



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**

**CAUSE NO.881 OF 2018**

**PETER MUCHUI MWAURA.....CLAIMANT**

**VERSUS**

**KENYA RURAL ROADS AUTHORITY.....RESPONDENT**

**RULING**

The claimant filed application and Notice of Motion seeking the following orders;

- 1. The court be pleased to enter judgement on admission against the respondent herein for the sum of Ksh.6,982,283.80/= being the outstanding salary arrears from July, 2012 to October, 2020;*
- 2. The court be pleased to compel the respondent to pay the salary to the claimant to that of grade 5 as per appointment letter dated 8<sup>th</sup> May, 2012 with effect from November, 2020;*
- 3. The consent letter dated 17/2/2020 entered between Makalla, Theuri & Co. Advocates for the claimant and the firm of Miller & Co. Advocates for the respondent be set aside and the matter do proceed as undefended cause and accorded an early hearing date for formal proof.*
- 4. Costs of this application be borne by the respondent.*

The application is supported by the claimant's affidavit and on the grounds that the claimant is seeking payment of salary arrears admitted by the respondent and this should be released to him as the case is simple and straight forward. The respondent has not filed any defence and it is one year since service and there is nothing to go on trial as he is only pursuing his salary arrears.

That the firm of J.M. Rapando Advocates is on record to the respondent and without notice of change of advocates the firm of Miller & Co. advocates have no locus standi to enter into consent with the claimant's former advocates dated 17<sup>th</sup> February, 2020 which should be set aside.

The cause of action arose in the year 2012 and it is now 8 years and the matter should be urgently determined.

The claimant also avers in his affidavit that he was employed by the respondent in July, 2012 earning Ksh.112, 300 per month at grade 5. He has salary arrears of ksh.6, 982,283.80 from July, 2012 to October, 2020 and which has been admitted by the respondent subject to demotion to grade 3 which he has declined in an email dated 25<sup>th</sup> April, 2017. There was no demotion or payment of the due salary.

The claimant also avers that people whose grade 5 was lowered to grade 3 had consented to the same and were compensated in Cause No.915 of 2015 – Mohammed Bare & 43 others versus Kenya Rural Roads Authority.

Upon filing this suit the firm of J. M. Rapando & Co. Advocates entered appearance for the respondent and subsequently the firm of Miller & Co. Advocates entered appearance and recorded consent dated 17<sup>th</sup> February, 2020 with Makalla, Theuri & Co. Advocates seeking leave to file defence out of time. Such consent has not been adopted by the court.

The consent was improperly filed as no notice of change of advocates by Miller & Co. Advocates has been filed and the suit should proceed undefended and the orders sought allowed with costs.

In reply, the respondent filed the Replying Affidavit of Judith Yamo the Deputy Director – Human Resources and Administration and avers

that she has authority to reply herein.

The claimant was employed by the respondent from 1<sup>st</sup> July, 2012 at grade 5 with a gross salary of Ksh.112, 300 per month. There is no salary arrears amounting to Ksh.6, 982,283.80 as alleged and the respondent has not admitted owing the claimant such salary arrears.

The letter/email 'PMM3' dated of 25<sup>th</sup> April, 2017 is not an admission but a mere proposed negotiation aimed at unlocking the stalemate relating to the alleged salary arrears due to the claimant.

The claimant has been earning the salary addressed in his letter of appointment.

Ms Yamo also avers in reply that it is not true that all employees involved in Cause No.915 of 2015 were fully compensated and the claimant was not a party to this suit.

The respondent's advocates have always been Miller 7 Co. Advocates who were instructed on 11<sup>th</sup> September, 2019 and who filed a Memorandum of Appearance. The claimant was served through his advocates on 13<sup>th</sup> September, 2019 and the claimant has continued to communicate and received service from the said law firm.

The respondent has never instructed the firm of J. M Rapando & Co. Advocates as alleged.

The consent recorded on 17<sup>th</sup> February, 2020 is legitimate as the same was not obtained by duress, coercion or fraud and was properly executed by the parties represented by advocates. the same has been filed with the court. at the time the claimant was represented by the firm of Makalla, Theuri & Co. Advocates and the consent filed is legal.

The claimant has failed to disclose that he still works for the respondent and there are on-going negotiations meant to settle this dispute amicably per article 159 of the constitution which allow for alternative dispute resolution mechanism and amicable settlement and only fair that the application be dismissed to allow finalisation of negotiations.

The respondent also filed Supplementary Affidavit of Judith Yamo and who avers that the respondent does not owe the claimant the sum of Ksh.6, 982,283.80 and there is evidence to confirm the same. There is no admission by the claimant as owing such amounts as alleged.

The claimant filed his written submissions dated 18th November, 2020.

The court has considered the application, the affidavits and submissions filed by the claimant.

