



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 615 OF 2013

(Formerly Nairobi HCCC No. 200 of 2004)

Before Hon. Lady Justice Maureen Onyango

CHERUIYOT CHELULE ARAP.....1ST CLAIMANT
CHRISTINE APONDO.....2ND CLAIMANT
KAHINDI GALGALO.....3RD CLAIMANT
JOYCE KITI.....4TH CLAIMANT
BENSON I. KURIA.....5TH CLAIMANT
PAUL WAITHAKA.....6TH CLAIMANT
ESTHER NYAMBURA.....7TH CLAIMANT
PAMELA ODUWO.....8TH CLAIMANT
L. A ISAVWA.....9TH CLAIMANT
J. M. KIGUNDWA.....10TH CLAIMANT
STEPHEN MUYA.....11TH CLAIMANT
CAROLINE ONYANGO.....12TH CLAIMANT
E. LUVITA.....13TH CLAIMANT
L. O. ONDONGO.....14TH CLAIMANT
NOEL J. OPENDA.....15TH CLAIMANT
PETER GACHIRI.....16TH CLAIMANT

VERSUS

REGIONAL CENTRE FOR SERVICES IN SURVEYING

MAPPING AND REMOTE SENSING.....RESPONDENT

JUDGMENT

The Claimants herein are all former employees of the respondent.

The respondent Regional Centre for Services in Surveying and Mapping formerly referred to as the Regional Centre for Services in Surveying, Mapping and Remote Sensing (RCSSMRS) is an Inter-governmental Organization established in Nairobi-Kenya in the year 1975 under the auspices of the United Nations Economic Commission for Africa (UNECA) and the Organization of African Unity (OAU) with 20 contracting Member States in Eastern and Southern Africa; Botswana, Comoros, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Somali, South Africa, South Sudan, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

Vide their plaint dated 14th April 2004 and amended on 15th June, 2007, the claimants allege that in the year 2000, the Respondent declared them redundant and terminated their respective employment contracts. They aver that the Respondent refused to pay the Claimants their dues amounting to US\$1,343,774.93 under the terms of the employment contract and the Respondent's terms of service.

The claimants seek the following reliefs:

- a) The sum of US\$1,506,403.74 or equivalent Kshs.115,993,087.98
- b) Interest on (a) above at court rates
- c) Costs of the suit
- d) Any other relief that this court may deem fit to grant.

The Respondent filed a Defence on 13th January, 2005 denying the Claimants averments. It contends that the Claimants were among its employees who were terminated and whose terminal benefits totalling to Kshs.43,550,658.50 were paid by the Respondent in the year 2003. It further contends that each of the Claimant's received a sum as full and final settlement of their terminal dues.

This Court directed that the matter proceeds by way of written submissions. Consequently, each party filed its written submissions.

Claimants' Submissions

The Claimants submit that the Respondent waived any right to invoke sovereign immunity having partially settled the claim in respect of the 5th, 8th, 10th, 12th, 13th and 15th Claimants whose claims are to be severed from consideration.

They submit that in the 34th Governing Council meeting held in December 2000, it was resolved that the Director General implements the new staff and salary structures with effect from 1st January 2001, to offer new contracts to employees who met the new staff requirements and the amounts owed to the employees in accumulated unpaid terminal benefits be calculated up to 31st December 2000.

They submit that sometime in February 2002, they were paid Kshs.70,200 as part payment of their terminal dues.

They submit that by letter dated 17th October, 2006 the Permanent Secretary Ministry of Environment and Natural Resources confirmed that at the 37th Governing council meeting it was agreed that the interest on provident fund for former employees of the Respondent who left after the restructuring be paid by the respective countries. They submit that they have used the interest rate of 6.3/5 and not 37/5 as alleged by the respondent.

They submit that the gratuity as provided under Article 25 of the Staff Regulations stipulated that the Respondents shall pay gratuity equivalent to 15% of the basic annual salary to members who had served satisfactorily on contractual appointments for more than one year upon expiration of their contract or period of service.

They submit that the applicable law on redundancy is section 16A of the repealed Employment Act (Cap 226) thus they are entitled to severance pay at the sum of US\$162,628.81.

Respondent's submissions

The Respondent submits that at the time of its downsizing the terminal dues being the Provident Fund, gratuity, salary arrears and leave days of all staff were worked out and communicated to the concerned staff. It was its submission that the terminal dues excluded interest occasioned by delay in making payment on provident fund for reason that the figures were in dispute.

It submits that the Ministry on 27th March, 2003 paid its Kenyan staff who included the claimants US\$ 529,916.58 (Kshs.40,550,658.50) as terminal dues which amount excluded interest on provident fund pending negotiations and review. It submits that in a meeting held on 8th July 2004 between the Permanent Secretary of the Ministry, the Respondent and the Respondent's ex-employees amongst them the claimants, it was resolved that the Claimants would be paid based on the calculations of consultants and should they decline the ex-employees were to justify their claim. It submits that the Respondent established that the interest rate of 37% which the Claimants used to compute the rates was above the rates offered by the Fund Managers.

The respondent further submits that the Privileges and Immunities (Regional Centre for Services in Surveying and Mapping) Order 1985 the Minister declared the Respondent as an organisation which enjoys the privileges and immunities under section 9 of the Privileges and Immunities Act. It therefore submits that it enjoys diplomatic immunity thus the suit should be dismissed. In support of this it relies on the case of **Karen Njeri Kandie v Alassane Ba & Another [2015] eKLR**.

It submits that the Respondent set the interest rate on provident fund contributions at 6.33% and is willing and able to pay the Claimants at that rate which is the same rate it paid some of its ex-employees.

It submits that the Claimants are not entitled to part of their salaries from the year 1992 to 2000 as the Claimants received communication from the Respondent informing them of the salary discounted dollar rate of 80% owing to the financial difficulty it was facing.

Determination

The facts of this case are not disputed. The claimants were all employees of the respondent who were laid off due to financial constraints faced by the respondent. The respondent being a member organisation of Member states, depends on annual contributions of the member states. The financial constraints of the respondent were occasioned by non-remittance or late remittance of annual contributions by the member states.

The issues in dispute are the following –

- a) Whether the Respondent is immune from these proceedings
- b) Whether the Claimants are entitled to the sum of US\$ 1,506,403.74.
- c) Whether the claimants are entitled to the orders sought.

Whether the Respondent is immune from these proceedings

The Respondent submits that it enjoys immunity under Section 9 of the Privileges and Immunities Act. It further submits that it acted as agent of ISCOS thus it cannot be found liable in light of its diplomatic immunity. The claimants submit that this issue is *res judicata* and the respondent is estopped from raising the same.

While this suit was before the High Court as Civil Case 200 of 2014, the Court pronounced itself on the Respondent's immunity in its Ruling delivered on 21st October, 2018 by Okwengu J. (as she then was), the Judge held:

“Clearly the concept of qualified immunity is applicable in Kenya and the immunity provided under section 9 of the Immunities and Privileges Act is not absolute. The Minister of Foreign Affairs cannot purport to make it absolute through subsidiary legislation.

The dispute between the applicant and the respondents arises from individual contracts of employment entered into between the applicant as a juridical person and each individual respondent. It is not a dispute arising from the exercise of any sovereign authority by the applicant. I find that the immunity extended to the applicant was not intended to cover such private domestic disputes, which have nothing to do with the preservation of the applicant's independence or interference with the applicant's functions...Further, I find that this court having ruled in HCCC No. 160 of 2002 that the applicant is not entitled to immunity in respect of a dispute with its domestic staff, and the applicant having opted to settle the claim rather than appeal, the applicant is clearly estopped from raising the defence of immunity in similar claims..”

I therefore agree with the claimants that the High Court having dealt with the issue of immunity and the respondent having not appealed against the decision, this court cannot reopen the issue and determine the same again as it is *res judicata*. The Court of Appeal in **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** held:

*“Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in **Henderson v Henderson (1843) 67 ER 313**, *res judicata* applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”*

Whether the Claimants are entitled to the sum of US\$ 1,190,684.30 and severance pay of US\$ 162,628.81

The Claimants aver that they are entitled to the sum of US\$1,190,684.30 pursuant to the decision of the 34th Governing Council which provided that the amounts of the accumulated unpaid terminal benefits be calculated up to 31st December 2000.

According to the claimants, this sum is made up of interest on provident funds which were not remitted to the Scheme Manager and therefore did not earn the interest. This is not denied by the respondent. The only issue is the tabulation of the same. As has been admitted by the respondent, the **Governing Council's in the 34th Meeting of the Governing Council** held in Nairobi resolved:

1.1. *The amounts owed to the two accounts be calculated up to 31st December, 2000 and remain fixed while arrangement are made to gradually pay the employees their benefits.*

1.2. *That for the two accounts still outstanding with the Centre as at 31st December, 2000 no further interests shall be paid on them except for the Provident Fund amount deposited with the ALICO account.”*

Clause 9.6 and 11.3 of the Report of the 37th Meeting of the Governing Council Held at Mount Meru Hotel Arusha, Tanzania stated –

"9.6. On the report on Provident Fund Interest, the Chairman

informed the meeting that the interest liability has been recalculated and it has been reduced from US\$1,164,669.94 to US\$238,282.22.

The recalculations was carried out because it was noticed that

the 37% Interest rate was used was wrong. The correct rate should have been 6.33%."

"11.3. The Director General informed the delegates that after restructuring, a number of Kenyan nationals (mainly support staff) contracts were not renewed. It was agreed during the 34th GC meeting that their respective countries pay the benefits of nationals who had separated from the Centre be paid by their respective countries. Kenya had paid the benefits of its nationals in April, 2003 less the interest on provident fund. This issue had been discussed and agreed upon during the GC deliberations..."

The claimants in their submissions state that they tabulated the amount claimed based on 6.3. and stated they will be filing supplementary submissions to should the computations. This was however not done.

Other than the interest on unremitted provident funds, the claimants have prayed for gratuity. They have however not denied the respondent's averment that all the staff of the respondent including the claimants were paid all terminal benefits on 27th March 2003 through the Ministry of Environment and Natural Resources being Kshs.40,550,658.50 and that after this payment, which included gratuity and arrears of salaries. The details of the calculations are in claimant's list of documents at page 105 while the payments are at pages 103 and 104 clearly stating amount, cheque number, identity card number and signature of recipient. The payments included unpaid salary with interest, unpaid provident fund with interest, unpaid gratuity together with interest and severance. All 16 claimants are among the 23 employees which signed for the payments.

I have noted from the submissions of the claimants that they have not made any demands on gratuity. The only submission made in respect of gratuity is that they were entitled to the same at 15% of basic annual salary. There is no allegation that the same was not paid.

The Respondent submitted that it is willing to pay the Claimants their provident fund interest at the rate of 6.33% which have been tabulated at US\$ 169,835 as approved for payment by the respondent's Governing Council at its 37th meeting held in Arusha between 20th and 21st November 2003, before this suit was filed.

The claimants have further made a claim for severance pay as provided under Section 16A of the repealed Employment Act. This was never prayed for in the Amended Plaint and would in any event not be payable to the claimants for several reasons. The first is that it was not prayed for. It is trite law that parties are bound by their pleadings and courts cannot grant that which was not in the pleadings. Secondly the claimants were on contracts which expired and were renewed for only one or two months to await the meeting of the Governing Council of the respondent which was to deliberate on and approve payment of their terminal dues. This is borne out of the letters of termination of contract as exhibited by the claimants at pages 22 to 40 of the list of documents dated 11th November 2019 and filed on 15th November 2015. They were thus not declared redundant, but their contracts expired.

I thus find that the prayer for severance pay was an afterthought and is not merited.

The claimants made a claim of discounted salary paid at 80% of exchange rate between 1992 to 2000. This again was not tabulated. Further, the claimants having not raised any objections for the entire duration of their employment, would be deemed to have acquiesced to the same. The better part of the prayer would also be statute barred. The same was further not part of the pleadings or prayers in the plaint or the amended plaint and are thus not capable of being granted by the court.

Conclusion

Having reached the conclusion that the claimants were all paid full terminal benefits with the exception of interest on provident fund and having further found that the respondent through the Ministry of Environment and Natural Resources (as it was known at the material time) has been willing and able to pay the same since 2003, the claim by the claimants is dismissed with the exception of the admitted portion of the claim. The same shall be paid as tabulated in US\$ but based on current exchange rates as at the date of judgment.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE