment of extraneous allowances.”**

On the 7th September, 2016, when the appeal came before the Registrar of this Court for case management conference, it was agreed that the appeal be disposed of by way of written submissions. However when the appeal came before us for hearing on 14th November, 2016 only the written submissions by the appellants and those of the 2nd to 5th respondents were on record. Those of the 1st and 6th respondents were not. Similarly only counsel for the appellants and 2nd to 5th respondents attended court on that day. Though the 1st and 6th respondents and or their counsel had been served with the hearing notice in good time just like the other parties to this appeal, for unexplained reason(s) they failed

to attend court. Satisfied with the service of the hearing notice on the 1st and 6th respondents, we directed the appeal to proceed to hearing, their absence notwithstanding.

Mr. Njagi and **Mr. Onyiso**, learned counsel for the appellant and 2nd to 5th respondents respectively opted not to highlight their written submission and only prayed that we give them a date for judgment.

We have carefully read and considered the record of appeal, the judgment, the grounds of appeal, the written submissions and the authorities cited in support of and in opposition to the appeal.

In support of the first broad issue, the appellant submits that the circular dated 12th January, 2012 was very explicit on the employees to be paid extraneous allowances. That it specifically provided that support staff would be considered in the said payment. That the appellants fell in the group of support staff. As the category of support staff was clearly indicated on the face of the aforementioned circular without ambiguity, it was therefore in error for the learned judge to have held that the appellants had failed to demonstrate that they were not deployed within the categories included under the term support staff.

As regards the second broad ground, the appellants contend that **section 5** of the **Employment Act** and **Article 27** of the Constitution forbid or prohibit discrimination on any grounds other than those enumerated therein. The appellants are of the view, that the respondents' action of leaving them out of the payment of extraneous allowances was legally unjustifiable. That the proper interpretation of **section 5(6)** of the **Employment Act** was that the respondents had the onus of proving that the appellants contention of discrimination was either untrue or within the allowed statutory provisions. Accordingly, the learned judge erred in holding that there was no discrimination against them in the manner in which the payment of extraneous allowances was implemented, as the same was made in total disregard of the express statutory provisions. Finally, the appellants submit that the argument that they were not members of the Union and could not therefore benefit from the circular ensuing from the negotiations was untenable as it amounted to punishing them for not being members of a trade union and further the circulars in any event benefited other persons as well, who were not members of the union.

As for the 2nd to 5th respondents, it was submitted that the appellants were not entitled to extraneous allowance as they were not party to the negotiations that led to the issuance of the circulars. That the appellants failed to demonstrate that they were members of the union that was party to the negotiations or that they were unionsable. This omission, it was submitted, rendered their claim fatally incompetent.

With regard to the ground alleging discrimination, the respondents submit that there was no evidence that the circular was implemented in a discriminatory manner. That the circular was for the benefit of the specified category of persons, which excluded the appellants. Such exclusion cannot be said to be discriminatory.

This is a first appeal. The Court of Appeal in **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212,** while elaborating on the duty of the first appellate court, stated:-

> **"... On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence**."

It is common ground that the decision to pay extraneous allowance was precipitated by a strike called by the Union. The strike was only called off following negotiations between the Union, the Government through the 2nd to 5th respondents and Cotu. The negotiations resulted into are turn to work formula which provided for payment of extraneous allowances ranging from Kshs.30,000/= to Kshs.40,000/= with effect from 1st December, 2011. This was followed by a circular from the office of the then Prime Minister dated 19th December, 2011 specifying the category of the employees covered in the negotiations

which included:-

(i) Medical officers, Dentists and Pharmacists;

(ii) Clinical officers, Nurses and Technologists;

(iii) Mortuary attendants;

(iv) Drivers deployed in hospitals and,

(v) Patient attendants (Hospital wards/Dispensaries/Health centres)

Prior to this circular, the office of the Prime Minister had issued an earlier circular dated 11th June, 2010 on the same subject. The contents of the earlier circular were apparently not in tandem with the instant circular. Accordingly, by a circular dated 12th January, 2012, the same office sought to harmonize the two circulars and detailed the extraneous allowances payable to the following categories of employees:-

