**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 310 OF 2014**

**BETWEEN**

**748 AIR SERVICES LIMITED.....APPELLANT**

**AND**

**THEURI MUNYI.....RESPONDENT**

*(An appeal from the Judgment and Decree of the Industrial Court of Kenya at Nairobi (Mathews N. Nduma, J) dated 4th February, 2014* ***in Industrial Court Case No. 773 (N) of 2009***

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**JUDGMENT OF THE COURT**

The appellant (hereinafter '**the Company**') is an air charter company registered and operating in Kenya, though it appears to have Canadian parentage. It complains about an order made by the Industrial Court **(Nderi Nduma, J.)** on 4th February, 2014 for payment of Sh.2,794,364 to its employee, Theuri Munyi **(Munyi)** who had been declared redundant.

The salient facts may be briefly stated:

> On 24th January 2007, the company employed Munyi as its Chief Accountant at a net monthly salary of Sh.300,000 amongst other terms. On 1st June, 2007, he was promoted to Finance Director at a monthly salary of Sh.495,609. Barely a year later things started going south for the company as it was not making money due to the instability in South Sudan, its main area of operation. In April 2008, the management committee of Heads of Departments (HODs) of the company led by Munyi were tasked with exploring proposals for cost cutting measures for the company to remain in business. They proposed to the Board a 15% salary reduction for senior management, without affecting other staff but the proposal was reconsidered by the Board which decided the reduction be 50%. Munyi's salary, among other 7 senior management staff, was accordingly reduced from Sh.495,609 to a basic Sh.210,180.50 per month with effect from 1st May, 2008.

The arrangement appeared to have been accepted by those affected as they took the cut. But it lasted only eight months until January 2009 when the company was forced to declare some employees redundant. Munyi was eased out on 13th January, 2009 when his services were terminated and the post of Financial Director abolished. He was paid terminal benefits calculated by the company at Sh.495,608, which included salary for days worked in January, payment in lieu of leave, payment in lieu of notice and severance pay. He accepted the payment but made it clear it was *'without prejudice'*.

On 2nd December, 2009 Munyi went before the Industrial Court and filed suit claiming that his salary deduction amounting to Sh.1,160,919.61 and Provident fund of Sh.88,224.40 for a period of 8 months from May to December 2008 was unilateral and unlawful. He also claimed the termination of his employment on 13th January, 2009 was wrongful and without notice. He later amended the claim on 18th September, 2010 to assert that he was discriminated against because some employees were favoured by

the company.

The following orders were sought:-

> ***"(a) The respondent do pay the Claimant the portion of withheld salary and other benefits since May 2008 until 13th January 2009 as tabulated in paragraph 8 above;***
>
> ***(b) The Respondent do pay the Claimant the balance of his terminal dues as tabulated in paragraph 9 above:***
>
> ***(c) Damages for wrongful termination as provided for under Section 49 of the Act for breach of contract;***
>
> ***(d) Costs of this suit;***
>
> ***(e) Any other relief that this Honourable Tribunal may deem fit and just to grant."***

The company denied that it acted unilaterally in implementing the cost cutting measures and asserted that Munyi, as an insider to the financial state of the company, was well informed and indeed headed a committee that recommended cost cutting measures, hence his acceptance of the reduced salary. It also denied that the termination, due to restructuring of the company and declaration of redundancy, was unknown to Munyi since there was communication and he accepted his terminal dues. According to the company the claim was an afterthought.

After orally hearing Munyi, **Hamed Rashid Jibril**, (the Executive Chairman of the company), and **Esther Wainaina**, (the Human Resource Manager), and considering the submissions of counsel, the trial court found, *inter alia*, that the 50% salary reduction was implemented by the Board without consultation or agreement with Munyi and was therefore arbitrary, unlawful and unfair; that Munyi, among other management staff, objected to the arbitrary reduction of their salaries as it was in breach of his contract of employment; and that the salary reduction proposal was conditional and subject to reversal when the financial state of the company improved. The terminal dues could not therefore be based on such temporary arrangement. The trial court examined the contract of employment and found no lawful amendment to it and thus found in favour of Munyi as follows:

> ***(a) All the arrear salary and benefits not paid to him as from 5th May, 2008 in the sum of Kshs.1,249,144/01.***
>
> ***(b) Arrear terminal benefits calculated in terms of the correct remuneration terms of the contract of employment in the sum of Ksh.1,454,220/75.***

Finally the court found nothing wrong with the termination of Munyi's employment on the basis of redundancy.

