



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 58 OF 2013

(Formerly Nairobi E & LRC Cause No.726 of 2012)

(Before Hon. Lady Justice Maureen Onyango)

SAMUEL ADERO NYAMBURI.....CLAIMANT

-Versus-

KENYA NATIONAL UNION OF TEACHERS.....1ST RESPONDENT

KENYA NATIONAL UNION OF TEACHERS HOMABAY BRANCH.....2ND RESPONDENT

J U D G E M E N T

The Claim herein was filed by SAMUEL ADERO NYAMBURI (Deceased) vide Memorandum of Claim dated 24th April, 2012 and filed on 30th April, 2012. The Memorandum of Claim was amended on 24th August, 2012 and further amended on 21st July, 2014. The Claimant however died before the suit could be heard and was substituted by PETER OWADE NYAMBURI the legal representative of his Estate.

In the Re-Amended Memorandum of Claim filed on 28th July, 2014 the Claimant seeks the following prayers -

a) A declaration that the Refusal by Respondents to provide for or call fresh and proper elections in KNUT Homa-Bay Branch from 2006 up to 2011 as per the court order of 8/2/2010 and refusal to pay the deceased his terminal and or retirement dues is UNLAWFUL, hence a declaration that the deceased was the Homa-Bay branch Executive Secretary from 2006 to 31/12/2010, when he retired.

b) An order that Respondents do immediately Pay the estate of the deceased all his dues as follows:-

(i) Reimbursement of money paid to TSC (31% Pension Not Remitted to TSC).....Kshs. 349,016.25

(ii) Accrued Salaries/Allowances Not Paid

(From May 2006 to 31/12/2010) Date of retirement).....Kshs.6,913,720.00

(iii) Retirement/terminal benefit Not paid (Including other unpaid claims) Kshs.5,278,019.00

(iv) Pension based on KNUT salary scale Kshs. 838,004.40

TOTAL CLAIM IS Kshs.13,378,259.70

c) That the Respondent forthwith issue the Claimant with Certificate of service of the deceased.

d) That Compensation by an Award of Damages at 12 months salary at Kshs.130,375 x 12 =Kshs.1,566,900/- and Interest be paid, to the estate of the deceased by the Respondent from the date of breach till payment in full.

e) Interest on the above sums in (b) above at commercial rates from the date of breach (31/12/2010) till payment in full.

f) Costs of the cause plus interest at court rates be paid by Respondents, from the date of Judgement till payment in full.

The 1st Respondent did not file a reply to the Claim or Amended Claim. The 2nd Respondent filed a response to the Memorandum of Claim on 21st July 2015, denying the averments in the Memorandum of Claim but admitted owing the estate of the deceased the sum of Shs.431,958 being pension for 60 months.

The case was heard between 22nd July, 2015 and 12th November, 2015. A total of 3 witnesses testified being Mr. Peter Owade Nyamburi, the Legal Representative to the Estate of the deceased, Mr. Frederick Ober and Mr. Peter Omollo. The parties thereafter filed and exchanged written submissions.

Facts of the Case

Samuel Adero Nyamburi (the deceased) was elected as the Vice Chairman of KNUT Homa-Bay branch in 1992 and in 1996 he became Chairman KNUT Homa-Bay branch. On 17th July 1997 he was elected as full-time Executive Secretary of the KNUT, Homa-Bay Branch. He defended his seat and was re-elected on 29th April 2001 for another term of 5 years.

The KNUT Homa-Bay Branch conducted its elections for 2006 on 4th May, 2006 at which the deceased defended his seat but lost to **PETER OMOLLO - RW1** and his team. On the same day the deceased and 2 other officials protested to the returning officer on irregularities of these elections. On 10th May, 2006 the deceased also notified the KNUT Headquarters about the irregularities of the elections of 4th May, 2006 and requested the General Secretary not to recommend to the Registrar of Trade Unions (the Registrar) any changes of officials in the branch. The deceased further requested that salaries of the incumbent officials should not to be stopped pending the hearing and determination of the election petition they had filed in court. He had by that time already given notice of intention to sue should the changes be registered. This was in compliance with the provisions of the union's constitution (Article X, (E) (4) and as per the provisions of Section 38 of the Trade Unions Act (Now repealed).

The KNUT Secretary General however went ahead and signed Form 'N' on 8th May, 2006 and also notified the Registrar of the said changes, disregarding the protests by the deceased and his team following which the registrations were effected by the Registrar. The deceased and his Branch Executive Committee (BEC) challenged the said election results at the High Court at **Kisii vide Kisii High Court Civil Case No.59 of 2006** filed on 9th May 2006. On 20th July, 2006 the deceased was by a consent order allowed to remain in office pending the hearing and determination of his application for injunction also dated 9th July, 2006.

The deceased and his BEC remained in office up to the 8th August 2006, when Mwera J dismissed the application by the Claimant directing the matter to go to full trial. The Judge also vacated the consent orders of 20th July 2006. The deceased and his BEC complied with the said ruling and vacated office with the handing over taking place on 23rd October, 2006.

The case was subsequently heard on merits and Judgment was delivered by Musinga J. on 8th February, 2010. The Decree issued on 19th July, 2010 was as follows;

1. The election exercise concerning the officials of Homa-Bay KNUT Branch were marred by irregularities and the results were rendered void *ab initio*.

2. The election of the 1st, 2nd and 3rd defendants as Chairman Executive Secretary and Treasurer of KNUT Homa-Bay Branch are nullified and fresh elections to be conducted as soon as possible.

3. Defendants to bear costs of this suit.

According to the Claimant the deceased had managed to quash the elections of 4th May, 2006. It is the Claimant's argument that since there was no appeal by the Respondents or any other decision staying or overturning the Judgement in **Kisii HCCC No.59 of 2006** the said elections remained null and void *ab initio*. It is the Claimant's argument that ***void ab initio*** means void from the very beginning and that whatever happened then or thereafter is invalid, unlawful, useless, meaningless and of no consequence, legal or otherwise, whatsoever, and amounted to nothing.

The Claimant relied on the case of **REPUBLIC v THE CHAIRMAN SUNEKA LAND DISPUTES TRIBUNAL & 3 OTHERS Ex-parte OMBETA OMBETA [2013]eKLR**, in which the court cited with approval the case of **MACFOY VS UNITED AFRICA CO. LTD.(1961) 3 All E.R 1169**. In that case, **Lord Denning** stated as follows concerning an act which is a nullity;

"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

It is the Claimant's submission that this means there were no valid elections of KNUT Homa Bay Branch on 4th May, 2006. That it is as if there were no elections on 4th May, 2006 and if there were it is of no legal consequence. The Claimant further submits that this also means that the registration of the officials purportedly elected on 4th May, 2006 was also declared null and void and it is as if there were no registrations and if there were, it is of no legal consequence. It is further the Claimant's submission that this also means that **Peter Omollo** and his team should not have assumed office as a consequence of the said elections and if they did it is of no legal consequence. The Claimant submits that all that was done pursuant to the said election amounted to nothing. The Claimant submits that **Peter Omollo** and his BEC was never lawfully or validly elected on 4th May, 2006 and were therefore by law not officials of the branch at any given time, that their service with effect from 4th May, 2006 to 8th February, 2010 amounted to nothing.

It is the Claimants position that this therefore means that the status of the KNUT Homa-Bay Branch officials reverted to the position it was on 3rd May, 2006 before the elections were held. That it is as if the BEC of **Peter Omollo** was never in office at all, and if it was it is of no legal consequence. That there can never be a vacuum in the union leadership. That the deceased and his BEC were placed in the position in which they were on 3rd May, 2006.

The Claimant submits that as a result of the said judgment the Deceased had not lost and did not lose any elections held on 4th May, 2006 and should have been allowed to go back and continue in office until fresh elections were called. That as such the deceased and his team were legally in office but was only physically stopped from assuming duty by the respondents' actions and is thus deemed to have been in office until his retirement on 31st December, 2010.

