



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 143 OF 2012

KENYA DOCK WORKERS UNIONCLAIMANT

VERSUS

KENYA PORTS AUTHORITYRESPONDENT

RULING

INTRODUCTION

Before the court is a Notice of Motion dated 30/10/2012 filed by the members of the Dock Workers Retirees Association seeking orders that:

1. The Respondent do file in court under oath, a record of the applicants employment earnings history showing:

(a) what the respondents earned for the period between January 1999 and June 2001.

(b) All the deductions effected on the earnings of the respondents between the period January 1999 to June 2001.

2 The parties to prepare and file in court a joint audit of the applicants entitlement as per the judgment herein within a specified period.

The Motion is supported by the affidavit of Pius Omondi Owuor sworn on 29/10/13. The application is supported by the claimant but the respondent has opposed it vide a replying affidavit sworn by Muthoni Gatere on 15/4/2013. The critical issue for determination is whether the Motion is properly before the court. Regrettably the court holds the opinion that the Motion is improper for reasons raised below.

BACKGROUND

On 15/4/2007 the predecessor of this court made an award in respect of a suit filed by the claimant against the respondent by which the claimant was seeking for the withdrawal of contributory pension scheme which the respondent had introduced on 1999. The ultimate prayer in the case was therefore to have the new scheme withdrawn, all the contribution refunded to the workers and revert to the non-

contributory pension scheme.

The court declined to grant the said request subject to the following conditions:

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- a. **that the contributions of the employees who are still in service for the period under consideration i.e. January 1999 to June 2001, be credited to their accounts under the contributory pension scheme and certificates issued to them.**
- b. **That the contributions of both the employees and the Authority for those employees who have since left employment be paid or refunded to them or their next of kin in accordance with the contributory pension scheme rules and regulations.**
- c. **That the Board of Trustees shall strictly enforce the contributory pension scheme so formulated and introduced in accordance with the law, especially the RBA Act, and the rules and regulations made thereunder, and/or contained in the Deed of Trust.”**

The foregoing decision was challenged unsuccessfully thereafter by both parties to the suit vide High Court Misc. Civil Appl. No. 995 of 2007 (Judicial Review) and Application for Review by the Industrial Court on 15/7/2008 by way of interpretation of Award by the Respondent and the claimant respectively.

In view of the foregoing background the court wonders why we should have the present Motion.

APPLICANTS CASE

The applicants seem to suggest that the Award of the default Industrial Court *supra* was not effected and that it is not possible to be effected, complied with or executed unless the orders being sought under the present Motion are granted and effected.

The applicants are said to have retired and joined Dock workers Retirees Association. The list of the members of the said Association is annexed to the supporting affidavit. The applicants are asking the court to order the respondent to avail the record of earning fore their members and thereafter a joint Audit be done between the applicants and the respondent preferably within 3 months of this ruling.

CLAIMANTS CASE

The claimant contents that the respondent has failed to comply with the Award under consideration. She maintains that the conduct by the respondent can only be described as contempt because despite good cash flow and convertible assets, the respondent has not complied with the Award.

RESPONDENT'S CASE

The respondent sees the Motion as an attempt to reopen the suit for a re- litigation. She however contents that the matter was concluded and the court is now *functus officio*. In addition, she contents that the applicant is a stranger to the suit having not applied to be enjoined as a party and lacks *locus standi* to bring the Motion which is a keen to execution of the Award under consideration on behalf of the claimant.

ANALYSIS AND DETERMINATION

The issues for determination arising out of the Motion, affidavit and the submissions filed are:

- a. **whether the Notice of Motion is competent or is properly before the court.**
- b. **Whether the court is *functus officio* with regard to the matters being raised in the said motion.**
- c. **Whether the motion has merits and should be allowed.**

Is the Motion competent or properly before the court

As submitted by the respondent and not denied by the applicant, the application is brought by a stranger to the suit. The applicant(s) is an entity different and possibly independent from the claimant. There is no evidence shown to prove that members of the applicant association were or all also members of the claimant.

Even if they were members of the claimant they cannot move the court in respect of proceedings wherein they have not been enjoined. Until the applicant is made a party to the suit herein, she lacks *locus standi* to participate in the proceeding in this case even if they have a lawful interest in it. To that extent the court agrees with the respondent that the Motion under consideration is incompetent and improperly before the court for want of *locus standi*.

In addition, a reading of the prayer 2 and 3 of the Motion, which the court copied verbatim above, one cannot fail notice the vagueness of the Motion. Prayer 2(a) and (b) talks of the records of earnings and deductions effected on the earnings of the respondents between January 1999 and June 2001. Such vagueness renders the applicant self-defeating and incapable of being granted even if the application had *locus standi*. Whose income did the applicant intend to get details?

On the other hand, prayer 3 of the Motion is also vague in that it does not specify which parties are to prepare and file in court a joint Audit. It is not clear whether the parties mentioned are the parties to the suit or the parties to the Motion or is it the Board of trustees of the scheme mentioned in Clause (c) of the Court's Award *supra*. The court finds the prayer vague and impossible to grant because it would not be clear which parties are to effect the orders.

For the foregoing reasons the court holds that the Motion dated 30/10/2012 is vague and filed by the strangers to the suit and consequently it is struck out. The court does not therefore need to consider the other issues for determination raised above.

As a way of parting shot however, the court appreciates the respondents' action of filing the records requested and showing the willingness to negotiate the matters only that the applicant was a stranger to the suit. The court would therefore encourage the parties to the suit to work with the pension scheme management to effect the Award by the defunct court and if need arises to move this court appropriately. Similarly the court directs the applicant to consult with the claimant and the respondent and also the pension scheme managers to see how the deadlock can be broken, and in the event they fail, this court believes that it is not *functus officio* in the matters raised in the present Motion if the proper procedure is followed in moving it.

DISPOSITION

The Notice of Motion is struck out for being vague and incompetent. Each party shall bear her own costs.

Dated, signed and delivered this 14th day of February 2014.

O. N. Makau

Judge