



**Tuwot & 227 others & another v East African Portland Cement PLC
(Cause 2119 of 2014) [2022] KEELRC 1264 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1264 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2119 OF 2014
MA ONYANGO, J
JULY 8, 2022**

BETWEEN
JULIET CHEPCHUMBA TUWOT & 227 OTHERS APPLICANT
AND
KENYA CHEMICAL AND ALLIED WORKERS CLAIMANT
AND
EAST AFRICAN PORTLAND CEMENT PLC RESPONDENT

RULING

1. Judgment in this suit was delivered by my sister Wasilwa J. on 6th July 2015. In the judgment, the Court ordered as follows:

“I therefore find that the Claimants case has merit and order that the Respondents do implement the Collective Bargaining Agreement as negotiated. Where there are problems of implementation for the reasons that it is unsustainable, the Respondents should renegotiate the implementation process for purposes of reaching an amicable settlement beneficial to all parties.”
2. The Respondent was dissatisfied with the judgment and preferred an appeal to the Court of Appeal, Nairobi in Civil Appeal No. 14 of 2016. In a judgment delivered on 6th October 2017, the Court of Appeal dismissed the appeal. The file thus came back to this Court for implementation of the judgment and decree.
3. By an application dated 21st March 2018, the Claimant sought the following among other orders:



- i) That pending the Honourable Court do order and direct that the Respondent be ordered to fully implement the judgment of the Court delivered on 6th July, 2015 and reinforced by the Court of Appeal by its judgment delivered on 6th October, 2017.
 - ii) That orders be and are hereby issued certifying that the amount of arrears of salaries and house allowed due are Kshs.1,401,585,364.80 excluding overtime, leave traveling allowance, shift allowance.
 - iii) That the amount of Kshs.1,401,585,364.80 be and is hereby certified as the decretal amount due and payable by the Respondent to the Claimant as per the judgment dated 6th July, 2015.
4. In the affidavit of Were Dibo Ogutu OGW (now deceased) in support of the application he states at paragraphs 7, 10, and 12 as follows:
7. That upon the dismissal of the appeal, the Claimant sought the implementation of the Court's judgment but the Respondent did not respond at all.
 10. That the non-compliance of the Court's judgment on all employees of the Respondent has caused huge salary arrears and allowances amounting to Kshs.1,401,585,364.80 as per the workouts on each individual employee.
 12. That it is important Honourable Court do certify and decree that the amount due payable to the Claimant's members who were under contract should be Kshs.1,401,585,364.80 which amount excludes overtime, shift allowance, travelling allowance and medical allowance which can be calculated and paid on case to case basis.
5. The Respondent did not file a response to the application. After giving the Respondent opportunity to file its tabulation on 23rd April 2018, 15th May 2018 and 18th June 2018, the Court on 25th June 2018 referred the parties to the Ministry of Labour to help them reach a solution on the amount payable, following the averment of the Respondent that some of the grievants whose names appeared in the list had left its employment. No resolution was reached at the Labour Office.
6. The parties again attended Court on 11th July 2018 and 18th July 2018, when there was no tabulation by the Respondent. On 30th July 2018 the Court adopted the amount stated in the Claimant's application and entered judgment for the Claimant against the Respondent as per appendix DW04 filed in Court on 21st March 2018.
7. Appendix DW04 has been annexed to the affidavit of Mohamed O. Adan sworn on 17th May 2022 as EXHIBIT MH3. The list contains 464 names. However, the claim filed by the Claimant contained a list of 686 names. Although there are figures attached to the names in the list attached to the claim in respect of, no total tabulation was made in the list which contains arrears of basic pay.
8. Upon the Court adopting the figure of Kshs.1,401,585,364.80 as per tabulation of the Claimant in exhibit DW04, a part payment was made by the Respondent in the sum of Kshs.90 million following agreement between the parties. Agreement was reached and a consent recorded in Court for payment of the balance.
9. However, by an application dated 22nd April 2020, Juliet Chepchumba Tuwot, representing a group of 229 employees of the Respondent including herself, sought adoption of a further tabulation of Kshs.580,153,775.74 alleging that the group who were part of the original list of 693 grievants in the claim and were beneficiaries of the judgment had been left out of the payment of Kshs.90 million made by the Respondent to the Claimant and the negotiations for payment of the balance of the decretal.



10. She sought orders that the Respondent be compelled to include them in the settlement of Kshs.90 million that had been paid and an order that the 229 grievants were part of the beneficiaries of the judgment.
11. Upon hearing the parties on the application, the Court delivered a ruling on 16th September 2020 as follows: –
 40. On the issue of the application for the Applicants herein who are 228 in number wishing to be allowed to proceed in person, the Respondents having not opposed the same, the same was allowed.
 41. As to the orders sought in the application, the Applicants want the Court to compel the 1st Respondent herein to release to them the withheld decretal sums and for the Respondent to account for how the moneys have been paid out.
 42. In my view, the starting point is whether the Applicants were originally part of this Claim as filed in 2014 and whether the judgement of the Court entitled them to benefit from the judgement entered by this Court on 6/7/2015. From the pleadings herein, the Claim was filed by the Union on behalf of their unionisable employees.
 43. The Applicants are members of the Claimant’s Union, which the Respondents have not disputed. The question then is why the Applicants have been left out of the payment schedule.
 44. In the circumstances, it important that the Applicants be part and parcel of the members being paid out the moneys paid by the Respondents in Main Claim. I therefore find the application has merit and I allow it. I also allow the application in terms of the 2nd Respondent accounting for the money paid out by the 1st Respondent and to show how the Applicants have been included in the schedule.”
12. In the supplementary affidavit of Juliet Chepchumba Tuwot sworn on 11th December 2020, she has attached a list of the names of all the Respondent’s employees affected by this suit being 693 with a cumulative financial impact of Kshs.2,030,710,175.15.
13. The Claimant insists that the sum awarded is for only 464 employees in the list attached as exhibit DW04 of the affidavit of Were Dibo Ogutu while Ms. Tuwot’s position is that the sum awarded includes the group of 228 grievants that she represents.
14. From the foregoing it is evident that before the Court adopted the figure of Kshs.1,461,585,364.80, no verification had been carried out by the Court to ascertain the amount due to each of the grievants. The Court simply adopted the figure submitted by the Claimant following the Respondent’s failure to submit its own tabulation.
15. It is further evident that the Court in the ruling of 16th September 2020 substantially amended the earlier orders by directing that the group of Claimants represented by Juliet Chepchumba Tuwot be included in the amount awarded in the judgment.
16. My understanding of the orders of the Court in the ruling dated and delivered on 16th September 2020 is that the group of 228 employees are part of the beneficiaries to the sum of Kshs.1,401,585,364.80 awarded by the Court.
17. The Claimant has not reacted to the averments of the Respondent in the affidavit of Mohamed O. Adan and submissions dated 17th May 2022 to the effect that exhibit WDO4 contained errors in the list of 462 grievants in EXWD04 where he points out that the names of five grievants being no.



- 101923, 102264, 102709, 102618, 102619 and 102727 were repeated causing an overstatement of Kshs.13,143,554/-. (The number is six [6] not five).
18. The Claimant has further not responded to the averment that the tabulation in WD04 also contained errors in grade, amounts payable for house allowance, basic pay disbursed and omission of shift pay and overtime, which cumulatively led to an overstatement of the tabulated sum by Kshs.296,780,434 as particularised in the last page of Exhibit “MA8” of the affidavit of Adan.
 19. I have keenly perused the various lists submitted by the parties. I have particularly noted the list of duplication of numbers with different job groups for no. 101923 (C&D), 102264(d), 102709 (D &F) 102727 (G & H), 102619 (D&G) and 102618 (G&H) which are reflected in exhibit 8 of ADAN’s affidavit.
 20. I have further noted the difference in the tabulation in Juliet’s list of 229 grievants (Kshs.580,153,775.74) and the Respondent’s list (Kshs.283,070,424.97).
 21. Neither the Claimant nor the grievants represented by Juliet Tuwot have contested the averments in the affidavit of Adan.
 22. From the foregoing, I make the following findings:
 - (i) That by the ruling of 16th September 2020 the Court declared that the grievants represented by Ms. Juliet Chepchumba Tuwet are part of the beneficiaries to the judgment in this suit whose total number 693.
 - (ii) That the correct amount payable to each of the grievants is as per the schedule attached as Exhibit MA1 to the affidavit of Adan sworn on 17th May 2022.
 - (iii) That both the tabulation by the Claimants and the group represented by Juliet contain errors as set out paragraphs 29, 30, 31, 32, 33 and 35 of the affidavit of ADAN.
 - (iv) That this suit will be mentioned on 28th July 2022 for the Respondent to make a proposal on how it intends to liquidate the balance of the decretal sum being Kshs.1,401,585,364.80 due to the 693 grievants less Kshs.90,000,000/- already paid.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF JULY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO



JUDGE

