



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 918 OF 2012

(Before D. K. N. Marete)

BENTER AKINYI OPANDE.....CLAIMANT

VERSUS

KENYA UNION OF POST PRIMARY EDUCATION

TEACHERS (KUPPET).....1ST RESPONDENT

NATIONAL TREASURER OF KUPPET.....2ND RESPONDENT

JUDGEMENT

This is a protracted and somewhat circumlocutory cause. Its final phase comes out in a Re-Amended Statement of Claim re-amended on 11th November, 2014. The issue in dispute herein comes out as follows;

1) Failure by the respondents to pay salaries and wages due to the claimant.

The 1st respondent by a Reply to Re-amended Memorandum of Claim dated 9th February, 2015 denies Memorandum of claim and prays that it be dismissed for lack of merit and *locus standi* with costs to herself.

The 2nd respondent on the same breath and by the 2nd Respondent Response to the Re-Amended Memorandum of Claim dated 20th February, 2015 prays that the claim be struck out with cost, again, to herself.

The claimant's case is that at all material times to this cause, she was the registered Branch Executive Secretary of the 1st respondent's Nairobi branch.

Her further case is that she was elected Branch Executive Secretary of Nairobi County Branch on 18th June, 2011 and appointed to work as a full time secretary in September, 2011. She subsequently resigned from this position in November, 2012.

The claimant's other case is that the National Governing Council (NGC) of the 1st respondent is mandated by her constitution to set allowances and salaries: net and fixed salaries and allowances for Executive secretary. At all times, the 1st Respondent through the National Treasurer is mandated to remit salaries and allowances to the respective bank accounts of the Executive secretaries, a function they have carried out diligently.

The claimant's further case is that the 1st respondent through her National Treasurer is constitutionally mandated and required to remit 65% of the monthly dues collected at the County Executive Branch to the Branch's Bank Account. This, in the instant case, has not been met.

Again, the 1st respondent receives 5% of all branches remittances for the purpose of establishing a separate account for the pension of full time officials of the branches. Instead, the 2nd respondent has continued to expend this contribution without any authorization thus rendering the future security of the full time employees at risk.

The claimant's other case and averment is that despite various reminders that the 1st respondent remits funds received by herself to the claimant and her branch - the 2nd respondent, this has not been. Instead, she has teamed up with some official to frustrate the operation of the branch during the claimant's tenure of office.

It is her further case that by 1st November, 2012, she had not received her full salaries and allowances and or refunds for the month of March to October, 2012 all totaling Kshs.687, 000.00 at Kshs.103,000.00 per month. This is a contravention of the provisions of the Employment

Act, 2007 which calls for payment of employees wages at the end of every month and in any event, on the 30th day of every month.

Further, the failure on the part of the respondents (1st respondent?) to remit 65% and also cause a separate account to be opened in the same (name?) of pensions is contrary to the provisions of Pensions Act, Laws of Kenya. She puts it thus;

14. The 2nd, 3rd and 4th respondents are acting contrary to the powers bestowed upon them by the constitution of the Claimant's registered constitution. In the circumstances are acting contrary to the spirit, letter and the aspirants of the members of KUPPET by withholding the Claimant's salary to date.

15. The withholding of salaries and allowances which are due to the claimant pursuant to section 39 of the labour relations Act, 2007 automatically calls for sanctions under the provisions of section 47 of the labour relations Act, 2007 and section 18 of the Employment, Act, 2007.

16. The failure by the 5th respondent branch's banks, Equity bank, fourways towers branch to implement the resolutions of the BEC and to allow funds which cannot be accounted for.

17. The branch bank had failed in its mandate to protect public funds and instead has connived with some officials who are not authorized to operate the account and altered the mandate lawfully given to it by the BEC and allowed unlawful withdrawals.

The 2nd, 3rd, 4th and 5th respondent's could be an error and in reference to the original set up of the claim. This court shall pursue the claim as re-amended and treat the parties as the 1st and 2nd Respondents, thus deal and determine only the issues appurtenant to these parties.

She prays as follows;

1. THAT this court issue orders compelling the respondents to pay the Claimants salaries and allowances and/or refunds for March and April, and May, June, July, August, September 2012 at Kshs.103,000/= per month totaling Kshs.687,000/= unlawfully withheld.

2. THAT this court issues orders directed at the Respondents to pay salaries and allowances to the claimant at the end of every month, more so from June 2012 and every subsequent month.

3. THAT this Honourable Court be pleased to issue orders directed at the respondents to remit to the Nairobi County branch KUPPET 65% of its monthly subscriptions received by the 1st respondent and all the arrears computed on a prorate basis of the membership strength of branch.

4. THAT this Honourable Court be pleased to issue orders directed at the 2nd, 3rd and 4th respondent to cause an account to be opened and direct 5% of all collections from the monthly subscriptions received by them as pension saving savings for those full time employees of the branches from July 2011 to date and for each subsequent month and all the trustees be made signatories of the said account.

5. THAT this Honourable be pleased to direct KUPPET Nairobi County branch to operate only with three (3) principal officers of the branch as always been the custom and practice of the union.

The 1st respondent's case is a denial of the claim.

It is her contention that the claimant is disposed of requisite *locus standi* to bring this action on behalf of members of the 1st respondent and therefore shall put the claimant in strict proof thereof. She is no longer a member or official of the 2nd respondent and by extension an official agent of the 1st respondent.

It is the 1st respondent's further case that according to Article 6 (5d), it is the Nairobi Branch Governing Council which is empowered to employ the claimant as a full time branch secretary. In this region, the branch recommended to the 1st respondent to deduct from its portion of 65% of monthly dues and pay salaries to the claimants.

The 1st respondent's case is a pointer of the claimant's confirmation that she was religiously paid her salaries. This was until the Nairobi Branch directed the 1st respondent to stop remitting the claimants salary and instead remit the entire amount of 65% to its bank account No.0020197551297 – Equity Bank Fourways Branch. This was complied with in respect to remittances for the months of March to May.

It is in the penultimate the 1st respondent case that the claimant is deficient of a prima facie case as all her dues were met a long time ago. Further, this action is vexatious, bad in law and totally incurably defective and that at an opportune time, shall apply that the same be struck off.

She prays as follows;

A. That this case be dismissed for lack of merit and locus standi with cost to the respondent.

B. Cost of the suit.

The 2nd respondent's case is also a denial of the claim.

It is her case that the 2nd claimant did not resign from the said office of the 2nd respondent as alleged but instead absconded from office with effect from 20th October, 2012. Again, the claimant did not communicate her decision to resign from office to the Branch Executive Committee or Branch Governing Council as stipulated in the rules governing the respondents.

Further, she avers and without prejudice her denial of paragraphs 5, 6, 7, 8, 9 and 10 of the claim that this section of the claim is farfetched and is based on the fact that the claimant has been an employee of KNUT – a rival union from the month of October, 2012. She *in toto* denies admission of the claim.

The 2nd respondent's further case is that the claimant was fully paid all her dues at the end of June, 2013 which is clearly captured in MIN. 21/7/2013 of the Branch Secretary Executive meeting held on 31/07/2013 thus rendering paragraph 11 of the claim false. In any event, the claimant was a signatory to the branch account up to when she absconded duty and therefore bank transactions involving the 2nd respondent would have been immobilized when she was not earning her salary from March to October as she alleges.

The 2nd respondent closes her case with an averment that the claimant is the one at default and in breach of the Employment Act, 2007. She ought to have compensated the 2nd respondent for abscondment/quitting without notice. In all, she even lacks *locus standi* to bring out this action as she is neither an employee nor a member of the respondent union.

The matter came to court variously until the 19th October, 2018 when it was heard *inter partes*. Here, CW1 – Benta Akinyi Opande testified a case for the adoption of her witness statement dated 21 November, 2017 and a list of documents she filed on even date. She prayed that these be treated as her evidence and adopted as evidence and exhibits in this cause respectively and in support of her case.

On cross-examination, she testified on her salary and salary increment as per her letter of employment dated 18th September, 2011 – this at Kshs.37,500.00 and which salaries would depend on members enrolled. She also attested to a document on review of her salary dated 8th September, 2011.

On re-examination, she confirmed her claim as based on an amount of Kshs.103,000.00 based on document No.4 – Review of salaries. She further affirmed that the body to review salaries was the National Governing Council of the 1st respondent.