The gist of the application is that the claimant is seeking that upon an admission of the claim he should be paid Ksh.6, 982,283.80 by the respondent who has not defended the suit since the consent dated 17<sup>th</sup> February, 2020 has not been adopted by the court and the firm of Miller and Co. Advocates is not properly on the record.

Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal as held in the case of **Endebess Development Company Limited versus Coast Development Authority [2018] eKLR. a** Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision. See **Agricultural Finance Corporation versus Kenya National Assurance Company Limited (in receivership), [1997] eKLR.**

The claimant attached his letter of appointment dated 8<sup>th</sup> May, 2012 in the position of human resource assistant and clause 7 place his remuneration at grade 5 in the basic scale of Ksh.56,300 to Ksh.67,600 with annual progression of 5% of basic pay subject to satisfactory performance. In this regard, the claimant was to enter at ksh.56, 300 salaries per month together with various allowances.

The claimant's contention is that he is owed salary and pension arrears at Ksh.6, 982,283.80 from May, 2012 to October, 2020 and there is an admission by the respondent subject to him agreeing on a demotion to grade 3. He has relied on internal communications and emails dated 26<sup>th</sup> and 25<sup>th</sup> April, 2017.

On 25<sup>th</sup> April, 2017 Judith Yamo wrote to the claimant with regard to;

*Proposal to Pay Salary Arrears Arising from Revised Placement Wef July 2012 to Date (April, 2017)*

*Good evening Peter.*

*We spoke briefly in the above regard.*

*As indicated, management is keen to follow through with the issue of the proposal to pay salary arrears arising from your revised placement from July 2012 to date, and to present the same, to the HR Board Committee, with a recommendation to consider for settlement the resultant arrears. ...*

The claimant replied on 26<sup>th</sup> April, 2017;

*Good morning.*

*Thank you for the effort to resolve this matter.*

*I'm [I am] agreeable to the decision of the management to pay the outstanding arrears. I'm also okay with the decision to revert to lower position and will accept a raised offer to that effect.*

The court reading of these communications is that these are proposals between the parties who were negotiating a settlement. There was no acceptance. There is no reply to the claimant's offer by the respondent that is clear and unequivocal that he is owed the sum of ksh.6, 982,283.80 as of October, 2020. The negotiations related to April, 2017.

The claimant filed suit on 8<sup>th</sup> June, 2018. His claim is for a declaration that there is underpayment in the sum of Ksh.3, 155,266.80 and such should be tabulated by the court.

The facts of the matter are contested. The court finds no admission.

Where the court is called to interpret the documents and records of employment so as to arrive at a decision, judgement cannot be entered until such facts and interpretation is complete.

With regard to representation of the respondent and the consent filed, on the record is the respondent's *Memorandum of Appearance* filed on 13<sup>th</sup> September, 2019 by the firm of *Miller & Company Advocates for the Respondent*.

There are subsequent communications between the parties and copied to the court where the respondent is represented by the same law firm.

This is the court record and which parties must rely upon.

On 23<sup>rd</sup> August, 2018 the firm of J.M. Rapando Advocate filed *Notice of Appointment of Advocate*, acting for the respondent.

Whereas a party to a suit is allowed to be represented by advocate(s) of choice, Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016 reiterates that upon service of summons, a respondent should enter appearance and then file a defence.

*13. (1) If a party served with a statement of claim intends to respond, the party shall, within twenty one days from the date of service, enter appearance and file and serve a response to the suit.*

the starting point is the Notice to Enter Appearance as per the Court Rules.

Thereafter, a party may opt to appoint other advocates to represent their interests.

As much as the appointment of the firm of J.M. Rapando Advocate is noted, the respondent has since denied ever appointing such firm of advocates and there was no attendance in these proceedings.

There is no lacuna as the respondent is well represented by the firm of Miller & Company Advocates, who entered appearance herein on 13<sup>th</sup> September, 2019.

However, moving forward and to avoid ambiguity and proper service, the respondent shall address the *Notice of Appointment* filed by J.M. Rapando & Advocates. where such advocates filed the notice without instructions, impress upon them to withdraw it. Where the desire is to be represented by both firms, such right exists.

On the consent dated 17<sup>th</sup> February, 2020 the claimant was represented by the firm of Makallah, Theuri & Company Advocates and the respondent was represented by Miller & Company Advocates.

The claimant filed his *Notice to Act in Person* on 23<sup>rd</sup> October, 2020 long after the consent had been filed with the court on 8<sup>th</sup> March, 2020.

The filed consent is yet to be adopted as an order of the court as the claimant has since moved the court seeking to urge his application herein. Such does not negate the terms of the consent or make it illegal, unlawful or filed in error. The outstanding matter is to have the court adopt the same as an order of the court.

**Accordingly, the application dated 21<sup>st</sup> October, 2020 is found without merit and is hereby dismissed. Costs shall be in the cause.**

**DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2020.**

**M. MBARU**

**JUDGE**