



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 511 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 16th February, 2017)

FRANK ESEVWE & 57 OTHERSCLAIMANTS

VERSUS

THE UNIVERSITY OF NAIROBI.....RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 30.3.2016 brought under Section 3 and 12 of the Industrial Court Act 2011, Rule 16 and 27 of the Industrial Court (Procedure); Rule 2010 Section 5,8,10 and 18 of the Employment Act 2007, Section 57 and 59 of the Labour Relations Act 2007, Articles 27 and 41 of the Constitution of Kenya 2010 and all other enabling provisions of the Law, for the grant of the following Orders:

1. That, this Honourable Court may be pleased to certify this Application as urgent, service be dispensed with and the Application be heard Exparte in the first instance.

2. That pending the hearing and determination of this Application, an order of injunction to issue and is hereby issued restraining the Respondent by itself, agents and/or servants from interfering with the House Allowance of the Claimants herein and/or reduce the same from Kshs.17,013 to Kshs 10,371.00.

3. That , pending the hearing and determination of this Application, an order of Injunction to issue to STAY, the implementation of the reduction of the House Allowance of the Claimants from Kshs. 17,013 to Kshs 10,371.

4. That pending the hearing and determination of this Application, an Order of injunction to issue against the Respondent and restrain it from paying any house allowance to the Claimants, which is not in accordance with the agreement (RTWF) signed between the Respondent and Trade Union on the 19th March 2014.

5. That, an order of injunction to issue against the Respondent from reducing or interfering with the House Allowance of the Claimants.

6. That costs of the Application be provided for.

2. The Application is based on the following grounds and supported with the affidavit of Frank Esevwe and other facts to be adduced at the hearing thereof;

a) The Claimants are employees of the Respondent and designated as drivers in accordance with the terms and conditions of services as provided under Section 8 and 10 of the Employment act 2007.

b) The Claimant as employers are graded within the establishment of the Respondent and falls within the salary brackets or categories as covered in an Agreement signed by joint council of all public universities on the 19th March 2014.

c) The Respondents unilaterally paid the house allowance to the Claimants at Kshs 17,013 per month in a clear contravention of the said agreement.

d) The Respondent implemented the above agreement with effect from July 2010 and the Claimants were paid back- dated house allowance in the payroll of November 2015 and in the said agreement, all employees who were at the pay point of Kshs 25,413 were awarded house allowances of Kshs 20,416 and from the arrears paid through the said payroll; the Claimants were underpaid by Kshs 3,403.

e) The Respondent employed the Claimants with a minimum education qualification of 'O' level and each of them have different qualifications as drivers as shown in this grading and yet all of them have been bunched in the same pay point.

f) On or around March 2016, some of the Claimants received notices to the effect that their allowance would be reduced with the effect from March 2016 and the reasons have not been given to them.

g) The wages of an employee, on accordance with Section 18 of the Employment Act 2007 cannot be reduced without proper reason given to them. The Respondent's decision intends to discriminate this category of employees from the others in a clear contravention of Section 5 of the Employment Act 2007.

Further, this decision to cut the house allowance discriminatively contravened the provisions of Article 41 of the Constitution of Kenya, 2010 "fair remuneration" and "fair labour practice".

h) The Claimants have been earning a Basic Salary of less than the gazetted minimum wages guidelines and it is this Honourable Court that enforced the requirements through the order of this Court issued in Cause 817 of 2015 on 2nd November 2015 and the Claimants are apprehensive that the reasons why their house allowance is being reduced is because of the fact that they challenged the Respondent before this Honourable Court.

i) The Claimants pray that this Honourable Court consider and allows the orders so sought to protect their wages as provided under part VI of the Employment Act 2007.

3. The Respondents have not filed a response to this application.

Claimants Submissions

4. The Claimants submit that they shall rely on all documents on record, that is the Certificate of Urgency, the grounds on the face of the Notice of Motion application and all annexures thereto.

5. The Claimants submit that they are all drivers who are working and have been working at the University of Nairobi. They submit that the current application arose immediately after the Claimants

successfully challenged the Respondent's failure to implement the minimum wage guidelines in the gazette notices of 2012 and 2015 in Cause no 817 of 2015 Frank Esevwe and Others vs. The University of Nairobi. Their house allowance was then reduced to Kshs 10,371.00 an act that is illegal and should be condemned by the Court.

6. They submit that the act by the Respondent to reduce the house allowance is one of discrimination, contrary to Section 5 of the Employment Act and Article 27 of the Constitution. Further, the withholding of Kshs 6,642.00 each month goes against Section 17 and 18 for an employer to pay salary and allowance accrued to an employee.

7. They submit that the contravention is an offence and shall on conviction be liable to fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or both.

8. They submit that it is in ill faith and with malice that the Respondents purport to aver that there was an accounting error erroneously increasing the Claimant's house allowance and further could the CBA as agreed between the parties and the return to work formula agreement made on the 19th of March 2014 be negated by the Respondents "new" renewal appointment letter.

9. They submit that the orders sought herein be granted and the Claimant be paid the withheld part of the house allowances. As evidenced, the Claimants submit that they are entitled as they will be doing what the employer is obligated to do.

10. They submit that they have suffered due to this unfair and illegal reduction of house allowance, it is an unfair labour act, and it was done without a true legitimate cause. They ask the court to grant the orders sought.

11. I have considered the averments on record. I note that the increase of salary of the Applicants was an issue that is foregone and the Respondents started paying the Claimants house allowance of 17,013/= as per the annexed payslip.

12. The intention to reduce this house allowance to 10,271/= as per the Annexed FE.5 is an unfair labour practice as prohibited under Article 41 of the Constitution of Kenya.

13. Under Section 10 (5) of the Employment Act:

"Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing."

14. Subsection (1) encompasses all items in an employment contract and includes salaries and allowances payable. Such reduction or change in salary can only be effected after consultation.

15. It is my finding that the notice to reduce the house allowance of the Applicants contravenes their labour rights and is also unconstitutional and I therefore find for the Applicants and order that their house allowance shall not be interfered with until the final hearing and disposal of the main claim.

16. Costs be in the cause.

Read in open Court this 16th day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyabena for Applicants – Present

No appearance for Respondent