In defence, DW1- Moses Owiti Mbora duly affirmed also testified a case for adoption of his witness statement and list of documents as his evidence in support of the defence case. He introduced himself as the Executive Secretary, KUPPET, Nairobi Branch.

On cross examination, DW1 acknowledged that the claimant was a onetime Branch Executive Secretary, Nairobi Branch, KUPPET. He, however, denied awareness that the claimant was suspended as such Branch Secretary in 2011 and 2012 or even removed as a signatory to the branch bank account.

Further, Minutes of 24th July, 2018 – Respondent's Annexure – Min 24 – She was only owed 47, 000.00 and balances due. There were monies owed. This was Kshs.197,000. She was not in this meeting. There is proof of payment of this amount of kshs.197,000.00 in the respondent's bank statement. This is the branch account. This was a bank transfer.

On re-examination, DW1 testified that he was not a signatory to the branch account then, the date of meeting being 31st July, 2012. The minute of the meeting as annexed in the respondents list of documents dated 12th October, 2018 is as follows;

1. That in MN18/5/2013 Benter Akinyi Opande (formerly Executive Secretary) was only owed Kshs.47,000 after the payment of Kshs.150,000 was made in December 2012. Another payment of Kshs.47,000 was in June 2013. The balance was therefore nil.

2. ...

The issues for determination therefore are;

1. Whether the claimant absconded from duty as Branch Executive Secretary – Nairobi, in 2012?
2. Whether the claimant is jointly and severally owed any unpaid dues by the respondents?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant absconded from duty as Branch Executive Secretary – Nairobi, in 2012. The claimant in her written submissions dated 24th October, 2018 relied on her list documents dated 21st November, 2017 which indicates that the claimant was elected branch executive secretary on 9th May, 2012 and appointed as such on 18th June, 2011. She also annexed a letter dated 13th September, 2011 from the 1st respondent confirming her employment as such.

The respondent did not file any written submissions in support of their case. They did not also adduce any evidence in support of their case that the claimant absconded duty as Branch Executive Secretary – Nairobi, in 2012. Their case therefore comes to a cropper. I therefore find that the respondent's case of absconding duty by the claimant is unproven and therefore non-existent.

The 2nd issue for determination is whether the claimant is jointly and severally owed any unpaid dues by the respondents. The claimant has clearly established a case of employment by the 2nd respondent as Branch Executive Secretary at the material time of this dispute. She has

also clearly illustrated her pay details and the amounts owing to date.

Whereas the claimant has pleaded for an amount of Kshs.687,000.00 being withheld salaries and allowances and or refunds for the months of March to October, 2012 at Kshs.103,000.00 per month, she in her written submissions concedes to an amount of Kshs.550,555.00 being outstanding balance after other payments made during the pendency of this claim. This is expressed as follows;

This means that between March 2012 and October 2012, the total amount which should have been paid was Kshs.103,000.00 x 8 months =Kshs.824,000.00 but what was actually paid was Kshs.4,465 being the spill over from February + Kshs.95,465.00 +Kshs.12,000.00 + 77,000.00 + 42,000=Kshs.123,465/= leaving a balance of Kshs700,535.00

Even when the Kshs150,000.00 paid on 13/12/2012 is factored in this still leaves a balance of Kshs550,535.00

The claimant has overwhelmingly demonstrated a case of being owed withheld salaries by the 2nd respondent and I hold as such.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. She is. Having established a case of being owed salaries of March – October, 2012 by the respondents, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

- i. The respondents be and are hereby ordered to meet and pay Kshs.550,535.00 being balance of the claimant's withheld salaries for March – October, 2012.
- ii. That the 1st respondent be and is hereby ordered to remit to the 2nd respondent 65% of his monthly subscription received by the 1st respondent and all arrears computed on a pro rata basis from June, 2012 to date.
- iii. The respondents be and are hereby ordered to cause an account to be opened and thereby remit 5% of all collections received by them as pension for the full time employees of the branches from July, 2012 to date.
- iv. That all trustees be and are hereby made signatories to the account in (iii) above.
- v. That the costs of this claim shall be borne by the respondents.

Dated and signed this day of 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 20th day of December, 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Rakoro instructed by Rakoro & Company Advocates for the claimant.
2. Mr. Kingori instructed by Ashitiva & Company Advocates for the respondent.