



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2160 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

MAGDALENE KIBOI.....1<sup>ST</sup> CLAIMANT  
NASHON DWOYA.....2<sup>ND</sup> CLAIMANT  
JAMES KINYUA.....3<sup>RD</sup> CLAIMANT  
KEMUNTO MICHIEKA.....4<sup>TH</sup> CLAIMANT  
HILLARY OMENO.....5<sup>TH</sup> CLAIMANT  
RIXION KYALO.....6<sup>TH</sup> CLAIMANT  
EVANS OCHIENG.....7<sup>TH</sup> CLAIMANT  
MARY CONSOLATA NJERI.....8<sup>TH</sup> CLAIMANT  
ABDALLA SUDI.....9<sup>TH</sup> CLAIMANT  
SYLVIA ATIENO.....10<sup>TH</sup> CLAIMANT  
CYRUS BARMASAI.....11<sup>TH</sup> CLAIMANT  
MICHAEL OMOLO.....12<sup>TH</sup> CLAIMANT  
RICHARD KIVENZI.....13<sup>TH</sup> CLAIMANT  
ROSE OGGOT.....14<sup>TH</sup> CLAIMANT  
GRACE KELLER.....15<sup>TH</sup> CLAIMANT  
MATHEW KIPTALAM.....16<sup>TH</sup> CLAIMANT  
VICTOR SEREM.....17<sup>TH</sup> CLAIMANT  
DENIS NYABENGE.....18<sup>TH</sup> CLAIMANT

**VERSUS**

**ENGEN KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimants brought this Claim on 22<sup>nd</sup> November, 2018 May, 2016 alleging that the Respondent, a limited liability company failed and/or ignored to pay them house allowance contrary to the provisions of Section 31 of the Employment Act, 2007 and Articles 28, 41, 43 and 47 of the Constitution of Kenya, 2010. In their Claim the Claimants seek the following reliefs:

a) A declaration that the Claimants are entitled to the payment of monthly house allowance from their respective dates of employment.

b) An Order directed to the Respondent to pay monthly housing allowance to the Claimants from the date of employment to 31<sup>st</sup> October 2018 as tabulated below:

i. 1<sup>st</sup> Claimant (Magdalene Kiboi) Kshs.1,660,834.22

ii. 2<sup>nd</sup> Claimant (Nashon Dwoy) Kshs.2,363,483.71

iii. 3<sup>rd</sup> Claimant (James Kinyua) Kshs.5,491,807.65

iv. 4<sup>th</sup> Claimant (Kemunto Michieka) Kshs.2,440,023.02

v. 5<sup>th</sup> Claimant (Hillary Omeno) Kshs.157,500

vi. 6<sup>th</sup> Claimant (Rixion Kyalo) Kshs.824,658

vii. 7<sup>th</sup> Claimant (Evans Ochieng) Kshs.321,750

viii. 8<sup>th</sup> Claimant (Mary Consolata Njeri) Kshs.1,926,367.15

ix. 9<sup>th</sup> Claimant (Abdalla Sudi) Kshs.306,000

x. 10<sup>th</sup> Claimant (Sylvia Atieno) Kshs.1,032,968.83

xi. 11<sup>th</sup> Claimant (Cyprus Barmasai) Kshs.1,006,164.23

xii. 12<sup>th</sup> Claimant (Michael Omolo) Kshs.412,500

xiii. 13<sup>th</sup> Claimant (Richard Kivenzi) Kshs.185,250

xiv. 14<sup>th</sup> Claimant (Rose Oggot) Kshs.728,123.53

xv. 15<sup>th</sup> Claimant (Grace Keller) Kshs.1,199,097.88

xvi. 16<sup>th</sup> Claimant (Mathew Kiptalam) Kshs.523,523.85

xvii. 17<sup>th</sup> Claimant (Victor Serem) Kshs.168,000

xviii. 18<sup>th</sup> Claimant (Denis Nyabenge) Kshs.630,000

**Total Kshs.22,041,052.05**

c) An Order that the Respondent pays the Claimants their house allowance from 30<sup>th</sup> November 2018 until the suit is heard and determined.

d) An Order that the Respondent continues paying the Claimants' house allowance from the date of judgment henceforth.

e) An Order directed at the Respondent barring them from harassing and/or intimidating the Claimant as a result of the **filing of this suit**.

f) An Order that the Respondent to pay interest on prayer (b) & (c) above at commercial rates from the time they became payable to the date of Judgment.

g) Orders the Respondent to pay interest on prayer (b), (c) and (d) above at Court rate from the date of Judgment to the date of payment of the decretal sum in full.

h) Orders that the Respondent be condemned to pay costs of the suit.

i) Any other relief that this Court may deem fit to grant.

The Claimants contend that they participated in interview process and were successfully employed by the Respondent herein on diverse dates from the year 1997 and are in active employment.

They aver that they received the agreed salaries together with other allowances such as mobile phone allowances and car allowance but were not paid for house allowance. They maintained that failure by the Respondent to pay them house allowance was contrary to the provisions of Section 31 of the Employment Act, 2007.

The Claimants further aver that the failure of the Respondent's to pay or provide them with housing or payment in lieu thereof was tantamount to unfair labour practice and was in blatant violation to the provisions of Article 41 of the Constitution of Kenya, 2010 and Section 31 of the Employment Act, 2007.

The Claimants further aver that they have requested the Respondent's management for the house allowance in several meetings but it has failed and/or ignored and/or refused to pay the outstanding house allowance amounting to a total of KShs.22,041,052.05 as at 31<sup>st</sup> October 2018.

The Respondent in response to the Memorandum of Claim filed its Memorandum of Defence on 31<sup>st</sup> December, 2018, in which it averred that the Claimants are not entitled to the reliefs sought in their Memorandum of Claim on the grounds that:

- a) The issues raised by the Claimants were mutually resolved and settled and therefore the Claim is *res judicata*, the issues having been resolved in Cause No. 602 of 2018
- b) The Claimants received a consolidated salary which was inclusive of house allowance
- c) The Claim is time barred as they go beyond the 3 year period of limitation.

The Respondent further averred that the Claimants' claims for payment of house allowance are false and without legal basis and is calculated to unjustly enrich the claimants. The respondent urged this Court to dismiss the claim with costs to the Respondent.

The Respondent further filed a Notice of Motion Application dated 2<sup>nd</sup> July, 2019 seeking the following reliefs:

1. That this Court be pleased to strike out the Memorandum of Claim dated 22<sup>nd</sup> November 2018 and dismiss the suit by the Claimants.
2. That costs of the suit hereto and the Application be awarded to the Respondent.

The Application is premised on the grounds THAT:

- a) On 24<sup>th</sup> April, 2018, the Claimants filed a suit against the Respondent being **Employment and Labour Relations Court Cause No. 602 of 2018: Richard Kivenzi & 25 Others v Engen Kenya Limited**.
- b) The Claim was irrevocably and unconditionally settled and the consent adopted as an Order of the Court marking the matter and issues raised therein as fully settled.
- c) The Claimants subsequently filed the instant Claim seeking payment of house allowance which the Respondent maintains is not payable as the Claimants received a consolidated salary.
- d) It is further contended that failure on the part of the Claimants to include this claim in the initial cause No 602 of 2018 was to its detriment as the matter is *res judicata*. It is further the Respondent's contention that the Claimants have not given any reasons why the claim for payment of house allowance was not included in Cause No. 602 of 2018 and is therefore an afterthought and an abuse to the Court process.
- e) The Respondent stands to suffer serious prejudice in terms of costs and legal fees with respect with both matters.
- f) The respondent maintained that the Claim is an abuse to the Court process and that it is in the interest of justice that the same be struck out in its entirety with costs to the Respondent.

In response to the Application the 1<sup>st</sup> Claimant, Magdalene Kiboi swore an Affidavit on 11<sup>th</sup> July, 2019, in which she avers that this suit is not *res judicata* as the issues raised herein were not raised in Cause No. 602 of 2018.

She further averred that the only issue for determination in the instant claim is the payment of house allowance as provided under the provisions of Section 31 of the Employment Act, 2007. She further contended that this is an issue of continuing injury as the Claimants are still under the Respondent's employment and is therefore not time barred.

The 1<sup>st</sup> Claimant further averred that the Respondent has failed to prove the allegation that the current suit is *res judicata* and therefore urged the Court in the interest of justice to dismiss the Application with costs to the Claimants.

The Court directed that the Application would be heard alongside the main claim and parties agreed to dispose of both the application and the claim by way of written submissions.

### **Submissions by the Parties**

The Claimant submitted that the Respondent decided to consolidate their salaries but failed to avail necessary evidence to confirm that the salaries paid was actually a consolidated salary. The Claimant cited the case of **Joyce Kwamboka Oiriga & Another v Pauline Wanja Munene T/A Vistraline Book World and Stationery (2018) eKLR** where the Court held that a claim that a person is earning a consolidated salary is without basis and is accordingly dismissed where a Respondent produces salary vouchers showing that the Claimants were paid basic salaries. The Court in that matter went on to tabulate house allowance at 15% of the Claimants' basic salaries.

The Claimants further submitted that they are entitled to payment of house allowance as the term consolidated salary does not include house allowance.

On the issue of the Claim being *res judicata*, the Claimant submitted that this Claim is on non - payment of house allowance which was not raised in **Cause No. 602 of 2018: Richard Kivenzi & 25 Others v Engen Kenya Limited**. The Claimant further submitted that the issue of house allowance was not part of the consent settlement in Cause 602 of 2018. The Claimant relied on the case of **Leonard Indiazzi v Filista Omukamakami Atingo (1996) eKLR** where the Court of Appeal stated that where an issue is not raised before court it cannot form a basis of a suit being subject to *res judicata*.

On the issue of the Claim being time barred, the Claimant submitted that they are still employees of the Respondent and continue to receive their salaries which they insist does not include house allowance. That their claim is a continuing injury under the meaning of Section 90 of the Employment Act, 2007.

In conclusion the Claimants urged the Court to dismiss the Respondent's Application dated 2<sup>nd</sup> July, 2019 and allow their Claim as prayed.

### **Respondent's Submissions**

The Respondent on the other hand submitted that the Claimants have not proved their case. The Respondent submitted that it duly paid all the Claimants a consolidated salary that was inclusive of house allowance and therefore they are not entitled to the reliefs sought in their Memorandum of Claim.

The Respondent further submitted that the assertion by the Claimants that their pay slips do not contain an entry of house allowance is false. The Respondent cited the Court of Appeal decision in the case of **Grain Pro Kenya Inc Limited v Andrew Waithaka Kiragu (2019) eKLR** where the Court held that the primary document of contract is the letter of appointment as the pay slip does not constitute a contract.

The Respondent further submitted that prior to 2000 its employees received salaries disaggregated into basic pay and house allowance. That the salary was subsequently consolidated as evidenced by the salary increment letters issued to the Claimants herein as well as their employment contracts.

The respondent urged the Court to disregard the Claimants contradictory and false evidence and find that the Claimants have failed to prove their case. The Respondent relied on the case of **Abudi Ali Mahadhi v Ramadhani Saidi & Another (1999) eKLR** where the Court disregarded evidence of a witness whose evidence was inconsistent and riddled with irreconcilable variations.

The Respondent further submitted that the Claimants have no legal or factual basis to allege that it breached the law with respect to house allowance. The Respondent cited the decision in the case of **Evans Gato Orina v Aggreko International Project Limited (2019) eKLR** where the Court held that the burden of proof in a claim where the employer insists that the employee's salary was consolidated and the employee states otherwise rests with the employee.

On the claim being *res judicata*, the Respondent submitted that the Claim herein is indeed *res judicata* and urged the Court to dismiss the same in its entirety. The respondent further relied on the case of **John Florence Maritime Services Limited v Cabinet Secretary for Transport and Infrastructure & 3 Others & 3 Others (2015) eKLR**.

It is the respondent's contention that the present cause raises matters that were directly and/or substantially in issue in ELRC Cause No. 602 of 2018 that was compromised and consent recorded marking the matter as closed. The Respondent further relied on the case of **Mburu Kinyua v Gachini Tuti (1978) KLR 69; (1976 – 80) 1 KLR 790 and Churanji Lal & Company v Bhajjee (1932) 14 KLR 288** as cited in the case of **Republic v Director of Public Prosecutions & Another Ex parte Ramesh Chandra Govind Gorasia (2016) eKLR**.

The Respondent submitted that the Claim for house allowance was raised by the Claimants as an afterthought after consent was adopted in Cause No. 602 of 2018. The Respondent maintained that this action by the Claimants is tantamount to an abuse of the court process. The

Respondent cited the case of **Milka Njeri Thuo & Another v Pauline Wangari Gikera & Another (2018) eKLR** where the Court held that the doctrine of *res judicata* would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction, but also to situations where either matters which could have been brought in were not or parties who could have been enjoined were not enjoined.

