REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1953 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

AMOS KIOKO MUSYOKA..... 1ST CLAIMANT

BASIL KINUTHIA ..... 2ND CLAIMANT

LUCY NGARUIYA.....3RD CLAIMANT

MARGARET NDUNGU..... 4TH CLAIMANT

RACHAEL MWILU KALEKYE..... 5TH CLAIMANT

SAMSON K. MAKAU..... 6TH CLAIMANT

STEPHEN KIHONGE..... 7TH CLAIMANT

WILFRED GATEHI GITAU..... 8TH CLAIMANT

VERSUS

CMC MOTORS GROUP LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant initiated the claim by way of a memorandum of claim dated and filed on 21st September 2016. The Claimants were employed by the Respondent as management employees for service duration ranging from 35.5 years to 2.8 years and were declared redundant on 20th January 2016.

2. The Claimants contends that the redundancy affected both the unionisable and non unionisable employees but the Respondent paid the unionisable employees based on 21 days for every worked year as contained in the CBA while the non-unionisable employees were paid based on 15 days for every worked year.

3. The Claimant states that the Respondent is in breach of the law for discriminating against the Claimants and goes against Section 40(1) (d) and as a result have suffered damages and loss which they claim from the Respondent.

4. The Claimants have calculated their underpaid severance as follows

a.... Amos Kioko Musyoki..... Kshs.443,536

b.... Basil Kinuthia Mucheri..... Kshs.100,775

c.... Lucy Ngaruiya..... Kshs.535,543

d.... Margaret Ndungu..... Kshs.256,677

e.... Rachel Mwilu Kalekye..... Kshs.23,480

f..... Samson K. Makau..... Kshs.182,755

g.... Stephen Kihonge..... Kshs.175,040

h.... Wilfred Gatehi Gitau..... Kshs.71,532

5. The Claimants states that the Respondents decision to underpay their severance is unlawful as such claims judgment against the Respondent as follows;

(a).. Kshs.1,789,338

(b).. General Damages for mistreatment and discrimination

(c)... Cost of the suit

(d).. Interest on (a) and (b) above at courts rate

(e).. Any other and/or further relief that the court may deem fit and just to grant in the circumstances.

6. In Response to the claim the Respondents filed a defence/Response to claim dated 24th April 2017.

7. The Respondent avers that Section 40(1)(g) of the Employment Act provides that an employer shall pay an employee declared redundant severance pay at the rate of not less than 15 days for each completed year of service.

8. The Respondents contends that section 40(1)(d) of the employment Act applies to members of a trade union or non-members who ought to be members but contends that it does not apply to non-unionisable employees holding management positions.

9. The Respondent avers that it is a stranger to the CBA being referred to by the Claimants and states that any such CBA does not apply to the present case.

10. The Respondent avers that the Claimants were paid severance pay at the rate of 15 days for each year worked as provided under section 40(1)(g) of the Employment Act.

11. The Respondent's states that each Claimant received a letter dated 13th January 2016 which stated how their terminal dues had been calculated which they accepted voluntarily, willingly and without any coercion as such states that the Claimants are estopped from bringing any action against the Respondent.

12. The Respondent avers that the Claimants were paid their severance pay and denies that the Claimants have suffered any loss or damage and states they are not entitled to any special or general damages.

13. The Respondent urges the court to dismiss the Claimants claim with costs.

Evidence

14. The statement of Amos Kioko Musyoka states that he had authority to sign the same on behalf of the other Claimants. He states that the Claimants were employed by the Respondent with periods of service ranging from 2,8 years to 35.5 years and were declared redundant on or around 20th January 2016.

15. That the redundancy affected both unionisable and unionisable employees and unionisable employees were paid severance pay at 21 days for each year worked as per the CBA and staff manual.

16. That Clause 7(f) of the Human Resource Policy and Procedures Manual 2014 provided for equal severance pay n the event of a redundancy. It is averred that payment of severance pay at 15 days for every completed year of service as compared to the unionisable employees was illegal irregular and breach of labour law and discriminatory.

17. The Respondent's witness **Sarah Kithaka,** the **Group Human Resources Manager** states that her statement replaced that of Mr. Ben Sifuna the former Group Human Resource Manager who had exited the Respondent's employment.

18. That after the Claimants were declared redundancy is January 2016, their dues were to be paid in accordance with Section 40(1) of the Employment Act.

19. The Witness states that the Claimants were paid severance pay at the rate of 15 days for every completed year of service. That the Claimant's voluntarily, willingly and without coercion accepted the terms of the redundancy letter dated 13th January 2016 and confirmed that they had no other or further claims of any nature whatsoever against the Respondent and its affiliates.

20. That subsequently, the Claimants willingly voluntarily and without compulsion signed of the staff clearance certificate confirming

receipt of terminal dues and accepted the same in full and final settlement of all any monies due to them by the Respondent and that they had no further claims whatsoever against the Respondent.

21. That the Claimants cannot resuscitate a done deal which they signed willingly.

22. Finally, the Witness states that the rate of severance pay received by the Claimants was neither illegal nor irregular or in breach of labour law or discriminatory.

Claimant's Submissions

23. The Claimants in their submissions have formulated the following issues for determination:

i) Whether the Respondent was in compliance with Section 40(1)(g) of the Employment Act

ii) Whether the Respondent was in compliance with Section 5(3) of the Employment Act in circulation of the employment packages

iii) Whether Claimants wilfully signed release and discharge letters upon receipt of the exit package that were the subject matter of the proceedings.

24. The Claimants submit that they were employed by the Respondent and were affected by redundancy on the 20th January 2016.

25. The Claimants submit that members of the union received severance pay that was calculated at 21 days for every year worked while the Claimants who were not members of the union received severance pay at the rate of 15 days for each worked year.

26. The Claimants submit that the Respondent failed to appreciate the provisions of Section 40(1)(g) of the Employment Act

> ***"An employer shall not terminate a contract of service on an account of redundancy unless the employer complies with the following conditions***
>
> ***g) The employer has paid an employee declared redundant severance pay at a rate of not less than fifteen days' pay for each complete year of service."***

27. The Claimants submit that Section 40(1)(g) of the Act sets out the minimum conditions and does not bar the employer from agree or contracting on better terms and that it was a fundamental right of an employee declared redundant to receive payment of not less than 15 days pay for each completed year.

28. The Claimants rely in the collective bargaining agreement specifically clause 7(f) that states

> *"Payment of severance pay for non unionisable staff shall be based on the same number of days as payable to unionisable employees."*

29. Reliance is made on the holding of Marete J. in **Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v North Coast Beach Hotel [2017] eKLR** where the Judge expressed the view that the terms and conditions of employment contained in the CBA superseded all other terms and conditions.

30. It is submitted that payment of severance at 15 days as opposed to 21 days paid to the unionisable employees was illegal, irregular and unfair.

31. On compliance with Section 5(3) of the Act, it is submitted that Article 41 of the Constitution of Kenya 2010 provided for the right to fair labour practices among other rights. That it was now settled law that labour and employment rights were constitutional rights and neither be limited nor derogated by the discharge letters. Reliance is made on the decisions in **Lillian Nyambura Nduati v Highlands Mineral Water Company Limited [2016] eKLR, Charles Nyangi Nyamohanga v Action Aid International [2015] eKLR** and **Simon Muguku Gichigi v Taifa Sacco Society Limited [2012] eKLR**.

32. The decision in **D&C Builders v Rees (1965) ALL ER VOL 3857** was used for the proposition that payment of a lesser sum cannot discharge an obligation to pay a greater sum. The decisions in **Lloyds Bank Ltd v Bundy [1974] ALL ER** and **Lee v Showmen's Guild of Great Britain [1952] ALI ER** were used to urge that the jurisdiction of the Court cannot be ousted by an agreement of parties including discharge of either party from an obligation.

33. Similarly, the decision of **Caroline Atieno Osweta v Bake & Bite Mombasa Limited [2016] eKLR** was relied upon to urge that an employer could not wave a discharge form to circumvent obligations under the law.

34. Finally, it is submitted that it would be against public policy to hold in favour of employers who compel employees to sign discharge letters to derogate lawful claims.

35. The Court is urged to strike out the Respondent's memorandum of response.

Respondent's Submissions

36. The Respondents identifies the following issues for determination;

i) Whether the payment of severance pay by the Respondent to the Claimants at the rate of fifteen (15) days' pay for each completed year of service is unlawful and discriminatory;

ii) Whether Claimants are estopped from making any claim of any nature whatsoever against the Respondent after having signed the letters dated 13th January 2016 and the staff clearance certificate.

37. The Respondent submits that Section 40(1) of the Employment Act provides that *an employer who terminates a contract of service on account of redundancy shall pay the employee declared redundant severance pay at the rate of fifteen (15) days' pay for each completed year of service."*

38. The Respondent further submits that the Claimants admitted in their memorandum of claim that they were paid severance pay at the rate of 15 days for every completed year of service.

39. The decision in **Charles Kambo Wamai v Bamburi Cement Limited [2013] eKLR** is relied upon to demonstrate the scope of a CBA in a redundancy situation.

40. Reliance is also made on the decision in **Fredrick Ngari Muchira, Howard Kipkoech Korir & 98 Others v Pyrethrum Board of Kenya [2013] eKLR** on the interpretation of Section 40(1)(d) of the Employment Act, where the Court expressed itself as follows –

> *"The court has considered that section and finds that it applies to unionisable employees so that while an employee is eligible to join the union and decides not to join the union, then in event of redundancy the employee opting not to join the union or being a union member will thereby not suffer disadvantage in view of the redundancy clause in the collective agreement. In making the finding, the court considers that such unionisable employee opting not to be a union member or to be such member is liable to pay agency fees or union dues respectively under Section 49 of the Labour Relations Act 2007 and therefore entitled to benefit from the provisions of the collective agreement. In the opinion of the court, the section does not apply to the management employees who essentially are not eligible to be union members. Accordingly, in the absence of more favourable agreement between the management staff and the Respondent, the court finds that the Claimants in the management cadre are entitled to fifteen (15) days' pay for each completed year of service as per Section 40(g) of the Act as there is no established basis for the court to order the Respondent to pay out at a higher rate of thirty (30) days per year served."*

41. The Respondent further submits that the Claimants held non-unionisable management positions and they were not and ought not to have been members of a trade union consequently section 40(1)(d) of the Employment Act does not apply. It relies on the holding in **Fredrick Ngari Muchira, Howard Kipkoech Korir & 98 Others v Pyrethrum Board of Kenya (supra)** that –

> *"Section 40(1)(d) applies to unionisable employees so that while an employee is eligible to join the union and decides not to join the union, then in event of redundancy the employee opting not to join the union or being a union member will thereby not suffer disadvantage in view of the redundancy clause in the collective agreement*.

42. It submits that the severance paid to the Claimants at the rate of 15 days for every worked year is lawful and not discriminatory.

43. On whether payment of 15% to the Claimants was discriminatory and unlawful, the Respondent submitted that Section 40(1)(d) of the Employment Act, the foundation of the Claimant's case did not apply to the circumstances of this case since the Claimants held non unionisable management positions and could not have been members of a trade union. That the computation of severance pay at 15 days for each completed year of service was lawful and not discriminatory.

44. On estoppel, it is urged that the letters dated 13th January 2016 notified the Claimants how terminal dues would be computed and were explicit on severance pay including the number of years worked and all Claimants signed the letters. In addition, the Claimants receive the payments and signed the staff clearance certificate on diverse days in the month of February 2016. In the premises the Claimants are estopped from making any claim against the Respondent.

45. The Respondents submit that each Claimant was issued with a letter dated 13th January 2016 stating how their terminal dues were calculated which they accepted and they received the money stipulated and a clearance certificate was issued.

46. The Respondents states that by signing the clearance certificate the Claimants absolved the Respondents from any further claim. Reliance is made on the Court of Appeal decisions in **Coastal Bottlers Ltd v Kimathi Mithika [2018] eKLR** and **Trinity Prime Investment v Lion of Kenya Insurance Company Ltd [2015] eKLR** where the Court addressed the issue of discharge vouchers and letter in detail.

47. Finally, the Respondent submits that since the Claimants signed the discharge letters and the staff clearance certificate and received payment, they are estopped from making any other claim against the Respondent.

48. The Respondent urges the court to dismiss the Claimants claim with costs.

Determination

49. After careful consideration of the pleadings, documents on record and submissions by Counsel, the issues for determination are: -

a) Whether the discharge letters extinguished other claims against the Respondent;

b) Whether the Claimants were entitled to severance pay at 21 days for every completed year.

50. As regards discharge letters the parties have adopted diametrically opposed positions and so are the judicial authorities relied upon to reinforce the submissions.

51. The Court of Appeal has addressed the issue of discharge agreements/letters and vouchers in several decisions so has the Employment and Labour Relations Court.

52. In **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** the Court of Appeal cited its holding in **Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR**

> *"… it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs."*

53. In **Coastal Bottlers Limited v Kimathi Mithika (supra)** the Court held that

> *"Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.*
>
> *As such, we respectfully disagree with the submissions made on behalf of the respondent to the effect that this Court in the **Thomas De La Rue Case** found such agreements could not bar further claims. Our understanding of that decision is that the Court simply stated that the answer lay with the facts of each case. In its own words, this Court in the aforementioned case expressed:*
>
> > *"We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge."*

54. In **Coastal Bottlers Limited v Kimathi Mithika (supra)** the discharge letter tabulated the Respondent's entitlement. The Court stated:

> *"In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties …Giving effect to the parties' intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant."*

55. In **Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR** the Court of Appeal was categorical that:

> *"… we agree with the Learned Judge that the execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged ... We therefore find that the execution of the discharge voucher by the appellant and the receipt of the sums therein stated, no more liability by way of any balance of the loss remained with the respondent."*

56. The Court is in agreement with these sentiments.

57. In the instant case, the Claimants executed the discharge/agreements or letters between 20th and 23rd January 2016 and the staff clearance certificates on diverse days from 2nd to 12th February 2016, thirteen days later. The discharge letter or agreement read as follows –

> *"PRIVATE & CONFIDENTIAL*
>
> *Ref: BS/KM/2016/0029*
>
> *Date: 13th January 2016*

Amos Kioko Musyoka

Staff No. B3G/0502

Service Advisor

CMC Motors Group Ltd.

NAIROBI

Dear Mr. Musyoka,

REDUNDANCY

Please refer to our letter of 8th December 2015 regarding the refusal by Volkswagen Group to grant the organization change of control and the subsequent termination of the Distribution Agreement.

In the circumstance, we have no alternative' but to significantly downsize the VW operation in line with the business needs and would like to notify you that your role has been declared redundant with effect from 20th January 2016.

You are expected to commence a handover of any Company property in your possession to your respective Line Manager, Medical Insurance Cards for yourself and your family members (If any) to the respective Departments and thereafter contact Human Resources for payment of your terminal dues which will be tabulated as follows less statutory deductions that may be lawfully effected and any

liability you may have with the Company;

· *Basic Salary for 20 days worked in the month of January 2016 for which you will be paid Kshs.41,565.33.*

· *One (1) month's pay in lieu of notice in accordance with the Appointment Letter.*

· *Payment for accrued but un-utilized leave days whereas of 20th January 2016 you will have 27 days which amounts to Kshs.55,345.00.*

· *Severance pay at the rate of Fifteen Days (15) pay for completed years of service. As of 20th January 2016, you will have worked with the company for 35.5 years therefore your severance pay in accordance to the prevailing labour laws is Kshs.1,105,811.00,*

· *You shall be notified separately by the Pension Administrators of your entitlement under the Pension Scheme.*

On behalf of the Management of this Company, we would like to acknowledge the invaluable services that you have provided to the company in the past 35.5 years and take this opportunity to wish you well in your future endeavours.

Yours faithfully

CMC MOTORS GROUP LIMITED

SIGNED

BEN SIFUNA

GROUP HUMAN RESOURCES MANAGER

Encl.

ACCEPTANCE

I,…… have read and understood the contents of this letter and agree to be bound by the terms hereof and hereby confirm that save for the terminal dues enumerated above, I have no other or further claims of any nature whatsoever against CMC Motors Group Ltd and its affiliates.

*Signed by Me (**SIGNED**) this 21 day of JANUARY 2016"*

58. Applying the above principles to the instant case, it is common ground that the Claimants were employees of the Respondent for diverse periods ranging from 2.8 years to 35.5 years.

59. The discharge letter was an offer to the Claimants which all accepted by indicating the name, signature and date. None of the Claimants has alleged that they were labouring under any form of incapacity or were compelled to sign the agreement or the contents were misrepresented or that there was fraud or undue influence.

60. Submissions by the Claimant's Counsel that the Claimants were given readymade documents to affix their signatures before receiving their severance pay, is not supported by any evidence. Moreover, none of the Claimants signed the two documents under protest or declined to sign for purposes of more information and/or clarification.

61. It is not alleged that the Claimants had not been taken through the necessary steps in a proposed redundancy and in particular, the one (1) month notice, consultations and a way forward. The discharge letter makes reference to an earlier letter dated 8th December 2015.

62. In sum, no reason has been advanced to demonstrate that discharge letter/agreement should be invalidated in line with Section 107(1) of the Evidence Act, that he who alleges must prove.

63. As the Court of Appeal has observed, a discharge voucher or agreement or letter is a complete agreement binding on the parties thereto.

64. The Claimant submits that the Respondent did not comply with Section 40(1)(d) of the Employment Act which states that –

> **(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—**
>
> **(a) …;**
>
> **(b) …;**
>
> **(c) …;**
>
> **(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**

65. It is not in dispute that the Claimants were non-unionisable employees of the Respondent. The Claimant relies on the decision in **Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v North Coast Beach Hotel (supra)** where the grievants were members of the Claimant trade union and the Learned Judge applied the terms and conditions contained in the CBA. This case is distinguishable in that the grievants were not only unionisable but were members of the union. In the instant case, the Claimants were neither unionisable nor members of trade union which ought to have championed their cause.

66. In **Charles Kambo Wamai v Bamburi Cement Limited [2013] eKLR** the Court expressed itself as follows:

> *"That the claimant was not a unionisable employee and as such the provisions of the CBA concerning the unionisable employees did not apply to him. According to the CBA produced as document No, 2 filed in court on 9/7/2013, the job group A-E are only workers covered by the CBA and they earn much lower salaries than the claimant. Whether the claimant rejoined the union after appointment to management office was neither here not there, it did not change the terms of contract which excluded him from benefits of the CBA. Consequently, the terms of redundancy for him were to be dealt with under Section 40 of the employment Act 2007. Section 40 of the said Act provides that before termination by redundancy, the employer shall … pay terminal dues including accrued leave days, not less one month notice pay, and severance pay of not less 15 days' pay for each completed year of service.*

67. The uncontroverted evidence on record is that the Claimants were managerial staff and did not belong to any trade union.

68. The Court is further guided by the sentiments of my brother Ongaya J. in **Fredrick Ngari Muchira, Howard Kipkoech Korir & 98 Others v Pyrethrum Board of Kenya (supra)** relied upon by the Respondent as follows:

> *"The court has considered that section and finds that it applies to unionisable employees so that while an employee is eligible to join the union and decides not to join the union, then in event of redundancy the employee opting not to join the union or being a union member will thereby not suffer disadvantage in view of the redundancy clause in the collective agreement. In making the finding, the court considers that such unionisable employee opting not to be a union member or to be such member is liable to pay agency fees or union dues respectively under section 49 of the Labour Relations Act, 2007 and therefore entitled to benefit from the provisions of the collective agreement. In the opinion of the court, the section does not apply to the management employees who essentially are not eligible to be union members. Accordingly, in absence of more favourable agreement between the management staff and the respondent, the court finds that the claimants in the management cadre are entitled to 15 days' pay for each completed year of service as per Section 40(1)(g) of the Act …"*

69. Although the Claimants submit that there is sufficient judicial precedent on the applicability of discharge letters and rely on the decisions in **Lillian Nyambura Nduati v Highlands Mineral Water Company Limited (supra), Charles Nyangi Nyamohanga v Action Aid International (supra), Simon Muguku Gichigi v Taifa Sacco Limited (supra)** and **Caroline Atieno Osweta v Bake and Bite Mombasa Limited (supra),** the more authoritative pronouncements by the Court of Appeal are neither mentioned nor distinguished relative to the instant case.

70. As regards the effect of payment of a lesser sum, this is the rule in **Pinnel's case (1602) 5 Co Rep 117a** where the Court observed that:

> *"Payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, etc. in satisfaction is good. For it shall be intended that a horse, hawk, or robe, might be more beneficial to the plaintiff than the money ..."*

71. This rule was further elaborated in **Foakes v Beer [1884] App. Cas. 605**. The rule in **Pinnel's case (supra)** is a rule of consideration and has several exceptions where payment of a lesser sum extinguishes the entire debt and these include payment accompanied by fresh consideration, prepayment at the creditors request or were parties entire into a deed of release or promissory estoppel applies.

72. In the instant case, none of the Claimants have shown that they were entitled to a large sum before 13th January 2016, but more significantly, all Claimants executed a deed of release voluntarily with full knowledge and information of the circumstances and effect of the discharge agreement or letter.

73. The decision in in **Lloyds Bank Ltd v Bundy (supra)** relied upon by the Claimants is often cited as authority for the principle of unconscionable bargains, which is an offshoot of the vitiating element of undue influence in the law of contracts.

74. Neither of the Claimants has pleaded undue influence or unconscionability of the discharge agreement or letter.

75. Having demonstrated that the employment law in Kenya is the general law of contract as much as the common law principles some of which are have been given a statutory expression by the Employment Act and other statutes, including the Constitution of Kenya, it is important to emphasise that the employment contract is a contract and the relationship between an employer and employee cannot be established outside the contract. The rights and duties guaranteed by law flow from the contract.

76. Under the law of contract, what has been created by agreement may be extinguished by agreement as encapsulated by the maxim *eodem modo quo oritur, eodem modo dissolvitur "An agreement by the parties to existing contract to extinguish the rights and obligations that have been created it, itself a binding contract provided that it is either made under seal or supported by consideration."*

See **Cheshire G.C., Fifoot C.H.S and Furmston M.P**, **The Law of Contract [8th Edition 1972] at 529.**

77. In the words of Sir Charles Newbold P. in **Damondar Jihabhai & Co Ltd & Another v Eustace Sisal Estates**

Ltd 1967 EA 153 at p 156

> *"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."*

78. For the foregoing reasons, the Court is satisfied and finds that the discharge agreement or letter dated 13th January 2016 and signed by all the Claimants on diverse dates between 20th and 23rd January 2016 and the staff clearance certificates signed on diverse dates between 1st and 22nd February 2016 were binding agreements, by which the Claimants voluntarily waived their rights pursue any further claim against the Respondent.

79. As to whether the equitable principle of estoppel raised by the Respondent applies to this case, the Court relies on pronouncements made by English Judges who formulated the principle which is now applicable in Kenya as explained by Spry JA in **Century Automobiles Ltd v Hutchings Biemer Ltd [1965] E.A. 304**.

80. In the words of Denman C.J. in **Pickard v Sears [1837] 6Ad. & El. 469**

> *"The rule of law is clear that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time."*

81. The principle was elaborated by Lord Denning L.J. in **Combe v Combe [1951] 2KB 215** as follows:

> *"Where 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 a promise or assurance cannot afterwards be allowed to revert to the 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, even though it is not supported in point of law by any consideration but only by his word."*

82. In the instant case, it is common ground that the Claimants signed the redundancy letter dated 13th January 2016 on diverse days in the third week of January 2016. By their conduct they made a representation to the Respondent which it acted on and discharged its part of the bargain by paying the amounts due to each of the Claimants who subsequently signed the staff clearance certificate confirming that they had accepted the payment in full and final statement of all and any monies due to them from the Respondent and had no further claim whatsoever. By paying the amounts due to the Claimants, the Respondent changed its legal position and it would be inequitable for the Claimants *"to revert to previous legal relations as if no such promise or assurance had been made"* by them. They are estopped by their conduct.

83. As to whether the Claimants were entitled to severance pay at 21 days for every completed year of service, it has been demonstrated that the Claimants held non-unionisable positions and therefore not eligible to join a trade union. In addition, the non-applicability of Section 40(1)(d) of the employment to managerial staff has also been demonstrated.

84. More significantly, however, it has been demonstrated, with the help of judicial precedent that the parties entered into a mutual agreement dated 13th January 2016 to discharge and/or release each other from the obligations created by their respective contracts of employment.

85. There is no evidence on record that any of the Claimants faulted the process of declaring them redundant. Having interacted with the Respondent's Human Resource Policy and Procedures Manual, 2014 whose paragraph or clause 7(f) provided that in the event of being declared redundant *"payment of severance pay for non-unionisable staff will be based on the same number of days as payable to unionisable employees"*, the Claimants are deemed to have been aware of this clause since it was part of their contract of employment when they signed the discharge letter or agreement. None of the Claimants has pleaded or alleged ignorance of Clause 7(f) of the Respondent's Human Resources Policy and Procedures Manual, 2014 or the CBA relied upon. The same is admitted in the witness statement of Amos Kioko Musyoka.

Conclusion

86. **Accordingly, having found that the discharge letter dated 13th January 2016 was a legally binding agreement by which the Claimants waived their rights to make further claims against the Respondent in respect of the contract of employment between them and the employer, the Claimants' prayers set out in paragraph 26 of the memorandum of claim dated 21st September 2016 are not sustainable and the suit is hereby dismissed.**

87. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3RD DAY OF JANUARY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE