REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1789 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

GEORGE OCHIENG ODODA AND 173 OTHERS.....CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION.............1ST RESPONDENT

KENYA RAILWAYS STAFF RETIREMENT

BENEFIT SCHEME..2ND RESPONDENT

JUDGMENT

1. The genesis of this suit is a Plaint dated 27th April, 2009 filed at the High Court as HCCC No. 230 of 2009 against the 2nd Respondent alone. On 21st July, 2015 the suit was referred to this Court on the basis that this Court has jurisdiction as the dispute emanated from an employment relationship. Thereafter, the Claimants made several amendments to the Plaint/Claim with the last re-amendments being the Claim dated 13th August, 2019, which amendments included the joinder of the 1st Respondent.

2. The Claimants contend that the 1st Respondent has to date dishonoured the terms and conditions of the retrenchment package. They therefore pray for following reliefs:

> *a) The Claimants pray for an injunction restraining the Respondents by itself, agents, servants and or employees or any other person claiming authority under it from interfering with the Claimants quiet enjoyment of the tenancy and allow the Claimants continue retaining the said houses and until they are fully paid their dues.*
>
> *b) THAT this Court be pleased to uphold the contents of the CBA executed, dated 24th November, 1997 alongside the Central Joint Council (CJC) agreement dated 10th November, 1997 and both registered on 12th June, 1998 at the Industrial Court as RCA No. 165 of 98.*
>
> *c) THAT this Court be pleased to issue a permanent order compelling the Respondents herein forthwith pay to the Claimants their dues as per the CBA dated 24th November 1997 as calculated and tabulated for each individual Claimant as attached in the list of documents in regard to:-*
>
> > *I. Salary arrears*
> >
> > *II. Salary arrears of the year 1998 RB1 25% & RCII 40%*
> >
> > *III. Pension arrears dated as from 1st January 1998 to date.*
> >
> > *IV. Severance*
> >
> > *V. Gratuity arrears*
> >
> > *VI. 50% of their monthly salary accruing from the date of registering the CBA to date or as the Court deems fit.*
> >
> > *VII. Leave allowance to job group B*

d) Any other relief that this Court deems fit.

3. The 1st Respondent, a state corporation and sponsor of the 2nd Respondent, filed an Amended Statement of Response dated 30th October, 2019. It objects to the Claim on grounds that it merges the jurisdiction of the Retirement Benefits Tribunal, it is statute barred as the issues complained of occurred in 1998 and is res judicata as a similar suit being Nakuru HCCC No. 397 of 1998 between the same parties was determined. It further avers that it complied with the terms of the CBA.

4. The 2nd Respondent, a pension fund into which all the contributions of the 1st Respondent's employees are remitted, filed an Amended Defence to the Claim dated on 13th November, 2019. It denies that the Claimants were parties to the CBA and also avers that the suit is res judicata by virtue of HCCC No. 397 of 1998 which was heard on merit and decided in favour of the 1st Respondent.

Facts and Evidence

5. The Claimants were all former employees of the 1st Respondent in job groups B & C until their retrenchment in May 1998. Upon their retrenchment, they were entitled to their retirement package as per the conditions set out in a CBA dated 16th January, 1998 and registered in Court on 11th June, 1998.

6. Prior to this retrenchment, the CJC in a meeting held between 10th to 14th November, 1997 entered into an agreement which was to be effective from 1st January 1998 to 31st December, 1998. The agreement provided for aggregate salary increment for the year 1998 top bracket (RB1) at 40% and the bottom bracket (RCII) 70%. The Claimants maintain that the terms of these two agreements were never implemented.

7. **John Bernard Ochieng, CW1**, testified that he was in RCII and was paid 30/% but the balance of 40% has not been paid. He testified that he was not entitled to pension but was entitled to gratuity at 30%. He testified that though he was paid his gratuity there was a balance of Kshs.922,825. He further testified that there exists a balance of his salary increase which was to affect his gratuity. He testified that their claim is that only 30% of the CBA was implemented and they now seek the balance of 40%.

