REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appeal 300 of 2009

BETWEEN
TEACHERS' SERVICE COMMISSION.....APPELLANT

AND

SIMON P. KAMAU & 19 OTHERS .....RESPONDENTS

(Being an appeal from the judgment and decree of the High Court of Kenya at Nakuru (Maraga, J.) dated 23rd October, 2008
in

H.C.C.C. No. 65 of 2006)
****

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court *(Maraga, J.)* delivered on 23rd October, 2008.

The factual background is that the respondents are all retired teachers and were prior to their retirement employees of the appellant and members of the Kenya National Union of Teachers, hereinafter called "the Union". On the other hand, the appellant is a body corporate with perpetual succession with power to sue and be sued and it was at all times the national employer of the respondent as stipulated in the Teachers Service Commission Act.

In the superior court, the twenty respondents instituted a suit against the appellant ***H.C.C.C. No. 65 of 2006*** and also sought leave to institute the suit on their own behalf and on behalf of all the other retired teachers.

The heart of the dispute is that following protracted negotiations between the appellant and the teachers, an agreement relating to a remuneration package for all teachers was signed which package was to be effective after 1st July, 1997. The package included serving teachers and who were on leave pending retirement or final termination of appointment or after that

date. Pursuant to the agreement, the appellant gazetted the salary package incorporating salary increments and other benefits as set out therein.

As regards the twenty named respondents, at the point of retirement their salaries were calculated in such a way that the salary covered the first phase of the agreement but the anticipated lump sum payment was not reflected in the final salary for the purpose of calculation of pension, hence the suit filed in the superior court because pension calculations to be were as per the relevant law, required to be based on the "last salary.".

The appellant's main contention is that the implementation of the enhanced remuneration as per the agreement was done in phases and that at the time of their retirement, the plaintiffs benefited from the 1997 phase which then constituted the only logical and legal basis for the calculation of pension awardable in terms of ***section 10*** of the Pensions Act. After a full hearing the superior court found for the respondents and granted the prayers sought in the plaint hence this first and final appeal to this Court.

The Defendant relies on nine grounds of appeals as follows:

1. ***The learned Judge erred in law and fact in failing to appreciate that the claim before him was for unpaid pension and retirement benefits and not for unpaid salaries***

2. ***The learned Judge erred in law and fact in failing to recognize that a claim for unpaid Pensions and Retirement benefits could only be maintained as a against the Director of Pensions pursuant to Section 3 of the Pensions Act and not the Teachers Service Commission.***

3. ***The learned Judge erred in law and in fact by ordering the computation and payment of unpaid Pensions and Retirement Benefits on the basis of salaries that Respondents never earned an order, per-in curium or contrary to the Pensions Act.***

4. ***The learned Judge gravely erred in failing to establish that the Leave Order Obtained through Nakuru Miscellaneous Application 497 of 2005 allowing the respondents to commence a representative suit on behalf of their purported colleagues was advertised as required in order that the outcome thereof would affect and/or apply to all they purported to represent.***

5. ***The learned Judge so gravely and seriously erred in law when he constructed Section 10(1) of the Pensions Act in a manner that amounted to amending it.***

6. ***The learned Judge further erred in law and in fact when he proceeded to apply his misconstruction of the said Section 10(1) to the facts of the case leading him to the obvious erroneous conclusion of the matter.***

7. ***That the learned Judge erred in law and in fact when he failed to appreciate that upon filling up the pension form and forwarding them together with all other supporting documents to the Director of Pensions, the Teachers Service Commission was fanctus officio in matters (sic) Pensions and Retirement Benefits.***

8. ***The learned Judge also erred in law and fact when he failed to appreciate that the only claim that could be sustained as against the Teachers Service Commission subject to limitation was, if at all, a claim for unpaid salaries.***

9. ***The learned Judge erred in law and in fact when he misdirected himself and gave a judgment whose net effect was to order the computation and awarding of Pensions and Retirement Benefits based on salaries that were never earned."***

The above grounds notwithstanding, in his submissions, counsel for the appellant, Mr. Bosire summarized and argued the grounds as under:

1. ***That the suit was filed against the wrong party.***

2. ***That the superior court misapplied the applicable law.***

3. ***That the order was incapable of compliance on execution.***

4. ***That leave to file a class action had lapsed at the time the suit was commenced.***

In his submissions *Mr. Bosire*, respondent contended that the true nature of the claim related to retirement benefits and pension and as a result the proper defendant should have been the Director of Pensions and or the Attorney General. In this regard he relied on section 3 of the Pensions Act.

