



**REPUBLIC OF KENYA**

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

**CAUSE NO. 148 OF 2014**

**PETER KINGOINA .....CLAIMANT**

**VERSUS**

**THE COUNTY ASSEMBLY OF NYAMIRA..... RESPONDENT**

**JUDGMENT**

1. On the 10<sup>th</sup> of February, 2017, the Court of Appeal sitting at Kisumu delivered the Judgment in **Civil Appeal No. 84 of 2015, Peter King'oina –vs- The County Assembly of Nyamira**, arising from proceedings and judgment of Lady Justice Maureen Onyango delivered on 25/6/2015 dismissing the claim.

2. In its decision, the Court of Appeal allowed the Appeal and set aside the judgment of the Court as follows: -

“We substitute therewith judgment for the appellant against the respondent in terms of prayers 24(a) and (b) of the Memorandum of Claim dated 24<sup>th</sup> June, 2014. Prayers 24(c) and (e) of the Memorandum of Claim are denied.....” Considering that the suit before the lower Court was determined on the basis of the pleadings and affidavits without *viva voce* evidence, we are unable to determine prayer 24(d) of the Memorandum of claim as there is no material before us on the basis of which to consider this prayer. In the circumstances, we order that prayer 24(d) of the Memorandum of Claim be and is hereby remitted back to the Employment and Labour Relations Court (*before any judge of that Court other than M. Onyango J.*) to determine whether the appellant is entitled to any of the heads of relief sought thereunder and to assess the quantum of compensation payable to the appellant under any of those heads, if any.”

3. The claimant sought the following reliefs under paragraph 24

*(d) In the alternative to (c) above, an Order of compensation of the claimant for the remainder of his unfinished term of office as Speaker of the Respondent calculated as follows: -*

(i) Monthly salary for the remainder of the current term of the Respondent from May, 2014 to August, 2017 calculated as follows: -

(i) 2014 – Kshs.(284,375.00 x 26,000.00) x 8 = 2,483,000.00.

(ii) 2015 – Kshs.(306,250,00 x 26,000,00) x 12 = 3,987,000.00

(iii) 2016 – Kshs.(328,125,00 x 26,000.00) x 12 = 4,249,500.00

(iv) 2017 – Kshs.(350,000.00 x 26,000) x 8 = 3,008,000.00

Total: Kshs.13,727,500.00

(v) House allowance entitled but not paid – Kshs.50,000.00 per month from 22/3/2013 till May, 2014 = 700,000.00.

(vi) Pension Fund Contribution by the employer at 15% of basic salary as follows: -

2014 = 15% x 294,375.00 x 8 = 341,250.00

2015 = 15% x 306,250.00 x 12 = 551,250.00

2016 = 15% x 328,125x12 = 590,625.00

2017 = 15% x 350,000.00 x 8 = 420,000.00

Total: 1,903,125.00

(xii) Money expended (to be expended) on domestic workers which is an entitlement of the Speaker of the County Assembly = Kshs.315,000.00.

(xiii) Medical cover at an amount of Kshs.1,000,000.00 upto the end of the current term of the County Assembly.

(Xiv) Mortgage benefit under the Respondent's mortgage scheme of Kshs.3,000,000 and car loan of Kshs.2,000,000.00.

4. The respondent had filed Memorandum of Response on 4/8/2014 in which the contents of paragraphs 1, 2, 6, 7, 8 9 and 13 of the Memorandum of Claim were admitted.

5. On 7/12/2017, the Court gave the following directions in this matter:

“Oral evidence be led in respect of prayer 24(d) of the Memorandum of Claim. Hearing on 26/7/2018. Parties at liberty to file witness statements in respect of the hearing as directed by the Court of Appeal.”

6. On 17/10/2018 Joshua Kolagi advocate appeared for the respondent and Mr. Ongoya for claimant appeared before me and Mr. Kolagi submitted thus: -

**“Matter was heard and determined regarding quantum. There is a judgment on quantum.”**

7. Mr. Ongoya did not make any presentation on the day. The Court ordered: -

“Matter was finalized and file closed. It remains so unless there is substantive application to revive the same.”

8. On 28/2/2019 Mr. Magiwa advocate for the claimant and Mr. Mwesigwa Advocate for the respondents appeared before me pursuant to an application by the claimant dated 4/2/2019.

9. The Advocate recorded the following consent: -

“By consent of the parties Application dated 4/2/2019 is allowed as prayed. Hearing of the suit on item 24(d) (compensation) be on 8/7/2019.

10. On 8/7/2019, the Court was informed that the respondent was willing to settle the matter out of Court and hearing of the matter was by consent of the parties deferred to 4/12/2019. Meanwhile the matter was allocated a mention date on 31/7/2019 to record consent.

11. The Court was on 31/7/2019 informed that negotiations were going on and the matter be mentioned on 9/12/2019 to record settlement.

12. On 9/12/2019, the Court was informed that negotiations had collapsed and the parties requested a hearing date. The Court allocated the 5<sup>th</sup> March, 2020 for hearing of the suit.

13. On 5/3/2020, the matter did not proceed because the respondent had changed its advocate. The Court granted the matter a fresh hearing date on priority basis on 16/3/2020.

14. COVID – 19 set in and the Court was unable to proceed with the matter as scheduled.

15. On 19/2/2020 the matter was placed before the Deputy Registrar Hon. B. Omollo M/s Odhong held brief for Mr. Walukwe for the Respondent and there was no appearance for the claimant. M/s Odhong informed the Court that: -

“Both parties have complied. We pray for a judgment date.” **The Deputy Registrar then directed “judgment on notice.”**

16. The Court has perused the record and found that the parties had in disregard of the directive of the Court of Appeal in its judgment dated 10/2/2017 opted to file written submissions in respect of the pending dispute for compensation as set out under paragraph 24(d) in the statement of claim.

17. The claimant filed his submissions on 24/1/2020 whereas the respondent filed its submissions on 21/8/2020. The submissions by the claimant are limited to assessment of Quantum under prayer 24(d) of the Memorandum of Claim

18. The respondent however filed its submissions strictly on the basis of the directive by the Court of Appeal in its judgment stating that the

respondent does not admit liability in its submissions nor did the parties record a consent before Court compromising the issue of liability with regard to prayer 24(d) in the Statement Claim.

19. It is the Court's considered decision that the parties have not complied with the directive by the Court of Appeal. In particular, the claimant has not tendered any evidence to prove on a balance of probabilities that he is entitled to the reliefs set out under prayer 24(d) of the Statement of Claim.

20. In terms of Section 107 and 108 of the Evidence Act, he who alleges a fact must prove it on a balance of probabilities.

21. The respondent denounces the reliefs sought by the claimant in his written submissions stating that under paragraph 24(d) (i) to (v) of the Memorandum of Claim dated 24/6/2014, the claimant purports to claim from the respondent anticipated salary for the would have been term of the Speaker of the County Assembly from the time he was impeached on 12/5/2014 to the Presumptive end of term in August, 2017.

22. The claimant has clearly squandered his opportunity to substantiate his claim by preponderance of evidence to the standard required by law.

23. As the Court of Appeal stated in its judgment dated 10/2/2017,

“We are unable to determine prayer 24(d) of the Memorandum of Claim as there is no material before us on the basis of which to consider that prayer.”

24. That finding by the Court of Appeal remains valid to date with respect to this Court.

25. The Court finds therefore that the claimant has failed to prove the claim set out under paragraph 24(d) of the Memorandum of Claim on a balance of probabilities and the suit is dismissed in respect of that prayer 24(d) (i) to (d) for failure of proof by the claimant.

26. The Court makes no Order as to costs considering that no further proceedings have taken place with regard to the outstanding prayer 24(d) (i) to (d).

27. The final orders of the Court are therefore that the suit is dismissed with no order as to costs in respect of prayer 24(d) of the Memorandum of Claim.

**DATED AND DELIVERED NAIROBI THIS 11TH DAY OF MARCH, 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 Judgment 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:**

Mr. Ongoya for the Claimant

Mr. Walukwe for Respondent

Chrispo: Court clerk