



**IN THE COURT OF APPEAL**

**AT MOMBASA**

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

**CIVIL APPEAL NO. 64 OF 2014**

**BETWEEN**

**KATIWA KANGULI.....  
APPELLANT**

**AND**

**BAMBURI CEMENT LIMITED .....  
... .RESPONDENT**

***(Being an appeal from the Judgment of the Industrial Court of Kenya at Mombasa (Makau, J.) dated 20<sup>th</sup> June, 2014***

**in**

**Industrial Cause No. 218 of 2013)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal against the dismissal of the appellant’s suit in the judgment by **Makau, J.** delivered on 20<sup>th</sup> June, 2014 in **Mombasa Industrial Cause No. 218 of 2013**. The facts leading up to this appeal are that by a letter dated 28<sup>th</sup> April, 1976, the appellant was offered employment by the respondent on a probationary basis, for a period of three months. The said employment was subsequently confirmed, with the appellant continuing to serve as a unionized miller and kiln operator at a monthly salary of Kshs.3,600/- until 15<sup>th</sup> August, 1984, when he was promoted the position of a kiln burner, a position that made him to be part of the management team of the respondent.

Accordingly, having joined management staff, the appellant ceased to be a unionized employee up until his retirement on 30<sup>th</sup> June, 2010. The basis of the appellant’s claim before the trial court was that upon his retirement, the respondent failed to properly compute his gratuity payable for the years he had worked as a unionisable employee, and as such, had been deprived of his dues to the tune of Kshs.4,755,900/-. In particularizing his claim, the appellant contended that according to the Collective Bargaining Agreement (CBA) in place, between the Kenya Chemical and Allied workers Union (*the union*) and the respondent in 2010 when he retired, he was entitled to gratuity from the time of employment in 1976 upto the time of

his retirement calculated on the basis of the salary he was earning just before his retirement.

Though he conceded that the respondent had paid him Kshs.2,372,732/- as gratuity, he was quick to add that the amount thus paid was for the period in which he was engaged as a management level employee. However, he was underpaid the gratuity for the period between 28<sup>th</sup> April, 1976 and 15<sup>th</sup> August, 1984 when he was a unionized employee. He contended that, that amount should have been computed as per the 2010 CBA as follows:- **Last basic salary x the monthly rate set by the CBA x the years served.** This he said, translated to: **Kshs.191,000 x 3 months x 8.3 years= Kshs.4,755,900/-** This was the sum sought in the memorandum of claim dated 1<sup>st</sup> November, 2012. Instead he was paid **Kshs.2,372,732** made up as follows: **Kshs.3,600 x 2.5 x 8.33 = Kshs.74,970/-.**

On its part, the respondent filed a response to the claim, dated 30<sup>th</sup> September, 2013, denying any indebtedness to the appellant. The respondent's position was that since joining management in 1984 to the time of his retirement in 2010, the appellant was not a unionized employee and could thus not claim to have been entitled to gratuity in respect of that period. Further, that the sum paid in gratuity pertained to the period between 28<sup>th</sup> April, 1976 to 15<sup>th</sup> August, 1984, and the computation thereof was in accordance with the CBA in place as at 2008. In line with this, the respondent averred that the appellant's contention that the 2010 CBA was applicable was erroneous and misleading. In addition, the respondent stated that on receipt of the gratuity thus paid, the appellant had acknowledged the same to be in full and final payment of his gratuity dues. Consequently, it was the respondent's contention that the said acknowledgement estopped the appellant from lodging a claim such as the one before the trial court. In view of the above, the respondent urged the court to find the appellant's claim mischievous, without basis and to dismiss the same with costs.

The claim before the trial court was disposed of by way of written submissions, with evidence adduced through the bundles of documents filed by the respective parties. To buttress his argument, the appellant contended that the computation formula he was claiming under had been employed by the respondent with regard to other workers' gratuity dues, case in point being one **Mugala Karani Tofa** and the appellant could thus not fathom why his computation was done differently.

By the aforesaid judgment, the learned trial Judge ruled in favour of the respondent, holding that the claim was without merit, thereby dismissing the same with costs, hence this appeal. Though mounted on six grounds, the gist of this appeal is on three issues; One, that the learned trial Judge erred in failing to find that the gratuity payable between 1976-1984 was wrongly calculated. Two, that the learned Judge erred in holding that the salary applicable in calculation of gratuity herein was the salary as at the time the appellant ceased to be unionized and not the salary as at retirement and three; that the trial Judge erred in finding that the appellant could not benefit from the CBA that was in place as at the time of his retirement.

With leave of court, the appeal was disposed of through written submissions. Through the said submissions, the parties have basically reiterated their respective submissions and positions in the trial court as summarized above. In our view, those three issues of the appeal can be collapsed into one broad issue, whether the appellant was entitled to gratuity for his entire period of employment and if so, the calculation and quantum thereof.

