



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 2181 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

TRAILINK GROUP LIMITED.....CLAIMANT

VERSUS

KENYA LONG DISTANCE TRUCK DRIVERS AND ALLIED

WORKERS UNION.....RESPONDENT

RULING 4

Before this Court is the Respondent's Application dated 3rd October 2019 where the respondent seeks the following Orders-

1. Spent.
2. That the unrebutted quantum of the Respondent's/Applicant's computation following the order in the judgment delivered on 26th day of May 2017 served upon the Claimant/Respondent on 18th January 2018 be and is hereby adopted as a decree for execution purposes.
3. That the Deputy Registrar draw and issue the decree to the Respondent/Applicant for the quantum meruit total of Kshs.32,616,329 payable to the grievants as listed in the computation appearing as annexure C attached herewith.
4. That the Respondent pay the total amount with interest at court rate from 26th May 2017, the date of delivery of judgment till payment in full.
5. That the costs of this application be borne by the Claimant.

The Application is supported by the grounds set out in the motion and the averments in the Supporting Affidavit of Nicholas Mbugua sworn on 3rd October 2019.

The Respondent avers that Nduma J. delivered a judgment on 26th May 2017 whereby the grievants who were dismissed between 21st November 2014 and 16th December 2014 were to be paid 8 months salary as compensation for wrongful termination among other prayers.

The Claimant made an application for stay and was granted a conditional stay of execution on 24th November 2017. It however failed to meet the conditions of stay to date. As such, vide the letter dated 18th January 2018, the Respondent forwarded their own computation to the Claimant for approval.

Upon the Claimant's failure to approve computation, the respondent filed a Bill of Costs dated 10th May 2018 using its own computation. The Bill of Costs was scheduled for a ruling on 23rd May 2018 before the deputy registrar, but the same could not be delivered due to the pending issue of computations which was a hindrance in ascertaining the value of the subject matter from the judgment.

The Respondent avers that the Claimant's failure to obey the orders issued has been detrimental to the grievants who continue to suffer irreparable loss.

The Claimant opposed the Application vide the Replying Affidavit of Peter Njenga sworn on 17th October 2019. The affiant avers that the orders sought will affect the substratum of Civil Appeal No. 88 of 2018 scheduled for hearing on 16th December 2019. Further, that the issues raised are the subject of the appeal in grounds 8, 9, 10, 11 and 12 of the Memorandum of Appeal.

The affiant further avers that Wasilwa J. declared that this Court was *functus officio* in her ruling of 24th January 2019, hence the application is an abuse of the Court process.

The affiant contends that the Applicant's computation was controverted by the Respondent's letter of 16th February 2018.

The parties argued the application in open Court on 22nd October 2019.

Submissions by the Parties

The Respondent submitted that the Claimant was first served with the computation on 18th January 2018 but has not given any computation or proposal to date. The Respondent further submits that there is no law that bars the Court from issuing the orders sought.

In response to the Claimant's Affidavit, the Respondent submits that the Claimant being the employer is better placed to tabulate as it has employment records. As such, it ought to have made its own computations if it disputed the computations by the respondent.

The Claimant submitted that the Respondent was informed that it was ready and willing to pay 8 months' compensation for only 11 employees whom in its opinion were the only ones entitled under the contract. However, there was no response to the letter.

It is the Claimant's submissions that the particulars of the Kshs.32,000,000 has not been proved. The claimant further submits that if the Respondent wanted the grievants to be awarded notice pay and service pay, the respondent ought to have sought a review of the judgment.

In its rejoinder, the Respondent submitted that the judgment required computation of terminal benefits which included service pay and notice pay. Additionally, the respondent submitted that the Claimant ought to prove the allegations regarding the names of the grievants it is disputing. The respondent further submitted that if the list included dead employees, then their estates would benefit.

Analysis and Determination

I have considered the application and the affidavit in response to the same, the evidence in support of the parties' respective cases and the oral submissions of counsels. The issues before this Court for determination are as follows-

- a. Whether this Court has jurisdiction to hear the application herein.
- b. Whether the Respondent is entitled to the orders sought.

Jurisdiction

The Claimant has argued that this Court lacks the jurisdiction to hear the instant Application because the issues raised are subject of appeal at the Court of Appeal.