It is those findings, except the finding on redundancy, that the company sought to challenge under 15 grounds listed in the memorandum of appeal. However, learned counsel appearing for the company, **Mr. Ogutu**, instructed by M/s Ochieng Ogutu & Company Advocates, reduced them into 7 grounds by urging, without highlighting, grounds1, 3, 8 and 14 separately and combining grounds 2, 6, 7, 9; grounds 10, 11, 12, 13 and grounds 15, 4, 5. There are considerable overlaps in those grounds but they may be summarized:-

> **The learned Judge erred in law in:**
>
> > ***(a) Failing to address the doctrine of estoppel and whether Munyi was estopped from claiming the reduced portion of his salary having received it for 8 months.***
> >
> > ***(b) Finding that the respondent's salary was not reduced in accordance with the law of***

***contract.***

***(c) Failing to make a finding as to whether the respondent's salary was withheld as he claimed or reduced as the appellant contended.***

***(d) Finding that the respondent had objected to the arbitrary rejection of his salary.***

***(e) Finding that the contract between the parties could only be amended expressly and by consent.***

***(g) Failing to determine the issues framed.***

***(h) Awarding the respondent the sum of Sh. 2,794,364 and failing to subject it to taxation.***

**(k)** It was contended on the first ground that Munyi was estopped from claiming the reduced salary which he purports was "withheld salary" having received it for eight months without raising any complaints. Defining estoppel from ***Black's law Dictionary***, 2nd Edition, counsel submitted that the conduct of Munyi amounted to acceptance of a new term of the employment contract. He also cited this Court's definition of the doctrine in ***Serah Njeri Mwobi vs John Kimani Njoroge [2013] eKLR*** and the persuasive decision of the ELRC (**Abuodha, J.**) in ***Lawrence Omondi vs Creative Eye Limited [2015] eKLR*** where, in a case similar to this, a senior management employee was estopped from demanding the initial salary after accepting the reduced salary for five months. In counsel's submission, Munyi should be estopped from claiming the reduced portion of his salary which he had already waived by conduct and raised new legitimate expectation of the company that it was to pay the reduced salary from May 2008.

On the 2nd ground, counsel observed from the evidence on record that the salary reduction was occasioned by financial challenges and that Munyi led a management team to make proposals on cost cutting measures which team proposed a salary reduction of 15% for HODs. The Board, however, as it was entitled to, increased the reduction to 50% and informed Munyi, the team leader, who made no objections. In the circumstances, urged counsel, there was a written offer to change the written terms of the contract but Munyi did not exercise the right to reject it. It amounted to acceptance by conduct as there was no set procedure in the contract for reviewing Munyi's salary. At all events, added counsel, the reduction applied to all senior company employees. He cited the case of ***CMC Aviation Limited vs Mohammed Noor [2015] eKLR*** where an employee pilot accepted in writing a salary cut after demotion but turned round to reclaim the original salary and position. This Court stopped him.

On the 3rd ground, counsel accused the trial court of failing to note that Munyi was claiming *"withheld salary"* but the company was contending that the salary had been *'reduced'* and so, nothing was withheld. It shows lack of evaluation of the pleadings and evidence, he charged. As to the finding that Munyi had objected to the reduction, which is the 4th ground, counsel submitted that there was no such evidence and therefore the finding was baseless. A process of arriving at salary reductions was followed and it was not an arbitrary decision. The 5th ground adverts to the manner of amendment of contracts and counsel's view was that a written contract was amenable to amendment orally or by conduct. He cited the English Court of Appeal decision in ***Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others EWCA CIV 396*** for that proposition. The penultimate complaint was the failure to consider the three framed issues, counsel observing that only one issue was examined, relating to 'wrongful termination', leaving out 'discrimination at the work place' and 'failure to pay terminal benefits'. Finally, counsel faulted the trial court for saying nothing about the award being subject to income tax deduction under ***section 3 (1)*** of the **Income Tax Act**, Cap 470.

In response to those submissions, learned counsel for Munyi, **Ms. Edel Ouma,** instructed by M/s Muthaura Mugambi Ayugi & Njonjo Advocates, submitted that the doctrine of estoppel was not applicable in this case. That is because, as correctly held by the trial court, the company unlawfully

withheld Munyi's salary for 8 months without his express consent. Furthermore, the termination of the contract was unlawful. Counsel called for reassessment of the evidence on record and for revision of the trial court's orders to award Munyi the maximum 12 months' salary as damages for unlawful dismissal from employment under ***section 49*** of the **Employment Act**. She nevertheless conceded that there was no cross appeal for such prayer. Finally she stated that the issue of taxation was an obvious one which need not have been raised in the appeal. All in all, it was counsel's view that the appeal was misconceived.

We have reappraised the record of appeal under ***Rule 29 (1)*** of the **Court's Rules** in the manner of a retrial in order to arrive at our own conclusions in the matter. As always, we shall not lightly differ with the findings of fact made by the trial Court, which had the added advantage of seeing and hearing the witnesses, but will not hesitate to do so if, in our assessment, the findings were made without any evidential basis or through an error in principle such as failing to take account of particular circumstances or probabilities material to an estimate of the evidence. See ***Selle vs Associated Motor Boat Co. [1968] EA 123,*** and ***Mwangi vs Wambugu [1984] KLR.***

In our view, there are three germane issues which are dispositive of the appeal.

1. ***Whether the doctrine of estoppel applies.***

2. ***If not, whether the contract of employment was varied, and if so, in what manner.***

3. ***What are the appropriate orders in the case.***

Estoppel is not easy to define in legal terminology. In his customary innovativeness, Lord Denning in the case of ***McIlkenny vs Chief Constable of West Midlands, [1980] All ER 227*** gave the history of its evolution from French origins and compared it to a house with many rooms. Let us hear him:

> ***"..we have so many rooms that we are apt to get confused between them. Estoppel*** **per rem judicatum,** ***issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying '*** **estoppel** ***is only a rule of evidence. If you go into another room you will find a different notice: '*** **estoppel** ***can give rise to a cause of action'. Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will find in the others."***

The rooms we shall enter in the matter before us is estoppel by conduct and estoppel by election or waiver. Waiver is an intentional relinquishment or abandonment of a known right or priviledge. In the case of ***Banning vs Wright (1972) 2 All ER 987,*** **at page 998** the House of Lords stated thus:-

> ***"The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct".***

Closer home in the case of ***Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR*** the Court stated thus:

> ***"A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right."***

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the ***Serah Njeri Mwobi case (supra)*** and we adopt its analysis in respect of waiver and estoppel by conduct, thus:-

> ***"The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See Seascapes Limited vs Development Finance Company of Kenya Limited, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows:-***
>
> ***„Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him?."***

Applying the above learning to this case, it is contended that Munyi as the Financial Director and the chair of the committee of HODs which looked into the issue of cost cutting measures was aware, not only of the extent and reasons for the salary reduction, but also of his right not to accept the reduction but chose to do so for a period of eight months. He must therefore by his conduct be taken to have waived his rights. We think there is some substance in those arguments as they have evidential basis.

The letter that confirmed the Board's decision to reduce salaries was dated 22nd April, 2008 and stated as follows:

> ***"22ND APRIL 2008***
>
> ***STAFF NAME: MUNYI THEURI***
>
> ***S/N: 206***
>
> ***RE: SALARY REVIEW***
>
> ***Due to recent changes within our industry resulting in significant reduction of revenue, the company is left with no alternative but to undertake drastic measures aimed at reducing our monthly costs of operation.***
>
> ***It has therefore been decided to reduce all staff salaries by 50% effective 1st May 2008.***
>
> ***Your salary will therefore be paid as follows:***

***BASIC PAY : Kshs.210280.5***

***PAYE : Kshs.53802.34***

***NSSF : Kshs.200***

| | | |
|---|---|---|
| ***NHIF*** | ***:*** | ***Kshs.320*** |
| ***PROVIDENT FUND*** | ***:*** | ***Kshs.10514.025000000 001*** |
| ***SACCO DEDUCTIONS*** | ***:*** | ***Kshs.3000*** |
| ***NET PAY*** | ***:*** | ***Kshs.142444.135*** |

***Any other personal obligations including loans and advances will also be deducted on a monthly basis as has been the case.***

***Yours faithfully,***

***ESTHER WAINAINA***

***HUMAN RESOURCES MANAGER."***

In his oral evidence, Munyi confirmed receipt of the letter but did not respond to it. He stated, thus:-

