



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NUMBER 68 OF 2006**

**TRANSPORT AND ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**KENYA BUS SERVICE LIMITED.....RESPONDENT**

**KENYA BUS SERVICE MANAGEMENT LIMITED.....OBJECTOR**

**RULING**

1. By a ruling delivered on 7<sup>th</sup> June, 2013 Justice Rika ordered the claimant to proceed with execution against the respondent for a sum of Kshs 526,326,540/=. The court further ordered that the claimant be at liberty to bring further execution proceedings against the respondent on any outstanding amount at the end of first execution proceedings.
2. This ruling attracted objection proceedings from Kenya Bus Management Limited objecting to the execution against what it claimed were properties yet it was not a party to the suit. Judge Rika in his ruling delivered on 17<sup>th</sup> January, 2013 did not find merit in the application and dismissed the same. The learned Judge observed that the objection was not merited and was part of the prolonged effort by the respondent not to meet the obligations arising under the award on record. The judge further observed that in employment law, legal separation of the respondent and the objector as argued by the objector, counted for nothing. According to the judge, the court was satisfied that the respondent and the objector were part of the same economic enterprise and indeed represented by the same firm of advocates or network of advocates.
3. It is important to note before proceeding further that this matter has long history and has been handled by several Judges including those of the predecessor court. In this kind of scenario evidence and information lapses are not uncommon. I came into this matter for the first time on 24<sup>th</sup> October, 2014 and having listened to counsel for the parties. I became of the view that the matter involved the establishment of the approved list of respondent's actual employees and second, there existed arrangements for them when it became untenable to keep them as a workforce.
4. At this point there were pending before the court, applications for objection, stay of execution, review etc which in my view I considered only served to obfuscate issues and increase the paper pile that the file had become. I consequently froze those applications and counter applications and directed the parties to get to a round table discussion on what in my view was a simple issue of the exit arrangement from an employment relationship and report to the court within a month.

5. On 21<sup>st</sup> November, 2014 when the parties appeared before me, they recorded a consent to the effect that the claimant furnished the respondent with a list containing the names of its members who were employees of the respondent and who were beneficiaries of the award. The respondent was to countercheck and confirm the list. The matter was subsequently mentioned several times with the hope of settling the list of employees. On 8<sup>th</sup> July, 2015 when the matter came before me, Mr Nyamu for the claimants informed the court that they had agreed on the number of former employees at approximately four hundred and that there were additional two hundred and fifty which were disputed. Mr Kimathi however countered Mr Nyamu's position by saying that they had received Mr Nyamu's list with computations and also gave theirs. However, the parties had not agreed on the computations.

6. The court therefore directed the parties to review and consider the computations exchanged possibly with the assistance of an expert and submit to the court an agreeable joint report on the agreed areas of the computation and isolate those areas where an agreement could not be reached. This did not happen prompting the court to direct on 1<sup>st</sup> December, 2015 that the parties do file statement of agreed issues forthwith and thereafter the claimant to file and serve submissions on the respondents and the respondent to make a response to enable the court determine the dispute.

7. Mr Nyamu in highlight his submissions before me stated concerning the actual number of the beneficiaries of the award that his clients provided a master payroll while the respondent provided a spreadsheet. According to Mr Nyamu master payroll provided by the claimant bore the name of Kenya Bus Services Limited while the first one furnished by the respondent bore the name of KBS Management Limited which by a subsequent filing was changed to Kenya Bus Limited. This according to Mr Nyamu demonstrated the documents were not authentic. According to counsel, by the time his clients were sent on compulsory leave KBS Management had not been registered. The same was registered on 27<sup>th</sup> June, 2006.

8. Regarding the number of unionisable employees, Mr Nyamu submitted that they attached a check-off sheet in the supplementary bundle of documents which demonstrated this. According to this document there were six hundred and eighty four unionisable employees whose union dues were duly deducted by the respondent. There were further sixty two employees whose payslip were found in the bundle of documents which confirms they were unionisable. This brings to a total of 746 employees. According to counsel, the first page of the award talks of failure to pay over seven hundred employees as per the Minister's recommendation and the decree is only for seven hundred and thirty two employees.

9. Concerning the multiplier, counsel submitted that this could be found in the award where it was stated that the wages to be paid for the time the grievants were on compulsory leave. According to counsel, the grievants were to be assumed to be still at work for as long as they had not been issued with termination letters. Regarding whether employees on retirement should benefit from the award, counsel submitted that none of the employees had received any retirement letters.

10. Concerning the issue whether employees seconded to Bustrack and those moved to KBM Management should benefit from the award, counsel submitted that Bustrack and KBS were the same company. This was clearly demonstrated by the letters of secondment attached to list of documents filed on 1<sup>st</sup> December, 2016. And for KBM employees Counsel submitted that they could only benefit if any salary was outstanding from the time they were sent on leave and the time of absorption. Regarding costs, counsel submitted that his clients were entitled to costs since the respondent had been evasive since the commencement of the execution process. The respondents according to counsel had been indirectly challenging the award asking the court to write another one.

11. Mr Kimathi for the respondent on his part submitted that the issues in the dispute emanated from the award of Justice Kosgey. The key aspects captured in that award were that the respondent had paid Kshs 500,000/= to the Ministry of Labour and that the respondent had suspended operations as at 10<sup>th</sup> June, 2005. The award further confirmed that the respondent's tools of trade had been attached. Counsel further submitted that 566 staff members had been paid Kshs 5,146,610.80 and further that the award limited the period which the grievants were to be paid. According to counsel, what was attached to the Notice of

Motion dated 16<sup>th</sup> September 2010 was merely a schedule which came up with a multiplier.

12. According to Mr Kimathi, the respondent could not even at this confirm the number of beneficiaries of the award. Counsel submitted further that the Union should be law avail the register. Counsel further argued that the issue of the number of employees who could benefit from the award could only be determined at the full trial. According to counsel, no employee was hired for more than two years hence none could be on compulsory leave beyond the period of the fixed term contracts. Counsel further submitted that an appeal is pending over the ruling of Justice Rika on the issue of execution delivered on 7<sup>th</sup> June, 2013.

13. Mr Nyamu in response to Mr Kimathi's submission stated that there was no mention of contractual terms in the award. The respondent never raised the issue before Kosgei J hence could not raise it at this stage. Counsel further submitted that no document has been exhibited to show that Kshs 5,146,610.80 had been paid. According to counsel, a multiplier of 60 months had been used as the court directed.

14. The court as above summarized each parties position in this matter. The court has further carefully considered the award made by Kosgey J of the predecessor court on 6<sup>th</sup> September, 2007. This award is the backbone of the matter before me where I have been called upon to make certain determinations. Justice Kosgey in his judgement elaborately reviewed and considered the background of this dispute. In his judgement the judge was confronted with a company once prosperous and an employer of choice for drivers, mechanics and people in related field. The giant was falling due to changes in the operating environment and competition which brought about huge financial loses.

15. In order to mitigate or manage its human resource exposure, the respondent sent its workforce on unpaid compulsory leave with the hope to recall them once the situation is resolved. This decision to send the grievants on unpaid compulsory leave was impugned by the judge describing the same illegal and not provided for in the national labour legislation. The Judge therefore ordered that the respondent pays the grievants all their wages for the period they have been on compulsory leave. Counsel before me framed issues for my determination as follows:

1. What is the actual total number of the unionized employees/beneficiaries of the award herein?
2. Which of the two documents/spreadsheets reflecting unionisable employees separately provided by the parties is authentic.
3. What multiplier is applicable in determining the amount payable n salary arrears as per the award?
4. Whether the employees due for retirement as at the time of being sent on compulsory leave are entitled to the benefits of the award.
5. Whether employees hitherto seconded to Bus Track are entitled to benefits under the award.
6. Whether employees who moved to Kenya Bus Service Management Limited are entitled to the benefit of the award.

16. All these issues except issue number 4, 5 and 6 were considered and a pronouncement made thereon by Justice Kosgey in his award. Further issues number 5 and 6 were considered and a pronouncement made thereon by Justice Rika in his ruling made on 17<sup>th</sup> January, 2013. Justice Kosgey in his award made on 6<sup>th</sup> September, 2007 observed that the respondent was able to disburse payment to 734 members of staff totaling to Kshs 5,146,610.80. The respondent further made payment to Ministry of Labour in the sum of Kshs 500,000/= towards payment of staff dues.

17. Mr Nyamu for the claimant came up with a figure of 746 employees which were reflected in his bundle of documents. This is a difference of about twelve employees. The respondent on its part did not provide any numbers. Instead Mr Kimathi submitted that the numbers could not be determined unless

after a full hearing. The responsibility of keeping employment records is cast upon the employer. The court will in the circumstances agree with the claimant's list and place the number of employees to benefit from the ward at 746.

18. Concerning the multiplier, this was not addressed by Justice Kosgey in his award however Justice Rika had come up with a figure of kshs 526,326,540/= in his ruling on 7<sup>th</sup> June, 2013. This is the figure the claimant wants to execute in default of payment. The court therefore cannot at this point introduce a multiplier since that might interfere with the amount already ascertained by my brother Judge. That would amount to sitting on appeal against my colleagues decision. The respondent or even the claimant if aggrieved can appeal against this decision.

19. Concerning the issue whether employees due for retirement could benefit from the award, the court position is that this is not possible since an employee due to retire is not entitled to salary but retirement benefits.

20. In conclusion, the court orders that the award made by Justice Kosgey and subsequent rulings by honourable Justice Rika shall remain in force unless overturned on appeal by the Court of Appeal.

21. The claimant shall further have costs of the suit.

22. It is so ordered.

Dated at Nairobi this 29<sup>th</sup> day of September, 2017

**Abuodha J. N.**

**Judge**

Delivered this 29<sup>th</sup> day of September, 2017

**Abuodha J. N.**

**Judge**