8. **Christopher Njoroge Ng'ang'a, CW2,** testified that his salary and pension were to be increased by 45% but his salary was increased by 20%. Hence, there is a balance of 25%.

9. **Ruth Simon Mahugu, CW3** testified on behalf of her late husband Simon Mahugu Ndirangu and adopted her witness statement dated 9th July, 2019 as her evidence in-chief. On cross-examination, she testified that she is paid her late husband's pension but is yet to be paid his terminal dues. She further testified that she occupies a house owned by the 2nd Respondent but does not pay rent.

10. **Richard Kosgei,** the 1st Respondent's Senior Human Resource Assistant testified as RW1. He testified that the 25% and the 40% salary arrears sought by the Claimants was not part of the CBA of 16th January, 1998. He further testified that the pension arrears from 1st January, 1998 to date are not due because they were paid as per the rate stated in the CBA. He further testified that severance pay and leave allowance were paid and the 50% gratuity is not due.

11. He testified that the Claimants last salary was the one implemented in 1998 and was reviewed on 1st May, 1999 by which time the Claimants had already retired. It was his testimony that the 1st Respondent's position is that what was agreed and registered was implemented and that it was not aware of any unimplemented agreement. He testified that the agreement discussed in November, 1997 was unenforceable because it was not registered and instead, a subsequent agreement is what was registered.

12. It was his testimony that upon transfer of the property to the 2nd Respondent in 2016, the 1st Respondent had no responsibility to continue paying rent. He denied there being an agreement that the Claimants were to continue living in the houses at the expense of the 1st Respondent.

13. **Nicholas Kikuvi,** the Benefits Manager of the 2nd Respondent, testified as RW2. He testified that the 1st Respondent transferred its property to the 2nd Respondent and that rent was due from the tenants. He testified that the current arrears stand at over Kshs.60 million and that the Claimants' allegation that they occupy the houses for free is not valid.

Determination

14. The issues for determination are:

(a) Whether the matters raised in the suit are res judicata;

(b) Whether the suit is statute barred;

(c) Whether this Court has jurisdiction to determine the payable pension;

(d) Whether the claim is bad in law for noncompliance with Section 81 of Kenya Railways Corporation Act;

(e) Whether the Claimants are entitled to the orders sought

a. Whether the matters raised in the suit are *res judicata*

15. The Respondents submitted that the matters in the present suit are res judicata because they were directly and substantially in issue in Nakuru HCCC No. 397 of 1998. The 1st Respondent argued that prayer (a) in the Nakuru Case was heard and conclusively determined and an order for stay of execution against the judgment was denied by the Court.

16. The Claimants on their part submitted that this issue was already dealt with in a Ruling delivered by Ndolo J., on 19th February, 2016. Indeed, the Judge found:

> *"I have looked at this case in light of Nakuru HCCC No. 397 of 1998 and have formed the opinion that the similarity in subject matter and the relationship between the Respondent and KRC do not by themselves render the issues raised in the current case res judicata."*

17. That Ruling was with respect to the 2nd Respondent's application dated 28th May, 2015 and by then it was the sole respondent in this suit. Therefore, the issue of res judicata in respect of the 1st Respondent was not dealt with.

18. Section 7 of the Civil Procedure Act provides:

> **No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

19. In the Nakuru Case, the Plaintiffs therein alleged that the Defendant, the 1st Respondent, had disregarded the terms of the retrenchment package. Prayers (a) of the Plaint sought to compel the Defendant to pay them in accordance with the terms of the CBA of the General Joint Council Agreement of 10th-14th November, 1997. Prayer (d) of the Plaint sought the continued retention of the leased houses until they were fully paid in accordance with the CJC Agreement of 16th January, 1998 and the Circular letter Ref. No. EST. 19/14/1/e of 30th March, 1995.

20. CW1 confirmed that he was a party in the Nakuru Case and they filed this suit after they detected that the Nakuru case could not be correctly resolved. The CBA and CJC agreements referred to in the two suits are similar and prayers (a) and (d) in the Nakuru Case are those sought in this Claim.

21. The doctrine of res judicata was addressed by Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** where it held:

> *"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."*

22. Undeniably, the issues in the two cases revolve around the retrenchment package. In the Judgment delivered on 9th May 2011, the Court found that the evidence was below the threshold of a balance of probabilities. It is trite that the issues raised in this suit are res judicata only in so of far as they were determined in HCCC No. 397 of 1998. This would also only apply to the Claimants who litigated in the Nakuru Case. During cross-examination, CW2 testified that he was not a party to the suit. In the Judgment of the Nakuru Case, the Judge observed that he had only seen the list that contained 127 Plaintiffs.

23. The Claimants produced a list of Claimants who were parties to HCCC No. 397 of 1998. However, the list contains some names which are either abbreviated or only one name is given making it difficult to single out which of the Claimants were parties to both suits.

24. The foregoing notwithstanding, the prayers in Nakuru HCCC No. 397 of 1998 were substantially different from the instant suit. In that suit the Plaintiffs sought the following orders –

> *a) a mandatory injunction compelling the defendant, its agents,. servants and/or employees to pay the effect the plaintiff (sic) in accordance to (sic) the terms of the collective bargaining, agreement of the general Joint Council agreement of 10th – 14th November, 1997.*
>
> *b) A mandatory, injunction compelling the defendant by agent (sic) servant and/or employee compelling the defendant (sic) to pay the plaintiffs overtime and night shifts allowances difference resulting from Industrial Court Cause No. 72 of 1998, 25% award to locomotive drivers as per Kenya Gazette No. Vol. 51 of 28th August, 1998 Notice No. 4750.*
>
> *c) A mandatory injunction compelling the defendant by itself, agents and or servant or employees to remit auxiliary deductions from the applicants' salaries towards insurance premiums and Save As You Earn (SAYE).*
>
> *d) A permanent injunction against the defendant restraining by itself, agents, servants and/or employees from unlawfully evicting*

and/or interfering with the plaintiffs' quiet possession and enjoyment of the tenancies and continued retention of the defendant's leased houses until the plaintiffs are fully settled in accordance with the Central Joint Council Agreement Clause b, c and d of 16/1/1998 and General Circular letter Ref. No. EST.19/14/1/e of 30th March, 1995 respectively or howsoever threatening, harassing or intimidating the plaintiffs …"

25. The Court further extracted the issues as follows –

i) failing to pay the plaintiffs the difference of overtime and night shift allowances in terms of the Industrial Court award in Cause No. 72 of 1998;

ii) failing to pay 25% salary award to locomotive drivers in accordance with Kenya Gazette No. Vol. 51 of 28th August, 1998;

iii) failing to remit auxiliary deductions from the plaintiffs' salaries towards insurance premiums and Save As You Earn (SAVE);

iv) threatening to evict or evicting the plaintiffs from its (the

defendant's) residential quarters.

26. The doctrine of res judicata would therefore only apply to the issues as extracted by the Court in the judgment.

27. The instant suit was provoked by a notice issued by the 2nd Respondent, the Kenya Railways Staff Retirement Benefits Scheme, to the Claimants to vacate the residential premises which they had been occupying since their services were terminated. The residences were among those transferred to the 2nd Respondent by the 1st Respondent by Legal Notice No. 169 of 7th September 2006.

28. The 2nd Respondent came into existence upon registration on 4th May 2006. It was thus not a party to Nakuru HCCC No. 397 of 1998.

29. It is further worth noting that the suit herein was filed in April 2009 and was therefore pending in Court as at 9th May 2011 when judgment in Nakuru case was delivered. As at the time of determination in the Nakuru suit, this suit was only against the 2nd Respondent, the 1st Respondent having been joined later in 2018.

