



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2105 OF 2014

COMMUNICATION WORKERS UNION OF KENYA..... CLAIMANT

-VERSUS-

TELKOM KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th May, 2020)

RULING

The Court delivered judgment in the suit on 23.11.2014 in favour of the claimant in the following terms: **In conclusion judgment is hereby entered for the claimant against the respondent for:**

- a) **The declaration that the respondent's failure to pay members of the claimant being its employees the due bonuses per prevailing respondent's policy contravened section 5(2) of the Employment Act, 2007 and section 5 (2) and (3) of the Labour Relations Act, 2007 thereby amounting to violation of Article 41(1) and (2) (c) of the Constitution.**
- b) **The respondent to pay all outstanding bonuses to claimant's union members in accordance with its Human Resource Policy Manual by 31.12.2018 failing interest to be payable thereon at Court rates from the date of the judgment till full payment; and for that purpose the claimant to compute the quantum and to file and serve within 7 days for recording on a convenient mention date.**
- c) **The respondent to pay 75% of the claimant's costs of the suit.**

The claimant (in terms of order b) filed a computation of bonus dated 30.11.2018 through Kamotho Njomo and Company Advocates. The respondents have on 28.11.2018 filed a notice of objection to the computation by the claimant. The grounds of objection are as follows:

- a) The formulae used by the claimant to compute the bonuses payable to its members does not conform with the judgment of the Honourable Court. Whereas the judgment requires the claimant to pay bonuses in accordance with the respondent's Human Resource Manual, the claimant has instead computed bonus for each of its members at a flat rate of 47.5% which rate does not conform with the respondent's Human Resource Manual nor does it have any basis.
- b) Having pronounced itself in the judgment, the Honourable Court becomes *functus officio* and as such it cannot issue any other or further orders in the matter or require the parties to file further documents or make further submissions on the matter.
- c) The honourable Court does not have jurisdiction to delegate the judicial function of assessment and computation of damages and declaration of appropriate relief to any of the parties to the suit.

The parties have filed their respective submissions in view of the objections to computation.

It is submitted for the respondent that in Kenya Airports Authority –Versus- Mitu-Bell Welfare Society and 2 Others (2016) eKLR the Court of Appeal held thus, “...**post judgment supervision of implementation of judgments is not a function of a trial court. Implementation and execution of judgments is governed by specific rules and it is to these rules that resort must be made.**” It was further submitted that by requiring the claimant to compute and file the computation in 7 days, the Court was seeking to implement and execute its own decision. The respondent further submitted that in Telkom Kenya Limited –Versus- John Ochanga (Suing on his own behalf and on behalf of 996 former Employees of Telkom Kenya Limited) [2014]eKLR it was held that it was a misdirection on the part of the learned Judge in imposing upon the appellant the very obligation that by law resides in the courts to conduct computations and declare the entitlement of claimants before them and that assessment of damages was a purely a judicial function that cannot be delegated. It was further submitted for the respondent that as per the holding in Kenya Revenue Authority –Versus- Menginya Salim Murgani [2010]eKLR thus, “**We respectively reject the notion that Article 159(2) (d) of the Constitution and the overriding objectives of the Civil Procedure Act and Rules could be invoked to justify a departure from well-used procedure for perfecting declaratory**

judgments by inviting parties to compute entitlements and the filing of affidavits as happened in this case. We reiterate that it would be a serious abdication of the judicial function were the same to be delegated to the parties who come to the courts for that very determination. Such delegation is a nullity for all purposes and the challenge to the learned Judge's ruling on that score is well-founded and upheld." Thus it was submitted that the Court was not allowed to delegate its judicial authority to the parties to the suit.

It was further urged that the Court found in the judgment that the respondent was to pay all outstanding bonuses to claimant's union members in accordance with its Human Resource Policy Manual which provided for variable payment of the bonuses at a percentage of the fixed salary and at the discretion of the management. It was submitted that instead the claimant had filed the computation using the flat rate of 47.5 of basic salary for each of its members. Further requiring the parties to make submissions on the filed computation was irregular in that the Court had become *functus officio* as the Court must down its tools as it lacks jurisdiction as was held in Raila Odinga & 5 Others –Versus- Independent Electoral and Boundaries Commission & 3 Others [2013]eKLR. Further once the Court became *functus officio* the matter can only be escalated to the Court of Appeal.

For the claimant it was submitted that the Court ordered, "**(b) The respondent to pay all outstanding bonuses to claimant's union members in accordance with its Human Resource Policy Manual by 31.12.2018 failing interest to be payable thereon at Court rates from the date of the judgment till full payment; and for that purpose the claimant to compute the quantum and to file and serve within 7 days for recording on a convenient mention date.**" It was submitted that the order was clear on the purpose of the claimant computing and filing the outstanding bonuses due to the claimant's members. The claimant filed the computation on 30.11.2018 and a year later on 28.11.2019 the respondent filed the objection to the computation. It was submitted that the computation conformed to the judgment because the Court found that the respondent applied 47.5% for all unionisable employees not being the claimant's members and that was the uniform rate to be applied to purge the discrimination. Further the Court cannot revisit its findings in that regard as it would amount to sitting on appeal on its own decision. Further on 26.09.2019 the respondent was given its opportunity to file its computation but failed to do so. Further in Raila Odinga & 5 Others –Versus- Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR the Supreme Court approved the holding in Jersey Evening Post Limited –Versus- Al Thani [2002] ILR 524 at 550 that, "**A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the Court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the Court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.**" Further it was submitted that in the instant case the Court was not *functus officio* because the Court was not revisiting its judgment by way of amending, adding or subtracting; and the judgment contemplates the court would make further orders as per order on computation. Further the case of Telkom Kenya Limited –Versus- John Ochanga (Suing on his own behalf and on behalf of 996 former Employees of Telkom Kenya Limited) [2014]eKLR is different from the instant one because in the present case the Court does not seek the claimant to make further evidence after delivery of judgment. It was submitted that it was acceptable and not uncommon for the court to require parties to file documents after judgment such as was held in Esther Wanjiru Githatu –Versus- Wanjiru Githatu [2019]eKLR by the Court of Appeal that nothing was wrong with the trial court's order for the parties to agree on a valuer to conduct a valuation of all the immovable assets registered in the name of the deceased within thirty days of the judgment failing which the court was to appoint an independent valuer and whose findings would be final. The claimant submitted that the notice of objection was an abuse of court process and was calculated to frustrate the claimant. Further there being no contrary computation by the respondent the computation be adopted as filed for the claimant.

The Court has considered the objection and the respective submissions. The Court makes findings as follows:

a) The respondent has not filed an application for review against the judgement and the orders therein. By way of the present objection, the Court finds that the respondent is precluded from urging the propriety of the Court's order thus, "**(b) The respondent to pay all outstanding bonuses to claimant's union members in accordance with its Human Resource Policy Manual by 31.12.2018 failing interest to be payable thereon at Court rates from the date of the judgment till full payment; and for that purpose the claimant to compute the quantum and to file and serve within 7 days for recording on a convenient mention date.**" As submitted for the claimant the Court is precluded from sitting on appeal on its own decision and the submissions made by the respondent in that regard can only be ventilated at the Court of Appeal or upon an application for review and which is not before the Court. The Court observes that in any event the respondent has filed a notice of appeal against the judgment.

b) The substantive objection by the respondent against the computation by the claimant is that a flat rate of 47.5% has been applied in the computation filed for the claimant. The Court found that 47.5% was the universal rate applied to unionisable staff whether members or non-members of the claimant. The computation by the claimant would therefore be upheld unless any arithmetic or other errors were to be identified by the respondent. Despite an opportunity to file alternative computation or to dispute the figures in the computation, the respondent has failed to do so except urging the matters in the notice of objection. For avoidance of doubt, the outstanding bonuses in the order in the judgment can only mean the unpaid bonuses consequential to purging of the discrimination in issue in the judgment.

c) In the current case it is clear that the mention to record the computation was a further action for conclusive role of the Court in the matter. While ordering the claimant to file the computation the Court did not seek to delegate the matter to the claimant as urged for the respondent but that the Court by itself, at the mention, would record the computation in presence of both parties and taking into account their respective concerns (as per opportunity as is being urged in the present notice of objection). Thus the case as urged for the claimant is clearly distinguishable from Telkom Kenya Limited –Versus- John Ochanga (Suing on his own behalf and on behalf of 996 former Employees of Telkom Kenya Limited) [2014]eKLR where the trial court made elaborate orders for filing affidavits after judgment and therefore the Court of Appeal's finding that it amounted to reopening of the case. In the instant case the computation did not require parties to avail further evidence and looking at the matters in dispute, the computation was a necessary step for completeness and finality of the trial Court's role in the matter. In the Court's opinion it was a rather obvious issue that if the rate of bonus was found to have been applied discriminately and as was found in the judgment, the amount due towards purging the discrimination would be obvious and not amount to a litigious issue.

d) The Court finds that the computation would be considered judiciously at a mention as the Court's judicial function was not abandoned or delegated to the claimant. The claimant's computation and one by the respondent as was subsequently directed would

fall for conclusive determination by the Court. The computations by the parties would, in the opinion of the Court amount to resources on record for use by the Court and not a final determination by the parties in that regard and therefore not a delegation as urged for the respondent. In the circumstances and with abundance of tenets of justice, the Court would give the respondent a final chance to file its computation in 30 days failing the claimant's computation as filed on 30.11.2018 would fall for recording by the court with or without alterations as the Court will determine on a date convenient to the parties.

In conclusion the respondent's notice of objection filed on 28.11.2019 is hereby dismissed with orders:

- 1) The respondent is given a final chance to file and serve its computation in 30 days from the date of this ruling and failing the claimant's computation as filed on 30.11.2018 would fall for consideration for recording by the court with or without alterations as the Court will determine on a date convenient to the parties.
- 2) Parties to fix a convenient mention date for consideration of recording the computation or such further appropriate orders.
- 3) The respondent to pay the claimant's costs of the notice of objection.

Signed, dated and delivered in court at Nairobi this Friday, 29th May, 2020.

BYRAM ONGAYA

JUDGE