> ***"I saw App. A to the response dated 22.4.2008. Everybody in my department received this including Petros Ali, myself. Staff salary were reduced by 50% effective 1.5.08. My salary was reduced to 210 280.5 gross. Esther Wainaina confided in me that this was unprocedural unlawful and she resigned. I took it up with the Chairman we skyped everyday. I did not reply to this letter."***

He was also aware of the reasons for the cost cutting measure and confirmed he was the author of the first proposals for 15% salary cuts, stating:-

> ***"The cut in salary was due to decline in business. The cut was discriminatory people gave views and proposals in various meetings. I authored a structure with salary cuts. It was not my decision. We had reduced staff at the company to restructure the organization was good in 2008 in my view. App. 2 page 4 company had financial strain in 2008."***

With such conduct, it is easy to accept the evidence of the executive Chairman, Jibril, that Munyi and others had understood and accepted the cost cutting measure since they never reported to the labour office or went to court. There is no evidence on record to show that Munyi and the other employees objected to the salary reduction, as erroneously found by the trial court. A finding made on no evidence on record amounts to no finding at all. Munyi received the reduced salary for eight months until the second phase of the company restructure struck by way of redundancies. He was indeed the Financial Director incharge of the payroll. Needless to say, he did not file any cross appeal against the finding by the trial court that there was nothing wrong with the redundancy declared by the company in January 2009.

It would be unjust and inequitable in those circumstances, in our view, to allow Munyi to revert to the previous legal relationship with the company. By his conduct, he evinced an intention to affect the legal relationship between him and the company for a period of eight months. The cases of ***Lawrence Omondi vs Creative Eye (K) Limited [2015] eKLR*** (supra) and ***CMC Aviation Limited vs Mohammed Noor [2015] eKLR (supra)*** are relevant in this regard. The doctrine of estoppel was raised and argued by the parties but was not considered by the trial court, which was a clear non direction. We find on the first issue that the doctrine applied in this case and was favourable to the company. With that finding, it becomes unnecessary to consider the second issue which is rendered academic. But we may briefly look at it for whatever it is worth. Is it the law that a written contract of employment can only be amended in

writing?

We are well aware of the parole evidence rule which prohibits the adduction of extrinsic evidence to alter the terms of a written contract between parties. In the case of ***Prudential Assurance Company of Kenya Ltd vs Jutley & Another [2005] eKLR*** the following passage from *Odgers Construction of Deeds and Statutes (5th Edn) at p.106* was cited stating thus:

> ***"It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence".***

In *Halsbury's Laws of England (4th Edn) vol. 9 (1) at para 622*, it is further stated as follows in respect of the rule:

> ***"Where the intention of parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms".***

The above propositions do not apply in the case before us. There is no dispute in the wording or import of the employment contract between Munyi and the company. The terms as relate to salary, position, responsibilities, leave, termination and other clauses were expressly spelt out in the letter of appointment dated 24th January, 2007. The contention is rather that it was open for the parties to enter into other agreements, written, oral, or by conduct, affecting their written contract and that this did in fact happen in respect of the term relating to reduction of salary.

As **Mwera, J.** (as he then was) stated in ***Housing Finance Company of Kenya Ltd vs Njuguna LLR 1176 (CCK)***:-

> "***Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they choose."***

The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - ***Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others (supra)*** - Lord

Justice Beatson stated as follows:

> ***"Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct."***

That court further stated that even where the contract contained a *'no oral variation'* clause, the parties were at liberty to make a new contract varying the original contract by an oral agreement or by conduct.

And so it is in this case. The variation of the salary by the act of both parties was a new term which bound them. It was erroneous therefore for the trial court to find and hold that the original contract was not capable of variation and was not varied in respect of the salary clause.

We have said enough to satisfy ourselves that this appeal is meritorious and ought to be allowed. We allow it with the consequence that the orders issued by the ELRC are hereby set aside and substituted with an order dismissing the suit filed by the respondent before that Court. Costs would normally follow the event but in the circumstances of this case it would be inequitable to condemn an employee to pay costs when the same employee suffered reduced remuneration in an effort to assist the employer to

survive in business. The order that commends itself to us is that each party shall bear its own costs here and before the Employment & Labour Relations Court.

Orders accordingly.

**Dated and delivered at Nairobi this 14th day of July, 2017.**

**P. N. WAKI**

**…….……..**

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

**…….……..**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**…….…..……..**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**