He further contended that the unpaid salary increments fell outside the provisions of ***section 10*** of the Pensions Act in that the provision states that the pension granted under the section should not exceed the full pensionable emoluments drawn by an employee at the date of his retirement. The Act, he submitted, did not cover any anticipated or promised increments and therefore the court was in error in giving a clear provision a purposeful meaning, when the provision was not ambiguous. For this reason the superior court misapplied the law and/or misdirected itself on the relevant or applicable law. In particular, counsel contended that the proper claim should have been against the appellant for unpaid salaries. Since the claim covered pensions the respondents had failed to join the proper party namely the Director of Pensions or the Attorney General and as a result the judgment and decree obtained were not capable of compliance or execution.

Finally the learned counsel urged the Court to note that the suit was filed four months after leave to institute the class action whereas the respondents had been given 21 days to institute the suit and therefore failure by the respondents to comply with the terms of the order for leave was fatal to the suit and the appeal.

Mr. Kimatta, learned counsel for the respondents submitted that the linchpin of his clients case was that negotiations between the Union and the Teachers Service Commission were protracted and culminated in the signing of the 1997 Agreement which incorporated salary increments and other benefits, which due to hard economic times facing the government at the time, were agreed to be paid in phases and that only the 1997 phase was implemented hence the dispute.

Mr. Kimatta submitted that the respondents and other retirees numbering 50,000 nationwide were entitled to all the benefits as clearly stipulated in the agreement.

Pursuant to the agreement the respondents were awarded a lump sum package on top of their existing salaries and that the agreement embraced salaries and other benefits and the benefits were reflected in a conversion table and also duly gazetted. The learned counsel demonstrated that the actual position was set out in a letter dated 24th November, 1997 which made reference to Legal Notice 534 of 11th November, 1997 and which the Commission addressed *inter alia* to all Provincial Directors of Education which stated that the increase on salaries and allowances had been spread over a period of five years ending on 1st July, 2001 and further confirmed that the benefits applied to the respondents and by a subsequent agreement between the Government of Kenya and the Union signed on 24th May, 2003 by the representatives of both parties it was agreed as under:-

> ***"(i) That the payment of the agreed package be effected within six (6) years with an initial instalment of Kshs.4 billion beginning July, 2003 with other payments being paid in equal instalments of Kshs.4.9 billion.***
>
> ***(ii) That after a period of one year from the date the two parties will meet again to review and see whether the agreed period can be reduced further to five years depending on the growth of the national economy."***

Mr Kimatta added that the filing of the suit outside the period set out in the leave order was never raised in the superior court and did not form part of the grounds of appeal. He concluded his submission by stating that the prayers as set out in the plaint and in particular

prayer (c) covered unpaid salaries and other benefits.

On our part we have given the matter anxious consideration. At the outset it is clear to us that the agreement between the two parties speaks for itself as material, both as regards the benefits covered and the description of those entitled to benefits. It is clear to us that the agreement covered serving teachers and retirees involved. The latter group includes the plaintiffs and those they represent. We note that the agreed lump sum salary and other benefits were duly converted in terms of the grades of the teachers involved. For this reason we find no merit in the appellant's argument that the Commission did discharge its contractual obligation as per the agreement by only reflecting the 1997 phase on the salary slips of the retirees. In terms of the agreement we hold that plaintiff had a contractual right to have the additional salary reflected in the final salary. What should have been reflected on the pay slip was what was contractually due to the plaintiffs as per the agreement. We hold that the agreement became part and parcel of the retirees contract of service with the appellant. The entitlement was sufficiently clear and we need not strain the language of the agreement to come to this conclusion. As a court of law we cannot rewrite the agreement for the parties and our cardinal duty is to enforce the bargain struck by the parties and not to thwart it either.

We are of the view that since the last salary as appertains to the plaintiffs and others could not be ascertained in terms of ***section 10*** as at the date of retirement without reflecting the additional unpaid salary which responsibility lay with the Commission as an employer, the starting point was to ascertain the last salary as per the agreement. For this to be done, the plaintiffs had to sue the Commission as the employer for the award of lump sum payment which is what the plaintiffs did. It was incumbent upon the Commission to reflect the increment in the pay slip as the last pay and release the payslips to the Pensions Department to every entitled respondent retiree. With respect, the appellant counsel's argument put the cart before the horse! The horse is the Commission and the cart is the Director of Pension. The suit clearly places the horse first (i.e. the Commission) and the cart (second i.e. Director of Pensions) and this is what the plaintiffs did in suing the Commission.

On the issue of compliance with the order we find that since the superior court had awarded all the benefits as per the agreement, the same covered the salaries as well and this is the meaning we attach to the order as regards prayer (c) in the plaint. On the ground nearly all the other benefits were calculated as a percentage of the salary and this is clearly borne out by

the conversion table. In this regard we wish to adopt the natural meaning of the words used in the agreement and the words used include *inter alia* a lump sum salary award.

Concerning the effect of noncompliance with the order for leave to institute the suit, we note that this was never raised in the superior court or raised as a ground of appeal before us since no leave had been sought to raise it, we say no more on this. Even if it was properly raised, we find that since this was a procedural point we could not have allowed it to defeat the ends of justice, in view of our statutory duty to act justly as embraced by ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act. We would on the peculiar facts before us, decline the invitation for us to act as exhorted by the appellant.

As regards what is to be regarded as the last salary, we repeat that it is up to the Commission to work it out and thereafter ask the plaintiffs and other affected retirees to present the proper working said documentation to the Director of Pensions. We must however point out that it is not the function of a court of law to add additional words to a statute or an Act of Parliament whose provisions are unambiguous. The superior court should not have added the words *"or supposed to be drawn by him at the date of his retirement"* It would have been sufficient to find that the court was in the circumstances, in its role of interpreting or construing the provision, entitled to impose fair standards of decision making. In this regard we endorse Lord Scarmans holding in the case of ***Council of Civil Service Unions v The Minister for Civil Service [1984] A.C. 374*** that where Parliament delegates power, there is an implied duty of fairness attached to all administrative acts. According to the agreement between the parties, the respondents and other retirees, had earned the lump sum salary awarded and this additional increment should have been reflected in their pay slips as the *"last salary".* The dictates of fairness in the circumstances of the case demanded this construction. In this regard we further endorse *Lord Mustil's* holding in the case of ***Doody v Secretary of State for Home Department [1993] 3 ALL E.R. 92*** to the effect that where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair. Again in the House of Lords case ***Pearlberg vs Varty (Inspector of Taxes) [1972] IWKR 534th*** the House of Lords (now Supreme Court) held inter-alia:-

> ***"as Parliament is not presumed to act unfairly the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness."***

The respondents are not claiming what they did not earn and therefore entitled to receive from the appellant. The collective agreement, referred to in this judgment, did individually form part of the contract of service of the respondents and those they represent, with their employer. Common sense demands this interpretation since any other view would not give effect to the agreement between the parties and would not make sense. In this regard we would like to adopt the words of wisdom of Lord Goddard CJ in the case of ***Barnes v Janvis [1953] I WLR 649*** where he stated:-

> ***"A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered."***

Again in interpreting unambiguous statute we wish to re-echo the holding of Lord Simon of Ghaisdale in the case of ***Maunsell vs Olins & another [1975] AC 373 at page 391*** where he stated:-

> ***"..... In statute dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction or fulfil the purpose of the statute …"***

In the circumstances, the invitation by Mr Bosire, learned counsel, to disregard the agreement between the parties would give rise to injustice to the respondents. The meaning of the phrase "last salary" should include the effect of the agreement signed by the parties.

We therefore hold that the last salary should be computed in a way that incorporates all the terms of the agreement between the parties. In the result we uphold the superior court's judgment. The appeal is accordingly dismissed with costs to the respondents.

Dated and delivered at Nakuru this 12th day of November 2010.

M. OLE KEIWUA
.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR