



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 95 OF 2019

PROFESSOR MABEL IMBUGA.....CLAIMANT/APPLICANT

VERSUS

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY.....RESPONDENT

RULING

1. The application before me is the Claimant's Notice of Motion filed on 5.3.2020 seeking the following orders:

a. Spent

b. THAT the Honourable Court be pleased to find and hold that the Claimant is entitled to the Judgment sum of Kshs. 9,012,821/- being the Exit Package ordered in this Honourable Court's Judgment delivered herein on the 24.1.2020.

c. THAT this Honourable Court be pleased to approve the aforesaid sum of Kshs. 9,012,821/- as the Judgement/Decree sum for enforcement herein.

d. THAT the Respondents be condemned to pay the costs of this application.

2. The application is based on grounds that this Court entered Judgment in favour of the Claimant on 24.1.2020 but the Respondent has failed to compute and pay the sums due to her. The application is supported by the Claimant's affidavit sworn on 27.2.2020 in which she deposed that after the said Judgment was delivered, her counsel wrote to the Respondent on 5.2.2020 demanding for the payment due but there was no response; that on 18.1.2020 she attended Court as directed by the court in the said judgment to ascertain whether payment had been made but the Respondent's counsel did not turn up; and that she has now moved the court to approve her computed dues.

3. The Respondent opposed the application by a Replying affidavit sworn by its Registrar Administrator, Dr. Rose Gathu, on 10.3.2020 in which she deposed that the Respondent took time to work out the Claimant's package to align it with the judgment of this Court; that the package be pegged on the 2003 Terms and Conditions of Service as opposed to the 2014 terms of service; that before the judgment the claimant had been paid based on 2014 terms of service terms and as such she had been overpaid by Kshs.2,428,899; that according to the government's directives, the overpaid amount will be recovered; that the claimant's claim for Kshs.9,012,821 is unsupported by evidence and it must fail.

4. In a brief rejoinder, the Claimant filed a Supplementary Affidavit sworn on 14.4.2020 in which she deposed that the purported computation and payment of her dues is wrong. She further produced her own computation and schedule of payments received to substantiate her claim for the unpaid dues for the entire period that she had been out of office. She contended that the correct computation of her dues is one in her schedule which shows that the Respondent still owes her Kshs. 12, 207,642 as at the end of April 2020 contrary to the alleged overpayment.

5. The application was canvassed by way of written submissions

Submissions

6. The Claimant submitted that she has filed a detailed schedule in support of her application which shows that as at April 2020 the total outstanding amount is Kshs. 12, 207, 642 being the difference between what received from the respondent from the time she exited the office of the Vice Chancellor as per the filed payslips and what ought to have been paid under the 2003 exit package. Further, she argued that the Respondent has not disputed the said outstanding balance of Kshs. 12, 207,642/-.

7. The Respondent argued that the Claimant's annexures are fatally defective and ought to be struck out for failing to comply with Rule 9 of the Oaths and Statutory Declaration Rules that provides that all exhibits to affidavits are to be securely sealed under the seal of the commissioner and marked with serial letters of identification. It argued that the failure to comply with this rule is not a mere technicality which can be cured by invoking the provisions of Article 159 (2) (d) of the Constitution thus the affidavits and annexures should be expunged for want of compliance with these provisions.

8. It relied on **Kenya National Union of Nurses v Kiambu County Public Service & 5 Others [2019] eKLR** where the Court expunged the offending affidavit and held that without sealing of exhibits forming part of the affidavit, there was no proper affidavit before the Court. It further relied on the case of **Chris Munga N. Bichage & 2 Others v Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR**.

9. It further submitted that the Claimant has without amending her application, submitted that she is entitled to payment of Kshs. 12, 207, 642/-. It contended that the tabulations annexed to the Claimant's Supplementary Affidavit are in line with the Exit Package under the 2014 Terms and Conditions of Service which is contrary to paragraph 26 of the Judgment. It submitted that Clauses 10 and 11 of the 2003 Terms and Conditions of Service are the ones applicable in computing the claimant's exit package.

10. Accordingly, the respondent submitted that pursuant to this Court's Judgment, the Claimant's lawful benefits under the 2003 Terms and Conditions are a sum of Kshs. 17, 314,662/- which includes basic salary, house allowance, domestic workers, house servant, gardener and watchman and commuter allowance for 19 months upto 29.2.2020. In its view there is no justification for the extension to the months of March and April when the Claimant's application was filed on 27.2.2020.

11. Finally, the respondent submitted that a cursory perusal of the Claimant's payslips indicates that it made payments under the 2014 Terms and Conditions of Service from August 2018 to February 2020 and as such it only owes the Claimant Kshs. 204, 281.90.

Issues for determination and determination

12. The main issues for consideration are:

- a. Whether the Claimant's affidavits and annexures thereto should be expunged.
- b. What constitutes the claimant's Exit Package under her contract of service?
- c. Whether the Claimant is entitled to the sum of Kshs. 9, 012,821 under her exit package, as at the date of filing the application.

Whether the Claimant's affidavits and annexures thereto should be expunged.

13. The Respondent submitted that the Claimant's annexures should be expunged as they do not comply with Rule 9 of the Oaths and Statutory Declaration Rules. Indeed, the Claimant's annexures to her supplementary affidavit were neither sealed nor marked.

14. The Court in **Francis A. Mbalanya v Cecilia N. Waema [2017] eKLR** held;

“ It is therefore not true, as submitted by the Plaintiff's counsel, that the failure to seal and number the annexures is a procedural technicality that can be saved by the provisions of Article 159(2) (d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act...However, considering that the Supporting Affidavit in itself complies with the law, it is only the annexures that can be expunged from the record, and not the Supporting Affidavit and the Application.”

15. In view of the foregoing binding precedent, it is clear that the failure by the Claimant herein, to comply with Rule 9 of the Oaths and Statutory Declarations Rules cannot be aided by Article 159 of the Constitution. I therefore proceed to strike out the annexures to the claimant's Supporting Affidavit and the Supplementary Affidavit.

What constitutes the claimant's Exit Package under her contract of service?

16. The court discussed the claimant's exit package in its judgment delivered on 4.1.2020 and held that the package is the one contained in the respondent's Terms and Conditions of service of 2003. No appeal was preferred against the judgment and as alluded to by the respondent, it has complied with judgment and even overpaid the claimant using the Terms and Conditions of Service for the 2014 instead of the 2003 version. The claimant has denied the alleged overpayment and maintained that the respondent has to the contrary not complied with the judgment and has schedule of payment annexed to the Replying Affidavit is not correct. According to her the respondent has underpaid her basic salary, allowances and totally failed to pay other benefits under the 2003 Terms and Conditions of Service.

17. Clause 10 of the respondent's Terms and Conditions of Service provided that:

“EXIT PACKAGE

At the end or on termination of the contract the Vice-Chancellor will have an exit package that will comprise of [sic] the following:-

- (i) The provisions of one secretary and other secretarial support as long as one is in the service of the university.*

(ii) Telephone and utility expense for as long as one is in the service of the university.

(iii) The provision of utility vehicle so long as one is in the service of the university.

(iv) Facility of house servant, gardener and watchman for a period of five years provided one is in the service of the university.

(v) Pension contribution for Senior Management Team should be pegged on actual salary.

(vi) Should continue with the basic salary and house allowance which are personal to them, by the university they exit to.”

18. The respondent has not produced any copies of payslips or other evidence to prove what it has actually been paying to the claimant but only a letter to its counsel dated 24.2.2020 containing four Tables about the claimant’s exit package under 2003 Terms of Service. Table 1 details the claimant’s entitlements and what has been accorded including access to secretary; telephone and utility expenses of upto a maximum of Kshs.10,000; provision of utility vehicle for official purposes plus commuter allowance of Kshs.18,000; facility for house servant, gardener, and Watchman of Kshs. 55,140; Basic salary of Kshs. 744,078 plus house allowance of Kshs.94,080; and Pension contribution for senior management based on Kshs.744,078 at 20% by the employer and 10% by the employee.

19. The foregoing table captures the correct Exit Package for the claimant as provided under clause 10 of the respondent’s Terms and Conditions of Service 2003. However, the said package does not seem to limit the amount payable to telephone and utility expenses to Kshs.10,000. Utility expenses in common parlance includes electricity and water costs. Consequently, the burden is upon the respondent to justify the said maximum amount of compensation for telephone, electricity and water bills.