It is the Claimants contention that the elections having been declared null and void *ab initio*, the deceased remained in office until the elections ordered by the court were held. It is on the basis of this contention

that the Claimant has urged the court to find that the deceased was entitled to salary and benefits up to 31st December, 2012 when he retired.

The Respondents on the other hand argue that the implication of the annulment of the elections of 4th May 2006 declared null and void *ab initio* is that neither of the contestants in the election of branch executive secretary was entitled to be in office. It is the Respondents position that the Claimant's position cannot be supported in law for the reasons that firstly, in his Complaint dated 9th May 2006, in **Kisii HCCC No. 59 of 2006** the deceased claimed inter-alia that the newly registered officers be permanently enjoined from assuming office or acting as the 2nd Respondent's officials. That in effect, the Claimant was asking the court to declare that his designation as Branch executive secretary was not in any way affected by the changes to the register by the registrar of and therefore had no effect in so far as his salary and benefits were concerned. The Respondents submit that in his Judgment annexed at page 78 of the Respondent's bundle of documents, the Hon. Musinga J left no doubt about the fate of the said prayers when he stated thus-

'Prayers numbers (iii) and (iv) in the Complaint have been overtaken by events.'

The Respondents submit that what the Court emphatically stated in the above statement was simply that ***'The persons whose election was challenged may have been irregularly elected, but they did hold office for the period between 2006-2010 and the court cannot make orders in vain.'***

Secondly, the Respondents argue that the court did not have jurisdiction and therefore could not, in law, confer on the Claimants the title and/or designation of branch executive secretary or reinstate them to the said position as alleged or at all. The Respondents relied on Section 38(8) of the Trade unions Act which provided as follows;

'The rules of a trade union shall provide for the election or re-election by secret ballot of all the officers of the trade union, at elections to be held not less than once in every year.'

The Respondents submit that by dint of the aforesaid provisions the Respondent's membership promulgated the Kenya National Union of Teachers' Constitution which at Article X(3) thereof, provides as follows;

'Every Branch official shall be elected after five years...'

and further that Article X(D)(1) and (4) of the said Constitution provides as follows;

'Except as otherwise herein expressly provided, all officers of branches shall be elected every five years by secret ballot at branch general meeting...'

'Every branch officer of the union shall vacate his/her office on the expiry of five years, but shall be eligible for re-election'

The Respondents submit that in essence, the Respondent's applicable constitution mandatorily requires **every** branch official to **vacate** office after every 5 years from the date of election. That it necessarily follows therefore that by compulsion of the supreme rules of the Respondent, not a single official of the Respondent was legally entitled to hold office as at 4th May, 2006 and so where elections are declared void *ab initio*, it does not really matter who was on the register as at 4th May 2006. That no person was entitled to be in office after 5 years.

The Respondents submit that the Claimant's interpretation of the Hon. Musinga J's Judgment that the same reverted the status quo ante the elections of 4th May 2006 is incorrect. The Respondents submit that by dint of the aforesaid articles, and contrary to the Claimant's claim, not even the Honourable Court had power to and actually did not reinstate or confer on any officer of Homa-Bay Branch any position in the said Branch as at 4th May 2006. The Respondents submit that the letter dated 9th February 2010 annexed at page 36 of the Claimant's bundle was therefore a misapprehension of the Judgment of the Hon.

Musinga J. and had no effect in law contrary to the Claimant's assertions.

The Respondents submit that if the Claimant was interested in serving the membership and therefore earning a salary, he was free to do so in the elections consequent upon Musinga J.'s judgment. That he however chose not to and has instead chosen to dwell on DW1's eligibility to vie for and hold the said position.

The Respondents submit that the eligibility of DW1 to vie for the disputed or subsequent elections is not an issue pleaded in the claim nor is it relevant for the purpose of determining the issues in controversy herein. That in any event, it is *res judicata* and ought to have been raised in **Kisii HCCC No.59 of 2006**. The Respondents submit that regrettably the said digressions characterize the entire claim herein. That it is a claim for inflated and unexplained terminal benefits relating to a period when the deceased, by PW1's own admission and as confirmed by DW1, was not in office.

The Respondents submit that it was PW1's evidence in chief that the deceased did not resume office and neither did he contest the ensuing elections of 2011. That any doubt of the Claimant's absence from office is put to bed at pages 83 and 84 of the Respondent's bundle of documents which contains a record of handing-over minutes showing that the deceased did in fact physically vacate office. That when all is said and done the deceased did not provide any services to the Respondents between the year 2006 and 2010.

Issues for Determination

At the conclusion of the hearing, I instructed parties to agree on issues for determination and directed that should they could not agree, each party should frame its issues and limit its submissions to the issues as framed. The parties did not agree on issues each framed its issues as follows -

For the Claimant:

- 1) Was the deceased an elected official and employee of KNUT, Homa Bay Branch? And if yes, from when to when?
- 2) Was the KNUT Homa Bay branch election of 4/5/2006, contested and challenged by the deceased in court and were they declared irregular, null and void by the court on 8/2/2010? And if yes what are the legal consequences of the said judgement?
- 3) Did the KNUT Homa Bay branch comply with the said orders of the court and did the branch conduct fresh elections as ordered by the court on 8/2/2010? And if not what are the legal consequences?
- 4) Did the deceased exit from the union and from employment as a result of losing the elections of 4/5/2006 or did he retire from office after reaching the mandatory retirement age of 60 years? And if he exited through retirement who should have issued his retirement notice in 2010?
- 5) Was the deceased paid his retirement and or terminal benefits and what are the retirement and or terminal benefits? And as a consequence should the deceased be granted the remedies prayed for in the claim?
- 6) Did the respondents terminate the services of the deceased unlawfully and unfairly?

For the Respondent:

- i) Was the Claimant an official of the 1st and/or 2nd Respondent between the year 2006 and 2010?
- ii) Is the Claimant was entitled to salary and attendant benefits from the 1st and/or 2nd

Respondent between the year 2006 and 2010?

iii) What are the Claimant's lawful terminal benefits?

iv) Who should bear the costs of this suit?

In my opinion there is no dispute over the deceased's position while working with the 1st and 2nd Respondents up until the elections of 4th May, 2006. The issues for determination are therefore the following -

1. Whether the deceased was an official of the 1st and 2nd Respondents between 4th May, 2006 and 2010.

2. What are the deceased lawful terminal benefits.

3. Who should bear the costs of the suit.

Determination

I will now consider the issues as perceived by the court.

1. Whether the deceased was an official of the 1st and 2nd Respondents between 4th May, 2006 and 8th February, 2010

As has been confirmed by both parties, the deceased's last term in office expired on 4th May, 2006 when fresh elections were conducted. He lost the elections and contested the results of the elections in **Kisii High Court Civil Suit No.59 of 2006**. Upon filing suit the parties recorded a consent order that the Deceased and his team remain in office pending the hearing of an application he had filed together with his case contesting the elections. The said order which was recorded on 20th July, 2006 was vacated on 8th August 2006. As pointed out by the court in the ruling that vacated the consent orders, the Plaintiff's, among them the deceased, had "**no cover of the law to remain in office**". The court in the said ruling stated as follows at page 6 thereof -

"The defendants (1st, 2nd and 3rd) were elected and registered. They are the people to hold office of the 6th Respondent (Homa-Bay Branch) until the averments to challenge elections under the Trade Unions Act or other legal courses are exhausted. At this point this court will accept that after their elections, due process and returns were pursued ending in registration by the registrar of trade unions."

The said orders remained in force until the final determination of the case on 8th February, 2010 when Judgement was delivered. In the Judgement the Court stated as follows -

Are the Plaintiffs entitled to the reliefs sought in the plaint?

*In view of the irregularities in the voting process as herein above established, the results were rendered void **ab initio**. The elections of the 1st, 2nd and 3rd defendants are therefore nullified. Fresh elections should be conducted as soon as possible. Prayers numbers (iii) and (iv) in the plaint have been overtaken by events.*

The court did not return the deceased whose term had already expired on 4th May, 2016 to the office. There is no guarantee that if elections were held again immediately or at any time between 4th May, 2006 and 8th February, 2010 the deceased would have been re-elected to his former position as Branch Executive Secretary of the 2nd Respondent.