It is on this basis that the Respondent contends that the Claimants case is in the circumstances *res judicata* by dint of Section 7 of the Civil Procedure Act and therefore urged this Court to dismiss the same with costs.

The Respondent further contended that in the event this Court proceeds to find that the contracts prepared by the 4<sup>th</sup> Claimant are found to be unlawful she should not benefit from her failure and neglect to conduct her duties professionally as she was required to. The Respondent cited the case of **Kenya Ports Authority v Fadhili Juma Kisuwa (2017) eKLR**.

The Respondent further contended that the Claim as presented by the Claimants is time barred as the same go beyond 3 years limitation period. The Respondent relied on several judicial decisions among them **Attorney General & Another v Andrew Maina Githinji & Another (2016) eKLR**.

With respect to the reliefs sought, the Respondent submitted that the Claimants are not entitled to the same as they have failed to prove their case as against it. The Respondent relied on the case of **Abudi Ali Mahadhi v Ramadhani Saidi & Freight Forwarders Limited (1999) eKLR** where the Court in dismissing the claim held that special damages in addition to being pleaded must be strictly proved failing which the court cannot allow such claims. The Respondent further cited the case of **African Line Transport Company & Another v Sylvester Keitany (2017)**.

In conclusion the Respondent urged the Court to dismiss the Claim in its entirety with costs to the Respondent.

### **Analysis and Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited, the issues for determination are: -

1. Whether the Claim is *res judicata*.
2. Whether the Claim is time barred.
3. Whether the Claimants are entitled to the reliefs sought in their Memorandum of Claim.

### **Whether the Claimants' Claim is *res judicata***

The plea of *res judicata* is provided for in Section 7 of the Civil Procedure Act (CPA) which reads:

**“No court shall try any suit 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 in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

Kuloba J. (as he then was) set out the Definition and essentials of *res judicata* as a thing or a matter adjudged; a thing judicially acted upon or decided; a thing or a matter settled by judgment. He further observes that, in that expression is found the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

The plea of *res judicata* is applicable only where the former judgment was;

- a) That of a court of competent jurisdiction.
- b) Directly speaking upon the matter in question in the subsequent suit and,
- c) Between the same parties or their privies.

Section 7 of the Civil Procedure Act set clear conditions which must be satisfied before *res judicata* can successfully be pleaded namely;

- i. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.
- ii. The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.

iii. Such parties must have been litigating under the same title in the former suit.

iv. The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.

The Court in the English case of **Henderson v Henderson (1843-60) ALL E.R.378**, observed thus:

*“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the 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.”*

I have compared the pleadings in **Cause No. 602 of 2018: Richard Kivenzi & 25 Others v Engen Kenya Limited** and the instant cause. It is not in dispute that some of the Claimants herein were also claimants in the said suit. However, the subject matter of the two suits is not the same. In the previous suit the Claimants sought the following reliefs:

a) A declaration that the Respondent is in breach of the provisions of the Employment Act, Cap 226 and the law in the following respect:

i. By attempting to unfairly terminate the employment of the Claimants contrary to Section 45(1) of the Employment Act in that:

1. There was no valid reason to terminate the Claimants' employment
2. That the reason for the termination is not based on any operational requirements of the Respondent; and
3. The procedure adopted for termination of the Claimants employment was inherently unfair.
4. A declaration that the Respondent is in breach of the Contract of service in the following respect:

ii. Breaching its fiduciary responsibility by conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.

iii. Threatening to breach and or terminate the Contracts of Service without any just or lawful cause.

b) A declaration that the intended sale of the respondent's business in Kenya amounts to a material change in relationship between the Claimants and the Respondent and that intended sale is in effect a transfer of business from the Respondent to a third party requiring the consent and/or acquiescence of the Claimants.

c) A declaration that the purported and or intended sale amounts to an attempted wrongful dismissal and unfair termination of the Claimants by the Respondent.

d) A declaration that the Claimants are entitled to make an election as to whether to transition to the new buyer of the Respondent's business or to opt out of their employment contracts.

e) An injunction and or prohibitory Order restraining the Respondent by itself, its servants, employees, agents, assigns and or any other person howsoever:

i. From selling, transferring, disposing or otherwise its assets, shares and or control in Engen Kenya Limited to any third party before the Respondent has first sought and received the express written consent, on terms, of all the Claimants agreeing to transition, on terms, to the Respondent's business under new owners; or

ii. From applying for and or obtaining any change of ownership in Engen Kenya Limited or in any manner altering its ownership status with the Registrar of Companies pending full and faithful satisfaction of condition of (e) and (i) above

iii. From applying for and or seeking and or obtaining the consent or approval of any statutory authority required to sanction any change of shares or ownership in the Respondent pending the full and faithful satisfaction of condition (e) and (i) above.