30. It is for these reasons that I agree with the decision of Ndolo J. that the suit herein is not *res judicata*.

b. Whether the suit is statute barred

31. From the record and the pleadings, the 1st Respondent which was the Claimants' employer was joined to the suit in the year 2018. This was 20 years after the Claimants' retrenchment in 1998. It is on this basis that is argues that the suit was filed hopelessly out of time of 3 years prescribed by the Employment Act, 2007 and even outside the contractual limitation period of 6 year period.

32. While the Claimants were retrenched in 1998, the contentious issue is the continued failure by the 1st Respondent to pay their terminal dues as provided in the CBA and the CJC Agreement. Prior to the enactment of the Employment Act, 2007 Section 4 (1) of the Limitations of Actions Act governed the limitation period in employment claims being 6 years after the cause of action arose.

33. Section 90 of the Employment Act, 2007 addresses the limitation period of employment claims as follows:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

34. The failure by the 1st Respondent to pay the full terminal benefits is not disputed. RW1 in his testimony does not deny that the Claimants were to receive either 40% or 70% salary increment but only 20% and 30% was paid respectively. The remainder of the amount is still unpaid and as such time starts running from the date they are paid these amounts. The non-payment and failure to fulfill the terms of the CBA has been a continuing injury because the conditions attached to the retrenchment package were never fulfilled.

35. Further there was a lot of correspondence between the 1st Claimant and its agents including the Parent Ministry through the Permanent Secretary, Ministry of Transport, in which the pending terminal benefits of the Claimants is acknowledged. For example, in the letter dated 2nd October 2006, the Permanent Secretary, Ministry of Transport wrote as follows –

"*Ref No. MOT/CONF/8.006 VOL.IX Date 2nd October 2006*

Kahiga Waltindi

Mirugi Kariuki & Company Advocates

Morop Distributors (K) Ltd Building

Kenyatta Avenue

P 0 Box 1689-20100

NAKURU

RE: RETRENCHEEES OF KENYA RAILWAYS CORPORATION

Reference is made to your letter Ref. No. M/C/CIV/3423 dated 21st August 2006 on trenches of Kenya Railways.

I wish to inform you that a Committee has been formed to address issues concerning the retrechees of Kenya Railways Corporation. All concerns raised by retrenchees are to be discussed and the way forward reached before end of November 2006.

SIGNED

M. O. Eshlwani

For: PERMANENT SECRETARY"

36. Again on 13th September 2007, the Permanent Secretary wrote to the 2nd Respondent as follows

"*Ref No. MOT/CONF/8.006 VOL.III Date 13th September 2007*

Mr. Mathew Tuikong

Chief Executive Officer

Kenya Railways Staff Retirement Benefits Scheme

NAIROBI

Mr. Nduma Muli

Managing Director

Kenya Railways Corporation

NAIROBI

EVICTION OF 1998 RETNRECHEES FROM KRC HOUSES

We are in receipt of a letter of complaints from the 1998 Retrenchees alleging, that they have been evicted from the KRC houses as from yesterday, 12th September 2007.

However, you may recall that the Permanent Secretary formed an Inter-Ministerial Committee comprising of representatives from the Ministry, Kenya Railways Corporation, Inspectorate of State Corporations, Civil Service Reforms Secretariat, Directorate of Personnel Management, Ministry of Justice & Constitutional Affairs and' Ministry of Finance vide letter Ref. MOT/CONF/8.006 Vol. III of 26th September 2006 with a view to addressing the issues relating to former employees of Kenya Railways Corporation. One of the issues being discussed is that of the 1998 Retrenchees, and they had put their Court case on

hold to enable the Committee complete the Report.

The Final Report is ready and was discussed with the Permanent Secretary on 27th August 2007 prior to presentation to the Board of Kenya Railways. However, another meeting with the Permanent Secretary will be scheduled soon to finalise the last part of the Report.

In this connection, we advise you to put on hold the eviction of the 1998 Retrenchees as per the list attached until this Report is implemented.

SIGNED

Elijah T. Nduati

FOR; PERMANENT SECRETARY"

37. Also letters dated 2nd October 2008 and 9th October 2008 from the 1st Respondent reproduced below –

Letter dated 2nd October 2008

"Ref: CAC/STAFF VOL X   October 2, 2008

Chief Executive Officer

KRSRBS

NAIROBI

RE: RETENTION OF QUARTERS: 1998 RETRENCHEES AWAITING CLEARANCE

Some of the group retrenched in 1998 had a pending Court case leading to their continued retention of quarters pending

resolution of their transport allowance clearance.

Their case has since been progressed for settlement and in the meantime the Corporation has committed to meet their rent obligations.

In the circumstances therefore, kindly arrange to stay the eviction order in respect of the staff appearing in Appendix 1 attached.

You will be advised immediately they are settled.

SIGNED

Josephine Masibo

Human Resources & Admin. Manager

For: MANAGING DIRECTOR"

Letter dated 9th October 2008

"Ref: CAC/STAFF VOL XL   Date: October 9, 2008

Chief Executive Officer

KRSRBS

P. O Box 46796 – 00100

Nairobi

RE: RETENTION OF QUARTERS: 1998 RETRENCHEES

AWAITING CLEARANCE

Our letter of the same reference dated October 2, 2008 refers;

Kindly note that the below mentioned people were erroneously omitted for that list.

Please arrange to stay the eviction order in respect of them for the corporation will meet their rent obligation.

NAME	***C/NO***	***HOUSE NO.***	***ESTATE***
Simon M. Mahugu	*821*	*31*	*Land Ma*

	85		*we*
James W. Njogu	*12496*	*N8-8*	*Makongeni*
Josephat M. Kimwere	*245192*	*Blk 13 C*	*Land Mawe*

Yours Faithfully

SIGNED

Rhoda Ochira

Human Resources Officer (ER)

For: Human Resources & Admin. Manager"

38. In **Henry Kipchumba Tarus v Postal Corporation of Kenya [2019] eKLR** the Court held:

> *"Is there continuing injury herein?*
>
> *In **George Hiram Ndirangu versus Equity Bank Limited [2015] eKLR** the court held that the logical meaning of continuing injury or damage would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues. In the instant case the court returns that the continuing injury includes the alleged admitted and unpaid dues determined as of 25th May, 2017.*
>
> *Save for the admitted continuing injury and dues held with regard to letter dated 25th May, 2017 to file for claims which arose last on 25th April, 2014 is out of time."*

39. It is therefore my finding that the unpaid terminal dues constitute a continuing injury and is not time barred.

40. Further as I have already pointed out above, the suit herein was a reaction to the rent demands and eviction notices issued by the 2nd Respondent on 21st April 2009.

41. I thus find that neither the claim against the 1st Respondent nor the claim against the 2nd Respondent are time barred.

c. Whether this Court has jurisdiction to determine the issue of pension as raised in the claim herein

42. The 1st Respondent submitted that the claim for pension arrears does not fall within the jurisdiction of this Court but within the purview of the Chief Executive Officer of the Retirement Benefits Authority and the Retirement Benefits Tribunal as set out in Sections 46 to 48 of the Retirement Benefits Act.

43. The Claimants contention is that the failure by the Respondents to implement the terms of the CBA resulted in their pension or gratuity being based on an incomplete salary scale. CW1 testified that 40% balance of his salary increment affected his gratuity. He further testified that there is a balance of his salary increase which was to affect gratuity at 40%. CW2 also testified that his salary and pension were to be increased by 45% but only 20% was paid leaving a balance of 25%.

44. The jurisdiction of this Court in pension matters was determined by the Court of Appeal in **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another v Ann Wangui Ngugi & 524 others [2018] eKLR** where it held:

> *"Nevertheless, it is not necessary to determine this ground of appeal. Having found that the appeal does not lie and that the ELRC has no jurisdiction for that reason, to determine the appeal, it follows that the court is debarred from hearing and determining the appeal thus rendering the remaining ground of appeal hypothetical and therefore moot …*
>
> *In our view, to determine the statutory jurisdiction of the ELRC to entertain disputes relating to retirement benefits or retirement benefits schemes without determining the court's constitutional jurisdiction to entertain such disputes, would not finally settle the*

law on jurisdiction. It would only cause confusion. For those reasons, we decline to determine the question of the statutory jurisdiction of ELRC until the right occasion arises."

45. It is my finding that the Claim in this suit questions the computation of dues. It is not entirely a pension matter but an issue on whether the pension tabulations took into account the entire salary increment, as per the CJC Agreement. The determination on the rightful salary increment is a matter within the jurisdiction of this Court as Section 12(i) and (j) of the Employment and Labour Relations Court Act provides that it has jurisdiction to determine the registration and enforcement of collective agreements. Ultimately, this Court has jurisdiction to determine the matter.

d. Whether the claim against the 1st Respondent is bad in law

46. The 1st Respondent submitted that the claim against it is bad in law for noncompliance with Section 87 of the Kenya Railways Corporation Act which provides that –

87. Limitation

Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

47. They rely on the case of **Joseph Sebastian Ringo v Kenya Railways Corporation (2015) eKLR**. In that suit, the Court specifically held –

"In view of the time limitations herein terminating the suit, the application of Section 87 of the Kenya Railways Corporation Act is of no effect. Time cannot be extended for the benefit of the Claimant by the use of such provisions as it gives less time to file the suit or complaint then the Employment Act, 2007 or the repealed Employment Act Cap 226."

48. In the instant case, the primary legislation is the Employment Act. A shorter period cannot be applied as it would mean that employees of the 1st Respondent would be discriminated as against other employees. Secondly, the claim against the 1st Respondent is a continuing injury that had been acknowledged over the years as reflected in the letters referred to above. The above case therefore does not apply to the instant case. I thus find that this case is not bad in law.

e. Whether the Claimants are entitled to the orders sought

49. As stated above, the Claimants posit that their terminal dues have never been fully settled. The CBA dated 16th January, 1998 and registered on 11th June, 1998 set out the conditions of the retrenchment as follows:

"ii. __Conditions attached to the Retrenchment package__

a. Before the notice of retirement is issued to the staff, three officials of the Kenya Railways Workers Union will be given the opportunity to scrutinize the list of the unionisable staff affected to eliminate any victimization.

b. All staff who will be retrenched will be allowed to retain Railway houses/leased houses if in occupation of any; those drawing owner occupier house allowance or normal allowance will continue drawing their allowances until they are fully settled.

c. All staff will be given three months special leave notice followed by their annual leave and on completion of their terminal leave they will be eligible for payment of their terminal benefits. But should the corporation find itself unable to pay the terminal dues on due date, those staff who are pensionable will be paid their reduced monthly pension; those who are eligible for payment of gratuity will be paid a monthly allowance equivalent to 50% of their current monthly salary until they are fully settled.

d. The severance pay to be paid to the staff who will be retrenched is non-taxable. The documentary evidence of government clearance is attached to the agreement."

50. RW1 testified that the 1st Respondent is not aware of any unimplemented Agreement and that the Claimants are not owed anything. He further testified that the agreement discussed in November 1997 is not enforceable because it was not registered and that the Claimants salary scale is the one implemented in 1998.

51. He however contradicted his testimony under cross examination by stating that the Claimants received a salary increase of 20% and 30% against the intended 45% and 70% respectively. CW1 confirmed this when he stated that only 30% of the CBA salary increase was implemented and they now seek the balance of 40%. CW2 on his part testified that his salary was increased by 20% hence there was a balance of 25%.

52. The Agreement reached at the CJC meeting held between 10th to 14th November, 1997 stated:

> "*Wages and Salaries*
>
> *The Council discussed the issue of wages and Salaries at length and after considerable negotiations, both parties agreed as follows:*
>
> *(i) That the aggregate Salaries increment for the year 1998 will be 45% at the top bracket (RBI) and 70% at the bottom bracket (RCII)*
>
> *(ii) That the salaries of all Union Members will be increased by 20% at the top bracket (RBI) and 30% at the bottom bracket (RCII) with effect from 1st January, 1998; and*
>
> *(iii) By 25% at the top bracket (RBI) and 40% at the bottom bracket (RCII) with effect from 1st November, 1998*
>
> *(iv) That the agreement on this item will expire on 31st December, 1998"*

53. The argument that the agreement could not be implemented because it was not registered does not stand. This is because RW1 confirmed that the terms of the agreement was already incorporated into the contracts of the employees and partially implemented. The remainder was to be paid in installments. His testimony that the 2nd installment was overtaken by events as the CBA was reviewed is incorrect because regardless of the time the installment was due, the Claimants eventual terminal benefits were to be based on these salaries. The Claimant would only not be entitled to increments under subsequent CBAs that reviewed the CBA dated 16th January, 1998.

54. Based on the finding that the Claimants did not receive their terminal dues calculated on the full percentage of their salary after the increment, I find that they are entitled to the remainder of their terminal dues. This amount is to be computed based on their salary after the 70% and 45% increment respectively as stated in the CJC Agreement.

55. With respect to the leased houses, the transfer and vesting of the 1st Respondent's properties was effected in accordance with Legal Notice No. 169 of 2006. As a result, the 2nd Respondent now owns the properties occupied by the some of the Claimants.

56. The 2nd Respondent's submission that there is no employment relationship between it and the Claimants and that this Court lacks jurisdiction to determine landlord-tenancy disputes is not relevant as this Court is not determining the tenancy of the Claimants. The jurisdiction of this Court as provided for under Section 12(1) of the Employment and Labour Relations Court does not extend to tenancy disputes between the Claimants and the 2nd Respondent. Nevertheless, the 1st Respondent transferred its properties to the 2nd Respondent in spite of an existing obligation under condition (ii)(a) of the CBA dated 16th January 1998, which fails under the jurisdiction of this Court as an employment benefit.

57. The 1st Respondent's liability still remains due to the fact that the Claimants never received their terminal dues. There is evidence on record that the 1st Respondent undertook to pay house rent for employees who had not been paid full terminal benefits. See letter dated 2nd October 2008 from the 1st Respondent to the 2nd Respondent reproduced above.

58. The 1st and 2nd Respondents are therefore obligated to determine how to address the issue of rent because the Claimants already had an enforceable property lien over the houses. Consequently, the 2nd Respondent cannot evict the Claimants until they are fully paid by the 1st Respondent.

Conclusion

59. From the foregoing, I find that the Claimants have proved on a balance of probabilities that they have not been paid their full terminal benefits pursuant to the CBA dated 24th November 1997 and CJC Agreement dated 10th November 1997. They are therefore owed salary arrears and resultant pension and/or gratuity based on the reviewed salary. They are further entitled to retain the 2nd Respondent's houses that they have been occupying pending payment of full terminal benefits as per CJC Agreement.

60. CW1 testified that the computation of the Claimants dated 29th November, 2018 was derived from their last salary and that they did not produce their pay slips/pay advise slips as the 1st Respondent failed to issue the same to them. The 1st Respondent having not filed its tabulation, it is directed to file the same within 30 days to enable the Court issue final judgment on the amount payable.

61. With respect to costs, the Claimants did not pray for costs in the claim as amended on 13th August 2019. There shall therefore be no order for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 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 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