



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2047 OF 2015**

**ABIGAE A. KIARIE.....CLAIMANTS**

**- VERSUS -**

**AGGREKO INTERNATIONAL COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**AGGREKO KENYA ENERGY RENTALS LIMITED.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 6<sup>th</sup> April, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 17.11.2015 and an amended statement of claim on 31.10.2017 through Okweh Achiando & Company Advocates. The amended statement of claim introduced a prayer thus, “**vii. Payment of House Allowance of Kshs. 3, 177, 146.40**”. The respondents appointed Iseme, Kamau & Maema Advocates to act in the matter effective 30.11.2015.

By a consent recorded in court on 03.02.2016 all matters in dispute were determined and parties further consented thus, “**7. THAT parties agree that the ONLY issue outstanding is a disputed claim for house allowance. The claimant to amend the state of the claim to plead house allowance and the said issue to be determined by the court...8. THAT the parties shall file written submissions on item (7) on the house allowance due.**”

The parties’ respective advocates filed the submissions as per the consent.

The claimant’s claim for house allowance is based upon paragraph 27 of the amended statement of claim which states thus, “**27. That by letter dated 29<sup>th</sup> December, 2010 the Claimant was promoted to the position of General Manager based in Uganda at a basic salary of Kshs.2, 281, 800/- per annum with a house accommodation at the cost of the Respondent, which the Respondent declined to pay upon the Claimant’s transfer to Kenya and Claimant was forced to rent her own accommodation at her own cost contrary to the provisions of her terms and conditions of service.**” At paragraph 50 the claimant has pleaded that the respondents failed to provide accommodation to the claimant and the claimant was forced to look for her own accommodation and pay rent at her own cost contrary to provisions of her terms and conditions of employment and section 31 (1) of the Employment Act, 2007. At paragraph 51 the claimant avers that she was entitled to the house allowance of Kshs. 3, 177, 145.00 calculated as follows:

- a) 15/05/2008 to 1/10/2008 gross salary of Kshs.55, 000.00 per month (6 months at Kshs. 55, 000 times 0.15 making Kshs.49, 500.00).
- b) 1/10/2008 to 1/01/ 2010 a consolidated salary of Kshs. 710, 936.00 per annum and house allowance did not apply.
- c) 1/01/2010 to 14/08/2015 salary of Kshs. 306, 632 per month (5 years and 8 months at 0.15 making 3, 127, 646.04.

The respondents did not file a defence but filed the relevant submissions.

The court has considered the claimant’s case as per the amended statement of claim. It is clear that the house allowance is claimed for the period ending on 01.10.2008 and then subsequently for the period ending on 14.08.2015. The court returns that the claim for house allowance was a continuing injury ending on the respective dates. Under section 90 of the Employment Act, 2007, for such continuing injury or damage the claimant was required to file the claim within 12 months next after the cessation thereof. The suit having been filed on 17.11.2015, the claim for house allowance for the period ending on 01.10.2008 was time barred under the section. The consent by the parties on 03.02.2016 to introduce the claim for house allowance for the period ending on 01.10.2008 clearly amounted to introducing a time barred cause of action. In any event, the court returns that the prayer for house allowance will fail for the following further reasons:

- a) The claimant has pleaded that she was to be provided housing accommodation and when the respondents failed to provide the

housing accommodation, she was forced to rent her own house. The court finds that the claimant has failed to establish by way of evidence the amount of rent she paid in that case and such liquidated damages were not specifically pleaded or proved.

b) The claimant has computed the payable house allowance applying the multiplier of 0.15 or 15 % without establishing contractual or other basis for the same.

c) In the contract of employment between the parties (upon deployment to Uganda) dated 18.01.2011, it was agreed thus, “ **The company will provide you with furnished accommodation at company cost**”. The parties are bound by that agreement and the claimant appears to have failed to secure the specific performance of that provision on the part of the respondents. The parties being bound by the contract, the court returns that the claimant was entitled to enforce the provision and not to turn around and rewrite the agreement to one of payment of house allowance. As submitted for the claimant, the parties were bound by the contract which spelt out the terms and conditions of service, unequivocally so. Accordingly, the court returns that the provisions of section 31 of the Employment Act, 2007 on payment of consolidated salary inclusive reasonable provision for rent or provision of reasonable housing by the employer will not aid the claimant to further the claim in view of the clear terms and conditions of the contract of employment on housing accommodation at the expense of the respondents.

d) The court finds that in any event the contract dated 01.10.2008 was incorporated in the contract dated 14.01.2010 so that as per clause 7 of the contract of 01.10.2008, the salary remained consolidated. The respondents’ submission in that regard is upheld and the prayer is therefore not justified.

e) As submitted for the respondents, the court follows Sani Orina –Versus- Hiprora Business Solutions (EA) Limited (2017)eKLR where Abuodha J held that gross salary as opposed to basic salary usually includes house allowance and other allowances paid by an employer and includes basic pay. Thus, the court returns that the claimant would not be entitled to house allowance for the period the contract of employment provided for gross salary being 15/05/2008 to 01/10/2008.

In conclusion, the court returns that the claimant is not entitled to house allowance as prayed for against the respondents in the amended statement of claim.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 6<sup>th</sup> April, 2018**.

**BYRAM ONGAYA**

**JUDGE**