iv. From continuing to conduct business in Kenya under any other name, form, arrangement or management control other than the name, form, arrangement of management control of Engen International Holdings (Mauritius) Limited headquartered in Engen House Quay D Road GPO Box 311 Port Louis, Mauritius.

f) Costs and Interest on the cause

g) Such further or other relief as the Court may deem fit and just to grant.

It is further not in dispute that Cause No. 602 of 2018 was not heard and determined on merit but rather parties entered a consent which was adopted by the Court as full and final settlement of the matter. On the other hand the instant Claim seeks for the payment of house allowance which is clearly not an issue that was raised in Cause No. 602 of 2018.

From the foregoing I find that the issue of *res judicata* does not arise in this case as the subject matter of the two suits are different. In the case of **Garden Square Limited v Kogo & Another (2003) KLR 20** the Learned Judge found the suit was *res judicata* as the same issues were directly and substantially in issue between the same parties.

#### **Whether the Claimants' Claim is time barred**

The Claimants maintained that their Claim is one of a continuing injury that continues to accrue if and when their salaries are due. They further maintained that they continue to be under the Respondent's employment and therefore the Claim is not statute barred.

The Respondent submitted that the suit as against it is statute barred the same having been filed more than 3 years after the Claimants respective dates of employment. The Respondent relied on the provisions of Section 90 of the Employment Act and maintained that this Court lacks the jurisdiction to hear and determine this Claim.

It further submitted that the issue of limitation of time is not a procedural technicality that can be addressed or cured by the Application of Article 159 of the Constitution of Kenya 2010 as sought by the Claimants.

Section 90 of the Employment Act provides as follows -

**90. Limitations 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.**

**The question that then arises is whether a claim for payment and/or non-payment of house allowance is a continuing injury.**

From the facts at hand it is clear that at the time of filing this Claim all the Claimants were still under the Respondent's employment and therefore the need for payment of house allowance arose when their salaries were due. In my view this is in fact a continuing injury under Section 90 of the Employment Act, 2007.

The foregoing being the case, the Claimants' claim is not time barred as their claim constitutes a continuing injury under Section 90 of the Act. The Section provides that claims for continuing injury or damage must be filed within 12 months next after the cessation thereof. At the time of filing this suit the Claimants were still in the Respondent's employment, a fact that was not controverted by the Respondent herein.

#### **Whether the Claimants are entitled to the reliefs sought in their Memorandum of Claim**

The Claimants claim is for payment of house allowance totalling to Kshs.22,041,052.05. They contended that the Respondent in complete violation of the provisions of Section 31 of the Employment Act, 2007 failed and/or ignored to pay them house allowance which resulted in them lodging a complaint with the Labour Commissioner vide their letter dated 4<sup>th</sup> September, 2018.

The Respondent's averment is that the salary was consolidated. It further maintained that the Claimants have failed to prove their case and therefore urged this Court to dismiss the Claim in its entirety.

It is clear that prior to the year 2000 the Claimants' salaries were disaggregated into basic salary and house allowance as evidenced by the letters of salary review attached to the Respondent's list and bundle of documents filed with the Memorandum of defence on 31<sup>st</sup> December, 2018.

Clearly, the Respondent did review the Claimants salaries over the years and the amounts kept increasing a clear indication that house allowance was a component of the consolidated salary of the claimants. There was no decrease of salary of the claimants at any point.

From the pay slips attached by the Claimants, I note that the same makes reference to Gross Pay. In the case of **Sani Orina v Hiprora Business Solutions (EA) Limited (2017) eKLR** Abuodha J. held that gross salary as opposed to basic salary usually includes house allowance and other allowances paid by an employer. Thus, the court returns that the claimants would not be entitled to house allowance as it is clear that the salaries paid to the claimants was intended to be a gross consolidated package as is evident from the historical analysis of the payment of salary by the respondent over the years.

In the circumstances the Claim for house allowance fails and is accordingly dismissed.

The upshot is that the entire Claim fails in its entirety with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MAY 2020

MAUREEN ONYANGO

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 and subsequent directions of 21<sup>st</sup> 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