



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 25 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**GLADYS MUTHONI MWANGI AND 20 OTHERS.....PETITIONERS**

*VERSUS*

**BARCLAYS BANK OF KENYA LIMITED.....1<sup>ST</sup> RESPONDENT**

**BARCLAYS AFRICA GROUP LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Application before the Court is the Petitioners' application dated 18<sup>th</sup> April 2018, where they seek for orders:

1. That this application be certified as urgent.
2. That this Court do order for settlement of terms of the Amended Decree dated 30th June 2016 as revised by the Court of Appeal Judgement dated 16th March 2018 to allow for recovery.
3. That each Petitioner's dues be computed, determined and paid as per the Schedule of Payment attached and found on page 89 of annexure RG1
4. That the motors vehicles of the 3<sup>rd</sup>, 5<sup>th</sup> and 8<sup>th</sup> Petitioners be transferred at book value with fully paid up insurance.
5. That upon determination of computation of figures, the Petitioners be given leave to execute via attachment before taxation due to the urgency of the matter.
6. That the Petitioners be at liberty to apply for such further or other orders and/ or directions as this Honourable court would deem fit and just to grant.
7. That costs occasioned by this application be borne by the Respondents.

The application is premised on the grounds:

a) That this Honourable Court delivered its Judgment on **Petition No. 25 of 2016 Gladys Muthoni & 20 Others vs Barclays Bank Limited** and Another on 30<sup>th</sup> June 2016 in favour of the Petitioners as follows:

1. The Cross-Petition is hereby dismissed
2. Judgment is hereby entered for the Petitioners against the Respondents jointly and severally and the court awards the Petitioners the following:
  - i. One Month gross pay as notice pay
  - ii. Severance pay at one month's gross salary for every completed year

- iii. Accrued leave days
- iv. Payable bonus for 2016
- v. Medical cover until 31st December 2016
- vi. Certificate of Service for each petitioner.

3. The Petitioners shall continue repaying any loans and or facilities advanced to them while in the employment of the Respondents at the same terms, rates, interests as at the time of termination unless they wish to repay such in advance. The Respondents shall not apply any unfavourable terms against the Petitioners on any facility due from them outside the terms already in existence.

4. Judgment is hereby entered for the Petitioners against the Respondents jointly and severally with declarations:

- i. That the redundancy notice issued to the Petitioners on 14<sup>th</sup> January 2016 was unprocedural and unlawful.
- ii. That the termination of employment of the Petitioners on account of redundancy is not justified and unfair.
- iii. That unlawful acts of the Respondents in the unprocedural and unjustified termination of the Petitioners employment amounted to discrimination against the Petitioners herein.
- iv. For unlawful and unfair termination of employment, each Petitioner is awarded 10 months gross salary
- v. For discrimination each Petitioner is awarded Kshs.500,000 in damages

5. The Petitioners shall be bound by the confidentiality clause in their contracts of employment for six months and for which the Respondents shall pay each six months in aggravated damages

6. The Petitioners with loan balances, facilities advanced and secured by the employment with the respondents and now due shall continue at the same rates and interests as at the time of termination 30th June 2016 and without undue disadvantage by the termination of employment.

7. The motor vehicle assets availed to the Petitioners as car benefits shall be transferred by the Respondents to the respective Petitioners at book value

8. There shall be cessation of employment relationship between the parties herein on 30th June 2016

9. Petitioners are awarded costs.

b) That after the court's judgment on 30<sup>th</sup> June 2016, the Petitioners did their own computation of the amount due to them as per their payslips at Kshs.272,007,734.

c) The Respondents however made an Application for Stay to the Court of Appeal via Notice of Motion Application dated 15<sup>th</sup> July 2016 seeking orders of stay of execution of the Trial court's judgment.

d) On 28<sup>th</sup> July 2016, parties appeared before the Trial Court for confirmation of terms of execution of the Amended Decree, however, no directions were issued as to that effect as such, parties were issued with a further mention date for 4<sup>th</sup> August 2016.

e) That on 4<sup>th</sup> August 2016, the Respondents presented their computation in an affidavit which was contained in their Application documents filed at the Court of Appeal which computation was at Kshs.252,793,280

f) The Petitioners noted that the variation between their figure and that of the Respondents was less than 10% and prayed to be allowed to proceed with execution using the Respondent's amount and follow with reconciliation of the figures later on which the court allowed.

g) The respondents' application for stay of execution was heard by the Court of Appeal on 11<sup>th</sup> August 2016 and the Respondents were ordered to pay the Petitioners Kshs.91,000,000 which amount was to be paid within 15 days. The Respondents made partial payment of the Petitioners' dues using their basic pay instead of their gross pay.

h) Subsequent to the Application of Stay of Execution, the Respondents also filed two appeals namely Appeal No. 296 of 2016 and Appeal No. 301 of 2016 respectively, with the second Appeal challenging the orders that were made by the trial court on 4<sup>th</sup> August on the decretal amount.

i) The Court of Appeal heard the two Appeals concurrently and delivered its judgment on 16<sup>th</sup> March 2018 where it upheld all the awards issued by the Trial Court save for award 3(v) and 4 highlighted above.

j) The Amended decree as upheld by the Court of Appeal did not incorporate the actual computation but the Appeal Court upheld the Petitioners' right to apply for computation of their rightful dues.

k) That the Court allows settlement of the Petitioners' dues without any further delay seeing that it has already been 21 months since the Petitioners left employment without payment of their final dues.

l) The Employment Act anticipates that an employee shall be paid all monies, allowances and benefits due to them at the time of exiting employment.

m) It is meet and just, for the purposes of justice and equity and overarching purpose of constitutional integrity, to make the orders sought.

The Application is supported by the affidavit of Rachel Gitau, the 5<sup>th</sup> Petitioner, wherein she reiterates the grounds on the face of the application.

The Respondents filed a replying affidavit sworn by one **Vaslas Odhiambo** the Employment and Wellness Relations Manager, Barclays Bank of Kenya Limited wherein he avers that this Honourable Court having delivered a final judgment on 30<sup>th</sup> June 2016 is *functus officio* and cannot make any merit-based decision on the matter or re-litigate the matter substantively.

That the Court of Appeal by its judgment delivered on 16<sup>th</sup> March 2018 in Civil Appeal No. 296 of 2016 consolidated with **Appeal No. 301 of 2016 Barclays Bank of Kenya and Another versus Gladys Muthoni Mwangi & 20 Others** ("the appeal") stated that this Honourable Court cannot engage in a merit based decisional re-engagement with the case. That this Honourable Court delivered a final judgment on 30<sup>th</sup> June 2016 and a decree was unilaterally extracted by the Petitioners' counsel therefrom on or around 5<sup>th</sup> July 2016. An Amended Decree was later also unilaterally extracted by the Petitioners' counsel on or around 13<sup>th</sup> July 2016. That the terms of the order of the Court of Appeal have yet to be settled as is evidenced by the fact that the order annexed to the Supporting Affidavit is a draft, rather than a final order. That this Honourable Court cannot deal with a matter that is still being dealt with by the Court of Appeal or issue the orders sought by the Petitioners.

That in addition to the Court of Appeal Judgment, the 1<sup>st</sup> Respondent made arrangements to pay the Petitioners the awards upheld by that judgment in two tranches. The first tranche was made on or around 2<sup>nd</sup> May 2018 where the Petitioners were each paid 10 months' gross salary in terms of the schedule annexed as "VO-3a" through their bank accounts. The second tranche comprising notice pay and accrued leave days was made on 7<sup>th</sup> May 2018.

That the Respondents have met their obligations in terms of paying the awards that were upheld by the Court of Appeal save for the 3<sup>rd</sup>, 5<sup>th</sup> and 8<sup>th</sup> Petitioners who have in their possession the 1<sup>st</sup> Respondent's motor vehicles. That the Parties entered into negotiations regarding the transfer of these motor vehicles at book value but the Petitioners failed, refused or otherwise neglected to sign the Sale Agreements, which would have transferred those motor vehicles to them and thereby frustrated the finalization of this issue. As to insurance of the said motor vehicles, the respondents aver that there was no such order granted by the Court and it has no basis.

That this court ordered that the Petitioners with loan balances, facilities advanced and secured by the employment would continue on the same terms, rates and interests as at the date of the termination - 30<sup>th</sup> June 2016. That the interest rate for Staff Housing loans (secured) as at 30<sup>th</sup> June 2016 was 6% whilst that for Staff Personal loans (unsecured) was 9%.

The Respondent avers that the 2<sup>nd</sup>, 14<sup>th</sup> and 16<sup>th</sup> Petitioners have failed, refused or otherwise neglected to settle their loans in contravention of the Orders of this Honourable Court. These loans are now due further to the Terms and Conditions, which remain binding on the Petitioners. That the 1<sup>st</sup> Respondent has recovered loan arrears from the defaulting petitioners on account of loan arrears/loans due as provided for by Section 19(1)(h) of the Employment Act, 2007 as well as the Terms and Conditions pertaining to the loans taken by these Petitioners. That income tax has also been deducted from the Petitioners' dues in accordance with the relevant provisions of the law.

That the petitioners' application dated 18<sup>th</sup> April 2018 is vexatious, premature and wholly unnecessary as the 1st Respondent has paid the Petitioners their lawful dues and that as the judgment delivered on 30<sup>th</sup> June 2016 was purely declaratory, there is no money judgment from which a decree may be extracted and from which execution may lawfully flow. The Respondents therefore pray that the application be dismissed with costs.

In a rejoinder to the replying affidavit the Petitioners aver that on 2<sup>nd</sup> May 2018, the Respondent without any advance communication made a payment of Kshs.48,413,175,40 being the amount for the award of 10 months gross salary that was awarded to each Petitioner for unfair termination, debited Kshs.6,600,018 from three Petitioners for car benefits at an old book value and also deducted tax of Kshs.22,731,306 at 30%. Further that on 7<sup>th</sup> May 2018, the Respondent made a further payment of Kshs.14,305,898 being the amount for the award of Notice pay and accrued leave days as at 30<sup>th</sup> June 2016.

In the Petitioners' view the said payments did not incorporate bonus pay for 2016 computed at Kshs.9,726,338 which was upheld by the Court of Appeal on 16<sup>th</sup> March 2018 when it delivered its Judgment on Appeal No. 296 of 2016 consolidated with Appeal No. 301 of 2016. The petitioners further state that the respondents also miscalculated the number of accrued leave days for various Petitioners hence the payments made were not commensurate with the actual leave days.

The petitioners contend that when making the payments, the Respondents unlawfully debited Kshs.2,200,006 from the 3<sup>rd</sup>, 5<sup>th</sup> and 8<sup>th</sup> petitioners being the old book value for motor vehicles provided to them by the respondents as car benefits when they were in employment

whereas the same had depreciated and the current value of the cars stands at Kshs.682,953.75.

It is their position that the Respondent unlawfully deducted tax from Petitioner No. 20 Rahab Ngendo who is exempted from paying tax by virtue of being a person living with a disability. That the payments made by the Respondents are inaccurate for the reason that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 13<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup> and 21<sup>st</sup> petitioners respectively are still out of employment and should therefore have had their terminal dues taxed using the Kenyan annual income tax bands for 2018, with personal relief credited, rather than the single tax rate of 30%.

The petitioners pray that this court directs that the petitioners be paid all their terminal dues as contained in the amended decree issued on 30<sup>th</sup> June 2016 and dated 13<sup>th</sup> July 2016 and further upheld by the Court of Appeal's judgment of 16<sup>th</sup> March 2018 and be awarded interest at 12% without any deduction of taxes seeing that there has already been a delay of 21 months since Petitioners left their employment without payment of their terminal dues.

## Submissions

The Petitioners have made submissions covered under two issues which are:

- i. Whether this Honourable Court having delivered a final judgment on 30<sup>th</sup> June 2016 is now *functus officio*.
- ii. Whether the Applicants /Petitioners are entitled to the prayers sought in Application dated 18<sup>th</sup> April 2018.

On the issue of the being court is *functus officio* it is submitted that this doctrine is founded on the principle of finality. The petitioners disagree with the Respondent's position that a Court vested with adjudicative powers may exercise those powers only once in relation to the same matter and that once that is done and a decision rendered, it is final and conclusive. It cannot be revoked or varied by the decision maker. It is only amenable to appeal by a superior court. The Petitioners state that this rendition is only a general legal principle, which has exceptions.

The petitioners submit that the doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. These have been captured thus in **JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 11** thus;

*"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court, functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available. "*

The petitioners also refer to the decision of the Court of Appeal whose position on the doctrine was expressed as follows:

*"...We do not propose to delve into issues of functus officio as it is well articulated on both sides of the argument and it is clear that there are exceptions to finality depending on the circumstances of each case."*

Order 21 Rule 8 (4) of the Civil Procedure Rules reads that;

*"On any disagreement with the draft decree any party may file the draft decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the Judge who heard the case or, if he is not available, before any other Judge, and shall give notice thereof to the parties".*

It is submitted that the application dated 18<sup>th</sup> April 2018 falls within the exceptions envisioned by this doctrine as the monetary terms of the Amended decree issued by this Court has not been finally determined and the application is therefore properly brought before this court.

Turning to the 2<sup>nd</sup> issue of whether the Applicants /Petitioners are entitled to the prayers sought in Application dated 18<sup>th</sup> April 2018 it is submitted that the essence of settling terms is to ensure that the resulting decree reflects the terms of the judgment/award/ruling in question.

That in settling the terms of a decree or order, a court is required to make it clear what exactly the judgment or as in this case the award meant. The need for the court to clarify the meaning of the judgment arises when the parties to the case are unable to agree on the meaning of the said judgment.

They cite the case of Ochieng, J. in **Bio-Medical Laboratories Limited vs. Attorney General [2015] eKLR** where he stated:

*"When a Judge is settling the terms of a Decree or Order, his role does not extend to a re-evaluation of the evidence and submissions which led the trial court to arrive at its decision."*

In this regard, the Petitioners submit that this Court's duty is only limited to resolving the disagreement between the parties as regards to computation of the award amounts and not to re-litigate the matter.

The award for bonus for 2016 was not overturned by the Court of Appeal, therefore the same should not be an issue of contention between

the parties. That the Petitioners have computed their half bonus for 2016 based on their gross pay at the time of their termination at Kshs.9,726,338 and to this extent, they urge the Court to uphold the Court of Appeal's finding preserving the payment of bonus for 2016 to the Petitioners and issue orders as to settlement of the same.

On the transfer of motor vehicle at residual book value, it is submitted that the book value of an asset is the asset's cost minus the asset's accumulated depreciation. Depreciation therefore is a mandatory consideration in calculating the book value of the motor vehicles transferred to the three Petitioners. Your Honour, it goes without saying that to not pay attention to depreciation which is an accounting principle applicable on assets is to fail accounting standards.

This position the petitioners was fortified by the court in **William Olotch v Pan African Insurance Company Limited (2017) eKLR** where it held on a similar issue of a motor vehicle asset that was issued by an employer to their employee that;

*"...Applying the normal depreciation of 25% per year the motor vehicle's value was assessed Kshs.3,575,000 at the time of the plaintiff's dismissal. It is obvious that the motor vehicle's value has since then depreciated hence the only fair order is to direct, which I hereby order, the plaintiff to pay the defendant Kshs.3,575,000/- as the value of the motor vehicle."*

It is submitted that in the present case, the value of each motor vehicle asset in 2013 when the Respondent issued them to the three Petitioners was Kshs.5,281,590. That the three Petitioners forfeited a monthly car allowance of Kshs.129,150.75 which was offered by the Respondent and opted that this goes towards payment for the vehicles. Essentially, the Residual value of the motor vehicle now stands at Kshs.682,953.75. It is submitted and pray that the Court should direct that the Respondents recomputed the value of the motor vehicles and refund to the three Petitioners the overcharged amount of Kshs.4,551,157 each.

On tax reliefs for the 12 Petitioners outlined at paragraph 9 of the Petitioners Further Affidavit sworn and filed on 8<sup>th</sup> May 2018 it is submitted that they are still out of employment and should therefore have been taxed using the Kenyan annual income tax bands for 2018, rather than the single tax rate of 30%. They pray for an order directing that the overcharged tax deducted from the Petitioners' severance be refunded to them.

It is also the Petitioners' submission that during the initial pay-out, allowances for the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, and 21<sup>st</sup> petitioners were not remitted. The Respondents calculated the Petitioners dues using their basic pay instead of their gross pay. As a result, the Respondent grossly underpaid the Petitioners by a sum of Kshs.15,860,000.

It is also submitted that this Honourable Court was silent on the issue of interest in its judgement. It is urged that the court exercises its discretion to grant consequential orders in terms of interest, drawing the attention of this Honourable Court to Section 26 of the Civil Procedure Act which provides:

**"(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6% per annum."**

The Petitioners invite this Honourable court's discretion in applying an equitable remedy to ameliorate the issue of interest considering that this Honourable Court delivered its judgment on 30<sup>th</sup> June 2016 whereupon the Respondents applied for stay of execution pending their appeals which were only concluded by the Court of Appeal by its judgment delivered on 16<sup>th</sup> March 2018. That this undue delay of over 21 months has occasioned great loss to the Petitioners who have indeed been denied the opportunity to utilize the decretal amount awarded to them by the trial court.

They have summarized the outstanding amounts due to them inclusive of interest calculated at 6% thereon as:

- i. Bonus half year at Kshs.9,726,338
- ii. Severance underpayment of Kshs.15,860,000
- iii. Vehicle cost overcharged Kshs.4,551,157
- iv. Tax overcharged Kshs.1,620,997
- v. Interest at 6% per annum (23 months) Kshs.11,870,144

**TOTAL= Kshs.43,628,636**

They pray for the application to be allowed.

### **Respondent's Submissions**

In addition to the issues raised by the Petitioners, the Respondents also raise an extra issue; that this Court does not have jurisdiction to hear and determine tax matters. They submit that at paragraph 8 of the Petitioners' Further Affidavit sworn by Rachel Gitau on 8<sup>th</sup> May 2018 and paragraphs 11 and 12 of the petitioners' further affidavit sworn by Rachel Gitau on 15<sup>th</sup> May 2018 the Petitioners introduce a new dispute on tax and applicable tax bands. The Respondents submit that this Honourable Court has no jurisdiction to adjudicate on tax disputes - there is

no jurisdiction conferred on it to hear such matters in its constitutive Act. Conversely, Section 51 of the Tax Procedures Act, 2015 expressly provides that:

**"A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law."**

That the Respondents are statutorily mandated to remit taxes to the Kenya Revenue Authority which mandate is recognised at section 49 (2) as read together with section 50 of the Employment Act, 2007. The respondent rely on the now trite holding of Nyarangi J. in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR1** where of the Court of Appeal held as follows:

*"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

It is submitted that on this ground the Application ought to be dismissed with costs.

On *functus officio*, it is submitted that the Court's role in this Petition came to an end when the Learned Lady Justice Monica Mbaru delivered her Judgment on 30<sup>th</sup> June 2016. That it is not simply a matter of "clarifying the judgment delivered on 30th June 2016". They submit that what the Petitioners seek is to re-litigate the entire matter in an unprocedural fashion and the appropriate application should have been under Rule 33 of the Rules of this Court.

They cite the decision in the Court of Appeal in **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**, where the court re-stated the doctrine of *functus officio* as follows:

*"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19<sup>th</sup> Century. In the Appellate Court quoted the Canadian case of Chandler versus Alberta Association of Architects [1989] 2 S.C.R. 848, in which Sopinka J. traced the origins of the doctrines as follows (at page 860);*

*"The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:*

- 1. Where there had been a slip in drawing it up, and,*
- 2. Where there was an error in expressing the manifest intention of the court."*

The respondents submit that the Petitioners' application does not lie within the scope of the exceptions of the doctrine of *functus officio* and should as such be dismissed. They further submit that this Court cannot order a settlement of terms of the Amended Decree dated 30<sup>th</sup> June 2016 (or 13<sup>th</sup> July 2016) as revised by the Court of Appeal judgment delivered on 16<sup>th</sup> March 2018. That this is because the settlement of the terms of the Order by the Court of Appeal has yet to be finalised they submit that where there is no Order from the Court of Appeal, this Court cannot take the step that the Petitioners ask it to. That in any event, there is no money decree presently obtaining from this Petition and one cannot be obtained through the Petitioners' intended shortcut.

In response to prayer 3 of the Application the respondents submit that this Court cannot compute, determine or order the Respondents pay the amounts contained in the Schedule of Payments attached as page 89 of the annexure RG1 or any of the other annexures contained in the Petitioners' various Affidavits. The respondents dispute the sums presented by the Petitioners on their own schedules which they submit are not supported by the law and are incorrect in fact. That each of the petitioners was paid their respective dues as is demonstrated by the contents of the affidavits sworn by the Respondent's Vaslas Odhiambo and the annexures thereto. That if there is a dispute on computation, there must be a process of testing the Petitioners' evidence vis-a-vis that of the Respondents to determine the correct position.

On Prayer 4 of the application to the effect that the motor vehicles of the 3<sup>rd</sup>, 5<sup>th</sup> and 8<sup>th</sup> petitioners be transferred at book value with fully paid up insurance, it is submitted that if any depreciation whatsoever occurred such depreciation occurred whilst the motor vehicles were in the custody of the concerned Petitioners and such loss cannot be visited upon the Respondents. It is submitted that the Petitioners make this claim in manifest bad faith and it ought to be dismissed.

In response to prayer 5 of the Application that the Petitioners be given leave to execute via attachment before taxation due to the urgency of the matter, it is submitted that the Respondents have paid the Petitioners in accordance with the awards that were upheld. It is also submitted that the fact that the Respondents have paid is not disputed by the Petitioners, that what is disputed is whether the Respondents have paid all of the Petitioners' claims. The Respondents submit that granting this prayer would result in the Respondents suffering great prejudice and irreparable harm. That it is misleading for the Petitioners to say that the Court of Appeal upheld their right to apply for execution. In the Respondent's view, what the Court of Appeal held was that the Petitioners could move the Court formally. This term "formally" connotes a formal application drawn in accordance with the Act and Rules. That the Petitioners' application is woefully informal and falls short of the precepts of the Court of Appeal.

It is further submitted that the claim for interest cannot be brought once a matter is concluded. The Petitioners had the opportunity to seek interest in their Petition. They did not and it was not granted. That the Petitioners' dues were paid promptly (further to the Stay of Execution granted by the Court of Appeal) in August 2016, barely a month after the delivery of the judgment of 30<sup>th</sup> June 2016 and again in the month

of May 2018, barely two months after the judgment of the Court of Appeal.

That without prejudice to the Respondents' submissions on the jurisdiction of this Court above, they submit that the dispute between the parties arose in March 2016, the Petitioners swiftly moved to court and judgment was entered on 30<sup>th</sup> June 2016 when the employment relationship terminated. The dues paid out to the Petitioners were paid out in respect of a relationship that terminated in that year. The money was earned in 2016 and it can therefore not be subject to 2018 tax bands. It is submitted that the Petitioners prayer in this respect is an unlawful attempt to evade taxes, which should not be countenanced by this Honourable Court.

On the claim for bonus, it is submitted that nowhere in their petition did the petitioners seek for an amount regarding the claim for bonus. Had they done so, this claim would have been litigated and tested. The Respondents' position is that they were paid bonus in the month of March 2016 (a fact which is admitted by the Petitioners). That bonus can only become payable once it is assessed in accordance with the terms of the Respondent's policy on bonus. That the Petitioners admit in paragraph 30 of their submissions that the Learned Lady Justice Monica Mbaru was cognisant of the fact that the employment relationship terminated in June 2016 and awarded the Petitioners bonus for year 2016, that what the Petitioners deliberately omitted is that the payable bonus for 2016 was that which was earned in the financial year 2015 and therefore has already been paid.

The Respondents submit that payment of bonuses is discretionary and is based on personal performance assessment, team performance assessment and overall business assessment; that it is therefore erroneous and ludicrous for the Petitioners to present to this Court "half bonus based on gross pay". As there is a clear dispute on this matter, it is submitted that there must be a process of testing the Petitioners' evidence vis-a-vis that of the Respondents to determine the correct position - in other words, there must be a hearing. That in the absence of a hearing on matters of fact, which are disputed, the Respondents shall be denied a fair trial.

On leave pay, it is submitted that it is one of the instances where the Act does not contemplate payments beyond basic pay. That the Respondents assessed the Petitioners leave pay according to the pay slips referred to at paragraph 19 of the Supporting Affidavit sworn by Rachel Gitau on 18<sup>th</sup> April 2018. It is submitted that if this Honourable Court contrasts the amounts paid to the Petitioners as leave pay as against the pay slips annexed to the Petitioners' affidavits, it will arrive at the amounts paid by the Respondents to the Petitioners. The Respondents pray for the Application to be dismissed with costs.