Both the 2008 and 2010 CBAs express themselves as being applicable to "*all employees who are represented by the union...*" The question that thus arises is, can a non-unionized employee benefit from a CBA between the union, its members and their employer? By definition, a CBA is a tri partite agreement between the employer, the trade union and the employee. As such, it is governed by the rules of contract, notably the doctrine of privity of contract.

**It thus follows, that a non-member to the union is not privy to it and cannot seek to enforce any benefits arising therefrom. The moment a worker ceases to be a member of the union, he also ceases to pay any union dues and/ or suffer any forbearance for the union. Consequently, he becomes a stranger to the consideration moving between the parties to the CBA. In *Aineah Liluyani Njirah v Aga Khan Health Services [2013] Civil Application No. 194 of 2009*, this Court, differently constituted**

observed that:-

***“There is, however, an important distinction made between express and implied benefits which are enforceable under a contract by a third party. When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so.” (emphasis added)***

Having been unionized from 28<sup>th</sup> April, 1976 to 15<sup>th</sup> August, 1984 (8 years, 3 months and 18 days), the appellant was thus entitled to gratuity as per the Union’s CBA then in force for the said period and the said period only. It is common ground that a sum of Kshs.2,372,732/- was paid to the appellant as gratuity. The appellant disputes the computation thereof.

According to clause 30 of the CBA dated 17<sup>th</sup> April, 2008, “An employee proceeding on normal retirement at 55 years shall qualify for payment of the following retirement benefits:-

**“(a) Service gratuity**

***For service between one and five years- one month basic pay for***

***each completed year of service.***

***For service over five years and less than twenty year - three month’s basic pay for each completed year of service.***

***For service over twenty years - three month’ basic pay for each completed year of service***

***And pro payment where the year is not completed”***

It is not in dispute that during his unionized period of employment, the appellant earned a basic wage of Kshs.3,600/-. Bearing in mind that his unionization subsisted for 8 years 3 months and 3 days, in the above schedule, his rate would fall under the second category. In light of this, the computation of his gratuity for the unionized period would be; his monthly wage x the monthly rate set by the CBA x the years served. This translates to: Kshs.3,600/- x 2 x 8.33 = 59,976/-. The respondents contend to have used a different rate, which yielded an even higher figure. According to the respondent’s computation, the figure was calculated as follows; Kshs.3,600 x 2.5 x 8.33= 74,970/-. Be that as it may, the latter figure can be seen as having been included in the computation of the terminal dues paid to the appellant. In view of the above, we consider that the appellant was not entitled to the sum claimed as the gratuity pursuant to his preferred method of calculation for the contested period since the respondent had properly computed the same. In other words, the calculation by the respondent was proper and legally sound. With regard to the appellant’s averment that other employees had given gratuity on different terms, such an argument cannot hold as no evidence has been adduced to this end. In any event, the appellant’s claim was not premised on discrimination.

Lastly, it is not lost on us that on 11<sup>th</sup> March, 2011, the appellant signed a document entitled “Acceptance of transfer of gratuity for period served as unionisable employee” and that it was in line with this that he received the sum of Kshs.2,372,722/- aforesaid. It is also not in dispute that subsequent to this, the appellant also signed a discharge voucher dated 4<sup>th</sup> June, 2011, in which he acknowledged receipt of the aforesaid sum duly taxed off. Of utmost importance to this case however is that, in signing the discharge voucher, the appellant admitted that the received sum was “was in full and final settlement and discharge

of all sums due to me and acknowledge that I have no further claims against the company including claims for reinstatement.” This constituted an unequivocal representation by the appellant that all his dues had been settled. Short of proving that this representation was secured through fraud, duress, mistake, undue influence or misrepresentation, the appellant cannot be allowed to disown it. **According to Halbury’s Laws of England 3<sup>rd</sup> Ed. Vol. 15 at paragraph 344,**

**“When one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.”**

It is in situations such as these that the doctrine of promissory estoppel applies. Estoppel is a set of doctrines in which a court prevents a litigant from taking an action the litigant normally would have the right to take, in order to prevent an inequitable result

In such a case, it is presumed that both parties understood the full implications of the undertaking and promise so given, and the promisor cannot thereafter be allowed to renege on his promise or undertaking. See **Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130** and **Silas Njiru & The Catholic Diocese of Meru v Andrew Kiruja [2010] eKLR**.

In signing the discharge voucher on the terms aforesaid, the appellant in essence gave an undertaking not to lodge a claim for any further gratuity dues. Unless he could show that that undertaking was vitiated by fraud, duress, mistake, undue influence or misrepresentation which was not the case here he remains so bound by the undertaking.

In the end, we are of the considered view that the appeal should fail with costs. It is so ordered.

***Dated and Delivered at Malindi this 17<sup>th</sup> day of July, 2015.***

**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**

