



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 5(N) OF 2010**

*(Before Hon. Lady Justice Maureen Onyango)*

**MUNIR ABUBAKAR MASOUD .....CLAIMANT**

**-Versus-**

**BANKING INSURANCE AND FINANCE UNION(K) .....RESPONDENT**

**J U D G E M E N T**

The Claim herein was instituted by the Claimant vide Memorandum of Complaint dated 31st December, 2009 and filed on 6th January, 2010.

The issues complained about are set out as follows:-

- (a) Respondents have been managing and administering a trade union unlawfully.
- (b) Respondents have not kept any records of employment for Complainant and for others.
- (c) Respondents failed to produce employment records to a labour officer on demand.
- (d) Respondents sent the Complainant on unsolicited and unlawful unpaid leave.
- (e) Respondents have used unfair labour practices on the Complainant.
- (f) Respondents have treated the Complainant in a discriminatory manner.
- (g) Respondents unlawfully denied the Complainant his rights to contest an elective seat.
- (h) Respondents have conducted an election contrary to its Constitution in breach of the law.
- (i) Respondents have wilfully withheld salaries of the Complainant without lawful cause.
- (j) Respondents have without lawful cause locked-out the Complainant from work.
- (k) Respondents have not paid the Complainant house allowance.
- (l) Respondents have not given the Complainant annual leave or paid him in lieu of leave.

The Claimant prayed for orders as on the face of the Memorandum of Complaint which number 18. Some of the prayers are issues that should be filed either as complaints to the Registrar of Trade Unions

or as criminal charges. The relevant prayers for purposes of this case are the following -

7.1 **THAT** this Honourable Court finds that the Respondents **failed to keep requisite records** of its employees required by **section 38** of the Employment Act, Cap 226 now repealed and replaced by **section 74(1)** of the Employment Act, 2007. The complainant therefore prays that the honourable court gives maximum punishment to the Respondents either under **section 48 of the Employment Act, Cap 226** or under **section 88 (1) of the Employment Act, 2007** so as to be a lesson to the Respondents and to deter others.

7.2 **THAT** this Honourable Court finds that the Respondents **failed to produce records** in regard to the employment of the Complainant to an authorised officer on demand in accordance with **section 38** of the Employment Act, Cap 226 now repealed and replaced by **section 74 (2)** of the Employment Act, 2007. The Complainant therefore prays that the honourable court gives maximum punishment to the Respondents either under **section 52 of the Employment Act, Cap 226** or under **section 88(1) of the Employment Act, 2007** so as to be a lesson to the Respondents and to deter others.

7.5 **THAT** this Honourable Court finds that the Respondents' action of sending the Complainant on unsolicited un-paid leave was unprocedural and contrary to Constitution and Rules of the Respondents and hence that action was unlawful. The Complainant therefore prays that the honourable Court make a declaration to that effect and declare that action as a nullity.

7.6 **THAT** this Honourable court finds that the Respondents action of singling out and selecting the Complainant to send him on unsolicited un-paid leave leaving out other contesting employees for the 2006 elections of the Respondent was discriminatory and contrary to Constitution and Rules of the Respondents as well as **section 5(2) and (3) of the Employment Act, 2007**. The Complainant prays that the honourable Court finds that the Respondents have thus committed an offence under **section 5 (5)** of the same Act and gives maximum punishment provided under **section 88 (1) of the Employment Act, 2007** so as to be a lesson to the Respondents and to deter others.

7.7. **THAT** this Honourable Court finds that the Respondents action of singling out and selecting the Complainant to unsolicited un-paid leave leaving out other contesting employees for the 2006 elections of the Respondent was using unfair reasons to inflicting disciplinary punishment on an innocent employee who was attempting to participate in Respondents election in conformity to the Constitution and Rules of the Respondents. The Complainant pray that the honourable Court finds the actions of the respondents as contraventions of **section 46 (d) and (e) of the Employment Act, 2007** and make a declaration to that effect and order for appropriate remedies so as to be a lesson to the Respondents and to deter others.

7.8 **THAT** this Honourable Court finds that the Respondents committed other conspiracies by using false and fabricated stories that the Complainant is occupying himself with business unrelated to the office and his duties. These false and fabricated stories were used to effect the injury to the Complainants reputation and injure his profession or trade or obstruct the free and lawful exercise by the Complainant of his trade, profession or occupation and to effect an unlawful purpose of sending the complainant on un-paid leave. The Complainant pray that the honourable court finds the actions of the Respondents are other conspiracies which are a misdemeanour under **section 395 of the penal** and made a declaration to that effect and order for appropriate remedies so as to be a lesson to the Respondents and to deter others.

7.10 **THAT** this Honourable Court finds that the Complainant action of going to Court jointly with eight members of the Defendant challenging the elections of the Defendant was lawful and protected by **section 121 (1) (g) of the Penal Code** and **section 46 (h) of the Employment Act, 2007** and so make a declaration that the Respondents cannot use this action to frustrate the Complainant in any manner whatsoever.

7.11 **THAT** this Honourable Court finds that the Respondents action of directing that the Complainant proceed to the Industrial Court to handle matters of the Respondents thereat nullified the earlier directives of the Respondents of sending the Complainant on un-paid leave until after the elections. The

complainant prays that the honourable court makes a declaration that in fact the complainant was not on un-paid leave but was at the entire disposition of the Respondents for the entire period in question and hence entitled to full pay.

7.15 **THAT** this Honourable Court finds that the Respondents failure or omission to pay the Complainant house allowance in breach of **section 9 of the Employment Act, Cap 226** or **section 31 (1) of the Employment Act, 2007**. The Complainant prays that the honourable Court gives maximum penalty to the Respondents either under **section 48 of the Employment Act, Cap 226** or under **section 88 (1) of the Employment Act, 2007** and furthermore issue orders that the Respondents pay all the accrued house allowance.

7.16 **THAT** this Honourable Court finds that the Respondents failure or omission to pay the Complainant in lieu of annual leave as a breach of **section 7(1) of the Employment Act, Cap 226** or **section 28 (1) of the Employment Act, 2007**. The Complainant prays that the honourable Court gives maximum penalty to the Respondents either under **section 48 of the Employment Act, Cap 226** or under **section 88 (1) of the Employment Act, 2007** and furthermore issue orders that the Respondents pay the Complainant in lieu of all the accrued annual leave between 15th September, 2003 and 30th January, 2006.

7.18 **THAT** this Honourable Court awards that the Respondents pay the Complainant his justified claims in the form of unpaid and applicable full salaries, house allowances, leave allowances up to 30th August 2008 together with all other claims made and established here-above since judgement of the High Court Miscellaneous Application 1683 of 2004 delivered on 22nd September, 2008 indicated that the Respondents is not entitled to represent **KRA**.

7.19 **THAT** this Honourable Court be please to award any other relief as it deems appropriate.

The Claimant filed a Supplementary Memorandum on 17th June, 2011 when he also filed an undated Bundle of Documents.

The Respondent filed a statement of Defence/Reply on 8th February, 2010 in which it prays for the following orders:-

- a) Finding that the cause of action which arose in January 2006 was duly reported and processed through the machinery provided under the Employment Act Cap. 226 (now repealed).
- b) Finding that the prayers and calls for imposition of maximum punishment to the Respondents by this Honourable Court are malicious and ill conceived by the Complainant.
- c) Finding that the Complainant is raising complaints and not claims that would only be dealt with under the provisions of Cap, 226 (now repealed) and the Penal Code and not through the Labour Institutions Act 2007 and or the Labour Relations Act 2007.
- d) Finding that the remedies sought by the Complainant are subject to another court forum to wit CMCC 2592 of 2006 and CMCC 3545 0F 2008 at the Milimani Commercial Court.
- e) Finding that the Complainant has no right of access to this Honourable Court under the repealed Employment Act Cap. 226 and the Trade Disputes Act Cap. 234 (now repealed) and neither does he have access to this Honourable Court on a cause of action that pre-dates the enactment of the Labour Institutions Act 2008 and the Labour Relations Act 2007.
- f) Finding that the complaint is defective as it is not founded on specific claims.
- g) Dismissals of the entire complaint with costs for want of jurisdiction.

The case was first heard by Mukunya J (retired) who heard part of the complainant's evidence. I took

over the case at the stage of cross examination of the complainant and also heard the defence case.

The complainant filed the claim in person but engaged Nyabera Nyakundi & Company Advocates who took over his representation from 20th May, 2010. Mr. Isaiah Kubai, the Secretary General of the Respondent represented the Respondent. The Claimant testified on his behalf and was heard on 15th February, 2012, 2nd November 2012, 30th January, 2013 and 25th March, 2013. The complainant thereafter filed written submissions on 23rd January, 2015.

The Respondent presented its case through oral submissions and thereafter called 4 witnesses. The Respondent presented its case on 20th March, 2014, 5th May 2014 and 12th November, 2014.

### **Complainant's Case**

The Complainant's Case is that he was previously an employee of Kenya Revenue Authority (KRA). He retired from KRA on 28th September, 1998 having attained the position of Senior Collector of Customs & Excise. He then applied for registration of **Tax Collectors Union (T.C.U)** on 21st January, 2002 as Founder Member and Interim Secretary General. The application for registration of the TCU was refused by the Registrar of Trade Unions on 6th February, 2004 on grounds that the Kenya Union of Commercial, Food and Allied Workers (KUCFAW) which was already registered, was sufficiently representative of a substantial proportion of the interests in respect of which the proposed TCU had sought registration. The registration of TCU was objected to by the Respondent, among others.

On or about 11th September, 2003 the Respondent's Secretary General called the complainant and invited him to join the Respondent, the Banking, Insurance and Finance Union (Kenya) (BIFU(K)) as an employee. At a meeting held between the complainant and Mr. Isaiah Kubai the Secretary General of the Respondent, the claimant was offered and accepted a letter of employment at a salary of Shs.30,000 per month. He worked with the Respondent diligently and in the first year managed to recruit 900 KRA employees into the membership of the Union, a feat that earned him regular praise and two salary increments between 2003 and 2005 from Shs.30,000 to Shs.55,000 per month as at January, 2006.

It is the complainant's case that his tribulations started on 20th January, 2006 when he was served with a letter sending him on unpaid leave until after union elections slated for March 2006. He testified that during the unpaid leave he was still performing his duties. That he attended court in Cause No.106 of 2005 before Hon. Justice Madzayo and also participated in several negotiation and conciliation meetings but was not paid any salary.

The Complainant testified that after elections he reported back to the office but was denied entry on instructions of the Secretary General of the Respondent. He reported the matter to the Provincial Labour Officer Nairobi at Nyayo House who called conciliation meetings attended by the complainant and the Respondent's representatives. The Respondent however did not present a memorandum to the Provincial Labour Officer as directed. The Labour Officer prepared a report recommending payment of Shs.999,641.60 to the Complainant by the Respondent which the Respondent failed to pay. After intervention by several labour officers, the office of the Attorney General advised that the Complainant pursues his claim through a civil suit which he subsequently filed. The complainant prayed that his prayers be granted as prayed.

### **Complainant's Written Submissions**

In the written submissions filed on behalf of the Complainant it is submitted that he had proved that he was an employee of the Respondent from 18th September 2003, a fact that was supported by the Respondent's witnesses. It was submitted that he was issued with an employment card and was paid a monthly salary, all evidence of his employment by the Respondent.

It was submitted that the termination of the Complainant's employment was unfair as he was sent on compulsory leave by a letter dated 20th January, 2006 but taking effect respectively from 3rd January, 2006. It was further argued for the Complainant that the letter did not state the contractual or legal

authority under which it was written and was null and void *ab initio*, unprocedural and illegal. That the complainant was never given a hearing and the decision to send him on compulsory leave was against the principles of natural justice. It was submitted that there was no valid reason for termination of the complainant's employment. It was submitted that the court has power to grant the prayers of the Complainant.

## **Respondents Case**

Mr. Isaiah Kubai, the Secretary General of the Respondent made oral submissions on behalf of the Respondent the called four witnesses. Mr. Kubai submitted that what is before this court for determination is not a claim but a complaint. That several prayers are grounded on breach of the Employment Act and Penal Code. He submitted that such prayers have no place in this claim as they give rise to criminal offences which should be prosecuted in the Magistrates Court and by Labour Officers.

Secondly Mr. Kubai submitted that the claim is statute barred by virtue of section 90 of the Employment Act, 2007 as the cause of action that is the subject matter of this suit arose in January, 2006 while this suit was filed on 6th January, 2010. He prayed that the suit be struck out on grounds that it is time barred. He relied on the decision in the case of **Peter Wangai Kiama v Lawrence Gelmon & 2 others Industrial Court Cause No.1170 of 2010.**

On the engagement of the complainant Mr. Kubai submitted that there was no employer/employee relationship between the complainant and the Respondent, that the letter creating the relationship between the parties signed on 18th September, 2013 is an assignment to recruit employees of KRA Countrywide. That at paragraph 2 of the agreement the parties agreed on a monthly pay of Shs.30,000 and further that the parties would meet after 3 months to review the agreement. That according to the agreement the complainant was to start recruitment in Mombasa. That parties agreed that once there was full unionisation the Claimant would be given full employment by the Respondent.

Mr. Kubai submitted that the agreement is not a letter of appointment but engagement for a specific job. He referred the court to the dictionary meaning of "*engage*" in Macmillan Dictionary which gives 6 different meanings of the word. He submitted that the intention of the parties was that the Complainant be engaged for recruitment services only. He submitted that section 35 of the Employment Act is not applicable to the complainant's case as the termination of employment contemplated therein is for a person employed on a contract of service.

Mr. Kubai further submitted that section 36 did not apply to the Complainant's case as the Complainant was not recruited by the Respondent and was not supervised by the Respondent. That the Respondent only required the Complainant to make reports to the office, which he did.

Mr. Kubai submitted that the title "Executive Officer" which the Complainant alleges he held does not exist in the Respondent's constitution which sets out the procedure for appointment of staff.

On the issue of relocation of the complainant, Mr. Kubai submitted that paragraph 2 of the Complainant's contract of engagement provided for continuous recruitment of members throughout the country and once the complainant had exhausted recruitment in Mombasa there was need for him to relocate to Nairobi. That at this juncture the parties agreed to increase the complainant's retainer to Shs.55,329. He submitted that the complainant carried out recruitment for the Respondent from 2003 to 2006.

In January, 2006 the Registrar of Trade Unions announced dates for elections for all trade Unions. The Complainant was interested and applied to contest for the position of Deputy Secretary General. Once the Complainant started campaigning he stopped filing returns on recruitment. The Respondent had to rethink the Complainant's position as contesting would take him away from his work. The Respondent therefore asked complainant to leave his assignment so that he could concentrate on election campaigns.

Around the same time the complainant registered an association known as **Hazina Employees Welfare Association (HEWA)** on 8th January 2006. The objects of the Association were similar to those of the

Respondent union. The complainant was thus recruiting members for his association while being paid to recruit members for the Respondent.

Mr. Kubai submitted that while on unpaid leave, the Complainant filed **Milimani Civil Case No.2592 of 2006** against the Respondent jointly with 8 other members of the Respondent union on 17th March, 2006. The suit sought to stop the Respondent's elections scheduled for 18th March, 2006. That on 18th April, 2008 the Complainant filed a Criminal complaint against officers of the Respondent. The complaint alleged theft of union funds by the Respondent's officers. It was the Respondent's case that the Complainant did not intend to resume work with the Respondents going by his activities set out above.

Mr. Kubai submitted that at the time the Complainant went on compulsory leave he had not raised any claim of house allowance, leave allowance or any other allowances. He submitted that the Complainant is not entitled to payment from January, 2006 to August, 2008 as he had no interest in working for the Respondent from January 2006.

Mr. Kubai submitted that the Complainant is not entitled to the prayers for house allowance and notice or other benefits under the Employment Act as his engagement terms did not provide for the same and the Employment Act is not applicable. Mr. Kubai further pointed out that the Complainant himself is not sure of what he is claiming. His first demand was for Shs.751,000. The next demand was Shs.1,281,281.50 through the District Labour Officer. The claim was again reduced to Shs.989,641.60. The final position by the District Labour Officer was that the Complainant be paid 3 months' salary to cover the period he was on unpaid leave, a position that the Respondent had agreed to comply with in a bid to settle the dispute although its position was that the Complainant was not entitled to the same.

The Respondent called 4 witnesses. Joseph Lepapa Tipape, RW1 testified that he was the Respondent union's Deputy Secretary General since 2006. Before that he was the National Treasurer General. RW2 Thomas Odero testified that he was the Respondent Union's National Organizing Secretary. RW2 Wilson Laibuni Gituma testified that he was the Respondent's Accountant and RW4 Isaiah Munoru testified that he was the Respondent's Economist. All the 4 witnesses testified that they worked with the Complainant.

### **Findings and Determination**

The issues that arise for determination based on the facts and evidence before the court are the following:-

1. Whether this claim is properly before this court.
2. Whether the claim is statute barred.
3. Whether the Complainant was an employee of the Respondent .
4. Whether the Complainant was unfairly terminated.
5. Whether the Complainant is entitled to the remedies sought.

The Respondent raised issues with the manner in which this claim has been filed, the title of the claim and the prayers. It is true that this case came to this court in a peculiar manner and the prayers sought range from issues that should have been dealt with by labour officers as labour complaints, while others should have been raised with the Registrar of Trade Unions. This court however takes a view that it can ignore what is outside its preview as provided under section 12 of the Employment and Labour Relations Act and deal with those within its jurisdiction only. For this matter the court will limit its determination to issues raised under prayers (d) (e) (f) (i) (j) (k) and (l) of the complaint. These can be summarised under the heads; unfair termination, discrimination and terminal benefits. These are all covered under the issues for determination as already crafted by the court.

The next issue is whether the claim is statute barred. In order to make a determination on this issue the court has to determine the law applicable at the time when the complainant left employment.

Section 90 of the Employment Act, 2007 which provides for limitation period of 3 years and which Mr. Kubai relied upon, came into force on 2nd June 2008, long after the Complainant had left the Respondent's employment on 20th January 2006. This means that section 90 thereof does not apply to this claim. The correct limitation period is that provided for under section 4(1) (a) of the Limitation of Actions Act which provides for a limitation period of 6 years. Having been brought in January 2010, the Claim was filed within time and is therefore not time barred.

The next issue for determination is whether the complainant was an employee of the Respondent on a contract of service or contract for services.

The Letter of engagement of the complainant expressly states the nature and purpose of the engagement. The letter is reproduced below:-

*18th September, 2003*

*Munir Abubakar Masoud*

*P O Box 99890*

**MOMBASA**

*Dear Mr. Masoud,*

**RE: ASSIGNMENT TO RECRUIT EMPLOYEES OF KENYA REVENUE AUTHORITY INTO BANKING, INSURANCE & FINANCE UNION (K)**

*This is to confirm that we have reached an agreement with you that you be engaged to recruit employees of the Kenya Revenue Authority Countrywide into the membership of Banking, Insurance & Finance Union (K) as the most relevant union for the money market.*

*On its part, the union undertakes to engage you at a monthly salary of Kshs.30,000/- with effect from 15th September, 2003. After three months the parties will meet to review the progress in the recruitment.*

*Further the union undertakes to meet reasonable incidental expenses connected with your work.*

*To start with, you will work under our Coast Branch Executive and this letter serves as an introduction to our Joyce Karanja in Mombasa Branch of the union.*

*Our undertaking is that, once the union is fully operational in the Kenya Revenue Authority, you will get a substantive appointment so that you can realize the endeavours of your colleagues at the Kenya Revenue Authority as well as the entire money market that this union caters for.*

*Wishing you all the best in your endeavours to fully unionize the employees of Kenya Revenue Authority. We remain,*

*Yours sincerely,*

**ISAIAH KUBAI**

**SECRETARY GENERAL**

The contract was therefore for a specific task at a specific remuneration. It was thus a contract for services and not a contract of service. The intention of the parties is expressed in the letter that the complainant's only task was to recruit KRA employees into membership of the Respondent union. The letter states that and it is only after this task was accomplished that he would be considered for a

substantive position in the union.

During cross examination the complainant confirmed that he did not complete the unionisation of KRA employees. It however appears that sometime after moving to Nairobi the complainant engaged in other union activities such as negotiations, conciliations and court attendance. This is confirmed by minutes of conciliation and negotiations meetings and corams on court proceedings that have been produced by the complainant. The witnesses called by the respondent also confirmed the same.

I therefore find that although the complainant was engaged only for the purpose of recruitment of KRA employees into the membership of the union he was later allowed by the Respondent to perform other union activities that were reserved for employees and/or officials of the union and there is therefore a presumption that he was absorbed into the employment of the union at some point after moving to Nairobi.

On the issue of unfair termination, the complainant alleges that his unpaid leave was illegal as it was backdated, the letter having been dated 20th January 2006, delivered to him on 23rd January, 2006, but to take effect on 3rd January 2006. He further avers that the union constitution was amended so that an employee vying for a position in the elections of the union did not have to resign.

I have perused the union constitution attached to the complainant's claim but have not seen any provision relating to resignation of officers vying for elective positions. The complainant did not draw the court's attention to any specific clause of the constitution providing for the same.

The complainant also averred that he was discriminated by being sent on unpaid leave while other employees vying for elective positions were not required to take unpaid leave. He however did not adduce any evidence or name any employee who was vying and was not subjected to similar treatment.

I therefore find that the complainant has not proved either that there was no provision for him to take unpaid leave to prepare for elections or that he was discriminated.

The complainant averred that after elections he reported back to the office but was turned away by Mrs. Mildred Anyika on instructions from the Secretary General not to allow him back into the office. It is this that the complainant avers constituted the unfair termination of his employment. The Respondent's position is that the complainant had no intention of reporting back to the office or was too embarrassed to report back based on his conduct of registering HEWA where he was the co-ordinator and filing suit against the Respondent.

The complainant did not adduce any evidence to prove that he had reported to the office after elections and was turned away on 20th March, 2006. Further, the complainant did not deny that in January 2006 he had registered an organisation called **HEWA** whose objects were in conflict with his engagement with the Respondent. He also admitted that he had filed a case in court on 17th March 2006 to stop the elections scheduled for 18th March 2006.

I find that the complainant had no intentions of working with the Respondent after he was sent on unpaid leave as his activities were inconsistent with any intentions to go back to work. I further find that the complainant has not proved that he reported back to work on 20th March, 2006 and was turned away by the Respondent. Consequently I find that the complainant failed to prove unfair termination.

## **Remedies**

The complainant prayed for punishment of the Respondent by imposing maximum penalties against the Respondent under section 48 of the repealed Employment Act and section 88 of the Employment Act, 2007 for failing to keep records or to produce the said records as provided under section 38 of the repealed Employment Act and Section 74(1) of the Employment Act, 2007.

He further prayed for penalisation of the Respondent for failure to attend the meeting scheduled for 24th

November 2006 or comply with the orders of the Labour Officer, failure to conduct elections of 2006 in accordance with section 38(7) of the Trade Unions Act and for failure to pay the complainant house allowance.

These are all matters that can only be dealt with in criminal proceedings and cannot therefore be determined in the present proceedings which are civil in nature.

As I had already pointed out earlier, the only prayers that can validly be dealt with herein are unfair termination and discrimination which I have already found herein above that the complainant has failed to prove, and the claim for terminal benefits. These are quantified under paragraph 4.3 of the claim as follows:-

**Quantified claim by the Complainant submitted on 24th March, 2006 to Provincial Labour Officer, NRB**

- 4.3.1 Transfer allowance (Transport) on relocation from  
Mombasa to Nairobi on the instructions of  
the Respondent .....Shs. 50,000.00
- 4.3.2 Disturbance allowance following the above named  
transfer.....Shs.  
30,000.00
- 4.3.3 Annual leave at the rate of 45 days per year with effect from  
18th September 2006 at the rate of the last salary received by  
the complainant (Salary Shs.55,329/- X 135 days {4.5 months}).....Shs. 248,980.50
- 4.3.4 Leave allowance at rate of monthly salary totalling  
4.5 months .....Shs.  
248.980.50
- 4.3.5 Refund of lawyers expenses incurred by complainant in his  
defence when maliciously prosecuted by K.R.A under Case #1791/04  
after which he was acquitted by the Court .....Shs. 25,000.00
- 4.3.6 Complainants salaries from 1st January, 2006 to date  
(January, February and March).....Shs. 165,987.00
- 4.3.7 House Allowance at 15% of the monthly salary since September 2003  
(Monthly Salary Shs.55,329/- @15%-Shs.8,299.35 X 30 months .....Shs. 248,980.50
- TOTAL COMPLAINANTS' CLAIMS  
TODATE .....Shs.1,017,928.50**

Transfer allowance is not provided for in law and neither is it provided for in the complainant's contract. No receipts have been submitted to prove that the complainant incurred the sum of Shs.50,000 or any

other sum on the said transfer. I accordingly find the claim not to have been proved and dismiss it. The claim for disturbance allowance has also no legal or contractual basis and is dismissed.

The complainant claims annual leave at the rate of 45 days per year. He has not submitted any evidence to prove that there was agreement for leave at 45 days. In any event the prayer is for annual leave from 18th September 2006 when the complainant was no longer working for the Respondent and the Respondent had no obligation in relation to payment in lieu of leave. His prayer for leave allowance has no contractual or legal basis either. The prayers for leave and leave allowance are dismissed.

Refund for lawyers expenses can only be a matter of agreement and cannot be ordered by court.

Salaries from January to March, 2006 were conceded by the Respondent following the recommendations of Mr. G.R. Ambuche, the Provincial Labour Office, Nyayo House, Nairobi in his letter dated 26th March, 2007 and which Mr. Kubai confirmed while making his submission in court.

I therefore order payment to the complainant of Shs.165,987.00 as conceded by the Respondent.

On the prayer for house allowance from 2003 to March 2006, the complainant prays for Shs.8,299.35 per month. During his testimony he stated that he was residing in his residence while in Mombasa and that when he moved to Nairobi the Respondent paid his hotel bills. He did not state at what point he started paying house rent.

The Respondent on the other hand avers that the complainant was paid a salary of Shs.30,000 and the same was increased to Shs.55,329 to cater for his accommodation.

The provision of 15% on account of house allowance is provided for under the Regulation of Wages (General) Order based on statutory minimum rate of pay.

The Employment Act (Repealed) which is applicable in this case provided for house allowance at section 7 as follows:-

***Housing.***

*9. Every 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 his wages or salary, as will enable the employee to obtain reasonable accommodation:*

*Provided that if, by reason of the conditions of employment, and wages payable, any person is placed at a disadvantage by the application of this section, the Minister may by notice in the Gazette, exclude the application of this section to that person and that person shall instead be dealt with as shall be specified in the notice.*

The Complainant was not on statutory minimum wage and has not proved there was agreement to pay him house allowance at 15% of his pay. He has also not proved that his salary was not inclusive of house allowance. His letter of engagement is silent. The letter states that "*Further the union undertakes to meet reasonable incidental expenses connected with your work.*"

I find that the complainant has not proved that he was not paid house allowance by the Respondent. The claim is dismissed.

**Conclusion**

The sum total is that save for the prayer for payment of salary for the period January to March 2006 in the sum of Shs.165,987, the claim by the complainant is dismissed.

Each party shall bear its costs.

Judgement Dated and Signed at Kisumu this **7TH** day of **OCTOBER**, 2016

**MAUREEN ONYANGO**

**JUDGE**

Judgement Delivered and Signed at Nairobi this 14th day of October 2016

**MATHEWS N. NDUMA**

**JUDGE**