#### **Determination**

Having considered the applications, the affidavits in support and in opposition and written submissions as highlighted in court and having further considered the decree of this court and the judgment of the Court of Appeal, it is my opinion that for this court to grant prayer 2, that is the settlement of terms of the amended decree dated 30<sup>th</sup> June 2016 as revised by the Court of Appeal judgment dated 16<sup>th</sup> March 2018, it is necessary for the parties to extract an order or decree based on the decision of the Court of Appeal first as without an order or decree, this court is being asked to interpret the decision of the Court of Appeal which according to the Court of Appeal Rules, is not this court's responsibility. Rule 33 thereof provides for decisions to be embodied in orders while Rule 34 provides for the preparation of the orders as follows –

#### **33. Decisions to be embodied in orders**

**(1) Every decision of the Court on an application or appeal, other than a decision on an application made informally in the course of a hearing, shall be embodied in an order.**

**(2) Every such order shall be dated as of the date on which the decision was delivered and shall in addition show the date on which the order was extracted.**

**(3) An order on an application shall be substantially in the Form I in the First Schedule and an order on an appeal substantially in the Form J in the Schedule.**

#### **34. Preparation of orders**

**(1) Where a decision of the Court was given in a criminal application or appeal, the order shall be drawn up by the Registrar who, in drawing up the order, shall not be required to consult the parties or their advocates.**

**(2) Where a decision of the Court was given in a civil application or appeal—**

**(a) the party who has substantially been successful shall within 14 days from date of judgment prepare a draft of the order and submit it for the approval of the other parties;**

**(b) the party to whom the draft has been submitted shall approve the same within seven days from the date of delivery;**

**(c) if all parties approve the draft, the order shall, unless the presiding judge otherwise directs, be in accordance with it;**

**(d) if the parties do not agree on the form of the order, or if there is non-compliance with sub-rules (a) and (b), the form of the order shall be settled by the presiding judge or by such judge who sat at the hearing as the presiding judge shall direct, after giving all the parties an opportunity of being heard;**

**(e) if the parties are unable to agree which party was substantially successful, the Registrar, on the application of either party, which application may be made informally, and after giving all parties an opportunity of being heard, shall direct by which party the draft is to be prepared, and such direction shall be final.**

**(3) The order embodying the decision on an application or in a civil appeal will be issued out of the Registry or sub-registry in the place where the application or appeal was heard.**

It is the opinion of this court that it is only after receipt of an extracted order/decreed of the Court of Appeal decision that this court may be called upon to settle terms based on the extracted order/decreed together with the amended decreed of this court. To act on the unextracted judgment of the Court of Appeal would imply that this court would be taking on a responsibility that it has no jurisdiction to perform.

On prayer 3 of the applications that each petitioner's dues be computed, determined and paid as per the schedule of payment attached as annexure RG1, it is the position of this court that this can only be done after the extraction of an order from the judgment of the Court of Appeal as it is that order that would form the basis of the computation.

The order for transfer of motor vehicles at book value with paid up insurance in my opinion is asking this court to vary the judgment of this court unprocedurally as provided in the rules of this court. The orders of this court did not mention insurance. All the court stated is to transfer the vehicles at book value. In my opinion book value can only be at the time that the concerned applicants took possession of the vehicles unless they can prove that they have since then not been using the vehicles which they do not deny have been in their possession since the date of judgment of this court.

As the respondent has submitted, there were discussions and agreements in December 2016/January 2017 in respect of the vehicles and a specific sum was agreed upon. Since this was not a subject of the appeal, this court has no jurisdiction to vary the same as there is no application before this court for setting aside the agreements.

The issue of taxation and interest were also not subject of the decreed of this court and can only be considered on an application for review.

I however do not agree with the respondents that this court has no jurisdiction to determine an issue of taxation of income arising from employment. Sections 19 and 49(2) specifically provide for statutory deductions, which include tax on employment income. To that extent, this court has jurisdiction to adjudicate on taxation of income arising from employment. Be that as it may, the prayers for the petitioners herein, which are for refund of tax already remitted to Kenya Revenue Authority and for deduction of tax based on taxable income in the current year 2018 are issues that the petitioners should have taken up with the Kenya Revenue Authority before the deductions were made from the proceeds of this case. Having failed to do so and the respondent having complied with the law in making the remittances, the petitioners can only follow up the issue with Kenya Revenue Authority with the provisions of the relevant regulations.

Having made the findings above, prayers 5 and 6 of the application are redundant.

From the foregoing, I find that the application is premature, has no merit and dismiss the same. The dismissal of the application does not preclude the applicants from making another application at the appropriate time for similar orders after extracting an order/decreed on the appeal decision. There shall be no orders for costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF OCTOBER 2018**

**MAUREEN ONYANGO**

**JUDGE**