



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2575 OF 2016

(Before Hon. Justice Hellen S. Wasilwa 11th November, 2020)

RAPHAEL NJOROGI MWAURA.....1ST CLAIMANT
SAMUEL MIGWI THEURI.....2ND CLAIMANT
MARY WAENI WAMBUA.....3RD CLAIMANT
ANNE ELIZABETH OWUOR..... 4TH CLAIMANT
CHARLES LWANGA OOKO.....5TH CLAIMANT
CHARLES THINWA MATHENGE..... 6TH CLAIMANT
CLEOPHAS SIMIYU WEKESA.....7TH CLAIMANT
FLORENCE KIRIMANIA OBURA.....8TH CLAIMANT
GODFREY KIGARIE GATHIGE.....9TH CLAIMANT
JAMES NGUGI NJUGUNA.....10TH CLAIMANT
JOSHUA KAMAU MWANGLI.....11TH CLAIMANT
NATHANIEL WAITHAKA WANYAGI.....12TH CLAIMANT
SAMUEL NJOROGI NJOGU.....13TH CLAIMANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

RULING

1. The Application Before This Court Is The Claimants/Applicants' Notice Of Motion Dated 8th June 2020 Seeking The Following Orders:-
 1. That The Honourable Court Be Pleased To Approve And/Or Adopt The Sums Payable To The Claimants/Applicants As Set Out In Schedule A Attached Thereto As The Judgment Sum Of This Honourable Court.
 2. That Pursuant To Order 1 Above The Respondent Be Ordered To Pay The Applicants The Judgment Sums Within The Next 10 Days From The Date Of The Court Order.
 3. That The Respondents Be Condemned To Pay The Costs Of This Application.

2. The Application Is Based On The Following Grounds:-

1. That The Honourable Court In Its Judgement Of 27th February, 2020 Passed Judgment In Favour Of The Applicant. It Directed The Applicants To Compute The Amounts Due To Them And File Them For Adoption.

2. The Applicants Computed Amounts Are Set Out In Schedule A Annexed To The Application.

3. The Application Is Supported By The Affidavit Of Raphael Njoroge Mwaura, The 1st Applicant On Behalf Of The Other Applicants, Sworn On 8th June, 2020. He Deposits That They Are Desirous Of The Honourable Court Considering The Figures And Adopting The Same As A Judgment Of The Court To Enable Them Realise The Fruits Of The Judgment. He Further Deposits That There Has Been No Proposal From The Respondent On The Issues Raised.

Respondent's Case

4. In Response To The Application, The Respondent Filed Grounds Of Opposition Dated 30th June, 2020 Stating That The Particulars Of Schedule Annexed To The Application Is Not Properly Calculated.

5. It Further Filed Replying Affidavit Sworn By Mercy Muchira The Ag. Manager Employee Resourcing, Sworn On 1st July, 2020.

6. The Affiant Avers That It Is Not Correct That The Court Directed The Claimants To Compute The Amounts Due To Them For Adoption By The Court. She Deposits That At Paragraph 69 Of The Judgment Dated 27th February, 2020, The Court Held That The Amount Shall Be Computed At A Later Stage And Adopted As A Judgment Of The Court.

7. She Avers That The Court Did Not Indicate That The Applicants Were To Unilaterally Compute These Amounts. She Further Avers That The Applicants Have Not Made Any Approach To The Respondent's Advocates In An Effort To Agree On The Sums Payable To Them. She Therefore Avers That The Respondent Was Not In A Position To Make Any Proposals On Computation Before This Application.

8. She Avers That None Of The Applicants Produced Their Payslips To Prove The Basic Pay They Were Earning. She Further Avers That The Applicants Have Nor Provided An Explanation How They Arrived At The Figures In The Schedule.

9. She Avers That The Figures Are Not Correct Because; The Total Outstanding Payment In The Schedule Has Not Changed From The Payment Claimed In The Statement Of Claim Despite The Fact That They Were Not Awarded Bonus Pay And "Other" Payments; The Tax Element Has Not Been Included And The Amounts Indicated As Salary Are Not The Correct Basic Pay Earned.

10. She Further Avers That The Applicants Have Failed To Give Credit For The 8 Months' Salary Advance That Was Paid To Them As Part Of The Voluntary Early Retirement Package. She Contends That The 5th, 7th, 8th, 9th, 11th And 13th Applicants Have Failed To Give Credit For Outstanding Liabilities With Respect To Unpaid Car Loans.

11. She Contends That Since Only The 1st-3rd Applicants Testified, The 4th To 13th Claimants Have Failed To Provide Evidence That They Worked For The Respondent For The Indicated Years.

12. The Respondent Filed A Further Affidavit Sworn By Mercy Muchira On 14th July, 2020 Which Annexed Its Tabulation Of The Applicant's Dues.

13. The Applicant Further Filed A Supplementary Affidavit Sworn By Raphael Njoroge Mwaura On 5th August, 2020. He Deposits That The Proposal By The Respondent Is Computed Based On The Net Salary And Incorporating The Element Of Tax Which Is Its Responsibility As Set Out In The Letter Dated 2nd April, 2015.

14. He Deposits That The Reference To The 8 Months' Pay Is An Introduction Of New Matters In The Absence Of A Counter-Claim. He Further Deposits That The Respondent Consented To Only 3 Applicants Giving Evidence On Their Behalf And The Respondent Has Their Employment Records.

15. The Respondent Filed A Second Further Affidavit Sworn By David Monandi On 18th August, 2020, In Reply To The Supplementary Affidavit. He Deposits That The Applicants Have Failed To Give Credit For 8 Months' Salary Advance That Was Paid To Them As Part Of The Voluntary Early Retirement (Ver) And That The 5th, 7th, 8th, 9th, 11th And 13th Applicants Have Failed To Give Credit For Outstanding Liabilities With Respect To Unpaid Car Loans.

16. He Denied That The Respondent Is Responsible For Tax, As The Same Is Not Provided For Under The Human Resource Manual. He Avers That The Computation Of Dues To The Applicants As Ordered In The Judgment Is For A Redundancy Package. He Avers That The 8 Months' Salary Advance Paid Is Not An Introduction Of New Matters And That The Applicants Cannot Chose The Portions Of The Ver Which They Prefer.

17. He Denied That The Respondent Consented To Only 3 Applicants Giving Evidence.

18. The Matter Proceeded By Way Of Written Submissions.

Applicants' Submissions

19. They Submitted That The Court Held That They Were Entitled To 2 Months' Pay For Every Completed Year Of Service As Per Part Vi Of The Respondent's Human Resource Manual Which Sets Out How The Computation Should Be Effected.
20. They Submitted That Section 4 Of Part Vi Provides That Computation Of Severance Pay Is Based On Consolidated Salaries Inclusive Of Their Personal Allowances Which They Used To Compute Their Pay. They Submitted That The Respondent Have Worked Out The Severance Pay Based On Basic Pay Therefore Denying Them A Substantive Portion Of Their Benefits. They Submitted That Computation Of This Pay Being Consolidated Claim Amounts To Kshs. 312,909,438.50 As The Amount Payable To Them Before Tax.
21. They Further Argued That The Respondent's Computation Applies Net Salary And That It Applied The Tax Element While The Applicants Have Computed The Sums Based On Consolidated Salaries.
22. They Submitted That The Letters Of Ver Dated 2nd April, 2015 Stated That The Company Would Bear All The Tax Costs And As Such The Respondent Cannot Rescind This Position. They Argued That Having Failed To File A Counter-Claim With Respect Of Tax, The Respondent Should Not Introduce The Tax Element When The Matters Is Fully Heard And Concluded.
23. They Urged The Court To Find And Hold The Respondents Liable To Pay The Applicants Sums Set Out In The Schedule.

Respondent's Submissions

24. The Respondent Submitted That In The Witness Statements Filed By The 1st To 5th And 7th To 13th Applicants And The 6th Applicant's Witness Statements, The Applicants Accept That They Received Payment From The Respondent Under The Ver Package Which They Have Repudiated.
25. It Submitted That The Applicants Cannot Keep What They Took From The Ver Which They Repudiated. It Argued That Payment Made To The Applicants Under The Redundancy Is Set Out In The Respondent's Human Resource Staff Regulation And Procedure Which Has No Obligation For It To Pay Tax.
26. It Argued That The Correct Computation Of The Applicant's Dues Is That Set Out In The Annexure To The Further Affidavit Of David Monandi Sworn On 18th August, 2020. It Argued That The Applicant's Submission That The Computation Is Based On Basic Pay Is Incorrect. Its Position Is Based On The Fact That Its Computation Shows That It Has Included House Allowance And Personal Allowances Of The Applicants In Arriving At The Gross Figure Used To Calculate The 2 Months' Salary For Each Year Worked.
27. With Respect To The Taxation Of The Payments, It Submitted That It Is Settled That Judgments Of This Court Awarding Terminal Dues Are Subject To Tax And There Was Therefore No Need To Raise This As An Issue For Determination. It Relied On The Court Of Appeal Decision In **Kioko Joseph (Suing As The Legal Representative Of The Estate Of Joseph Kilinda) V Bamburi Cement Ltd [2017] Eklr** Upholding The Decision That An Award Issued By The This Court Was Subject To Taxation. It Therefore Submitted That It Is Obligated To Deduct Tax From The Payments Computed To Be Due To The Claimants. In Support Of This It Cited The Decision In **Paul Ngotwa V Telkom Kenya Limited [2014] Eklr**.
28. It Submitted That It Was Responsible To Pay Taxes Under The Ver And That The Benefit Received By The Applicants Under The Ver Is The Sum Of Amounts Paid Directly To The Applicants And The Amount Paid As Taxes. It Submitted That These Amounts Should Be Deducted From The Amounts Computed As Due To The Applicants Under The Redundancy.
29. It Submitted That The Outstanding Liabilities Of The 5th, 7th, 8th, 9th, 11th And 13th Applicants Outstanding Liabilities Should Be Deducted From Their Final Dues.
30. In Conclusion, It Urged The Court To Adopt Its Computation.
31. I Have Examined The Averments Of The Parties Herein. This Court Delivered Its Judgement In This Matter On 27/2/2020. At Paragraph 69 Of The Judgement, The Court Made A Finding That The Amount Payable Shall Be Computed At A Later Stage And Adopted As A Judgement Of This Court.
32. On 8/6/2020, The Applicants Filed This Application Attaching A Schedule Of What Was The Expected Amount Payable And Seeking Court's Adoption Of The Same.
33. The Respondents Filed Grounds Of Opposition And A Replying Affidavit Asking This Court To Reject The Application. They Contend That The Payments Which Had Been Made To The Claimants Of 15 Days For Each Completed Year Of Service Had Been Paid Free Of Tax Whereas Redundancy Pay Under The Regulations Was To Be Subject To Tax.
34. On This Issue, The Applicants Filed A Supplementary Affidavit Sworn By One Raphael Mwaura. They Aver That The Severance Pay Was Computed Based On The Provisions Of Part Vi Section 4 Of The Respondents Human Resource Manual And That Their Last Payment Was Made Using Pay Slips Attached To The Replying Affidavit.
35. Part Vi, Section 4 Of The Respondent's Human Resource Manual On Redundancy Provide That Severance Pay For Those Who Have Served For Over One Year Will Be Paid At 2 Months' Salary For Each Year Worked For Those Who Have Worked For 16 Years Or More As The Applicants Are.

36. For The Judgement Delivered By Court, The Court Noted That In Computing The Applicants' Redundancy Here Baptised Voluntary Early Retirement (Ver), The Applicants Were Paid At The Rate Of 15 Days Gross Salary For Each Year Worked Which Feel Short Of The 60 Days Expected Leaving A Deficit Of 45 Days.

37. It Is Also Clear That The Applicants Were Given A Package Which Included An Advance Payment Of 8 Months Back Salary Based On Voluntary Early Retirement (Ver) Which This Court Found Was Not The Position.

38. The Company Also Agreed To Bear All Tax Costs On The Understanding That It Was A Voluntary Early Retirement (Ver). This Court Having Found That The Voluntary Early Retirement (Ver) Was A Disguised Redundancy, It Follows Therefore That The Amount Payable Is Taxable As Per The Law.

39. In The Circumstances, The Amounts Payable Will Be For 45 Days For Each Year Worked, Less 8 Months Advanced Basic Pay And Less Tax.

40. Based On This, The Payable Amounts Are As In The Following Illustration:-

a. Raphael Njoroge Mwaura Is Entitled To $45/30 \times 812,105 \times 35$ Years = 42,635,512.50 Less 8 Months Basic Pay Advanced And Total Is Subject To Tax.

41. The Issue Of Any Outstanding Liabilities From The Applicants Is A New Matter Not Raised As A Counter Claim And In Any Case It Cannot Be Raised Now, The Same Having Not Been Pleaded.

42. Given That These Figures As Submitted By The Applicants Have Included Figures Not Payable, I Will Direct That The Applicant Computes The Amounts Payable As Illustrated Above And Exchanges The Computation With The Respondents For Reply Or Concurrence And Then Have The Figures As Agreed Or Disagreed Upon Submitted For Court's Further Direction/Adoption As The Case May Be.

43. Costs In The Cause.

Dated And Delivered In Chambers Via Zoom This 11th Day Of November, 2020

Hon. Lady Justice Hellen Wasilwa

Judge

In The Presence Of:

Guserwa For Claimants – Present

Ondieki For Respondent – Present