



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 25 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**GLADYS MUTHONI MWANGI AND 20 OTHERS..... PETITIONERS**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....1<sup>ST</sup> RESPONDENT**

**BARCLAYS AFRICA GROUP LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING NO. 2**

Before me, for determination are three Applications, the first being the Petitioner's Notice of Motion Application dated 4<sup>th</sup> November, 2019. It seeks the following orders:

1. That this Application be certified as urgent (*spont*).
2. That this Court do order for settlement of terms of the Amended Decree dated 30<sup>th</sup> June, 2016 as revised by the Court of Appeal Judgment dated 16<sup>th</sup> March, 2018 to allow for recovery of the pending dues that remain unpaid to date including payment of payable bonus for 2016, severance underpayment, interest at 6% per annum from the date of the decree, auctioneer's fees and costs quoted at Kshs.400,000.00 as per the auctioneer's invoice found on page 11 of annexure RG1.
3. That each Petitioner's dues be computed, determined and paid as per the schedule of payment attached and found on page 12 of annexure RG1
4. That the Petitioners be at liberty to apply for such further or other orders and/or directions as this Court would deem fit and just to grant.
5. That this Court do order that instructions, getting up fees and party and party costs awarded to the Petitioners be computed in accordance with schedule 6, part A paragraph 1b and paragraph 2 respectively of the Advocates Remuneration (Amendment) Order, 2014.
6. That costs occasioned by this Application be borne by the Respondents.

This Application is premised on the grounds that: -

- a) This Court delivered its Judgment in this matter on 30<sup>th</sup> June, 2016 in favour of the Petitioners as per the Amended Decree dated 30<sup>th</sup> June, 2016.
- b) Upon receipt of the Judgment the Petitioners moved to execute the said Judgment through Nairobi Connections Auctioneers on 25<sup>th</sup> July, 2016 who proceeded with the proclamation of the Respondents assets on 8<sup>th</sup> August, 2019.
- c) The Respondents however filed an Application for stay of execution at the Court of Appeal and successfully obtained stay Orders thus halting the process of attachment.
- d) The Respondents further filed Civil Appeal No. 296 of 2016 and Appeal 301 of 2016, which appeals were heard and determined

and a Ruling delivered on 16<sup>th</sup> March, 2016.

e) The terms of the Amended Decree dated 13<sup>th</sup> July, 2016 were confirmed by the Court of Appeal save for the award for discrimination and aggravated damages. The Court of Appeal however did not make a finding with regards to the auctioneer's charges that had accrued following the process of proclamation that had already commenced but was prematurely halted following the Court of Appeal directive.

f) The petitioner filed an Application dated 18<sup>th</sup> April, 2019 seeking orders for settlement of Terms of the Amended Decree dated 30<sup>th</sup> July, 2016 which application was dismissed and directions issued that parties extract the decree from the Court of Appeal which was done on 2<sup>nd</sup> July, 2019.

g) This Court allows the settlement of the Petitioners pending dues in the interest of justice and equity.

The Application is supported by the Affidavit of **RACHEL GITAU** sworn on 4<sup>th</sup> November, 2019 in which she reiterates the grounds on the face of the motion.

The Application is filed under Articles 23 and 41 of the Constitution of Kenya, 2010, Section 13, Rule 3(2), (3), (4) and (5) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Section 32(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all enabling other provisions of the law.

The second application is the one dated 18<sup>th</sup> November, 2019 filed by the Respondents seeking the following orders that:

1. This Court strikes out the Petitioners' Notice of Motion Application dated 4<sup>th</sup> November, 2019.
2. The Petitioners be barred from making any further Applications in this Petition
3. The Petitioners be declared vexatious litigants by this Court and
4. The costs of the Application be borne by the Claimant.

The Application is premised on the grounds that:

- a) The Application does not bear reasonable cause of action against the Respondents
- b) The Respondents have settled the petitioners' dues in full in terms of the Orders of the Court of Appeal issued on 16<sup>th</sup> March, 2018.
- c) The petitioners have the sole intention of embarrassing and unnecessarily vexing the Respondents and the Court.
- d) The Petitioners' protracted applications and continued litigation on determined and settled issues is frivolous, manifestly vexatious, incompetent and amounts to an abuse of the Court process.
- e) The grant of the orders prayed in the Application will result in saving of judicial time and costs to the parties involved.

The Application is supported by the Affidavit of **VASLAS ODHIAMBO**, the Employment Relations Manager with the 1<sup>st</sup> Respondent sworn on 18<sup>th</sup> November, 2019 in which he reiterates the grounds on the face of the motion.

Lastly, the Respondents further filed a Preliminary Objection dated 29<sup>th</sup> September, 2020 on the grounds that this Court being *funtus officio* lacks the Jurisdiction to issue the Orders sought in the Petitioner's Notice of Motion dated 4<sup>th</sup> November, 2020.

In response to the Respondents Application dated 18<sup>th</sup> November 2019 the Petitioners filed a Replying Affidavit deponed to by **RACHEL GITAU**, the 5<sup>th</sup> Petitioner herein on 21<sup>st</sup> September, 2020 in which she avers that the Respondents remain indebted to the Petitioners in terms of unpaid bonus for 2016, payment of underpaid severance together with costs and interest and the Auctioneers charges that are as a result of the respondent's failure to settle the Judgment sum in good time.

She further averred that this Court in its Ruling of 5<sup>th</sup> October, 2018 directed parties to extract an order/decree from the Court of Appeal to facilitate the settling of the judgment as entered in favour of the Petitioners as against the Respondents.

The Affiant further maintained that the Application dated 18<sup>th</sup> November, 2018 is devoid of merit and urged the Court to dismiss it with costs.

The Respondents sought and were allowed to cross examine one Rachel Gitau the deponent of the Petitioners' Affidavits who reiterated the averments as contained in her Affidavits dated 4<sup>th</sup> November, 2019 and 21<sup>st</sup> September 2020.

The applications were disposed of by way written submissions.

### **Petitioners' Submissions**

The Petitioners in their submissions maintained that they are entitled to recovery of their pending dues that remain unpaid by the Respondents pursuant to the Judgment in their favour.

On payment of bonus it is submitted that the same are payable once earned and that cessation of the employment relationship should not deny an employee such benefits. The Petitioners relied on the case of **Aucamp v SA Revenue Service (2014) 35 ILJ 1217 (LC)** where the Court held that *bonuses form part of remuneration and an employee is entitled to the same after rendering services whilst he was under the employer's employment.*

On the issue of unpaid severance pay the Petitioners maintained that at the time of their separation the Respondents recovered the full car loan from their severance pay and they were therefore entitled to payment of the car allowance which had been utilised to pay the car loan in the sum of Kshs.180,000/-.

On the issue of payment of auctioneer's fees the Petitioners submitted that the Respondents are bound to pay the said fees by dint of Rule 7 of the Auctioneers Act. Emphasis was laid on the Court's findings in the case of **Co-operative Bank of Kenya v Joefrick N. Muinde T/A Kimu Auctioneers (2019) eKLR.**

The Petitioners further submitted that they are entitled to payment of interest as a discretionary and consequential order by dint of Article 159(2)(d) of the Constitution of Kenya, 2010 and Sections 1A, 3A and 26 of the Civil Procedure Act. The petitioners relied on the cases of **NIC Bank Limited v Tausi Assurance Co. Ltd (2017) eKLR** and **Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited (2015) eKLR** on the Court's discretion on awarding interest to a successful litigant.

On the issue of the Court being *functus officio* the Petitioners submitted that this Court is indeed clothed with the requisite jurisdiction to hear and determine its Application and that the same was not filed with an aim of re-engaging the Court in a matter that had been decided with finality as contended by the Respondents. For emphasis the Petitioners relied on the case of **Bellevue Development Company Limited v Vinayak Builders Limited & Another (2014) eKLR.**

It is further the Petitioners' contention that there is no intention to invite this Court to entertain new and separate matters as contended by the Respondents but rather an invitation to the Court to examine the differences arising out of the Respondents failure to fully honour awards of the Court as well as make a determination on the computation of severance pay with regard to three Petitioners that is *Rachel Gitau, Ed Chuchu and Charity Kimani.*

In conclusion the Petitioners maintained that they are yet to fully enjoy the fruits of the Judgment entered in their favour as the Respondents are yet to fully settle the amounts awarded by the Court. They therefore urged this Court to allow their Application as prayed.

### **Respondents' Submissions**

The Respondents on the other hand submitted that this Court is indeed *functus officio* and therefore lacks the jurisdiction to consider the reliefs sought in the Petitioners' Application dated 4<sup>th</sup> November, 2019. The Respondents relied on the Court of Appeal decisions in the cases of **Ngugi v Kinyanjui and 3 Others (1989) eKLR** and **Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited (2014) eKLR** where the Courts held that a final decision of a court cannot be re-opened.

It is further contended that the Petitioners' Application does not lie within the exceptions of the doctrine of *functus officio* as it seeks to vary and expand the declarations of this Court and to convert them into monetary awards.

The Respondents further maintain that what the Petitioners sought for were declarations which were granted by this Court as no figures were attached to the Petition and therefore there can be no error in the delivered judgment of the Court.

On the Claim for the payment of bonuses for the year 2016, the Respondents maintained that the Petitioners did not seek for any specific amount in terms of bonuses and therefore parties did not litigate on the issue as no final determination was issued by this Court. That in the circumstances the Petitioners cannot now present a computation of the same at this point to the Court as it would be tantamount to an attempt to have the matter reheard and/or interrogated by the Court despite the fact that the same has been heard and determined with finality. For emphasis the Respondents relied on the case of **Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited (Supra).**

On the issue of the additional severance for the three Petitioners as

well as payment of interest at 6% per annum the Respondents maintained that this Court lacks the capacity to make any such award as prayed as the same were never raised at the appellate court and therefore this Court is and remains *functus officio.*

It is further submitted that the Claim for additional severance pay has no basis and should therefore be dismissed accordingly. For emphasis the Respondents relied on the case of **Alex Muruiki Bundi v Kakuza Limited (2012) eKLR.**

The Respondents further maintained that there is no basis for the schedule of computation of payment as presented by the Petitioners and that the formula applied in computing is only known to them. They maintain that the only way the Court could ascertain the logic behind the

figures was through a hearing process which was not done at the hearing of the Petition filed herein. For emphasis the Respondents relied on the case of **Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited (Supra))**.

The Respondents maintained that the Petitioners' Application is an abuse of the Court process as they had previously approached the Court on a similar application that was already heard and a determination made.

In conclusion the Respondents urged this Court to uphold its Preliminary Objection dated 29<sup>th</sup> September, 2020 and further allow their Application dated 18<sup>th</sup> November 2019. They further urged this Court to dismiss the Petitioners' Application dated 4<sup>th</sup> November, 2019 with costs to the Respondents.

### **Analysis and Determination**

Having considered the Applications pending before me, the Affidavits, evidence, submissions and authorities cited by both parties in this matter, the issues for determination are: -

1. Whether this Court is *functus officio*
2. Whether the Application dated 4<sup>th</sup> November, 2019 is merited.

### **Is the Court *functus officio***

Both parties have put in lengthy submissions as to whether this Court is *functus officio* or is clothed with the requisite jurisdiction to hear and determine the pending applications. This Court has taken judicial notice of the fact that the issue of this Court's jurisdiction was indeed raised by the Respondents in the application dated 18<sup>th</sup> April, 2018 by the Petitioners in which they sought similar orders as what they seek in their Application dated 4<sup>th</sup> November, 2019.

In the Court's Ruling delivered on 5<sup>th</sup> October, 2018 the Court in dismissing the Application found that the Application was premature as the Petitioners had not extracted the order from the Judgment of the Court of Appeal to form a basis of this Court's jurisdiction to hear and determine the Application. The court stated in the ruling that the dismissal of the application was not a bar to the same being brought again after obtaining the decree from the Court of Appeal.

I note that the said decree has since been extracted and issued on 2<sup>nd</sup> July, 2019. I therefore opine that this Court is therefore clothed with the requisite jurisdiction to now determine the Application substantively.

As to what is payable to the Petitioners, a draft computation was done by the Petitioners which computations are disputed by the Respondents who argue that the same would amount to opening the case for re-litigation despite the fact that the matter was already heard and determined with finality.

The extracted Order from the Court of Appeal at paragraph 6, the Court stated as follows:

*The awards herein be and are hereby undisputed:*

- a) *One month's gross pay as notice pay*
- b) *Severance pay shall be at one month's gross salary for every completed year.*
- c) *accrued leave days are payable*
- d) *Payable bonus for 2016*
- e) *Medical cover shall be extended to 31<sup>st</sup> December, 2016 and*
- f) *Each Petitioner shall be issued with a certificate of service.*

The Petitioners do not dispute receiving payments from the Respondents but maintained that the same have not been fully paid. They attached a schedule of payments to their Application.

The Respondents on the other hand maintained that they have settled the sums and what is claimed by the Petitioners was not computed. That such computation could only have been determined at the hearing of the Petition as they would have had a chance to litigate on the issue.

There is however no schedule proffered by the respondents setting out what has been paid. Therefore, the Court is not in a position to ascertain from the Respondent's submissions and pleadings, what has or has not been paid in fulfilment of the Court of Appeal Judgment.

From the supporting affidavit of RACHEAL GITAU sworn on 4<sup>th</sup> November 2019, she deposes at paragraph 24 as follows –

**“24. That I am advised by my advocate on record whose advise I verify believe to be true that following the payments that have so far been made by the Respondent what remains unpaid now is payment of bonus for 2016, payment of underpaid severance to the three Petitioners mentioned above, internet and costs.”**

I will therefore limit the determination on these disputed items only, and on the Auctioneer’s fees which was not litigated at the Court of Appeal

#### **Bonus of 2016**

In the petition there was a prayer for bonus and an award for the same was made in the judgment of this court delivered on 30<sup>th</sup> March 2016. In the decision of the Court of Appeal, the Award for bonus was made as follows: -

- a) One month’s gross pay as notice pay;
- b) Severance pay shall be at one month’s gross salary for every completed year;
- c) Accrued leave days are payable;
- d) Payable bonus for 2016;**
- e) Medical cover shall be extended to 31<sup>st</sup> December 2016 and
- f) Each respondent shall be issued with a certificate of service.

The Applicants have not clarified to the court how the figures claimed for bonus were arrived at. The policy on bonus was not explained to the court. It was the duty of the Applicant to justify the same. The Court does not have the basis to determine the said issue. My finding therefore is that the Applicants have not justified the award of the figures claimed as bonus to justify the sums claimed. I have taken into account the wording in the decree which is “payable bonus for 2016” which means that the applicants ought to justify that the same is “payable”. I thus decline to award the same.

#### **Underpaid severance for Ed Chuchu Rachel Gitau and Charity Kimathi**

The award of this court, which was not disturbed by the Court of Appeal was –

#### **(ii) Severance pay at one month’s salary for every completed year.**

In the tabulation of payments by the Respondent, the severance pay is based on basic pay. The decree is clear that the same should be one month’s gross salary.

The Applicants have demonstrated that the P9 Forms for the three petitioners reflect that their gross pay were composed of basic pay and car allowance of Kshs.130,000 per month. The car allowance was omitted in the tabulation of severance pay by the Respondents. I thus award that their severance be tabulated afresh using gross salary as per Respondent’s Annexure VO-6 and VO-7 attached to the Index to Annexures dated 11<sup>th</sup> May 2018 as follows –

#### **Edward Chuchu**

Years Worked 36

Basic Pay Kshs.675,000.00

Car Allowance Kshs.130,000.00

Gross Pay Kshs.805,000.00

#### **Severance**

Gross Pay x years worked

805,000 x 36 **Kshs.28,980,000.00**

#### **Rachel Gitau**

Years Worked 23

Basic Pay Kshs.530,000.00

Car AllowanceKshs.130,000.00

Gross PayKshs.660,000.00

**Severance**

Gross Pay x years worked

660,000 x 23Kshs.15,180,000.00

**Charity Kimathi**

Years Worked 21

Basic PayKshs.528,000.00

Car AllowanceKshs.130,000.00

Gross PayKshs.658,000.00

**Severance**

Gross Pay x years worked

658,000 x 21Kshs.13,818,000.00

The severance paid by the Respondents to the three petitioners will be recovered from these allowances

**Interest**

As determined in this court's ruling dated and delivered on 5<sup>th</sup> October 2018, interest having not been awarded in the judgment in this court has no jurisdiction to grant the same.

**Auctioneer's Fees**

In view of the fact that the proclamation by Nairobi Connections Auctioneers was lawful as there was no stay of execution orders at the time of proclamation, the Respondent is under obligation to pay the Auctioneer's fees. The court orders that the Respondent pays the same as per Auctioneer's Fees Schedule in the Auctioneers Act.

For the prayer that instructions, getting up fees and Party and Party costs awarded to the Petitioners be computed based in accordance with Schedule 6, I agree with the Respondents' submissions that this is the role of the Taxing Master and not this court.

There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2021**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**