REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 468 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JOHH ELEGO AND 103 OTHERS..........................CLAIMANT

VERSUS

PRESS MASTER LIMITED.................................RESPONDENT

RULING

There are two applications before me for determination. The first is filed by the respondent and is dated 28th January 2019 while the second application is filed by the Claimants on 6th February 2019. The Respondent's application seeks the following orders:

1. Spent

2. That there be a stay of proceeding and execution of the Judgment of Nduma J. delivered on 10th August, 2018 and any resultant decree or consequential orders therefrom pending hearing and determination of this Application and the Respondent/Applicant's Appeal on the said Judgment.

3. That the Respondent/Applicant be at liberty to apply for such further order and/or directions as the Court may deem fit and just to grant.

4. That the costs of the Application be provided for.

The application is premised on grounds that after the Court's judgment and upon the attendance for mentions on various occasions, the Claimants filed their purported computation which the applicant disagrees with and has since filed a Notice of Appeal. One of the main grounds of the appeal is the order by the Court that the Claimants do file a computation in respect of various claims which computation would be confirmed by the Court. It avers that the appeal raises questions as to the legal sanctity of the order which fully misapprehended the fact that after delivery of the Judgement, the Court was *functus officio*. The application is supported by the Affidavit of Ondari Eric Okong'o, an Advocate of the High Court of Kenya sworn on 25th January, 2019 in which he reiterates the grounds set out in the motion.

The Claimants filed a Replying Affidavit sworn by John Elego Navade the Claimants' representative on 3rd June, 2019. He deposes that the Respondent's application should be struck out in the first instance since it has not been brought under Order 46 Rule 6 which provides for stay of execution pending appeal. He further deposes that the application has not satisfied the requirements under Order 42 Rule 6.

He avers that the Respondent has not proved how the appeal shall be rendered nugatory and that it would be unjust for the court to stay execution of the decree because the applicant has alleged that his appeal has a likelihood of success.

The Claimants' application seeks the following orders:

1. Spent.

2. That the Court be pleased in exercise of its inherent jurisdiction, to review its order issued on 28th January, 2019 to adopt the Claimants' computation filed on 25th October, 2018 to enable the Claimants execute the Court's Judgment entered in their favour.

3.That the costs of this application be provided for.

The application is anchored on grounds that the Court adopted the pre-judgment computation filed by the Claimants on 18th October 2018 of

Kshs.64,859,427 instead of the Claimant's post judgment computation of Kshs.38,713,989.30. They aver that this is a material error on the face of the court record and there are sufficient grounds for the court to review the Order. The application is supported by the Affidavit of Veronica Kanyara, an Advocate of the High Court of Kenya sworn on 6th February, 2019.

In response to the Claimants' application, the Respondent filed a Replying Affidavit sworn by Filah Martins, an Advocate of the High Court of Kenya, on 22nd May 2019. Counsel confirms that the Claimant proceeded to file their computation of Kshs.38,713,989.30 but the Court adopted the pre-judgment computation of Kshs.64,859,427. Counsel deposes that upon their perusal of the post judgment computation, they noted various mathematical errors specifically on gratuity, notice pay and 10% CBA increment bonus. According to Counsel the correct computation is Kshs.19,896,778.60 and not Kshs.38,713,989.30.

The Claimants filed a Further Affidavit sworn on 3rd June 2019 by the Counsel Kanyara who deposes that the parties engaged in discussion but failed to reach a consensus on computation. She further deposes that the claimants reviewed their computation filed on 26th October, 2018 and made a few amendments on the calculation of gratuity, notice pay 10% increment and that they introduced a column for house allowances that was due.

Claimants' Submissions

The Claimants submit that Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides for review of a decree or order and that the Respondent acknowledges the need for the Court to review the computation to cure the error/mistake occasioned by the adoption of the wrong computation. They rely on the case of ***Nyamogo and Nyamogo v Kogo (2001) EA 170*** where the Court held that an error apparent on the face on the record cannot be defined precisely or exhaustively there being an element of indefiniteness. That each case must be determined judicially on the facts of the case.

The claimants submit that the parties are in agreement with the calculations and tabulations apart from the gratuity. They submit that the total gratuity arrived at by the Claimants is Kshs.7,725,374.50 while the Respondents computation totals Kshs.6,309,985.00. It submits that to arrive at the correct tabulation of every Claimant, a definite formula is needed which would aid the attainment of the correct results as far as the calculation of gratuity is concerned.

They submit that the Court based its award on the CBA agreement signed between the Respondent and the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers which provides under Clause 3 of the CBA that the Claimants were to work for 44 hours a week. This implies that the total number of days worked are 22 days in a month and not 30 days as the Respondents seems to imply.

The claimants rely on Article 2 of the International Labour Standards on working time which provides that for the purpose of the Convention the term hours of work means the time during which the persons employed are at the disposal of the employer and does not include rest periods. They therefore submit that to arrive at the correct tabulation, it is paramount to distinguish working hours (actual days one reports to work) from calendar days (number of days in a month).

They submit that this Court while calculating dues owed to Claimants, has used the number of days worked which are less than 30. They submit that in ***Enock N. Mwongeri v Rajesh Kappor Shah t/a 7 to 7 Company Limited [2019] eKLR*** the court used 26 days to calculate annual leave.

They submit that the Respondent in the computation of the number of years worked omitted the years that the Claimants worked as casuals. They further submit that the Respondent while computing travelling allowance failed to include the number of years the Claimants worked on casual basis. That the Court awarded each claimant Kshs.3,800.00 whether they were employed on permanent or on casual basis.

They submit that the Respondent alleges that some claimants have been paid house allowance or are not entitled to house allowance but they have not supplied any evidence to that effect. They urged the Court to adopt the computation of Kshs.22,570,170.20.

Respondent's Submissions

The Respondent submits that it has been its position that the Court ought to review the orders issued on 28th January, 2019 adopting the Claimants' pre-Judgment tabulation of Kshs.64,859,247 as the amount due and owing to the Claimants. It submits that the Claimants seek to have their tabulation of Kshs.22,570,170.20 to be adopted as the final liquidated damages payable to them. It is its submission that the said computation is not a true reflection of what ought to be paid to the Claimants as per the Judgment and that the amount payable is Kshs.16,832,077.90.

The Respondent submits that it does not contest the formulae for computing the gratuity being 15 days for each completed year of service but it contests the number of years that the claimants worked. It avers that the number of years worked can be derived from a perusal of the contracts of employment. It submits that the Court should find that the correct computation is Kshs.6,309,985.00 as opposed to Kshs.7,709,872.50.

It submits that as provided in the payslip most of the Claimants received travelling allowance thus the amount owing is Kshs.131,400. It further submits that the Claimants should only be paid the difference in house allowance and not the entire sum as computed by the advocates.

It submits that Sabbas P. Muli and Silvester Wambua had sought redress from other courts and the suits were determined before the Judgement herein. In respect to the 4 months' pay it submits that the Claimants ignored the fact that their salaries were subject to deductions.

It submits that the Claimants have tabulated the awarded sums to all Claimants ignoring the fact that the Court in its Judgment confirmed that

19 of the claimants ought not to be party to this suit. It urged the Court to adopt the computation of the respondent in the sum of Kshs.16,832,077.90.

In respect of its application for stay, the respondent submits that pursuant to Order 22 Rule 22(1) and Order 42 Rule 6(1) of the Civil Procedure Rules, this Court has jurisdiction to grant an order of stay pending the hearing and determination of the appeal. It relies on the decision in ***Housing Finance Company of Kenya -V- Sharok Kher Mohamed Ali Hirji and Another [2015] eKLR***.

It submits that the appeal raises several grounds that are arguable as set out in the Memorandum of Appeal and also has substantive points in law which ought to be addressed by this Court.

It submits that should execution proceed substantial loss would be occasioned on the Respondent as the money decree arising out of the Judgment is in millions and not within the Claimants' reach. It submits that the Claimants have maintained that they are persons of little or no means thus it is questionable how they will refund the sum should the appeal be successful. It submits that it will be left with huge losses relying on the case of ***G. N. Muema P/A (Sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] KLR***.

It submits that it is willing to furnish security if so ordered by the Court.

Determination

The issues for determination are whether the Court ought to review its Judgement delivered on 10th August 2019, and the computation adopted on 28th January, 2019 and whether the Respondent has met the threshold for grant of stay pending appeal.

Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides that this court can review its decisions on grounds that there is discovery of new and important evidence, or an error apparent on the face of the record or if the judgment needs clarification or for any other sufficient reason. The parties herein agree that the Judgement needs to be reviewed as the Court adopted the pre-judgment computation as opposed to the post judgement computation.

The Court in its Judgment delivered on 10th August, 2018 held:

> "*In the final analysis judgment is entered in favour of the Claimants as against the Respondent as follows:-*
>
> > *a) Four (4) months' salary in compensation for the unlawful and unfair termination of employment.*
> >
> > *b) Unpaid Bus Fare allowance at Kshs.250 per month from January 2003 to September 2012.*
> >
> > *c) Gratuity at 15 days' salary completed year of service*
> >
> > *d) The Court awards payment in lieu of notice to the claims in terms of the CBA as follows:-*
> >
> > > *(i) Those with service below five (5) years, one month salary in lieu of notice.*
> > >
> > > *(ii) Those with service of five (5) years and above, two (2) months' salary in lieu of notice.*
> >
> > *e) The Claimants are awarded CBA increment of salary at 10% from September 2011 to date of dismissal. Any increment of allowances in the said CBA that remains unpaid to be included in the computation of gross salary increment from September 2011 to date of dismissal.*
> >
> > *f) The awards in (a), (b), (c), (d) and (e) above to be computed by the Claimant, filed and served on the Respondent within 30 days of this Judgment. Same to be confirmed by the Court on a date to be fixed subsequently."*

The respondent seeks stay of execution pending appeal while the claimants seek review of the order of 28th January 2019. Ordinarily, where there is an appeal, an application for review does not lie. In this case however, the review is for purposes of correction of the order of this court on computation of the decretal sum and therefore a matter that is not the subject of the appeal. Further, the respondent who has filed the appeal agrees that there is need for review of the orders of this court of 28th January 2019 to correct the apparent error.

In its written submissions, at paragraph 17, the claimants state as follows –

> "*The respondents and the claimants are in agreement with the calculations of all the tabulations apart from that of gratuity on which we submit. Whereas the total amount arrived at as gratuity by the claimants is Kshs.7,725,374.50 the respondent's computations totals to Kshs.6,309,985.00 each affecting the individual calculations for each claimant."*

There is thus no dispute all the items awarded in the judgment as computed ty the respondent except gratuity.

The parties however do not agree on the tabulation of some of the items awarded in the judgment, which I now proceed to consider below:

Gratuity

Gratuity is provided for in the CBA at Clause 12(b) as follows –

> *b) An employee whose employment has been terminated by the employer shall be paid gratuity at 15 days basic salary for each completed year of service except where such termination is on account of discipline."*

The Judge awarded the Claimants gratuity of 15 days' basic salary for each completed year of service. The CBA provided that the Claimants were to work for 5 days or 5 days and a part day. The computation of gratuity should thus be based on basic salary divided by 26 days.

Computation formula is not contested by the parties being

> *(15 days/26 days worked in a month) x month salary x total number of years worked*

What the parties do not have a consensus on is the number of years of service. The respondent's positon is that the date of service should be reckoned from the contracts of service filed by the claimants. The claimants on the other hand rely on paragraph 75 of the judgment where the court held that-

> ***"All the Claimants who were in the employ of the Respondent up to 3rd October, 2012 are entitled to this increment. It is the court's finding that all the Claimants were unionsable whether or not they were members of the union; had ceased to be members of the union or had not joined the union at all. The fact is that all the cadre of employee, comprising the Claimants were unionsable and were entitled to benefit from the negotiated CBA terms. It was unfair labour practice and exercise in futility for the Respondent to fight the union and victimize continuously any employee, except those it termed permanent employees for joining the union. The Law allows employees who have worked for over three months being casuals to be converted to permanent and pensionable terms. Nothing disallows casual employees, so called, from joining the union. They remain unionsable and eligible to enjoy CBA terms. The court awards all the Claimants who were dismissed on 3rd October, 2012 the CBA increment from September, 2011. The amounts to be computed accordingly for confirmation by the court."***

I agree with the claimants that the Judge clearly intended to include the years of service before the claimants were issued with employment contracts. Further the CBA does not exclude the years of service before the issuance of employment contracts.

It is thus the court's positon that the years of service is to be computed from actual date of continuous service including the period before an employee is issued with a contract of service.

The foregoing notwithstanding, it is imperative to point out that the Judge in his finding at paragraphs 42 and 62 of the Judgment held that summary dismissal of the claimants except the 19 who had left the company was unlawful and unfair. Thus, these 19 claimants are not entitled to compensation.

In respect of the Respondent's application for stay of execution pending appeal Order 42 Rule 6(2) of the Civil Procedure Rules 2010 and Rule 5(2)(b) of the Court of Appeal Rules 2010 provide for the same.

Order 42 Rule 6(2) of the Civil Procedure Rules 2010 says

> **No order for stay of execution shall be made under sub rule (1) unless-**
>
> > **a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
> >
> > **b. such security as the court orders for the die performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

Rule 5(2) of the Court of Appeal Rules 2010

> **2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—**
>
> > **(a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;**
> >
> > **(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.**

In view of my findings on the application filed by the claimants on computation, I find that there is no immediate threat of execution as the decretal sum payable to each claimant is yet to be ascertained.

The application by the respondent is therefore declined as premature at this point in time. Should the need arise, the respondent can make the

application for stay at the appropriate time. I further believe that the issues in the appeal may be resolved if parties agree on the correct computation of the judgment as most of the grounds of appeal are also the subject of this ruling.

From the foregoing, I direct that the claimants do prepare a fresh tabulation of the terminal dues in line with the clarification herein and serve the same on the respondent within 30 days. The respondent shall within 15 days of service confirm the computation or file and serve the claimants with their own computation in court. The case shall be mentioned on 10th February 2020 for adoption of computation or further orders.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2019

MAUREEN ONYANGO

JUDGE