



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT NAIROBI**  
**CAUSE NO. 85 OF 2016**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 21<sup>st</sup> February, 2017)**

**THOMAS MWANGOLA MAGANGA.....CLAIMANT**

**VERSUS**

**TOTAL KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed his claim on 26.1.2016 through the firm of Kibungei & Company Advocates. It is his case that he was appointed by the Respondent in 1994 with effect from 4<sup>th</sup> July 1994.
2. On 28<sup>th</sup> January 2015 the Claimant left the Respondent's employment through a letter of even date on early retirement. At the time of his retirement, the Claimant was earning a basic salary of 699,600/= plus a mileage allowance of Kshs.114,286/=.
3. The Claimant avers that under the contract, the Respondent was obliged to provide him with a reasonable housing accommodation or pay the Claimant such reasonable sum as rent in addition to salary to enable him obtain reasonable accommodation.
4. That inspite of this obligation, between 1<sup>st</sup> January 1999 and 31<sup>st</sup> March 2015, the Respondent neglected, refused or otherwise failed to provide the said housing accommodation or housing allowance thus accrued to Kshs.36,570,944.01 which amount continues to accrue interest todate.
5. The Claimant has made a demand for this amount hence this claim.
6. The Respondent on their part filed their Memorandum of Response on 24.5.2016 through the firm of Mohammed Mungai Advocates and they aver that indeed the Respondent is exempted from the statutory obligation to provide the Claimant with reasonable housing or sufficient sum as rent to enable him obtain reasonable accommodation provided that the Claimant's contract of service contains a provision that the provision of rent is part of the Claimant's consolidated salary.
7. They also aver that on 1<sup>st</sup> January 1999 when Claimant was promoted, he was informed that the Respondent had reviewed the existing categorization of staff and salaries and he had been assigned category G.3. On salaries, the Claimant was informed that all salaries had been consolidated which meant that all payments which were made through the payroll would be treated as consolidated sum.

8. That the Respondent informed Claimant the benefit of the consolidation of salaries that ***“one of the main benefits of this consolidation is that your pensions will be based on the consolidated salary unlike in the past where house allowance and mileage did not count for pension payment”***.

9. The Respondents want this claim to be dismissed with costs.

10. The Claimant’s position is that the Claimant was not consulted on this consolidation and in any case this was illegal.

11. Having considered all the evidence and submissions filed, I note that the Claimant was 1<sup>st</sup> employed by the Respondents on 10<sup>th</sup> October 1985 as Depots and Distribution Assistant in Operation Department. On 5<sup>th</sup> May 1994 he was promoted as Depot and Distribution Manager on a salary of Kshs.80,000/= per month and a house allowance of 26,400/= per month.

12. The progression of the Claimant’s employment from this point to the next level where his salary is allegedly computed is not clear as there is no letter to that effect, however, Claimant’s Appendix H page 29 is a letter dated 23<sup>rd</sup> December 1998 indicating as following:

### **Salaries**

***All salaries have been consolidated which means that all payments, which are made through the payroll, will now be treated as a consolidated sum. This is in line with the current taxation law where all benefits are subject to the same taxation.***

***One of the main benefits of this consolidation is that your review will be based on the consolidated salary, unlike in the past where house allowance and mileage did not count for pension payment”***.

13. The import of this letter is that the Claimant was now paid a consolidated salary which included all allowances inclusive of house allowance.

14. The Claimant proceeded to be paid this consolidated amount reviewed from time to time until his retirement in 2015.

15. Under Section 31(1) of Employment Act:

***“(1) 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”***.

16. It is therefore feasible to have an employer consolidate salary or wages of an employee to include an amount to be used as rent.

17. In the case of Claimant, this is what the Respondent did and informed Claimant who continued to draw the consolidated amounts for 15 years without any complaint until after his retirement.

18. I do not believe the Respondent breached any terms of the contract and the fact that the Claimant accepted this amount without any complaint means he accepted the consolidated pay. He is estopped from renegeing in the same.

19. I find Claimant has not established his case as envisaged and the same is dismissed accordingly.

20. Each party will bear its own costs.

Read in open Court this 21<sup>st</sup> day of February, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Wetangula for Respondent – Present

Mrs Kibiwott for Claimant – Present