



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.37 (N) OF 2010**

**AGNES MUTHONI & 34 OTHERS.....CLAIMANTS**

**VERSUS**

**KENYA MEDICAL RESEARCH INSTITUTE (KEMRI).....RESPONDENT**

**AND**

**UNION OF NATIONAL RESEARCH AND ALLIED**

**INSTITUTES STAFF OF KENYA (UNRISK).....INTERESTED PARTY**

**RULING**

The claimants filed the application dated 3<sup>rd</sup> December, 2020 seeking for orders that;

1. Spent.
2. Spent.
3. Spent.
4. *The respondent's current Chief Executive Officer and Director one Dr. Yeri Israel Kombe be and is hereby ordered to reengage the claimants and allow the claimants to resume their work duties at the respondent's premises without any loss of status, salary and emoluments and pro tern pay their back pay, salaries and emoluments in conformity of the award given on 13<sup>th</sup> May 2010 as tabulated by the claimants herein in the schedule herein.*
5. *The court be pleased to order the respondent to remit the claimant's monthly salaries and allowances as and when they fall due*
6. *This court be pleased to order the sum of Kshs.200,000 plus the accrued interest deposited Account No.xx-xxxxxx held by Cooperative bank ltd pursuant to an order of this court on 1<sup>st</sup> October, 2010 as a condition of stay pending appeal in Court of Appeal No. 15 of 2011 be and is hereby released to the claimants.*
7. *The respondent to pay the claimants their unsecured back pay herein comprising of their salaries and allowances as follows and as tabulated in the schedule attached herein;*
  - a) *Their basic pay from 17<sup>th</sup> June, 2015 to date*
  - b) *Their allowances from 17<sup>th</sup> December 2010 to date.*
8. *Costs of the application be borne by the respondent.*

The application is supported by the affidavit of Garland Biko Livondo and on the grounds that the claimants have an award herein directing the respondent to reinstate and re-engage them. There have been numerous orders of stay obtained against the award which have now been withdrawn, lapsed or been spent.

There is currently no order staying the implementation of the award and only a portion of the entitlements due, basic pay from 17<sup>th</sup> December, 2010 to 15<sup>th</sup> July, 2015 have been secured on account of the orders issued in ELRC Petition No.31 of 2013 which has now been determined. The court ordered the basic pay secured be released to the claimants.

The only matter pending in court with regard to Petition No.31 of 2013 has been finalised and the stay spent or lapsed. The claimants should be allowed to enjoy the fruits of their award.

It is over 10 years since the order of reinstatement was issued and the respondent has yet to enforce due to numerous stay orders. The claimants are available to serve the respondent by reinstatement and re-engagement and the respondent shall not suffer any prejudice since they will have to pay back wages where reinstatement and re-engagement of the claimants is not done.

The claimants are apprehensive that the respondent will continue to unfairly neglect to comply with the court award unless compelled by this court.

In his Affidavit, Livondo avers that following the award herein, the court allowed the respondent stay pending appeal on condition that it deposits a security of Ksh.200, 000 in a joint interest earning account and account No.xx-xxxxxx held at Cooperative Bank Limited was ponded for the security deposit pending hearing of Appeal No.15 of 2011. The claimants challenged the appeal with a Preliminary Objection and on 10<sup>th</sup> May, 2013 the Court of Appeal struck out the appeal.

The respondent filed High Court Petition No.201 of 2010 where stay was granted but later withdrawn. Another application seeking stay orders was filed and the court directed these matter be heard by a bench of three judges and who heard and dismissed the petition on 16<sup>th</sup> July, 2016. The respondent applied for stay of the judgement pending appeal which was allowed on 9<sup>th</sup> September, 2016 on condition that there be a deposit of the basic salaries of the 35 claimants from 17<sup>th</sup> December, 2010 to 15<sup>th</sup> July, 2015 in court or in a joint interest earning account within 30 days and failure of which the order of stay would lapse.

On 19<sup>th</sup> October, 2016 the respondent deposited a sum of Ksh.50,569,000 basic salary in a joint interest earning account held in the names of Mohammed Muigai Advocates and Enonda & Associates Advocates at Sidian bank account No.xxxxxx Kilimani branch. This deposit was made out of time and without seeking leave of the court.

The respondent filed Appeal No.220 of 2016 which appeal was compromised in light of the decision by the Supreme Court regarding the impropriety mixed benches of judges from different courts by referring Petition No.31 of 2013 back to the court for hearing and judgement was delivered on 18<sup>th</sup> October, 2019 and the judge adopted the earlier judgement noting the court was *functus officio* but there as application for review and a ruling delivered on 13<sup>th</sup> October, 2020 the court directed that sums deposited in the joint interest earning account be released to the claimants who were interested parties in petition No.31 of 2013.

The respondent still owe substantial back payments and to pay the claimants their unsecured back pay herein comprising salaries and allowances from 17<sup>th</sup> June, 2015 to date and allowances from 17<sup>th</sup> December, 2010 to date total being Ksh.2,814,679.

There is no stay order pending stopping the re-engagement of the claimant, payment of back pay and a release of sums deposited as security to be paid with interests.

The interested party filed the Replying Affidavit of Zachariah Achacha and in support of the claimant's application.

There was no response by the respondent save to file written submissions.

Determination

On the application by the claimants, the court has analysed the written submissions and the record and Judgement herein delivered on 13<sup>th</sup> May, 2010 and decree thereof was that;

- 1. The letters of termination dated 17<sup>th</sup> December 2009 be declared null and void.*
- 2. Respondent/Employer to unconditionally reinstate all the 35 grievants employees who lost their jobs unfairly immediately with no loss of their basic pay or seniority and to re-engage them in the respective positions they were holding prior to the termination of 17<sup>th</sup> December 2009.*

On the record and the chronology of events as outlined in the Affidavit of Livondo in support of the instant application, there are no stay orders stopping execution of the judgement.

The judgement herein stands.

On 13<sup>th</sup> October, 2020 this court delivered ruling with regard to funds deposited as security in the sum of Ksh.50, 569,000 held at Sidian Bank Limited. Such is not challenged.

Contrary to the submissions by the respondent, what is outstanding is the enforcement of the judgement in terms of the decree and the components being;

- a) Unconditional reinstatement of all the 35 employees immediately;
- b) reinstatement without loss of basic pay or seniority; and
- c) Re-engagement in the respective positions held prior to the termination on 17<sup>th</sup> December, 2009.

The aspects of reinstatement/re-engagement and payment of basic pay is embedded in the award. The payment of allowances and emoluments thereof is not part of the award. There was no appeal on this limb.

To secure the orders of stay of execution of the orders above, the court on 1<sup>st</sup> October, 2010 adopted consent of the parties and orders that;

*... the respondent is hereby granted stay of execution of the award pending filing of an appeal to the Court of Appeal on condition of depositing shs 200,000 in a joint account with M/s Enonda Makaloo, Makori & Co. Advocates on or before 24<sup>th</sup> October, 2010.*

The pending petition High Court No.31 of 2013 is addressed with finality; Court of Appeal No.220 of 2013 is addressed with finality; and stay orders herein all lapsed and or spent, the award herein in the terms applied in the instant application is found with merit.

On the court award on 13<sup>th</sup> May, 2010 the orders sought by the claimant are found with merit save the order seeking payment of back pay, such was not part of the award. The specification that *with no loss of their basic pay* apply.

Accordingly, application dated 3<sup>rd</sup> December, 2020 is hereby allowed in the following terms;

- a) The respondent's current Chief Executive Officer and Director Dr. Yeri Israel Kombe is hereby ordered to re-engage the claimants and allow the claimants to resume their work duties at the respondent's premises without any loss of status as held on 17<sup>th</sup> December, 2009;**
- b) The claimants shall report on duty and before the Chief Executive Officer and Director on 18<sup>th</sup> October, 2021 at 8.30 AM for deployment;**
- c) salary (basic wage) due from 17<sup>th</sup> June, 2015 to date shall be tabulated and paid within 30 days from the date hereof;**
- d) the sum of Kshs.200,000 together with all the accrued interest deposited in account No.01-6400001 held by Cooperative bank Ltd pursuant to an**

**Order of this court on 1<sup>st</sup> October, 2010 shall forthwith be released to the claimant's advocates; and**

- e) costs of this application.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021.**

**M. MBARU**

**JUDGE**