



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 80 OF 2011**

**BETWEEN**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS .....CLAIMANT**

**VERSUS**

**KAPA OIL REFINERIES LIMITED .....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mr. Nyabena Advocate instructed by Nyabena Nyakundi & Company Advocates for the Claimant*

*Mr. Mogeni Advocate instructed by Kelvin Mogeni Advocates for the Respondent*

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**RULING**

1. The Claimant Union has made an Application dated 21<sup>st</sup> July 2014, seeking *inter alia* the following orders: -
  - a) The Court do certify that the decretal sum in respect of the Court Award in Cause Number 50 of 2000 is Kshs. 81,721,691.70 for purposes of execution;
  - b) The Respondent is ordered to pay the said decretal sum of Kshs. 81,721,691.70 within 14 days, in default execution to issue.
2. The Application is based on the Affidavit of the Claimant's General Secretary Mr. Boniface M. Kavuvi, sworn on the 21<sup>st</sup> July 2014. It is also supported by Affidavits of 462 individual Employees of the Respondent, sworn on the 21<sup>st</sup> July 2014.
3. Respondent's Chief Executive Officer Mr. Nitin Shah swore the Replied Affidavit on 2<sup>nd</sup> September 2011.

4. The Parties were heard on 13<sup>th</sup> March 2015.

5. The Award in the Industrial Court at Nairobi Cause Number 51 of 2000, was delivered by Hon. Justice Saeed Cockar [peace be upon him], on the 18<sup>th</sup> December 2000.

6. The Court awarded:-

a) General wage increase at 10% in the first year, and 12% in the second year.

b) Basic Wage at 10% above the General Wages Order applicable for Nairobi where most Employees live.

7. The Parties had a problem with interpreting the Award. The Claimant filed an Application for Interpretation under the Trade Disputes Act, registered at the Industrial Court at Nairobi as Cause Number 1-51 of 2000.

8. The Court interpreted its Award as below:-

a) An Employee recruited as General Labourer in 1999/ 2000 should have been paid Kshs. 3,174.60, this being 10% above the General Wages Order applicable for Nairobi. This would be the minimum wage rate for new Employees and such Employees would not be entitled to wage increase for that year.

b) Equally, any old Employee recruited as General Labourer as at January 1999, who was earning below Kshs. 3,174.70 [say Kshs. 3,060 after the general wage increase of 10%], should first be brought to the minimum of Kshs. 3,174.60 and then get the general wage increase of 10% which would bring him to Kshs. 3372.60.

c) Any General Labourer who was by June 1999 earning say Kshs. 3,402 [i.e. after general wage increase of 10%] which is above the applicable minimum, is not entitled to any other adjustment in his wages.

9. The Court attributed the misunderstanding of its Award to the Claimant Union Shop Stewards, who insisted on adjusting their wages to the year 2000 General Wage Order applicable for Nairobi, and then topping it up with 10% increase granted by the Court, which would result in higher than the intended increments. The Court concluded this stand by the Shop Stewards was the cause of the misapplications.

10. It was found however that 153 Employees, in implementing the Award, had been underpaid. It was ordered *that the wages with regard to the 153 Employees be adjusted and resultant arrears be paid.*

11. The Claimant Union, arguing that the Respondent had not implemented the Award of Justice Cockar as interpreted in Cause Number 1-51 of 2000, filed an Application in the High Court under the old regime regulating execution of Industrial Court Awards, asking the High Court to adopt the Award as its Judgment, to facilitate execution.

12. That Application eventually found its way back to the Industrial Court as Cause Number 80 of 2011, after the law had changed allowing the Industrial Court to execute its own decisions.

13. In a Ruling dated 3<sup>rd</sup> August 2011, this Court allowed the Claimant to execute the Award.

14. The Respondent then filed an Application seeking to review the Ruling of 3<sup>rd</sup> August 2011. The Respondent was able to convince the Court that:-

a) The Award resulting from the interpretation was restricted to 153 Employees.

- b) 74 of the 153 Employees had their wages adjusted in accordance with the Interpretive Ruling.
- c) Other Employees had left employment.
- d) Others had wages which were paid in consonance with the Award.
- e) Pay slips of the respective Employees availed to the Court captured an item indicated to be wage increment arising from Award in Cause 1-51 of 2000.
- f) In those pay slips, the Employees acknowledged payment, stating “*arrears paid in full and final payment of Ruling in Cause Number 51 of 2000.*”

15. The Court also found there were records indicating while the Respondent had shown it paid the arrears of wage increments, there was no conclusive proof that the entire obligation under the Award had been met. Parties had agreed years after the Court gave then an interpretation, that there were outstanding obligations which remained to be met.

16. In the Ruling dated 18<sup>th</sup> September 2013, the Court confirmed the Award of Justice Saeed Cockar as interpreted on 16<sup>th</sup> December 2003 as the Award of the Court for purposes of execution. The Claimant was allowed to extract decree and execute only with regard to any of the 153 Employee identified in the last orders of Justice Saeed Cockar. Further, the individual Employees on whose behalf execution is sought, were to swear individual Affidavits, and Parties, who the Court acknowledged are in a continuing relationship, were urged to discuss and agree on any other issues within their industrial relations framework.

17. This is the background, against which 462 Employees of the Respondent have come back to Court, asking to execute arrears of wages tabulated at Kshs. 81,721,691.70.

18. They state in their Affidavits, and their Counsel submits, that in Cause Number 51-2000, the Court granted them wage increment of 10% above the General Wages Order applicable in Nairobi. The basic wage for Nairobi was either Kshs. 3,412.80 or Kshs. 3,401.10. As a result of the failure by the Respondent to adjust these wages accordingly, there have arisen arrears computed up to this day, for each of the 462 Employees, at between Kshs. 133, 959 and Kshs. 153,695, which is amounting to Kshs. 81,721,691 with respect to which execution is sought.

19. Counsel for the Claimant submits the Respondent failed to adjust the Employees’ wages as granted in the Award of the Court. The Respondent raised the wage without adjusting the minimum applicable in Nairobi. This has resulted in arrears of wages. The Respondent has not shown it paid anything after the Ruling of this Court of September 2013. It is important the Respondent complies.

20. The Respondent replies that the argument advanced by the Claimant, is a rehash of the arguments made before Justice Cockar. It was a matter settled in the interpretive Ruling. The Court stated the Shop Stewards were adjusting the wages contrary to the Award of the Court. It was ruled all Employees, except the specified 153, were paid in terms of the Award. The Court in its last Ruling restricted the Claimant to pursuing possible execution against 153 Employees. The Claimant has defied the order of the Court, and expanded the list of the Grievants to 462.

21. The pay slips contained in the Replying Affidavit of Respondent’s CEO, show Employees were paid the wage increment, with specific reference made to Cause 1-51 of 2000. No Employee has contradicted these pay slips. The Claimant is attempting to impress the Court to pay nonexistent arrears, and compound these into subsequent CBAs. The misleading interpretation advanced by the Chief Industrial Relations Officer with respect to the Award, is the same position adopted by the Claimant today. The Claimant has gone back to the position which the Court rejected. The Respondent had accounted for all the 153 Employees with regard to implementation of the Award. Litigation must have an end. The Claimant must pay the costs of dragging back the Respondent to Court, and in doing so, disregarding the order of the Court.

*The Court finds:-*

22. This Court has tried to assist the Claimant Union in pursuing the arrears of wages of its Members, alleged be unpaid from 2000. The tone was set in the Ruling dated 3<sup>rd</sup> August 2011, when the Court granted the Claimant leave to execute, stating that the wage increments made were in the nature of verified or verifiable figures.

23. The Respondent made an Application for review, which demonstrated the Respondent had by and large, complied with the Award of the Court. The Court then set the parameters for further proceedings in the matter, to identified 153 Employees, whose details emerged from the interpretation exercise overseen by Justice Cockar.

24. The Claimant has instead of pursuing execution along this line, expanded the space to bring in 463 Employees. It was not intended by the Court in its Ruling of September 2013, to reopen the entire dispute that has been the subject of an Award, Interpretation, Review and other forms of judicial interventions in the form of execution proceedings.

25. What the Court makes of the present Application is that the Claimant has failed to establish any executable balance of the Award by Justice Cockar. The Court gave the Claimant an opportunity to bring forward specific names, with specific figures, out of the 153 Employees. There are no specific Employees of the 153, shown to have wage arrears. Instead, the original dispute is being replayed, with a whole 462 Employees, regurgitating an argument which was rejected by the Trial Court in 2003, seeking wage arrears.

26. The Claimant has not explained what the arrears captured in the pay slips of 2005, represent. There appears to be a persistent effort by the Claimant at misrepresentation of the Award of the Court, even after the various interpretations have been made by the Court, which should have put the matter to rest.

27. It was noted by the Court in the interpretation that the Shop Stewards were misleading the Employees by misinterpreting the Award. The Report of the Economist J.N. Macharia from the Labour Ministry dated 11<sup>th</sup> April 2003 similarly found fault with the Shop Stewards insistence on adjusting their wages based on the General Order for the year 2000 applicable for Nairobi, topped up with an increment of 10%, which would result in higher figures than when the correct General Order of 1999 was adopted. This misapplication is shown again in the Affidavits filed by the 462 Employees.

26. The figure of Kshs. 81,721,691.70 which is sought to by the Claimant Union is a result of this misapplication. It comprises alleged arrears based on the wrong interpretation of the Award. This wrong interpretation is made even after the Court gave the correct interpretation. The figure includes demands by Employees who were not on the reduced list of 153 identified to have some lingering questions on the implementation of the Award. The inclusion of the additional Employees, and revival of the same argument on the implementation of the Award, takes back the proceedings to year 2000, before Justice Cockar made the interpretive Ruling. Litigation must have an end. No evidence contradicting the pay slips produced by the Respondent has been availed to the Court by the Respondent. The Court has given the Claimant Union ample opportunity to show there is an executable decree which remains to be satisfied; this has not been shown. IT IS ORDERED:-

***[a] The Application filed by the Claimant dated 21<sup>st</sup> July 2014 is dismissed with costs to the Respondent.***

***[b] The file shall be transmitted back to the Registrar, Employment and Labour Relations Court in Nairobi for assessment of costs and any further interventions the Parties may desire.***

Dated and delivered at Mombasa this 16<sup>th</sup> day of June 2015

James Rika

Judge