The argument of the Claimant that the deceased remained in office following the court's decision that elections of 4th May 2006 were null and void *ab initio* is not supported by either the judgment of

Musinga J. or the Ruling of Mwera J. On the contrary, Mwera J. explicitly ordered the deceased to vacate office. The Judge further vacated the consent order allowing the deceased to remain in office. Musinga J. on the other hand held that prayers (iii) and (iv) were overtaken by events. The prayers were that the court issues-

(iii) a permanent injunction restraining the 1st, 2nd and 3rd Defendants from assuming and/or acting or masquerading as the bona fide officials of the KNUT Homa Bay Branch as a result of the elections held on the 4th May 2006, and,

(iv) a permanent injunction restraining the 4th, 5th and 6th Defendants from declaring the 1st, 2nd and 3rd Defendants as the bona fide officials of the KNUT Homa Bay Branch, and/or dealing with the 1st, 2nd and 3rd Defendants as the bona fide officials of the KNUT Homa Bay Branch, whatsoever and howsoever.

The total sum of the orders in Kisii HCCC No. 59 of 2006 are that the deceased was ordered to vacate the office which he was holding pending determination of his case, and after determination of his case, the court refused to grant his prayers restraining the Defendants from holding office.

I therefore find that after 4th May 2006, the deceased was in office only between 20th July and 8th August, 2006. I further find that the team elected at the elections of 4th May 2010 were in office from the date on which they were registered as branch officials by the Registrar of Trade Unions on 8th May, 2006 and that they remained in office until the date of elections that were ordered in the Judgement of 8th February 2010. Apart from declaring the elections null and void ab initio in the said judgement, the Judge did not make any order that the persons then holding office should vacate or that the deceased should retain or be reinstated to his former office.

2. What are the deceased lawful terminal benefits

The Claimant prayed for payment of the following -

- (i) Reimbursement of Shs.349,016.25 being 31% pension not remitted to TSC.
- (ii) Accrued salaries/allowances not paid from May 2006 to 31/12/2010 in the sum of Shs.6,913,720.00.
- (iii) Retirement/terminal benefits not paid amounting to Shs.5,278,019 and lastly
- (iv) Pension based on KNUT salary scale in the sum of Shs.838,004.40.

The basis of the claim under (i) was the fact that the Claimant had to pay the same to TSC in order to qualify for his pension failing which the pension would be reduced. The Respondents however argue that the Claimant was paid pension in advance and it was his responsibility to remit the same to TSC. The Respondents referred the court to the Claimant's payslips which have an item on pension.

According to Claimant's Appendix 20 at page 110 of RE-AMENDED MEMORANDUM OF CLAIM filed on 28th July, 2014 the Branch of the Union is responsible to maintain the Executive Secretary's Pension Rights. The said provisions are contained at paragraph 5 of the TERMS AND CONDITIONS OF SERVICE FOR FULL TIME BRANCH EXECUTIVE SECRETARIES of the 1st Respondent and provide as follows -

The Branch of the Union shall maintain the Executive Secretary's Pension Rights by paying 25% of his/her basic salary to the Teachers' Pension Fund or to him/her direct. Where the Officer is paid pension direct, the Branch shall make sure that such officer contributes to the National Social Security Fund in accordance with the regulations governing contribution to this fund.

Further the letter dated 19th September, 2001 from TSC releasing the deceased from service stated at paragraph 2 thereof as follows -

It is the responsibility of your new employer to pay your salary. In addition, a pension contribution at the rate of 31% plus a WCPS ` contribution of 2% of your monthly salary calculated at TSC salary scales should be paid to maintain your pension. The remittance should be made in Bankers Cheque drawn in favour of the Director of Pension. However, the cheques should be sent to this office for initial schedule which indicated the amount due for period 1/6/97 to 11/12/2001

Again by letter dated 31st October, 2001 the 1st Respondent wrote to the deceased advising him to remit his pension dues. The letter reads as follows -

KNUT/HB/31/102/2001

October 31,2001

The Executive Secretary,

KNUT Homa Bay Branch

P O Box 97,

HOMA BAY.

Dear Brother Nyamburi,

RELEASE TO PRIVATE INSTITUTION:

Enclosed herein please find a self-explanatory letter ref. No.TSC/No.120394/184 of September 19, 2001 addressed to you through the Secretary General by the Teachers Service Commission (TSC) on the above subject.

Please, take the necessary action by remitting the 31% Pension Contributions to the TSC which your branch has not done since 1997 as per the attached schedule.

Yours faithfully,

(signed)

(L.K. MAJALI)

ACTING SECRETARY GENERAL

K.N.U.T.

CC.

The Chairman,

KNUT Homa Bay Branch

The Treasurer

KNUT Homa Bay Branch

I have perused the deceased's payslips at pages 24 and 25 of the RE-AMENDED MEMORANDUM OF CLAIM and confirmed that the earnings are composed of Basic Pay, Commuter, House Allowance, Allowance (Medical), and Pension. Page 95 of the 2nd Respondent's Response containing the particulars of payments to the deceased show that his pay for January, February, March and April was a net of Shs.71,993 made up as follows -

- Basic Salary Shs.26,870
- House Allowance Shs.28,105
- Medical Allowance Shs. 5,870
- Bill Car Allowance Shs. 2,687
- Pension Shs. 8,461

Total Shs.71,993

From the foregoing, I agree with the Respondents submissions that the deceased was paid pension together with his salary and it was his responsibility to remit the same to the TSC for onward transmission to Pensions Office as provided under the KNUT terms of service for Brnach Executive Secretaries. The deceased is therefore not entitled to a refund of Shs.349,016.25 that he paid to TSC as claimed.

(ii) The Claim for accrued salaries not paid from May 2006 to 31st December, 2010 in the sum of Shs.6,913,720 is not payable in view of the findings I have made above that the deceased was not in office during the said period.

(iii) The prayer for terminal benefits in the sum of Shs.5,278,019, has not been properly explained. In the written submissions a claim of Shs.2,899,454 has been made consisting of -

- (i) Gratuitous Provincial Payment Kshs.370,000/-
- (ii) Consultation allowance (advisory council) Kshs.375,000/-
- (iii) The unpaid leave 52 days (2004 & 2005) Kshs.173,186/-
- (iv) Service Gratuity up to 2002 Kshs.493,789/-
- (v) Service Gratuity for 2 years at 2.5% Kshs.280,000/-
- (vi) Service Gratuity (1998-2010) Kshs.1,207,479/-

Grand Total Kshs.2,899,454/-

Starting with Service Gratuity, the Claimant has annexed a letter dated 12th April 2006 forwarding a cheque for gratuity for the period January 2004 to April 2006 in the sum of 198,672.80 (less tax of Shs.59,601) leaving a balance of Shs.139,011.80 paid to deceased by cheque No.024947 dated 3rd May 2006. This therefore means that the deceased was paid all his service gratuity up to the last month worked and his claim is therefore without foundation.

The Claim for consultation has not been sufficiently explained. The reference to pages 12 and 21-22 of Respondents bundle does not prove that the deceased attended meetings of the Advisory Council or that if he attended, he was not paid.

The Claim for annual leave is the only one that I find to be valid. According to the deceased terms and conditions of employment as set out at page 110 of claimant's bundle of documents, Executive Secretaries

are entitled to 42 days annual leave per year. The Claimant has claimed 52 days leave for 2004 & 2005. The Respondents who are supposed to keep records of leave have not produced any records to show that the Claimant took leave as provided in section 10(6) and (7) of the Employment Act. There is also no express denial of the same in the Response to the Claim.

For these reasons I find that the Respondents have not controverted the claim of annual leave and award the Claimant the same. Based on his salary of Shs.71,993 per month, he is entitled to Shs.124,787.90.

The rest of the items claimed under this head have not been proved and are dismissed.

(iv) Pension

The Claimant prays for pension for the years 2006, 2007, 2008, 2009 and 2010 being a total sum of Shs.838,004.40. The Claimant relied on the 1st Respondent's Staff Terminal Benefits Scheme, and letters written by the deceased on 8th June, 2010.

I find that the Claimant is not entitled to pension for the period 2006 to 2010 as the deceased ceased being the Branch Executive Secretary on 4th May, 2006.

The Respondents have however conceded that the deceased is entitled to pension based on the formular provided in the Staff Terminal Benefits Scheme for the period up to May 2006. In their submissions the Respondents state as follows -

"i) Lumpsum payment

*From the outset, we wish to submit that the Claimant is only entitled to lumpsum terminal benefits calculated as per the KNUT staff terminal Benefits Scheme (**the scheme**) formulated by applicable KNUT head office in January, 2003. Clause 5.1 thereof as read together with clause 5.4 provides for the computation of lumpsum as follows;"*

'The lumpsum payable to a KNUT staff shall be based on two factors, the Total monthly emoluments in the last month of service (TME) and the total months of Service (TMS).'

For the deceased who was a full time elected branch official the TME was composed of Basic salary, House allowance, medical allowance, commuter allowance and entertainment allowance (as per Clause 5.2 of the scheme).

Similarly the TMS was calculated as per the total months of continuous uninterrupted service subject at all times to the limitation of 60 months for branch officials. According to the Respondents the formula for the calculation of the lump-sum is given as

TME x TMS

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As the deceased was first elected as Branch Executive Secretary in October, 1997 and served up to 4th May, 2006 which was a total of 103 months he was entitled to terminal benefits calculated as follows;

TME = 71993

TMS = 60 months

Hence 71,993 x 60 =431,958

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The above TME is based on the last salary and allowances of the deceased which according to the wage book at page 95 of the 2nd Respondent's bundle of documents was Kshs.71,993. The basic salary was Kshs.26,870, house allowance Kshs.28,105, medical allowance Kshs.5,870 and commuter allowance of Kshs.2,678 only. According to the Respondents the Claimant's computation of the TME @Kshs.146,825 at page 11 of the Memorandum of Claim is according to the Respondents manifestly erroneous and misleading. The Respondents further submit that the Claimant computed the TME based on the amendment of 1st July, 2007 after the deceased ceased being the Branch Executive Secretary.

I have looked at the Amendments referred to which are at pages 150 to 152 of the Claim and refer to "Anomalies in the KNUT Terminal Benefits Scheme of January 2003". There is no reference to an effective date of 1st July 2007 therein. Since these were "corrections" of anomalies and there is no reference to the effective date of the corrections, the only interpretation is that they take effect from the date of the circular which was the subject of the corrections which is January 2003. The Court also notes that the Respondents did not make any payments prior to the corrections being made and there is no justification for the Respondents making the tabulations in 2016 and not using corrections made in 2007.

For these reasons, it is my finding and I hold that the deceased was entitled to pension calculated as follows -

TME = 71,993

TMS = 103

Hence $71,993 \times 103 = 7,415,279.00$

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I therefore award the Claimant the sum of Shs.741,527.90 on account of pension.

The Claimant further prays for compensation and certificate of service. Compensation is only payable where there is unfair termination under section 49 of the Employment Act 2007. The deceased was not terminated unfairly and is not entitled to compensation. In any event the claim arose in 2006 before the enactment of the Act. On the claim for a certificate of service, it is the opinion of the court that it will serve no purpose as person for whose benefit it is made is deceased and it is specific to the person, thus the estate of the deceased has no use for it. I thus do not find it necessary for the Respondent to issue the same.

Conclusion

In conclusion the claim filed by the claimant herein fails with the exception of the prayers for Annual Leave and Pension which I award him as follows -

(i) Annual Leave Shs.124,787.90

(ii) Pension Shs.741,527.90

Total Shs.866,315.80

I also award the Claimant costs.

Judgement Dated, signed and delivered this 17th day of November, 2016

MAUREEN ONYANGO

JUDGE