



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE 1200 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

AINEAH LIKUMBA ASIENYA.....1<sup>ST</sup> CLAIMANT  
FRANSISCA WANJIKU MUIGAI.....2<sup>ND</sup> CLAIMANT  
FREDRICK ONDENG OKELLO.....3<sup>RD</sup> CLAIMANT  
NASHON PHILIP ODUOR.....4<sup>TH</sup> CLAIMANT  
JAMLCK MBAE MWIRICHIA.....5<sup>TH</sup> CLAIMANT  
TOBIAS OBUKWI WANZALA.....6<sup>TH</sup> CLAIMANT  
EBBY KAHAI MUDAVADI.....7<sup>TH</sup> CLAIMANT  
FRANCIS MUTUNGI MUTUNE.....8<sup>TH</sup> CLAIMANT  
NELSON MARK ETALE.....9<sup>TH</sup> CLAIMANT  
EDWARD SEWE OCHILLO.....10<sup>TH</sup> CLAIMANT  
CHARLES JOHN OKETCH.....11<sup>TH</sup> CLAIMANT  
MARTIN KISOMBE MWANJALA.....12<sup>TH</sup> CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....1<sup>ST</sup> RESPONDENT  
THE POSTMASTER-GENERAL,  
POSTAL CORPORATION OF KENYA.....2<sup>ND</sup> RESPONDENT

**RULING**

The parties herein filed two applications seeking review of the Judgment by Nzioki wa Makau J, dated 4<sup>th</sup> April 2019. The Claimant filed its Amended Notice of Motion on 11<sup>th</sup> June 2019 while the Respondent filed its Notice of Motion on 15<sup>th</sup> May 2019. The Claimants in their Notice of Motion seek the following orders:

1. Spent.

2. That this Court be pleased to review the Judgment and Decree herein dated 4<sup>th</sup> day of April 2019 and determine the undernoted issues that

were pleaded, canvassed at the hearing and submitted upon but inadvertently not determined by the Judge that is

a. Claim for:

i. Unpaid salary and house allowance for the 9 days worked in the month of October 2006.

ii. Terminal leave/accrued leave days not taken.

iii. Transport allowance.

iv. Interest.

b. The judgment and consequential decree further require clarification on the claimants' length of service.

The Application is supported by the grounds that the claimants pleaded issues and evidence which was inadvertently left undetermined by the Court and that the issues require clarification or determination for completeness in the determination of the quantum of the decretal sum. Further, that this is an error on the face of the record.

The Application was supported by the affidavit of Fredrick Ondeng Okello sworn on 30<sup>th</sup> April 2019. He deposes that the issue of the length of service was raised, evidence adduced and submissions made thereon but the Court did not make a determination on some of the issues.

In response to the application, the Respondents filed a Replying Affidavit on 15<sup>th</sup> May 2019 sworn by Samuel M. Mburu wherein he states that the respondent's partially concur with the Claimants on the application for the review of the Judgment as issues that were pleaded, interrogated and submitted upon were omitted in the Judgement. The Respondents listed the omitted issues in both the Replying Affidavit and in its Application which seeks the following orders:

1. That this Court be pleased to review the Judgment and Decree herein dated 4<sup>th</sup> April 2019 and determine the following issues that were pleaded, interrogated at the trial and submitted but erroneously overlooked and omitted by the trial Judge that is –

i. The Consent Orders recorded in Court 21<sup>st</sup> December 2018

regarding leave days.

ii. Interest on the Respondents' successful Counter-claim.

iii. Costs justly awardable to the 2<sup>nd</sup> Respondent, the suit against him having been struck out and considering that costs would normally follow the event.

iv. The Claimants' number of years worked for the Postal Corporation of Kenya, the latter having come into existence on 1<sup>st</sup> July 1999, complete with vesting Order on relevant assets and liabilities once the Claimants' pre-existing employment benefits with KPTC Limited were transferred to Pension Scheme.

2. That there be no order as to costs of and incidental to this Application.

The grounds in support of the application are that there is a mistake and/or error apparent on the face of the record and that the trial Court mistakenly overlooked and omitted to give a determination on various issues.

The Claimants did not file a reply the Respondents' Application but relied on the Supporting Affidavit to their application as a response to the application.

### **Claimants' Submissions**

The Claimants submitted that the Court in its Judgement only determined the issues on retrenchment package, costs, counter-claim and set off and tax liability. However, the Court inadvertently failed to make a determination on the length of service of the claimants, accrued contractual terminal benefits at the time of declaration of redundancy and interest.

The Claimants submitted that the issue of the length of service is relevant and critical since part of the retrenchment package decreed by the Court is for payment of 2 months' salary for each year worked and that it is imperative for the Court to make a pronouncement on each claimant's length of service as it was the multiplier.

They submitted that the accrued contractual benefits as at the date of retrenchment being unpaid salary for 9 days worked in the month of October 2006, terminal/accrued leave days and transport allowance were pleaded. They submitted that the Respondents in their submissions admitted the claim for 9 days worked in the month of October 2006 and transport allowance at the rate of one twentieth ( $\frac{1}{20}$ ). They submitted that the Respondent admitted the accrued leave days being 13 days for the 1<sup>st</sup> Claimant,  $7\frac{1}{2}$  for the 2<sup>nd</sup> – 5<sup>th</sup> Claimants, 39 days for 6<sup>th</sup> Claimant and  $7\frac{1}{2}$  days for the 7<sup>th</sup> to 12<sup>th</sup> Claimants.

