



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 440 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> May, 2018)**

**ANTHONY NDUNG'U GAKUO ..... CLAIMANT**

**VERSUS**

**BAKER HUGHES EHO LIMITED**

**(KENYA BRANCH) ..... RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit through the firm of Kiplangat & Associates Advocates claiming damages for payment of the Rig Bonus allowances, overtime compensation and statutory deductions. He avers that he was employed by the Respondent as a Field Specialist by a letter of offer of employment dated 26<sup>th</sup> August 2013. The Respondent submitted the contract of employment dated 17<sup>th</sup> October 2013 for execution and the Claimant assumed office on 4<sup>th</sup> November 2013.
2. He further avers that he duly performed his roles and functions on the strength of the said letter of offer of employment and on 24<sup>th</sup> October 2014 his contract of employment was terminated upon the expiry of one month's notice which had been issued to the Respondent by the Claimant.
3. The Claimant states that whilst working for the Respondent as a Field Specialist, he was forced to work for extra hours without extra pay and that during his stint at the company he was paid house allowance way below the minimum amounts as stipulated in law.
4. He further states that the Respondent proceeded to pay him his Rig bonus allowance for the period between December 2013 and April 2014 but failed to pay his rig bonus allowances for the months of May, June, July, August and September 2014 amounting to Kshs. 428,400.
5. He adds that the entire period he worked for the Respondent they made the usual statutory deductions payable to NHIF and NSSF from the Claimant's salary but failed to remit the said deductions to the aforesaid statutory bodies as can be confirmed by NSSF provisional Member Statement of Account dated 22<sup>nd</sup> November 2014 and NHIF Member Data Summary issued on 3<sup>rd</sup> March 2015.
6. The Claimant avers that the Respondent failed to pay his dues and benefits and he sent emails to the Respondent requesting them to pay him his unpaid rig bonus allowances but the Respondent refused which further pushed the Claimant through his Advocate to write a demand letter dated 22<sup>nd</sup> December 2014 to protest the refusal and/or neglect of the Respondent but the Respondent denied the demands and refused to satisfy them.
7. He further avers that the Respondent is a local branch or subsidiary of Baker Hughes incorporated as a foreign corporation in Houston Texas, United States of America outside the jurisdiction of the Court and that Baker Hughes Inc. has sold all its outstanding shares to Halliburton in a stock and cash transaction worth a staggering \$35 Billion which sale is expected to be completed in the second half of the year and has already started laying off its staff in South Africa, Gabon, Nigeria and Kenya in anticipation of the expected take over or buy out and therefore the Claimant seeks for an order compelling the Respondent to furnish security for its appearance.
8. The Claimant states that the Respondent's acts of declining to pay his entitlements without adhering to the laid down procedure in the circumstances was wrongful, unlawful and utterly inhumane, of which the Claimant has and continues to suffer loss and injury personally.
9. The Respondents filed their reply where they aver that it is a company incorporated in Bermuda but is registered in Kenya as a foreign company with a local branch pursuant to the provisions of Section 366 of the Companies Act Cap 486 laws of Kenya and has long term goals

and commitments in Kenya and has no intention of winding up or ceasing its operation in Kenya as suggested by the Claimant.

10. They further aver that the allegations that the Baker Hughes incorporated has sold out all its outstanding shares to Halliburton in stock and cash transaction worth USD 35 Billion are inaccurate and misleading because even though there are discussions towards transfer of such a business, no agreement has been reached and until the transaction is finalized, the two entities will continue operating independently and the said deliberations have not impacted on the operations of the Respondent in Kenya. They also state that it is not true that the Respondent has laid off any workers in anticipation of the alleged takeover by Halliburton.

11. The Respondent avers that they own assets including equipment worth hundreds of millions in Kenya and also hold bank accounts therefore they are more than capable of settling the sum of Kshs. 2,000,000.00 claimed by the Claimant or any other amount the Court may ultimately award in the event the Claimant establishes its claim from its assets and interests in Kenya.

12. They further aver that the Claimant was their employee who tendered a one-month resignation notice which was accepted resulting in the termination of the Claimant's employment contract, and upon resigning the Respondent paid the Claimant all his full terminal dues in the sum of Kshs. 365,628.91 which included the bonuses for 87 rig bonus days and as such, the Claimant was not entitled to any other amounts at all from them.

13. They further aver that they deducted the statutory deductions payable to NHIF and NSSF and remitted the same to NHIF and NSSF respectively and verily believe that the Claimant is not being forthright in claiming that he has never been issued with his certificate of service and therefore the Claimant has not established a case to warrant granting of the orders sought.

### **Submissions**

14. The Claimant submits that it is not in dispute that the Claimant worked in the field on diverse dates between May and September 2014 and is therefore qualified to be paid bonus allowance. He submitted that the Respondent's attempt to introduce evidence to the effect that there was a policy change whose effect was that the Claimant was no longer eligible for rig bonus allowance did not apply to him as it took effect from 1<sup>st</sup> November 2015 when he had already left employment with the Respondent.

15. He further submits that during the trial he showed the Court the provisional statements of accounting showing that the Respondent did not remit his NSSF deductions for the period of December 2013 and September 2014 when he was in employment. He also states that during the entire period he worked for the Respondent, he used to begin work at 6 am and work until 7 pm and at times he could work until very late thus claiming overtime compensation in accordance to Section 5 and 6 of the Regulation of Wages (General) Order which provides for payment of work done in excess of the normal number of hours per week and therefore urges the Court to award him the said sum and dismiss the Respondent's Defence and enter judgement for the Claimant.

16. The Respondents submit that whereas there was a rig bonus indicated in the letter of offer, the employment contract signed by the Claimant did not have a provision for rig bonuses and having signed the contract as it was, the Claimant was bound by its terms. They heavily relied on the case of **Christopher Ndolo Mutuku & Another Vs CFC Stanbic Bank Limited [2013] eKLR** where the Court considered a scenario involving variance between a letter of offer and contract.

17. They also submit that the Claimant's claim for underpaid housing allowance from November 2013 to September 2014 is not merited for the reasons that the employment contract was clear that the sum of Ksh.150,333.33 was a consolidated salary inclusive of housing allowance of Ksh.20,833.33.

18. They further state that the allegations that they had deducted the NHIF contributions from November 2013 to October 2014 and failed to remit the same is not true as the evidence is clearly shown of the swift transfers and urge the Court to decline to grant the relief sought by the Claimant.

19. The Respondent state that there is no evidence to support the allegations that the Claimant worked for a period of 6 months continuously at the rig site for a period of 12 hours each day, in the absence of a timesheet to show the overtime worked approved by the Respondent and therefore the allegations should be dismissed.

20. I have considered the evidence and submissions of both parties. I note that the Claimant resigned from the employment of the Respondent after giving due notice. What the Claimant is claiming is payment of his benefits. The Claimant prays for his bonus allowances from May to September 2014.

21. On this claim, the Respondent have averred that there was a policy shift and therefore the Claimant is not entitled to this payment. The Claimant averred that the rig allowance was to compensate them for working in a remote area for a long time away from family.

22. The Respondent referred to the Policy document, which is at page 1 of their Supplementary list of documents. The document at page 2 indicated that ***"employees who work on a regular rotation and receive time-off of day worked are not eligible for compensation under this Policy except where explicitly communicated. Field employees shall not be entitled to overtime hours."***

23. To this, the Claimant told Court that the effective date of this Policy which would have denied him rig allowance was 1/11/2015 and that this was introduced after he had resigned and therefore does not affect his allowances already earned.

24. I do agree with the claimant that this Policy decision was introduced after he had left the Respondent's employment. He had already earned the rig bones and the same had already been provided for in the Claimant's employment contract at 2.4.3 which stated as follows:-

***“The employees may be required to work additional hours during weekends and may be eligible for overtime salary as per the applicable Company Policy”.***

25. The Respondents had also been paying the Claimant this rig allowances between December 2013 and April 2014 hence they could not turn around that the Claimant was not entitled to it after he resigned from work.

26. I therefore find for Claimant on this claim and award him **Kshs.428,400/=** rig allowance earned between May 2014 to September 2014.

27. The Claimant also claimed payment of underpaid house allowance. The Claimant’s salary was 155,333.3 per month. His house allowance was Kshs.20,883 per month. Indeed the Claimant has submitted that he is entitled to 18% house allowance of his basic salary as per the Regulations of Wages (General) Order. Section 31(1) of the Employment Act 2007 states as follows:-

***“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation”.***

28. The obligations to pay house allowance is placed on the employer and the same should be reasonable. The practice in this Court has been to peg this allowance at 15% of basic salary. This however is not a mandatory expectation. I therefore find that the Claimant having accepted payment of the house allowance offered to him cannot turn around and state that it was below his expectation. This claim is therefore not payable.

29. The Claimant sought payment of NSSF and NHIF dues not remitted by the Respondent. He exhibited the statements showing non-remittances from December 2013 and September 2014 when he was still in employment. I therefore award him this prayer at **Kshs.40,000/=**.

30. On overtime pay, the Claimant submitted that he worked overtime for 6 months. The Claimant has however not exhibited any evidence that indeed he worked the number of hours stated. This prayer is not supported by any evidence and therefore do not award him as prayed.

31. Total therefore awarded to the Claimant is **Kshs.468,400/=**.

32. This Court also orders the Respondent to issue the Claimant with a Certificate of Service.

33. The Respondent will pay costs of this suit with interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **18<sup>th</sup> day of May, 2018**.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kipngeno for Claimant – Present

Adunya holding brief for Nyabira for Respondent