



REPUBLIC OF KENYA

IN THE INDUSTRIAL

COURT AT NAIROBI

CAUSE NUMBER 1722 OF 2011

BETWEEN

1. DAVID MWANGI GIOKO
2. BARRCK ONYANGO OKUKU
3. ALOIS JUMA OGOLA
4. MAURICE OGOLA OLOO
5. NJUGUNA EMILY N.
6. PAUL OKUMU
7. MESHACK OMOLO
8. SAMUEL KAGIRI
9. MARK KHAYIKA NGARA
10. FELISTAS NEKESA ONGECHI
11. MARGARET W. KIHU
12. EMILY MUMBI KAIRU
13. Z.O. AGENYA
14. MIRIAM MUTUA
15. JOHN K. MBUGUA
16. STEPHEN MWANGANGI SILA
17. JOSEPH N. AUMA
18. GLADYS MUCHUMA
19. JOSEPH MAINA NJAU
20. MATHIAS ASIAMBO
21. ALFRED O. OJWANG
22. CHRISTINA AMBUKI KIMWELE

23. MARGARET NJOKI
24. MICHAEL WANDERI
25. BETHA NDEGI KIURA
26. RICHARD A. DONGO
27. CHARLES OHOKA OGOLA
28. JANE WARIARA MWANGI
29. PATRICK G. NJOROGI
30. RAMJUS OTHENO OWIDO
31. JAMES KARIUKI WABORO
32. FRANCIS KIHARA
33. SAMUEL MUIRURI NYURURU
34. SAMUEL K. MARAKWEN
35. PHOEBE M. MASYOKO
36. MARGARET W. NGOTHO
37. VERONICAH N. NG'ANG'A
38. MWANGI GACHORE
39. LYDIA WANJIRU
40. JACINTA NJAGI
41. JUSTUS B. MAKWARA
42. LUCY NJOKI CHEGE
43. DANIEL W. MUKUA
44. ISAAC NGUGI.....CLAIMANTS

VERSUS

NAIROBI CITY WATER & SEWERAGE CO. LTD.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Maosa & Company Advocates for the Claimants

Trippleoklaw Advocates for the Respondent

RULING

1. In its first Award delivered on 22nd March 2013, the Court found that the Claimants were retired prematurely by the Respondent.

2. It was ordered under paragraph:-

(b) The Respondent shall pay to each of the undisputed Claimants 5 months gross salary in compensation for unfair termination.

(c) The Respondent shall pay to each of the undisputed Claimants the following terminal benefits:-

- (i) Golden handshake of Ksh.75,000
- (ii) 4 months' basic salary for each of the remaining 5 years.
- (iii) 1 month basic salary in lieu of notice.
- (iv) Ksh.75,000 in baggage allowance.

3. The Respondent was to pay the above awards with 60 days of delivery of the decision.

4. The Court further directed Provincial Labour Officer Nairobi to investigate bona fides of disputed Claimants, and any arrears of salaries owed to the Claimants, prior to retirement.

5. Upon receiving the Report of the Labour Officer, the Court prepared, and delivered Further Award on 28th January 2014.

6. The number of Claimants was reduced to 44. The Claims by 2 of the 44 Claimants, Samuel Muiruri Nyururu and Jacinta Wanjiru Njagi were disallowed. The number of the successful Claimants in the end, stood at 42.

7. The Claim for arrears of salaries and allowances at ksh.42,242,786.30 was declined, without prejudice to the Claimants initiating a fresh Claim, involving the Trade Union which registered the CBA upon which the particular Claim was based.

8. The 42 successful Claimants were to be paid compensation and terminal benefits as shown at paragraph 2(b) and 2(c) of the Ruling.

9. This was to be paid, less the amount of ksh.4,229,425 already paid by the Respondent, and acknowledged by the Claimants.

10. The Further Award is dated 28th January 2014.

11. In compliance, the Respondent's Advocates transferred the sum of ksh.41,152,605 to Claimants' Advocates on 28th February 2014.

12. The Claimants do not seem to have disputed computation of the amount paid by the Respondent. There was no communication from the Claimants' Advocates to the Respondent's Advocates, alleging that the sum paid, did not satisfy the grant of compensation and terminal dues, as contained in the Award finally made on 28th January 2014.

13. The Claimants instead, filed in the Court of Appeal, Civil Appeal No. 66 of 2014. They alleged they were appealing against part of the Award. It is not clear if the money paid by the Respondent's Advocates to the Claimants' Advocates was released to the individual Claimants.

14. The Appeal was kept pending until 15th January 2017 when the Claimants' new Advocates wrote to the Court of Appeal, withdrawing the Appeal.

15. The Notice of withdrawal states:-

"The principal reason for the said withdrawal is that the Appellants' cause of action has been satisfied in the Award given by the Superior Court"

16. The Court of Appeal made an order of withdrawal on 22nd January 2018.

17. As the Appeal was pending, the Claimants returned to the Trial Court seeking to have the Trial Court make an order, that the Award remains unsatisfied. They claimed to be owed ksh.125,502, 886.

18. In a Ruling delivered on 4th December 2017, the Court declined Claimants' Application on the ground that the Claimants' Appeal was still pending in the Court of Appeal.

19. On 5th March 2018, the Claimants returned to the Trial Court, this time seeking to have the orders of dismissal made on 4th December 2017, reviewed and set aside. The Application is mainly grounded on withdrawal of the Appeal. It is argued that the Trial Court dismissed Claimant' Application on 4th December 2017, on the ground that Appeal was pending. As the Appeal has been withdrawn, the Court should reinstate Claimants' Application which seeks to have the total sum payable revised, to Ksh.125,502,886.

20. The Application for review and setting aside was heard during the Court's service week at Nairobi, on 17th October 2018.

The Court Finds:-

21. The Claimants have not shown why, their Application seeking the Court to find there is an unsatisfied decretal amount of ksh.125,502,886, should be reinstated.
22. They informed the Court of Appeal, that their cause of action has been satisfied in the Award given by this Court.
23. They have not demonstrated that the Award, made on 28th January, 2014, on compensation and terminal benefits, remains in any way unsatisfied.
24. They did not dispute the computation of compensation and terminal benefits on 28th February 2014, when their previous Advocates received the sum of ksh.41,152,605, from the Respondent's Advocates.
25. The decree which fully put the matter to bed, is the decree made on 28th January 2014. Other adjudicatory and non-adjudicatory processes culminated in the decree of 28th January 2014. This decree overrides all other orders made before 28th January 2014.
26. The Claimants were placed at the liberty to bring fresh Claims on arrears of salaries and allowances with the participation of their Trade Union which co-authored the relevant CBA with the Respondent. They instead seem to take what was recommended by the Provincial Labour Officer as arrears of salaries predating retirement, as part of the decree of the Court. The recommendation of the Labour Officer was never adopted as part of the Court's Judgment. The Court instead placed the Claimants at liberty to pursue the Claim separately with participation of their Trade Union.
27. If the Claimants were not satisfied with the sum of ksh.41,152,605 paid way back in 2014, they ought to have raised the issue with the Respondent in 2014, not wait until 2017, to make their own tabulation. A total sum of Kshs. 45,382,030, translating on average to kshs. 1,080,524 to each of the 42 Claimants, has been paid by the Respondent to the Claimants. This amount appears to the Court, to be in agreement with the orders made in the Interim Award of 22nd March 2013, captured at paragraph 2 of this Ruling, which orders were confirmed in the Final Award of 28th January 2014. The amount of Kshs. 125,502,886 sought by the Claimants is at variance with what the Court granted. It is unreasonable, and disproportionate to the economic injury suffered by the Claimants, as a result of their premature retirement by the Respondent.
28. The Court's view is that the Claimants' cause of action has been satisfied, as stated by the Claimants in the Court of Appeal.
29. Contrary to the submission made by the Claimants' Advocate, the rules regulating review jurisdiction in the E&LRC are quite similar to the rules applicable under the Civil Procedure Rules.
30. Rule 33 of the Employment & Labour Relations Court (Procedure) Rules, 2016, requires the Applicant to show: there is discovery of new and important matter; some mistake or error apparent on the face of the record; judgment or ruling requires clarification; or any other sufficient reason.
31. The Claimants have not shown which of these rules, apply to their situation. They instead submit incorrectly, that the Respondent is importing Civil Procedure Rules on review jurisdiction to the E&LRC.

IT IS ORDERED: -

- a) The Application dated 2nd March 2018, filed by the Claimants on 5th March 2018, is rejected.*
- b) No order on the costs*
- c) The file shall be marked as closed*

Dated and signed at Mombasa this 1st day of November, 2018

James Rika

Judge

Dated, signed and delivered at Nairobi this 8th day of November 2018

Stephen Radido

Judge