They submitted that interest was prayed for in the Amended Complaint and also submitted on in great length.

### **Respondents' submissions**

The Respondents submitted that both the Employment and Labour Relations Court Act and the Employment and Labour Relations Court (Procedure) Rules confer a wide discretion on the Court to review its Judgment. They relied on the decision in **J. M. K v M.W.M. and Another [2015] eKLR**.

The Respondents submitted that both applications were timeously brought and that the Court is merely being called upon to adopt the Consent Orders recorded in Court on 21<sup>st</sup> December 2018 for the completeness of the Judgment. They submitted that the issue of interest payable on the Counter-claim was pleaded by the Respondents and argued in their written submissions.

They submitted that the suit against the 2<sup>nd</sup> Respondent was struck out for incompetence and that the payment of costs to the 2<sup>nd</sup> Respondent is not opposed. The Respondents submitted that the issue of the number of years worked was raised by the parties and particularly the 1<sup>st</sup> Respondent who argued and adduced evidence that the Corporation was established on 1<sup>st</sup> July 1999. They submitted that the employment dues accrued from service of the Claimants with Kenya Post and Telecommunication Corporation were transferred to a Pension Scheme that has independent existence.

### **Determination**

The main issue for determination is the review of the Judgment dated 4<sup>th</sup> April 2019. Both parties agree there are issues that were inadvertently not addressed by the Learned Judge. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides:

- (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—**
- (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;**
- (b) on account of some mistake or error apparent on the face of the record;**
- (c) if the judgment or ruling requires clarification; or**
- (d) for any other sufficient reason.”**

Each of the parties raised different issues which they allege were omitted by the learned Judge. The learned judge in his Judgment stated:

*“...The Claimants herein are therefore entitled to the remedy which is the sum of Kshs.200,000/- as well as the sums for notice and the payment for their service. The liabilities for the 7 out of the 10 Claimants which are admitted and which are set out by each of the 7 Claimants to be deducted from each of the 7 before the sums are paid out. The sums due to the claimants will be exempt from tax as stipulated in the letter by the Head of Civil Service. In the final result, the Claimants are each entitled to:-*

- a. Golden handshake of Kshs.200,000/-*
- b. 2 months' salary for each year worked*
- c. 3 months' basic salary in lieu of notice*
- d. Costs of the suit”*

The following is the determination of the court on the specific issues raised by the parties: -

### **Leave days**

The Respondents aver that they recorded a consent on 21<sup>st</sup> December 2018 in respect of leave days. From the record, the Court stated that the areas which the parties had agreed upon had not been entirely cleared. The record reflects that parties agreed that the 1<sup>st</sup> Claimant had 13 accrued leave days, 6<sup>th</sup> Claimant had 39 accrued leave days. However the respondent was yet to get a confirmation on the leave days in respect of 5<sup>th</sup>, 6<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup>.

As submitted by the Claimants, the Respondents in their submissions stated that leave days for the 1<sup>st</sup> and 6<sup>th</sup> Claimants had been agreed upon by consent and further urged that the 2<sup>nd</sup> – 5<sup>th</sup> Claimants and 7<sup>th</sup> – 12<sup>th</sup> Claimants agree on leave days as 7.5 days each.

I therefore find that the Claim for leave be allowed based on the agreement between the parties as –

1<sup>st</sup> claimant – 13 days,

6<sup>th</sup> claimant – 39 days

2<sup>nd</sup> to 5<sup>th</sup> and 7<sup>th</sup> to 12<sup>th</sup> claimants – 7.5 days each.

### **Transport allowance**

RW1 testified that the formula used in the calculation of transport allowance is 1/20 of the Claimants' annual salary and that the formula of 1/16 was in respect of unionable employees. I find despite there being computations using 1/16 as transport allowance, based on the letter dated 10<sup>th</sup> June 2004, the Claimants were entitled to transport allowance at the rate of 1/20.

### **Length of Service**

The Claimants length of service is to be used to compute the two months' salary for each year worked. I award that the length of service is to be computed as stated in the Certificates of Service.

### **Costs of the Counter-claim**

The learned Judge in his Judgment stated that there was no basis to enjoin the 2<sup>nd</sup> Respondent in the claim. I however do not agree that the 2<sup>nd</sup> respondent is entitled to costs independently as he was sued in his official and not personal capacity and further, that both respondents were represented by the same counsel who filed joint pleadings and conducted the suit for both respondents jointly. I therefore find that the 2<sup>nd</sup> respondent's costs are merged with those of the 1<sup>st</sup> respondent and indivisible therefrom. I thus make no orders for costs of the 2<sup>nd</sup> respondent.

### **Interest**

The court having not granted interest and this being a matter of discretion, this court finds no basis to interfere with the judgment.

### **Conclusion**

The judgment dated 4<sup>th</sup> April 2019 is accordingly reviewed. Any issue not affected by this ruling is retained as awarded in the judgment. If no mention is made in this ruling or in the judgment such issue shall be deemed to have been declined by the Judge.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2019.**

**MAUREEN ONYANGO**

**JUDGE**