(i) Doctors, Dentists and Pharmacists and Anesthetists (including Clinical officers,

(ii) Clinical officers and Nurses;

(iii) Other Paramedics;

(iv) Drivers and mortuary attendants and,

(v) Support staff

It should be noted that it is in this latter circular that for the first time a cadre of employees known as the support staff was introduced as beneficiaries of the agreement. But who were deemed to be the support staff? In the circular dated 27th January, 2012, the Permanent Secretary of the 2nd respondent clarified that the support staff referred to were the porters, patient attendants, theatre attendants, cleaners and laundry assistants only. From this clarification, it is quite apparent that the appellants were excluded as beneficiaries of the allowances. In other words, the appellants did not fall under any of the categories listed in the harmonized circular. The 1st and 6th respondents were thus not expected to extend payment of those allowances to the appellants without breaching Government Financial Regulations. Indeed the last paragraph in the circular dated 19th December, 2011 was emphatic that "***... Please ensure that the allowances are restricted to the specified categories for the cost to be within the budgetary commitments made by the Ministry of finance and also ensure that they are factored during the budgetary process....***"

We do not agree with the submissions of the appellants that the category of support staff was wide enough as to include them and that the circular only provided an indicative list of such persons and could not be said to be final. In our view the clarification circular must have been triggered by a letter dated 3rd January, 2012 addressed to the 1st and 6th respondents and copied to the 2nd and 3rdrespondents by Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers Union. In the letter aforesaid the union referred to the circular dated 27th December, 2011 and lamented that employees from the following departments had been excluded from payment of extraneous allowances: maintenance, laundry, catering, administration, finance, human resource, salary, security, secretaries, exchange and supplies. It is instructive that majority, if not all, of the appellants fall within these departments. Therefore, when the clarification circular was issued regarding who was the support staff, the respondents were well aware of the appellants' grievances, which they gave short shrift. It is therefore not correct as averred in paragraph 11 of the statement of claim that following series of negotiations the respondents directed that the appellants be paid extraneous allowances.

It is also common ground that the appellants were not party to the negotiations that resulted in the return

to work formula. Nor was their union if at all, represented in the negotiation. Indeed the opening paragraph of the circular dated 19th December, 2011 is instructive. It states "***....following successful negotiations between the Government and the Kenya Medical Practitioners, Pharmacists and Dentists Union on 12th December, 2011, the allowances indicated here below will be payable to Public Service Health Workers...***"

From the foregoing, it is obvious that payment of extraneous allowances arose out of negotiations between the Government and the Union. The appellants have conceded that they are not members of the Union; nor were they represented in the negotiations by their Union, if any. The negotiations resulted into what can easily pass for as a contract. The appellants were not party to that contract. It is trite that the appellants cannot purport to enforce a contract to which they were not party to nor reap benefits therefrom. See **Lawi Duda & Others v Bamburi Cement Co. Ltd [2012] eKLR**. By insisting to be paid extraneous allowances, which formed part of the terms of the contract to which they were not parties they are doing exactly what is forbidden. In fact if the appellant's claim was to be allowed it would amount to inviting the court to re-write the contract between the parties. As we stated in the case of **National Bank of Kenya Ltd v Pipeplastic Samkolil (K) Ltd and Another [2001] KLR 112"...** ***A Court of law cannot re-write a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved...***" In the absence of evidence proving that the appellants were actually covered in the negotiations, and the subsequent agreement, they cannot reap the benefits accruing therefrom. Further, the submission by the appellants that they were being punished for not being members of a trade union is untenable because under the Constitution, whether to belong to a trade union or not is voluntary and a matter of choice.

This ground alone is sufficient to dispose of this appeal; we need not therefore consider the second ground, whether the learned judge erred when she held that the appellants were not discriminated against in the payment of extraneous allowances.

Accordingly, we are satisfied that the learned judge on the material placed before her reached the correct decision on the claim. We accordingly find no merit in this appeal which is dismissed with no order as to costs.

Dated and delivered at Nairobi this 3rd day of March,2017

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR