



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.37 (N) OF 2010**

**AGNES MUTHONI & 34 OTHERS .....CLAIMANTS**

**VERSUS**

**KENYA MEDICAL RESEARCH INSTITUTE (KEMRI) .. RESPONDENT**

**AND**

**UNION OF NATIONAL RESEARCH AND ALLIED INSTITUTES STAFF**

**OF KENYA (UNRISK).....INTERESTED PARTY**

**RULING**

The ruling herein relates to the claimants application dated 1<sup>st</sup> November, 2021 seeking for Order (6) thereof that;

6. The claimants herein be at liberty to execute for the payment of their basic *salaries due from 15<sup>th</sup> June 2015 to 18<sup>th</sup> October 2021* and thereafter be at liberty to execute for payment of their gross monthly salaries as and when they fall due at the end of each month upon the lapse of the 30 days stay issued by this court.

The application is supported by the Affidavit of Garland Biko Livondo.

In the ruling of the court delivered on 10<sup>th</sup> December, 2021 the court addressed this application and outlined all the orders sought and in the final analysis made the following findings;

The claimants filed application dated 1<sup>st</sup> November, 2021 seeking for orders that;

1. Spent
2. That the Claimant/ Applicant be granted leave to institute contempt of court proceedings against the Acting Director General of the Respondent, herein namely Prof. Samuel Muriuki.
3. That Summons to be issued against the Acting Director General of the Respondent namely Prof. Samuel Muriuki herein to appear before this Honourable court and show cause why he should not be committed to civil jail for such term and/ or fined for contempt of contempt of court for such sum as the court may deem fit and just.
4. That the Acting Director General of the Respondent namely Prof. Samuel Muriuki herein be committed to civil jail for a term of six (6) months for contempt of court for having deliberately and blatantly disobeyed orders of this court issued on 14<sup>th</sup> October 2021 and served upon him.
5. That the Respondent and the Acting Director General of the Respondent namely Prof. Samuel Muriuki herein be compelled to personally pay the sum of Kshs. 1,000,000 million for contempt of court and such other daily sum the court may deem fit and just, until and unless the contempt herein is purged.
6. That the Claimants herein be at liberty to execute for the *payment of their basic salaries due from 15<sup>th</sup> June 2015 to 18<sup>th</sup>*

October 2021 and thereafter be at liberty to execute for payment of their gross monthly salaries as and when they fall due at the end of each month upon the lapse of the 30 days stay issued by this honourable court.

7. That this Honourable Court be pleased to issue any other or further orders of the court geared towards protecting the dignity and authority of the court.

On the analysis, the orders issued were that;

**....application dated 1<sup>st</sup> November 2021 is hereby allowed. I find the Respondent's Director and currently a position held by the Ag. Director, Prof. Samuel Kariuki to be guilty of contempt of court of the orders of this court issued on 14<sup>th</sup> October 2021. He is to appear in court on 16<sup>th</sup> December, 2021 for mitigation and sentencing.**

On Order (6) of the Notice of Motion dated 1<sup>st</sup> November, 2021 the claimants submitted that the court granted them an order for the tabulation of the due basic pay to be paid within 30 days which lapsed on 15<sup>th</sup> December, 2021. Only fair that the court do allow for execution for the sums due.

The claimants in tabulation of their dues in paragraph 22 of annexure 8 of the Respondents Compliance Affidavit state that the sum due is ksh.158, 610,700 is not verifiable and is without details of the tabulations. The respondent has given contradictory figures regarding the budgetary approval sums needed or implementation of the award.

The respondent has refused to disclose the following pertinent issues for non-payment of back pay and the excuse of lack of budgetary provisions;

Why they never made provision of the back pay despite being aware of the judgement since 13<sup>th</sup> May, 2010;

The respondent made and remitted the back pay for the period of 7<sup>th</sup> December, 2010 to 15<sup>th</sup> July, 2015 consisting of Ksh.50,569,000 and has failed to explain where this payment came from and why there was no budgetary allocation since;

The respondent has not explained where the sum of ksh.843, 604.80 which was paid to the claimants came from in the absence of a budgetary allocation; and

The respondent has not attached previous budgetary estimates to demonstrate that it did not make provision for the due back salaries.

The respondent is buying time as they await the Court of Appeal to overturn the court ruling whereas the order directing them to pay the back pay was to take effect within 30 days which has since lapsed and should pay the sum of ksh.158, 610,708 which is due as of 17<sup>th</sup> July, 2015. It has taken over 11 years for the respondent to give justice to the claimants. The obstinate refusal to pay in terms of the original award has put the respondents in their current situation as the matter of sentencing the Acting Director General is put in abeyance.

There is no reason why the respondent has partially complied with the court orders and paid Ksh.843, 604.80 and then declined to pay for the subsequent years under the guise that there is no budgetary allocation.

The claimants also submitted that the total sum due to them is ksh.158, 610,708;

Total sum paid to each claimant is ksh.843, 604.80;

Total due ksh.157, 767,101.20.

The claimants are seeking for the court to ascertain the due amount for execution to proceed. Once the figures are ascertained, a decree of the court shall issue for execution to proceed.

The Interested Party supported the claimants' application and that the court should allow them to proceed with execution proceedings taking into account the non-compliance by the respondent and the various rulings and directions of the court herein.

The respondent submitted that the application referenced by the claimant and Order (6) related to contempt of court and not on execution proceedings and which was determined in a ruling delivered on 10<sup>th</sup> December, 2021. No order was granted for leave to proceed with execution. The ruling had no blanket order allowing execution to proceed. That application is spent.

The respondent also submitted that where court were to find that the application and Order (6) is alive and active, such would be contrary to Rule 32 of the Employment and Labour Relations Court (Procedure) Rules which requires that the procedure to be applied in execution proceeding be that under the Civil Procedure Act and the Rules thereto.

Order 22 Rule 6 gives the procedures with regard to execution proceedings and the claimants have not complied.

The Notice of Motion dated 1<sup>st</sup> November, 2021 is not made pursuant to Order 22 Rule 7 which outlines the details applicable in an execution application.

There is no decree which has been extracted or an order of the court allowing execution to proceed on a stated amount. There is no matter capable of execution.

Order 22 rule 13 provides for the procedure applicable upon receipt of an application for execution in a protective and for the court to ascertain if Rule 7 thereof has been complied with and if not the application must be rejected.

The claimants have relied on a figure stated by the respondent and the only way it can be verified for the purpose of execution is through a court decree which has not issued. The sum of ksh.158 million is noted save the proper sum are Ksh.158, 610,706 from 2015 to June, 2021 and the tabulations by the claimant going beyond the subject period. There is a salary already paid and put into account, the attachments to the affidavit by the respondent account for the period of up to June, 2022.

Under Rule 31 of the ELRC Rules there are provisions for the details to be included in a decree or Order. An applicant must hold and Decree and the judgement of the court has no Order on the amounts due. in the affidavit of Mr Livondo he is not clear as to when time started running in terms of Order 22 rule 6 and 7.

The respondent has filed a Compliance Affidavit with due sums as of December, 2021 and the variances relates to statutory deductions and therefore the excess amounts and the application by the claimants should be dismissed.

#### Determination

The issue at hand and with regard to Order (6) of the Notice of Motion dated 1<sup>st</sup> November, 2021 is as outlined above and condensed, the claimants are seeking leave to have the decree herein ascertained to enable them proceed with execution.

As correctly submitted by the respondent, without a Decree or an Order of the court setting out the amounts subject for enforcement, execution proceedings would amount to nothing.

Order 22 rule 6 is made in two parts. The first part requires that;

Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Order 22 rule 7 is more elaborate on the nature of application and the contents thereof;

1. Where a decree is for the payment of money the court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the court.

2. Save as otherwise provided by sub rule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars—

- a. the number of the suit;
- b. the names of the parties;
- c. the date of the decree;
- d. whether any appeal has been preferred from the decree;
- e. whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;
- f. whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications, and their results;
- g. the amount with interest, if any, due upon the decree, or other relief granted thereby, together with particulars of any cross- decree, whether passed before or after the date of the decree sought to be executed;
- h. the amount of the costs, if any, awarded;
- i. the name of the person against whom execution of the decree is sought; and
- j. the mode in which the assistance of the court is required, whether—
  - i. by the delivery of any property specifically decreed;

- ii. by the attachment and sale, or by the sale without attachment, of any property;
- iii. by the arrest and detention in prison of any person;
- iv. by the appointment of a receiver;
- v. otherwise, as the nature of the relief granted may require.

3. The court to which an application is made under sub rule (2) may require the applicant to produce a certified copy of the decree.

Very elaborate procedures.

The respondent, well aware of these procedures and largely relied upon in the submissions and well aware of the judgement herein since May, 2010 has refused, failed and neglected to pay the back pay in full. the back and forth directions to comply and the allegations of lack of financial allocation cannot be justified in view of the time taken since judgement was delivered herein.

The respondent has the work records and has continued to enjoy latitude in an effort to comply with the judgement and orders of the court to no avail. Contempt proceedings remain in abeyance under the same measures.

In this regard, such elaborate procedures cannot take effect unless and until the back pay due to the claimants is ascertained for the Decree to issue and taking into account employment is on-going and every month comes with a new wage, the court having previously directed the respondent to address and only partially paid the back pay and only re-engaged the claimants on 17<sup>th</sup> January, 2022 to ensure progress and that the judgement and orders of the court herein are not frustrated by the conduct of the respondent, the following orders are hereby issued;

- a. The tabulation of back pay due to the claimants shall consist of dues owing and unpaid from 16<sup>th</sup> July, 2015 to 16<sup>th</sup> January, 2022;**
- b. The dues owing and unpaid (a) above shall include the basic pay and total gross pay;**
- c. The order (a) and (b) above shall be addressed within the next 7 days by the respondent;**
- d. Upon lapse and or failure to comply, the claimants shall proceed and apply own rates and figures in tabulation of back pay due and owing and which shall be adopted by the court as the judgement sum;**
- e. Once (d) above takes effect, the claimants shall be at liberty to proceed and execute the judgement award; and**
- f. Mention on 24<sup>th</sup> March, 2022 for confirmations on the above and further directions.**

**DELIVERED AT NAIROBI IN OPEN COURT THIS 10<sup>TH</sup> DAY OF MARCH, 2022**

**M. MBARU**

**JUDGE**