



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 37 OF 2013**

**PAUL MASINDE SIMIDI.....PETITIONER**

**VERSUS**

**NATIONAL OIL CORPORATION OF**

**KENYA LIMITED.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**SUMAYYA ATHMANI HASSAN.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> respondent/applicant filed a successful appeal before the Court of Appeal in a judgment delivered on 6<sup>th</sup> December, 2019 reversing the judgment by Linnet Ndolo, J. delivered on 30/11/2015 in which the respondent was awarded and paid Kshs.5,644,317.22 together with interest at Court rates of 12% per annum from date of payment until payment in full.
2. The application is based on grounds set out on the face of the application and buttressed in the supporting affidavit of Gladys Koletit, Corporation Secretary of the National Oil Corporation of Kenya, the applicant.
3. The application is opposed by the petitioner/respondent, in a replying affidavit sworn by the respondent on 30/9/2020 in which he deposes *inter alia* that the contents of the application as set out in paragraph 1, and 2 of the application and paragraphs 3,4,5,8,9,10 and 11 of the Supporting affidavit are not in issue. In other words the respondent admits having been paid the decretal sum and having lost the appeal before the Court of Appeal.
4. However, the respondent states that a sum of Kshs.2,322,562.22 out of the total sum paid were terminal dues which were payable to him without a Court Order and which sum was arrived at by Consent of the parties and was therefore a contract between the parties.
5. Further, the Court of Appeal did not annul or set aside the said contract of Kshs.2,322,562.22.
6. That the Court of Appeal did not expressly Order that the respondent refund the lawfully paid and contractual terminal dues.
7. Furthermore, the Court of Appeal did not expressly order that the respondent to refund the Kshs.3 million damages awarded by Ndolo, J.
8. That the application has no basis in law, is fatally incompetent and it be dismissed with costs.
9. The applicant relies on Section 13 and 20(3) (viii) of the Employment and Labour Relations Act, 2011, Sections 34 and 91 of the Civil Procedure Act and Order 9 Rule 9 of the Civil Procedure Rules, 2010.
10. The applicant did not cite any authority determined by Courts in Kenya or elsewhere on the issue of refund of a decretal sum duly paid upon judgment which judgment is subsequently reversed upon appeal.
11. Section 13 of the Employment & Labour Relations Court Act, 2011 as amended reads:-

“Enforcement of Court Orders.

**A judgment, award, Order or decree of the Court shall be enforceable in accordance with the rules made under the Civil Procedure Act.”**

**And Section 20(3) of the said Employment & Labour Relations Court Act, 2011 was deleted by Act No. 18 of 2018.**

12. On the other hand, Section 34 and 91 of the Civil Procedure Act

reads:-

**“34(1) All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.**

13. Whereas Section 91 provides:-

“ Application for restitution

(1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied on or reversed and for this purpose the Court may make any orders, including Orders for the refund of costs and for the payment of interest, damage, compensation and mesne profits, which are consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1)”

14. The Court has considered the deposition and respective submissions by the parties and has carefully considered the judgment by the Employment & Labour Relations Court, per Ndolo, J. delivered on 30/11/2015 in view of the submissions made by the parties and the decision by the Court of Appeal delivered on 6/12/2019 and has arrived at the following conclusion:-

**(a) The lower Court awarded the claimant/respondent**

**Kshs,3,000,000 in general damages.**

**(b) Terminal benefits computed by the parties at Kshs.2,322,562.22.**

**(c) Award of Certificate of Service.**

**(d) Costs of the suit.**

15. The Court of Appeal on the other hand made the following final Orders:-

(i) The appeal is allowed.

(ii) The judgment of the lower Court is set aside in its entirety.

(iii) The Cross -Appeal is dismissed.

(iv) The 1<sup>st</sup> respondent shall pay the costs of this appeal and the costs in respect of the cross-appeal.

16. It is pertinently clear from the foregoing that the entire judgment and decree of the Court Aquo was set aside. The effect of the Order of the Court of Appeal was to nullify the entire award by the lower Court including the award of damages, terminal benefits; grant of Certificate of Service and granted costs of the suit before the lower Court and at the Appeal Court to the appellant/applicant.

17. Accordingly, the applicant is entitled to restitution of the entire decretal sum and interest at Court rates from date of payment till payment in full.

18. The Court therefore allows the application and makes the following Orders:-

(a) The Petitioner/Respondent Paul Masinde Simidi to reconstitute the entire decretal sum paid to him by the 1<sup>st</sup> respondent /applicant National Oil Corporation of Kenya Limited pursuant to the judgment of Ndolo, J. delivered on 30/11/2015 in the sum of Kshs.5,644,317.22 together with interest at Court rates of 12% per annum from date of payment until payment in full.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of February, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

## **ORDER**

In view of the declaration of measures restricting court of 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, this ruling has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

## **JUDGE**

### **Appearances**

1<sup>st</sup> respondent/applicant-Mr. Kisaka

Mr. Gachuba for petitioner/respondent

Ekale Court clerk.