



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

**CAUSE NO. 305 (N) OF 2009**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA UNION OF ENTERTAINMENT  
AND MUSIC INDUSTRY EMPLOYEES.....CLAIMANTS  
ANTHONY WARUTERE.....CLAIMANT**

**VERSUS**

**FILM CORPORATION OF KENYA.....RESPONDENT**

**JUDGMENT**

On 22<sup>nd</sup> June 2011, the Claimants filed their Amended Statement of Claim dated 20<sup>th</sup> June 2011. The Claimant seeks the following reliefs:

- a. Anthony G. Warutere to be paid all his terminal benefits and entitlements amounting Kshs.356,869.00.
- b. Anthony G. Warutere to have interests on his terminal benefits and entitlements from January 2008 when the Collective Bargaining Agreement came into force.
- c. Antony G. Warutere terminal benefits be free from any deductions and claim from Kenya Union of Entertainment and Music Industry whose claim exclusively lies upon the Respondent.
- d. Antony G. Warutere to have costs on his Claim.

The Respondent in its Amended Memorandum of Response dated 22<sup>nd</sup> June 2011 and filed on 23<sup>rd</sup> June 2011, prays that the Claimant's claim be dismissed with costs and an award be made in favour of the Respondent for:

- a. Special damages to the extent of the revenue lost as a result of business lost.
- b. General damages for loss of business as a result of the Claimant's actions.
- c. A set off as against any dues that may be found to be due to the Claimants.
- d. Costs.
- e. Interest on (a), (b) and (c) above.
- f. Any other relief that the Court may deem fit to grant in favour of the Respondent.

**Claimant's Case**

The 2<sup>nd</sup> Claimant is a former employee of the Respondent who voluntarily retired from employment in January 2009 pursuant to Clause 35 of the CBA registered as CBA 265 of 2008. However, the Respondent is yet to pay the retirement benefits

amounting to Kshs.356,869.

It is the Claimant's case that although the CBA was registered, the employer was unsatisfied with the terms therein and begun laying off long serving employees. This was contrary to the CBA and employment laws. It is also the Claimant's case that as a result, it was forced to report a formal trade dispute to the Minister.

The Claimant avers that the Respondent has refused/failed to deduct and permit union dues to the unions account with effect from February 2009.

### **Respondent's Case**

It is the Respondent's case that the CBA was never implemented vide a separate agreement and its operations were suspended until the financial status of the Respondent improved. It is also the Respondent's case that the Claimant has no members at the Respondent's company.

The Respondent avers that all the allegations of wrongful redundancy and termination, non-payment of retirement benefits and refusal to remit trade union dues are false and unsubstantiated. The employees voluntarily retired and the benefits have been wrongly computed.

It is the Respondent's case that some employees were summarily dismissed from duty for misconduct, hooliganism, misappropriation of funds and incitement charges after they declined to formally write an apology. 5 employees were pardoned after tendering their apology.

The Respondent avers that it stopped submitting union dues on behalf of its employees because the Secretary General had instructed the Respondent to submit union dues to his personal account. The Respondent directed its employees to personally submit their dues to the union.

It is the Respondent's case that Claimant's Secretary General stated that he did not recognize the shop steward. Consequently, the union was null and void due to the non-recognition of the duly appointed shop steward by the Claimant's Secretary General.

The Respondent avers that any dues found due to the Claimants should be set off against the damages for loss of business which the Respondent Counterclaims for.

### **Submissions by the Parties**

The Claimant in its submissions dated 2<sup>nd</sup> October 2018 and filed on even date, reiterates its prayers and adopts the witness statement dated 14<sup>th</sup> August 2017 and the documents in the amended list of documents dated 14<sup>th</sup> August 2017.

The Claimants submit that the 2<sup>nd</sup> Claimant was an employee of the Respondent, which fact has not been disputed by the Respondent.

It is the Claimant's submissions that since the CBA was registered, it is binding upon parties and in respect of the employees who were members of the Claimant at the time. The Claimant relies on section 59 of the Labour Relations Act which provides that a CBA is binding upon all parties and operates from the dates cited in the Agreement. To reinforce this argument, the Claimant relies on the case of *Kenya Union of Journalists and Allied Workers vs. Nation Media Group Limited & Another eKLR* where the court held that a CBA is special in nature that it continues to bind all parties even after some employees, having been members of a union that participated in a CBA have left the union or employment.

It is the Claimant's submissions that the Claimant still enjoyed protection under the CBA despite the fact that he had retired.

On the issue of whether the Claimant is entitled to terminal dues, the Claimant submits that terminal benefits owing to employees were to be paid on the same date of determination of employment. The Claimant was entitled to terminal benefits of Kshs.363,979.00.

On the issue of how much terminal benefits are owing and due, the Claimant submits that the Claimant is entitled to 2 wages increments of 10% from 1<sup>st</sup> January 2008 to 31<sup>st</sup> December 2008 and from 1<sup>st</sup> January 2009 to 31<sup>st</sup> December 2009. The Claimant further submits that since the Claimant had worked for 10 years at the time of retirement, his basic salary increment was to be increased by Kshs.1,500 from Kshs.14,000 to 15,500.

The Claimant submits that the Claimant is entitled to Kshs.139,992 salary underpayment for the year 2008. The Claimant also submits that the Claimant is entitled to Kshs.48,995.52 house allowance underpayment for the year 2008.

The Claimant submits that the Claimant is entitled to Kshs.156,291.66 service gratuity. The Claimant further submits that the Claimant is entitled to Kshs.18,700.00 payment in lieu of notice.

On the issue of who bears the sum of unsubmitted union dues, the Claimant submits that the Respondent should bear that burden since it has that obligation as under section 50 of the Act. Further, the Claimant's pay slip indicates that the Respondent deducted union dues from the Claimant's salary.

The Claimant submits that the Respondent's Set off and counter-claim should fail because the claim has not been proven. The Claimant relies on the case of *Capital Fish Kenya Limited vs. the Kenya Power & Lighting Company Limited [2016] eKLR*.

The Respondent in its written submissions dated 7<sup>th</sup> November 2018 and filed on 8<sup>th</sup> November 2018, submits that claims related to the CBA brought after the dismissal of ELRC No. 371 (N) of 2009, are *res judicata*. For emphasis, the Claimant relies on the cases of *Henderson vs. Henderson [1843-60] All ER 378*, *John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*, *Kamunye & Others vs. Pioneer General Assurance Society Limited [1971] EA 263*, *Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR* and *Pop-In (Kenya) Limited & 3 Others vs. Habib Bank A.G. Zurich, [1990] eKLR*. The Respondent further submits that the 1<sup>st</sup> Claimant sought claim on behalf of its members, which suit was dismissed, and as such 2<sup>nd</sup> Claimant is estopped from making any subsequent claims on the basis of the CBA. The Respondent relies on the cases of *Serah Njeri Mwobi vs. John Kimani Njoroge – Civil Appeal No. 314 of 2009, D & C Builders vs. Sidney Rees [1966] 2 QB 617* and *Gatirau Peter Munya vs. Dickson Mwenja Kithinji & Others [2014] eKLR*.

The Respondent submits that the Claimant is not entitled to payment in lieu of notice as the Respondent is not responsible for the termination of the contract. The Respondent further submits that the Claimants did not controvert the assertion that the Respondent had advised its employees to submit their dues in their personal capacities.

It is the Respondent's submissions that since the Claimants did not file substantive defences to the counter-claim, judgment should be entered for the Respondent pursuant to section 25 (b) of the Civil Procedure Act.

It is also the Respondent's submissions that the CBA was unlawfully executed on its behalf and is therefore incompetent as a lawful document giving rise to legal rights complained of by the Claimants. The Respondent relies on the case of *Root Capital Incorporated vs. Tekangu Farmers' Co-operative Society Limited & Another [2016] eKLR*.

### **Determination**

After considering the evidence adduced by the parties, the issues for determination are:

1. Whether the CBA No. 265 of 2008 is binding upon the parties herein.
2. Whether the Claimants are entitled to the reliefs sought.
3. Whether the Respondent is entitled to the reliefs sought in its Counter-claim and Set off.

### **Whether the CBA No. 265 of 2008 is binding upon the parties herein.**

Before the issue of terminal dues is determined, the Court must determine whether the provisions of the CBA, for which the reliefs are pegged on, binds the parties.

The Claimants submissions that since the CBA was signed, it is binding upon parties and in respect of the employees who were members of the Claimant at the time. The Respondent on the other hand submits that the CBA was unlawfully executed on its behalf and is therefore incompetent as a lawful document giving rise to legal rights complained of by the Claimants.

The Claimants in their Amended List of Documents dated 14<sup>th</sup> August 2017 and filed on 16<sup>th</sup> August 2017, have adduced in Court a duly executed CBA and the letter dated 22<sup>nd</sup> December 2008 declaring the CBA duly registered. **Section 59 (5) of the Labour Relations Act 2007** provides as follows:

***A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.***

The Court in *Kenya Union of Commercial Food and Allied Workers v Kenya National Library Service [2016] eKLR* relied on the Court of Appeal case of *Teachers Service Commission versus Kenya National Union of Teachers & Others [2015] eKLR* to hold that:

*“Once there is such a CBA, section 59 makes it binding on all parties to the agreement; and should be incorporated in the contract of employment of every individual employee covered by it and is enforceable and should be implemented upon registration with the court. The CBA must be submitted to the Court pursuant to the provisions of section 60 of the Labour Relations Act to the court to assess the CBA compliance with the law and the constitution. The purpose of section 60 is therefore crucial here as before registration of the CBA, the court must be certified that it is not in conflict with any other law or if it does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister responsible for labour matters.”*

In that case the court cited with approval the cases of *Moses O Sigu versus Royal Garments Industries EPZ Limited, Cause No.83 of 2014* and *KUCFAW versus Corn Products Kenya Limited, Cause No.1302 of 2012* which held that;

*“Upon its registration with the court, a CBA becomes a binding agreement for its duration and based on its legal force, it is enforceable. Before parties to it can rely on any other document, the CBA becomes the primary document of reference.”*

From the foregoing I find that the CBA is binding upon the parties herein as it was duly executed and registered. Further, the Respondent has not proved that the person who signed the CBA on its behalf was not authorized to do so. Furthermore, the registration of the CBA has never been challenged or set aside thus it remains valid and enforceable.

#### **Whether the Claimants are entitled to the reliefs sought.**

The 1<sup>st</sup> Claimant has submitted that the 2<sup>nd</sup> Claimant was entitled to terminal benefits of Kshs.363,979.00. On the other hand, the Respondent has submitted that claims related to the CBA brought after the dismissal of ELRC No. 371 (N) of 2009, are *res judicata*. The Respondent relied on many cases which elaborate on the doctrine of *res judicata*. One such case is **Kamunye & Others vs. Pioneer General Assurance Society Limited [SUPRA]** where the principle was set out as follows:

*“Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent Court in a prior suit between the same parties or their representatives.”*

I have noted from the record that on 24<sup>th</sup> July 2017, the court (Nduma J. made orders as follows –

*“The suit is dismissed for want of prosecution that is 371(N) of 2009. 305(N) of 2009 to be heard on 21<sup>st</sup> February 2019. (Last adjournment). The two files be separated. Parties to file witness statement within 21 days.”*

The suit is therefore not *res judicata* as Nduma J. only terminated Cause No. 371 (N) of 2009 while he expressly confirmed that this suit. Cause No. 305 (N) of 2009 will proceed.

The claimant is not entitled to payment in lieu of notice as the respondent is not responsible for the termination of the contract. He applied for early retirement which the respondent accepted.

The claimant is entitled to the increments as sought because they became effective from the date of the enforcement of the CBA which was on 22<sup>nd</sup> December 2008 when the CBA was registered by the court. The 2<sup>nd</sup> claimant resigned by his letter dated 5<sup>th</sup> January 2009 after the registration of the CBA. Section 59(2), (3) and (5) of the Labour Relations Act provides as follows –

**(2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers’ association.**

**(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.**

**(5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.**

The CBA is for the period 2008 – 2009. Since the 2<sup>nd</sup> claimant retired in January 2009 he is entitled to benefits under the CBA for the period 2008 when he was in the respondent’s employment.

The 2<sup>nd</sup> Claimant is further entitled to gratuity because at the time of resignation, he had worked for over 5 years as is set out under Clause 35 of the CBA.

The 2<sup>nd</sup> Claimant is not entitled to the prayer on interest because the CBA was registered on 22<sup>nd</sup> December 2008 and could have only been effective from this date and not January 2008.

Prayer 3 is granted. This is because the 2<sup>nd</sup> Claimant’s payslips indicate that he was deducted Kshs.300.00 in union dues which implies that the Respondent was to remit it to the 1<sup>st</sup> Claimant. The Respondent has not adduced evidence to prove that it informed its employees to remit their union dues directly to the union.

#### **Whether the Respondent is entitled to the reliefs sought in its Counter-claim and Set off.**

The Respondent is not entitled to the reliefs sought in its counter-claim and set-off because they have not been proved.

#### **Conclusion**

In conclusion I find that the claimant is entitled to benefits under the CBA for the period 2008 – 2009 as follows –

According to the CBA, a Technician's basic minimum wages was made mandatory (shall) at Kshs.14,000 per month. This was provided under Clause 2 of the CBA classified Category F

The Respondent declined to pay this amount but instead continued to pay the basic wage at Kshs.7,089. as shown in the pay slips in the Amended Claimant's List of Documents.

The 2<sup>nd</sup> claimant requested for an early retirement vide a letter dated 5<sup>th</sup> January, 2009 which was accepted by the Respondent vide its letter dated 6<sup>th</sup> January 2009.

### **Long Service and Qualification Increment**

According to Clause 14 of the CBA, it provided

***“It is agreed that the Management shall grant in addition to an employee's basic monthly minimum wages/salary a long service and qualification increment on the date of implementation of this Agreement and this shall be allowed as follows:-***

- ***Kshs.1,000 on completion of 5 Years of Service***
- ***Kshs.1,500 on completion of 10 Years of Service***
- ***Kshs.2,000 on completion of 15 Years of Service***
- ***Kshs.3,000 on completion of 20 Years of Service ”***

The 2<sup>nd</sup> claimant was employed in the year 2000 and worked until year 2009. This is a period of ten (10) years. His basic salary of Kshs.14,000 was to be increased by Kshs.1,500. to Kshs.15,500 for long service. The salary for purposes of working out his terminal for purposes of working out his terminal benefits is therefore Kshs.15,500 per month.

### **General Wages Increment**

He was entitled to two (2) wage increases as per Clause 13 of the CBA which provided:-

***“It is agreed between the UNION and the EMPLOYER that there shall be a general wages increment of 10% (ten percent) from 1<sup>st</sup> January, to 31<sup>st</sup> December, 2008 and another 10% (ten percent) from 1<sup>st</sup> January, to 31<sup>st</sup> December, 2009 from the Employers basic Wages.”***

(a) 1<sup>st</sup> Increment of 10% from 1<sup>st</sup> January, 2008 to 31<sup>st</sup> December 2008  $10\% \times \text{Kshs.15,500} = \text{Kshs.1,550}$

Year 2008 Basic Salary would be

**Kshs.17,050.00** (Kshs.15,000 Basic Salary + Kshs.1,500 Long Service + Kshs.1,550, 1<sup>st</sup> Increment).

(b) 2<sup>nd</sup> Increment of 10% from 1<sup>st</sup> January 2009 to 31<sup>st</sup> December 2009  $10\% \times \text{Kshs.17,050} = \text{Kshs.1,705}$

Year 2009 Basic Salary would be

**Kshs.18,755** (Kshs.17,050 Basic Salary + Kshs.1,500 Long Service + Kshs.1,705, 2<sup>nd</sup> Increment)

### **Salary Underpayment**

The Salary pact was computed on the basic salary of Kshs.7,089 instead of Kshs.18,755 as provided for under the CBA.

The Salary underpayment was the difference between Kshs.18,755 tabulated under the CBA and Kshs.7,089 as per the Pay Slip.

The Salary underpayment for Year 2008 (12 months) is as follows:-  $\text{Kshs.18,755} - \text{Kshs.7,089} = \text{Kshs.139,992}$

### **House Allowance Underpayment**

The CBA paid increment of house allowance at 35% on basic salary. This was provided for under Clause 12 of the CBA.

The Respondent provided a house allowance of Kshs.2,481 which was wrongly computed on basic salary of Kshs.7,089 instead of Kshs.18,755.

The right house allowance computed at 35% Basic Salary of Kshs.18,755 ought to be  $35\% \times \text{Kshs.18,755} = \text{Kshs.6,564.25}$

House Allowance underpayment is the difference between Kshs.6,564.25 and Kshs.2,481.29 =  $\text{Kshs.4,082.96}$ .

Annually (2008) the House Allowance underpayment was Kshs.48,995.52 (Kshs.4,082.96 per month x 12 months)

### **Service Gratuity**

According to Clause 35 of CBA, on retirement an employee was to be awarded a benefit of service gratuity at the rate of Twenty Five (25) Days for each completed year of Service. The same was applicable in cases of voluntarily resignation and termination.

Therefore the service gratuity is Kshs.156,291.66 computed as follows –

Kshs.18,755 Basic Salary x 25/30 (25 days per month) x 10 Years = Kshs.156,291.66

In summary, the amount payable is as follows:-

#### **Item Particular Amount (Kshs.)**

1. Salary Underpayment 139,992.00
2. Service Gratuity 156,291.66
3. House Allowance 48,995.52

**TOTAL 345,279.18**

I therefore award the 2<sup>nd</sup> claimant Antony Warutere the sum of Kshs.345,279.19.

The counterclaim is dismissed.

The respondent shall pay the 2<sup>nd</sup> claimant his costs of the suit.

The prayers by the 1<sup>st</sup> claimant (the union) are dismissed as they have not been prosecuted or proved.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**