This application is in respect of execution of this court's judgment and decree. The fact that the matter is in the Court of Appeal does not oust the jurisdiction of this court in execution. Order 42 Rule 6 of the Civil Procedure Rules provides that –

[Order 42, rule 6.] Stay in case of appeal.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**
- (2) No order for stay of execution shall be made under subrule (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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

There is no stay of execution granted by either this court or the Court of Appeal. The applicant's application for stay of execution was dismissed by this court in the ruling of Radido J. delivered on 16th February 2018. This court thus has jurisdiction to hear the instant application.

On 26th May 2017, the Nduma J. issued the following final orders-

a. The dismissal of the grievants was wrongful and in

violation of the Return to Work Formula. All the grievants dismissed between the 21st November 2014 and 16th December 2014 be paid equivalent of eight (8) months' salary as compensation. the Respondent to file computation of compensation within thirty (30) days and Claimant to file a reply within 14 days if any for consideration and approval by the Court.

b. The Claimant to compute all terminal benefits due to the dismissed employees, file and pay within 30 days.

c. The Claimant is directed to recognize the Respondent forthwith in terms of the Recognition Agreement signed on 15th December 2014 by the parties.

d. Compensation is payable with interest at Court rates from date of Judgment till payment in full.

e. Claimant to pay the costs of the suit."

The Application was filed in line with the above orders as the issue of computation was not resolved in the judgment. The grievants cannot enforce the judgment without the computation of their terminal benefits. Further, there being no stay of proceedings pending before this Court, it follows that this Court is not barred from entertaining the Application hence has jurisdiction. It is worth noting that the claimant was granted a conditional stay on 24th November 2017, which conditions the claimant failed to meet.

Orders Sought

The Claimant submitted that it responded to the Respondent's demand letter contending that the list attached thereto comprised of some people who were deceased, some repeated names, names of individuals who were still in employment, names of those who were undeserving of the orders because they had not been cross examined and that notice pay and severance pay were not part of the claim yet had been included.

From the annexures marked JG-8, in the Replying Affidavit of Peter Njenga sworn on 23rd January 2015, the affiant provided a list of individuals who were in the Claimant's employ. There is also a list of computation of terminal dues by the claimant annexed to the affidavit as Exhibit JG10. A perusal of the list reflects that some names were missing in Exhibit JG 8 but had been included in the computations. They are-

- a. Johnstone Mutangily.
- b. Joseph Muthoka.
- c. Joseph K. Makopo.
- d. Timothy S. Waeni.
- e. Anne G. Ndungu.
- f. Daniel K. Kiilu.
- g. Josiah P. Nzioka.
- h. Patrick K. Maingi.
- i. James K. Kabuthia.
- j. Peter M. Kariuki.

- k. John M. Musyoka.
- l. Isack G. Mwaura.
- m. Stephen W. Mburu.
- n. Michael K. Njoroge.
- o. P. Mutua Kioko.
- p. Benson Mutisya.
- q. Benjamin M. Muunga.
- r. Musyoka Muia.
- s. Daniel K. Kiilu.

From this list, there were grievants who were in the December 2014 payroll (Annexure marked JG-10). They are-

- a. Musyoka Muia.
- b. Patrick K. Maingi.
- c. Daniel K. Kiilu.
- d. Timothy S. Waeni.

Additionally, in the annexure marked JG-9, the Claimant provided the following names of individuals who had left its employment-

- a. Mwema Mutevu.
- b. Alexander M. Kilonzo.
- c. Mourice Otieno.
- d. Leonard K. Kavuu.
- e. Peter Mwau.
- f. Francis M. Kirumba.
- g. Isiaih O. Olweny.

The Claimant also attached the pay slips of Mourice Otieno and Alexander M. Kilonzo for December 2014. This means they were still employees as at that December.

Another fact that has been noted is that: the name of Stephen M. Mulwa was repeated as Stephen Mulwa and that of James K. Thuo repeated as James T. Kamau. Additionally, the salaries of the following employees were overstated in the computations yet their pay slips indicated a lower salary.

- a. Samuel M. Musee's salary which was overstated as Kshs.10,801.00 as opposed to the Kshs.8,999.00 reflected in his pay slip.
- b. Lazarus W. Wafula's salary which was overstated as Kshs.24,002.00 as opposed to the Kshs.14,000.00 reflected in his pay slip.
- c. Musyoka Muia's salary which was overstated as Kshs.14,999.00 as opposed to the Kshs.9,392.00 December 2014 salary, reflected in his schedule of payment. There was no pay slip attached.

At the same time there were employees whose salaries were understated yet their pay slips indicated that they earned more. The salary of-

- a. Daniel K. Kiilu which was understated as Kshs.20,871.00 as opposed to the Kshs.24,002.00 reflected in his pay slip.