20. The foregoing observation notwithstanding, Table 2 sets out a simulation of payments to the claimants for August 2018 to February 2019 based on the basic salary of Kshs.744,078, House allowance of Kshs.94,080, Domestic servant, gardener and watchman of kshs. 55,140 and Commuter Allowance of kshs. 18,000. However, the burden of proving, by records, that the foregoing payment was made during the said period rests with the respondent especially after the claimant disputed the same. Under section 74 of the Employment Act, the employer has the obligation of keeping all the employment records of its employees.

21. Table 3 corroborates the allegations by the claimant that the respondent has not been paying her in accordance with the exit package ordered by the court in the judgment herein. In row number 5 of the table, the respondent admits that it stopped paying the claimant’s pension contribution based on Kshs. 744,078 from June 2019 and began paying based on Kshs. 248,848. The respondent justified the said action using the Government Circular OP/SCAC.1/12 (ii) of 2015 5 and PSC/ADM/14/V9(107) dated 25/10/2016 which allegedly directed that the basic salary reverts back to that of a Professor upon completion of tour of duty as CEO.

22. The said Circulars were discussed sufficiently in the judgment herein and the court will not revisit the same. The Government Circular OP/SCAC.1/12 (ii) dated 14.5.2015 was clarified and qualified by the subsequent Circular dated 19.8.2015 to the effect that it did not apply to existing contracts retrospectively. It follows that the claimant’s pension contribution ought to be based on the basic salary of Kshs.744,078 per month and not Kshs. 248,848. Row number 6 of Table 3 acknowledges that the claimant should continue receiving basic salary and house allowance which was personal to self as at the time of exiting the office of the Vice-Chancellor being Kshs. 744, 078 and house allowance of Kshs.94,080.

23. Having considered the material presented to the court, the Claimant ought to enjoy the following package after exiting the office of the Vice Chancellor of the respondent so long as she remains in the service of the university:

Basic salary *Kshs.744,078*

House allowance *Kshs. 94,080*

Domestic servant, gardener & watchman *Kshs. 55,140*

Commuter allowance *Kshs. 18,000*

Pension contribution based on basic salary of *Kshs. 744,078*

Telephone and utility expenses

Utility vehicle

Whether the Claimant is entitled to the sum of Kshs. 9, 012,821 as at the date of filing the application.

24. The Claimant averred in her motion that she is entitled to Kshs. 9,012,821 as her Exit Package and thereafter deposed in her Affidavit that she is entitled to Kshs. 12,207, 642. On the other hand, the respondent alluded that it overpaid the claimant by extending to her benefits not contemplated in the exit package under the Terms and Conditions of Service of 2003.

25. The court has nothing to say on the respondent’s alleged overpayment because it has not invited the court to make any orders on the same. Further, I have already observed that the respondent did not produce any proof of the alleged payments in its letter to its counsel dated 24.2.2020. Likewise, the court is unable to ascertain the amount owed to the claimant as at the date of filing the application because of lack of the supporting employment records especially after the striking out of the all annexures to the claimant’s affidavits. Consequently, I leave

that matter to the parties to amicably settle through a reconciliation of what ought to have been paid based on the exit package set out herein above and the alleged overpayment based on the Terms & Conditions of Service of 2014, and if no settlement the parties can apply.

Conclusion and disposition

26. The upshot of this, is that the application partially succeeds to the extent that the package payable is now clarified. Consequently, the court gives the following orders:

(a) The respondent is directed to compute and pay the claimant any outstanding arrears of the said monthly package less any items paid out erroneously.

(b) The respondent is directed to compute and remit any arrears of pension contributions erroneously unremitted due to computation based on any other figure less than the basic salary of Kshs. 744,078 per month.

(c) The respondent is directed to henceforth and so long as the claimant remains in its service, pay or accord the claimant with the following monthly package:

<i>(i) Basic salary</i>	<i>Kshs.744,078</i>
<i>(ii) House allowance</i>	<i>Kshs. 94,080</i>
<i>(iii) Domestic servant, Gardener & Watchman</i>	<i>Kshs. 55,140</i>
<i>(iv) Commuter allowance</i>	<i>Kshs. 18,000</i>
<i>(v) Pension contribution based on basic salary of</i>	<i>Kshs. 744,078</i>
<i>(vi) Telephone and utility expenses</i>	
<i>(vii) Utility vehicle</i>	

d) Each party to bear own costs of the application.

Dated and delivered at Nairobi this 11th day February, 2021.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE