



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 736 OF 2015**

**EUNICE WANJIRU MBAU .....1<sup>ST</sup> GRIEVANT/CLAIMANT**

**MARGARET WACERA**

**MURUNGO.....2<sup>ND</sup> GRIEVANT/CLAIMANT**

**FRANCIS WAIRUIRU KARIUKI.....3<sup>RD</sup> GRIEVANT/CLAIMANT**

**JAMES MBOGO MBUGUA.....4<sup>TH</sup> GRIEVANT/CLAIMANT**

**MBUA MWAURA NJOROGE.....5<sup>TH</sup> GRIEVANT/CLAIMANT**

**FREDRICK KINYANJUI CHEGE.....6<sup>TH</sup> GRIEVANT/CLAIMANT**

**PETER KANINI MACHARIA ..... 7<sup>TH</sup> GRIEVANT/CLAIMANT**

**SAMUEL NDUNGU MBURU ..... 8<sup>TH</sup> GRIEVANT/CLAIMANT**

**JAMES GATIBUI MUIRURI ..... 9<sup>TH</sup> GRIEVANT/CLAIMANT**

**GEOFFREY KIARIE CHAGE .....10<sup>TH</sup> GRIEVANT/CLAIMANT**

**WAITI GATHIRU ..... 11<sup>TH</sup> GRIEVANT/CLAIMANT**

**FRANCIS BARAE MUCHAI ..... 12<sup>TH</sup> GRIEVANT/CLAIMANT**

**MARGARET GATHONI**

**KINYANJUI ..... 13<sup>TH</sup> GRIEVANT/CLAIMANT**

**VERSUS**

**KOMOTHAI COFFEE GROWERS**

**COOPERATIVE SOCIETY LIMITED ..... RESPONDENT**

## JUDGEMENT

1. The issue in dispute in this suit is payment of retirement benefits and salary arrears to the thirteen (13) claimants by the respondent.
2. It is not in dispute that the claimants retired from the employment of the respondent. All the claimants were retired by a letter dated 3<sup>rd</sup> January 2015 attached to the memorandum of claim and marked 'App1'. A list of claimants and computation of retirement benefits per their retirement letters are also attached seriatim to the memorandum of claim from page 68 to page 114.
3. The respondent failed to pay the terminal benefits citing finance difficulties and offered to pay the same in small instalments as and when able.
4. On 25<sup>th</sup> March 2015, the claimants through their advocate Ongicho & company Advocates wrote a letter of demand in respect of the unpaid dues. The respondent failed to make good the claims hence the suit.
5. In the statement of response filed on 24<sup>th</sup> June 2015, the respondent admits owing retirement benefits to the claimants and other retirees.
6. The respondent denies owing any salary arrear as claimed or at all stating that it had since paid all the salary arrears.

The respondent states that it rightfully terminated employment of the claimants when they were due for retirement under the terms of the employment contracts and the 13<sup>th</sup> claimant Margaret Gathoni Kinyanjui voluntarily resigned from employment.

7. The respondent pleads that it is in dire financial constraints and has difficulties meeting its financial obligations and paying its creditors amongst them the retired employees including the claimants. Respondent relies on audited accounts for the year 2012 – 2013. Respondent states that the dire financial status persists to date. This is attributed to the fall of the coffee market which is the main preserve of the respondent.
8. Respondent states that the court should not issue orders in vain because it has no funds to pay the claimants.
9. Respondent prays that the court to indulge the respondent and structure a payment scheme of the due retirement benefits spread out over a duration of ten (10) years to enable the respondent remain afloat and meet obligations due to creditors at large and the farmers.
10. The court directed the Ministry of Labour, Social Security and Services, Central Planning and Monitoring Unit (CPMU) to investigate the matter and submit a report to court. The report was filed on 15<sup>th</sup> February 2016.
11. CPMU confirmed that from the Annual Audited accounts of the respondent, the respondent operated net deficits of Kshs.19.62 million in the year 2010; Kshs.19.3 millions in 2011, 13.8 millions in 2012, 16.5 millions in 2013 and, 13.3 millions in 2014.
12. CPMU also found that 80% of the net income must be paid to the society's membership who are coffee farmers and 20% goes to finance the operations of the society including payment of workers dues.
13. On the issues at hand in this case, CPMU observes that different rates are applicable to retirees in two different CBAs as follows;

- a) Payment of gratuity at rates provided for and depending on the number of months one has been

in service; and

b) Payment of severance pay at the rate of 20 days for each completed year of service.

14. CPMU observes that since the claimants were retired by virtue of advanced age and were not declared redundant, they are entitled to payment of gratuity but not service pay even though the registered CBA provides for both payments.

15. All the claimants had served over three (3) years and in terms of the CBA are entitled to either 18% or 22% of basic wage per each completed month of service.

16. Parties also have unregistered CBA but was implemented and provides retirement for employees who have served over three (3) years at the rate of either 22% or 25% of basic wage for completed months of service.

17. CPMU also established that, while the matter was pending in court, the respondent paid the claimants the outstanding five (5) months' wages that were pending payment as at the time of discharge. The claimants confirmed to CPMU that they were indeed paid according to CPMU.

18. The claimants seek payment in three instalments at the ratio of 50:20:30 1<sup>st</sup> instalment to be paid within April to June 2016; 20% within November to December 2016 and 30% within April to June 2017. The payments to be subject to a minimum of Kshs.150,000 during the 1<sup>st</sup> instalment and Kshs.100,000 within the second instalment and the court to monitor each payment.

19. That the claimants understand that severance pay is not payable upon retirement.

20. The correct dues payable following this understanding to each claimant is set out on page 12 to page 18 and summarised in a table set out on page 19 depending on whether the payment is to be made in terms of the registered CBA rates of 18% or 22% or unregistered CBA rates of 22% or 25%.

## **Determination**

21. The court has considered the pleadings by parties and the submissions thereof and in particular that the claim of gratuity is admitted by the respondent; the receipt of arrear salary is admitted by the claimants and the claimants also admit that severance pay is not payable to persons who retire on account of old age.

22. The court has carefully considered the report of CPMU and is wholly in agreement with the evaluation and recommendations made by the unit. Accordingly, the court makes the following final orders considering passage of time to date:-

a. The respondent is liable to pay each of the claimants gratuity in terms of the unregistered CBAs since the same has already been implemented by the respondent at the rates of 22% or 25% depending on the number of months served by each claimant.

b. The amount is payable in accordance with the reviewed position by the claimants as set out on page 12 paragraph 2(b) of the CPMU report. Due to the passage of time, the 1<sup>st</sup> and 2<sup>nd</sup> instalments are payable within November to December 2016 and the last instalment within April to June 2017 subject to the minimums set of Kshs.150,000 for the first instalment and Kshs.100,000 for the 2<sup>nd</sup> instalment.

c. The court adopts fully the computation set out on page 19 of the CPMU report Table 5(a), the column reflecting figures based on '*unregistered but implemented rates in Kshs. at 22% or 25% which ever is applicable*' as follows;

1. Eunice Wanjiru Mbau	-	2,425,000.00
2. Margaret Wacera Murungo	-	1,441,031.00
3. Francis Waruiru Kariuki	-	990,663.00
4. James Mbogo Mbugua	-	46,712.00
5. Mbua Mwaura Njoroge	-	1,462,489
6. Fredrick Kinyanjui Chege	-	555,000.00
7. Peter Kanini Macharia	-	228,319.00
8. Samuel Ndungu Mburu	-	341,663.00
9. James Gatibui Muiruri	-	947,331.00
10. Geoffrey Kiarie Chege	-	500,000.00
11. Waiti Gathiru	-	211,406.00
12. Francis Barae Muchai	-	450,280.00
13. Margaret Gathoni Kinyanjui	-	1,168,500.00
<b>Total amount</b>	<b>-</b>	<b>10,768,364.00</b>

d. The amount is payable with interest at court rates from date of filing suit till payment in full.

The interest payable will be paid as the last instalment within the period July to December 2017.

e. The respondent to pay costs of the suit.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of November 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**