- b. Samson S. Nzumali which was understated as Kshs.20,871.00 as opposed to the Kshs.24,002.00 reflected in his pay slip.
- c. Joseph M. Mwendo which was understated as Kshs.20,871.00 as opposed to the Kshs.24,002.00 reflected in his pay slip.

Section 74(1) of the Employment Act requires an employer to keep a record of all its employees. Additionally, order (b) of the Judgment delivered on 24th November 2017 required the Claimant to compute all terminal benefits due to the dismissed employees, file and pay them within 30 days. The Claimant cannot oppose the respondent's computations and at the same time fail to make its own computations. Under Section 10(7) of the Employment Act the burden of proof of employment particulars rests with the employer, the claimant herein.

In view of the foregoing, the Court adopts the Respondent's computations of notice pay and the 8 months' compensation of all the grievants in claimant's appendix 8 of the affidavit of Peter Njenga sworn on 23rd January 2015 but excluding those re-employed as per appendix 7 of the said affidavit and whom the Respondent failed to provide evidence to controvert the Claimant's assertion that they were not employees or had left employment, as outlined herein above.

Stephen Mulwa and James Thuo will be compensated only once as no evidence has been adduced to prove that the names repeated are for different individuals. The terminal benefits of Samuel M. Musee, Lazarus W. Wafula, Musyoka Muia, Daniel K. Kiilu, Joseph M. Mwendo and Samson S. Nzumali will be computed as per their correct salaries as reflected in their pay slips.

Section 107 of the Evidence Act provides as follows-

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

Although the Claimant has submitted that the grievants are not entitled to notice pay and service pay, notice pay has been awarded as part of terminal benefits. The Court in *Elisha Kirigha Gezzam Aka Elisha Kiriga Gezzam Mwambi v Brooke Bond Kenya Ltd [2013] eKLR* held as follows-

"From the pleadings and submissions of the parties there are two crucial questions which arises for determination and these are whether redundancy payment and terminal benefits are separate and distinct items..."

The Claimant sought to rely on Section 16A (1)(f) of the repealed Employment Act, though he never specifically referred to the repealed Act. ...

'Terminal benefits' was not defined in the repealed Employment Act. To my mind the term terminal benefits is a general term used in ordinary employment language to denote all the sum total and different categories of payment made to an employee on the coming to an end of the employment relationship while severance pay is a term of art referring to the specific or precise payment made to an employee who has been terminated at the behest of an employer for no mistake on his/her part. The termination is involuntary. In this regard severance pay would generally be a terminal benefit loosely defined. Severance pay is therefore a species of terminal benefits/dues."

Section 49(1)(a) of the Employment Act provides that-

- (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—**
- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;**

Although the orders were not clear on which terminal benefits were to accrue to the grievants, in light of the foregoing and the finding of Nduma J. that the grievants' termination was unlawful, notice pay would form part of terminal benefits. As such, the grievants are entitled to notice pay as computed.

On the issue of service pay, Section 35 (5) and (6) provides as follows –

- (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.**
- (6) This section shall not apply where an employee is a member of—**
- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;**
- (b) a gratuity or service pay scheme established under a collective agreement;**
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service**

pay scheme established under this section; and

(d) the National Social Security Fund.

The computation of terminal dues of the grievants at appendix 10 of the affidavit of Peter Njenga sworn on 23rd January 2015 and filed on 26th January 2015 reflects that pay slips of some employees had deductions of NSSF while others reflect nil deductions of the same. The respondent did not adduce evidence to prove which of the grievants was not a member of NSSF and is therefore entitled to service pay. This being a benefit that is only payable upon proof that an employee was not a member of NSSF or other pension or gratuity scheme, it is only payable upon specific award by the court. The court having not awarded the same, it is my finding that service pay is not part of the terminal dues payable herein.

The court thus confirms the tabulation of the respondent in respect of notice pay, and compensation only, but after removing the names of the persons whose names do not appear in exhibit 8 and 10 of the affidavit of Peter Njenga sworn on 23rd January 2015 and those re-employed as per Exhibit 7 of the said affidavit of Peter Njenga.

The Claimant shall pay the interest on the awarded amount from the date of judgment until payment in full and shall bear the costs of this application.

The Respondent is directed to make an application to the Deputy Registrar to issue a decree on the amount assessed in terms of its tabulation as adjusted in terms of this ruling.

Orders accordingly.

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

MAUREEN ONYANGO

JUDGE