



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2119 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2020)

JULIET CHEPCHUMBA TUWOT &

129 OTHERS.....CLAIMANTS/APPLICANTS

VERSUS

EAST AFRICAN PORTLAND

CEMENT COMPANY LIMITED.....1ST RESPONDENT

KENYA CHEMICAL & ALLIED WORKERS UNION.....2ND RESPONDENT

RULING

1. Pending before me for determination are two Applications filed by the Claimant/Applicant.

2. The first Application is the Notice of Motion Application dated 18th February, 2020. The same is brought under Certificate of Urgency and under the provisions of Section 12 of the Employment Act, 2007. Seeking Orders that:-

1. The Hon. Court be pleased to accord leave to the Applicants herein to act in person in this matter and priority hearing date be given to the application.

2. The 1st Respondent be compelled to release claimants/applicants' withheld as decretal sum and remit to their respective accounts to be provided.

3. The respondents do file list and award of each grievant unpaid by the 1st Respondent.

4. The firm of M/s Nyabena Nyakundi & Co. Advocates to give account of all monies paid by the 1st respondent on behalf of applicants/claimants herein to his Account NO.014000045486 held by Family Bank, Cargen House Branch, Nairobi and pay the applicants herein their shares forthwith.

5. The 1st Respondent do file in Court settlement deed together with the full list of beneficiaries.

6. Costs be in the Cause.

3. The Application which is premised on the grounds that:-

a) This is a concluded matter and therefore leave of Court is mandatory in order for the applicants to have audience from Court.

b) All applicants were at material times members of the 2nd Respondent and were represented by the firm of M/s Nyabena Nyakundi & Co. advocates.

c) The claim before the Court was for 693 claimants and the net award approved by the Court as decretal sum was for Kshs. 1,401,585,364.80 being salaries arrears and house allowance excluding other allowances such as overtime, leave, travelling allowance, shift allowance etc.

- d) Following a successful Garnishee application filed by M/s Nyabena & Co. Advocated the 1st respondent offered sum of Kshs. 90 million which was to be paid in two instalments so that Company accounts are opened.*
- e) The 1st instalment of Kshs. 40 million has been disbursed to the firm of M/s Nyabena Nyakundi & Co. advocates for onward transmission to the beneficiaries.*
- f) To our surprise our names do not appear anywhere in the list of beneficiaries and we are in dilemma as regards our payments.*
- g) It was our expectation that whatever moneys paid should be shared equally as each person has his/her own needs of money and hence the urgency of this matter.*
- h) We are informed from the reliable sources that priority of payment was made to those named in the garnishee application and not from the original list of 693 Claimants on Court record filed by the 1st respondent while seeking stay of execution orders.*
- i) Without clear modalities on mode of payment and actual lists of beneficiaries submitted to Court there is likelihood for some Claimants ending up losing their award and their shares squandered by either their Counsel on record or 2nd Respondent's agents and hence is necessary for M/s Nyabena Nyakundi to give accounts of all moneys received together with lists of beneficiaries.*
- j) All negotiations report of settling the balance of Court decree should be filed in Court with timelines but not to leave the matter open it would be difficult to fast track settlement.*
- k) The respondents are groping on actual lists of beneficiaries despite the existence of original list of 693 claimants on Court's record.*

4. The Application further supported by the Affidavit of **JULIET CHEPCHUMBA TUWOT** sworn on 18th February, 2020, in which she reiterates the averments made in the Notice of Motion Application.

5. The second Application is the Notice of Motion Application 22nd April, 2020 also filed by the Claimants/Applicants under Certificate of Urgency seeking the following Orders that:-

- 1. The Hon. Court be pleased to adopt the computation of the applicants herein for sum of Kshs.580,153,775.74 as an order of Court.*
- 2. The 1st Respondent be compelled to file their mode of payment of the said sum and remit to their respective accounts to be provided.*
- 3. The 1st Respondent's management do involve the Applicant's representatives to negotiation meetings of settling this claim.*
- 4. Costs be in the Cause.*

6. The Application is premised on the grounds that:-

- a) The Applicants were among the Claimants in this claim and during payment of Kshs. 90 million to 465 co-Claimants were not considered and their claim is in limbo.*
- b) The 1st Respondent and the firm of M/s Nyabena Nyakundi & Co. Advocates representing 465 Claimants have recorded settlement deed leaving out the 228 Claimants/Applicants herein.*
- c) The 228 Claimants were beneficiaries of the Court's judgment and their claims are captured in the Financial Report 2016 of 1st Respondent.*
- d) The 1st Respondent's management is only busy concentrating on 465 Claimants and has not recorded any settlement deed with applicants' representatives.*
- e) The Applicants have tabulated their individual claims against the 1st Respondent and would like the same to be adopted as an order of Court.*

7. The Application further supported by the Affidavit of **JULIET CHEPCHUMBA TUWOT** sworn on 22nd April, in which she reiterates the averments made in the Notice of Motion Application.

8. In response to both Applications the firm of Nyabena Nyakundi & Company Advocates on record for the Claimant Union, now referred to as the 2nd Respondent in the Applications, though Mr. Alfred Nyabena filed a Replying Affidavit on 4th June, 2020 in which Counsel avers that Judgment in this matter was rendered by this Honourable Court in the year 2015 where the Court directed that the Respondent (East Africa Portland Cement) pays all unionisable contract employees in terms of the Collective Bargaining Agreement signed between the Claimant union and the Respondent.

9. Dissatisfied with the Court's Judgment the Respondent filed an Appeal, Appeal No. 14 of 2016 challenging the said Judgment at the Court of Appeal. Mr. Nyabena averred that the said appeal was subsequently dismissed.
10. He further averred that following the Respondent's failure to implement the Judgment and decree of the Court the Claimant/Decree holder was to file an application dated 31st March, 2018 seeking to have the Court adopt the sum of Kshs. 1,401,585,364.80 as the amount due and payable to Claimant's members as per the Judgment of the Court.
11. The affiant confirmed that the parties did enter into a consent and it was agreed how the sum of Kshs. 1,401,585,364.80 was to be paid, which consent was duly adopted as an order of this Court on 13/1/2020.
12. He further confirmed receipt of the sum of Kshs. 90,000,000 and there being an arrangement of payment of the balance thereof.
13. In further response to the Applications the 1st Respondent filed a Notice of Preliminary Objection dated 13th May, 2020 raising the following issues:-
1. ***This Honourable Court lacks the jurisdiction to adjudicate over the Application for the reason that it is functus officio; and***
 2. ***This Honourable Court lacks the jurisdiction to adjudicate over the Application for the reason that the Application is res judicata the main suit and which suit has been determined.***
14. The 1st Respondent on the basis of the above grounds urged this Court to dismiss the Claimants'/Applicants Application with costs to the 1st Respondent.
15. The 1st Respondent further filed a Replying Affidavit deponed by **GEORGE MUCHIRI MWANGI**, its counsel on record, on 13th May, 2020 in which he confirms that this Court pronounced its Judgment in this matter on 6/7/2015. He however maintained that the Judgment was not a money decree as the 1st Respondent was not ordered to pay a specific figure.
16. He posits that the Claimant union now 2nd Respondent herein filed an Application dated 21/3/2018 and that this Court on 2/8/2018 certified that the payable amount for the Judgment was Kshs. 1,401,585,364.80 being the salaries and house allowance arrears due to the grievant members of the 2nd Respondent union.
17. He further confirmed that on 8/1/2020 the 1st Respondent and the Union did enter into a consent and agreed on how the sum of Kshs. 1, 401, 585, 364.80 was to be paid and the same adopted as an order of the Court on 13/1/2020.
18. The 1st Respondent maintains that since recording of the consent it has since paid a sum of Kshs. 90,000,000 of the Judgment sum and that the contention raised in the instant Application is on the division of the sums paid among members of the union (the 2nd Respondent) herein.
19. He further maintains that the Claimants did not raise any issue on their membership to the 2nd Respondent during the hearing and that the matter was subsequently heard to finality and Judgment entered in their favour.
20. The 1st Respondent contends that this Court having delivered its judgment is *functus officio* and that the issues raised in the instant Application are res-judicata to those raised in the Main Suit.
21. The 1st Respondent maintains that it would be unfair and unjust for this Court to order any additional payments to be made this Claim having been fully settled.
22. The 1st Respondent urged this Honourable Court to dismiss both Applications before this Court as they lack merit.
23. In brief rejoinder the Claimants/Applicants filed a supplementary Affidavit deponed by **JULIET CHEPCHUMBA TUWOT** on 13th May, 2020, in which she avers that the Applications filed are neither res judicata nor is this Court *functus officio* as pleaded by the 1st Respondent.
24. She further avers that the firm of M/S Nyabena Nyakundi & Company Advocates represented members of the 2nd Respondent but issues of discrimination arose when the sum of Kshs. 90,000,000 was paid out to members excluding some 228 who filed the instant Application seeking leave to appear in person and proceeded to make their computation of their individual claims that amounted to Kshs. 1, 311,585,364.80. She contends that the said amount forms part of the deed agreement of the consent order arising from the garnishee application.
25. The affiant avers that this Court has jurisdiction to vary the consent order and that the issue of it being functus officio does not arise. She further avers that no new matter has been filed with respect to the 228 Claimants as they were indeed parties in the original suit.
26. It is on this basis that the Claimants/Applicants urged this Honourable Court to allow their Applications in terms of the reliefs sought therein.

27. Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

28. The Claimants/Applicants in their submissions maintained that their applications are merited and that the dispute is purely between them and the 1st Respondent herein.

29. It is further submitted that the sum they seek to be adopted of Kshs. 580,153,775.74 is not a new figure but rather forms part of the decretal sum of Kshs. 1,401,585,364.80.

30. The Applicants contend that there is no plausible reasons that has been given by the Respondents in opposition to the Applications dated 18/2/2020 and 22/4/2020 and they therefore urged this Honourable Court to allow the same in terms of the prayers sought therein.

1st Respondent's Submissions

31. The 1st Respondent on the other hand submitted that this Court is functus officio having delivered its final decision and part of the decretal amount having already been paid out to the Union. To buttress this argument the Respondent cited and relied on the case of **Stephen Kimani Kibe Vs Kimani Kinuthia & 2 Others (2018) eKLR** and **the Court of Appeal decision in the case of Telkom Kenya Limited Vs John Ochanda (2014) eKLR**.

32. The 1st Respondent further submitted that the twin Application now pending for determination are in-fact res judicata to the main suit and therefore urged this Court to accordingly dismiss them. For emphasis the 1st Respondent cited and relied on the cases of **Kenyariri & Associates Advocates Vs Salama Beach Hotel Limited & 3 Others (2017) eKLR** and **The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others (2017) eKLR** where the Courts pronounced themselves on the issue of res-judicata and held that they ought not to re-litigate the same issues against the same opponent and in doing so would be a waste of judicial time.

33. The 1st Respondent maintains that it would be unfair and unjust for this Court to grant the prayers sought in the instant Applications. It further maintains that the dispute in the Applications is one between the Applicant's and their union and/or their Advocate on record and is therefore an unnecessary party to the dispute.

34. In conclusion the 1st Respondent urged this Court to accordingly find the two (2) Applications devoid of merit and dismiss them with costs to the 1st Respondent.

35. I have considered the averments of the Parties herein. There are 2 issues for this Court's consideration:-

1. Whether this Court is functus officio.

2. If not, whether the Applicants herein are beneficiaries to the decretal sum granted by Court in this Claim.

36. On 1st issue, the Respondents argued that this Court is fuctus officio having delivered a judgement in this case. Indeed this Court delivered its judgement on 6/7/2015. In the judgement, the Court directed that the Respondents in the main Claim should implement the CBA as negotiated.

37. The Court also made a finding that the Respondents had breached terms of the CBA by partially implementing it in favour of only workers on permanent engagement.

38. The Respondents were dissatisfied with the Court's judgement and appealed to the Court of Appeal. The Court of Appeal after hearing the appeal dismissed it and remitted the file back before this Court for execution. This application refers to the said execution process for which this Court is not rehearing or reopening the case.

39. The Claim that this Court is *res judicata* is therefore not rue.

40. On the issue of the application for the Applicants herein who are 228 in number wishing to be allowed to proceed in person, the Respondents having not opposed the same, the same was allowed.

41. As to the orders sought in the application, the Applicants want the Court to compel the 1st Respondent herein to release to them the withheld decretal sums and for the Respondent to account for how the moneys have been paid out.

42. In my view, the starting point is whether the Applicants were originally part of this Claim as filed in 2014 and whether the judgement of the Court entitled them to benefit from the judgement entered by this Court on 6/7/2015. From the pleadings herein, the Claim was filed by the Union on behalf of their unionisable employees.

43. The Applicants are members of the Claimant's Union, which the Respondents have not disputed. The question then is why the Applicants have been left out of the payment schedule.

44. In the circumstances, it important that the Applicants be part and parcel of the members being paid out the moneys paid by the

Respondents in Main Claim. I therefore find the application has merit and I allow it. I also allow the application in terms of the 2nd Respondent accounting for the money paid out by the 1st Respondent and to show how the Applicants have been included in the schedule.

45. Costs in the Claim.

Dated and delivered in Chambers via zoom this **16th day of September, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyabena for Claimants - Present

Muchiri for 1st Respondent – Respondent

Juliet Tuwot - Present