



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NO. 120 OF 2010**

KENYA UNION OF JOURNALISTS & ALLIED WORKERS.....CLAIMANT

VERSUS

NATION MEDIA GROUP LIMITED..... RESPONDENT

**RULING**

I delivered the Judgment in this case on 24<sup>th</sup> September 2013 in which I awarded the 1<sup>st</sup> Grievant shs.3,622,112.10 and the 2<sup>nd</sup> Grievant Shs.2,009,630.00. Being dissatisfied with decision the Respondent on 25<sup>th</sup> October 2013 filed a Notice of Motion under Certificate of Urgency seeking the following orders;

- a. The Application be certified urgent and service thereof be dispensed with in the first instance.
- b. Pending the inter parties hearing and determination of this Application, this Honourable court be pleased to grant a Stay of Execution of any decree resulting from the Award of the Industrial Court delivered by the Honourable Lady Justice Maureen Onyango on 24<sup>th</sup> September 2013.
- c. Pending the hearing and determination of an appeal against the award of the Industrial Court delivered by the Honourable Lady Justice Maureen Onyango on 24<sup>th</sup> September 2013, this Honourable Court be pleased to grant a stay of execution of any decree resulting from the said Award of the Industrial Court delivered by the Honourable Lady Justice Maureen Onyango on 24<sup>th</sup> September 2013.
- d. Costs of this application be provided for.

The grounds upon which the application is based are that;

1. That Award of the Industrial Court in this matter was delivered by the Honourable Lady Justice Maureen Onyango on 24<sup>th</sup> September 2013 in which Applicant herein was ordered to pay a grossly miscalculated sum of Kshs.5,631,742 to the claimant within 30 days of the award, failing which interest on the sum shall accrue at court rates.
2. The 30 day period is set to lapse on the 24<sup>th</sup> October 2013 after which the claimant will be at liberty to commence execution proceedings against the applicant and further, interest on the said sum of Kshs.5,631,742.00 shall begin to accrue at court rates.
3. The Applicant is dissatisfied with the entire Award of the Honourable Lady Justice Maureen Onyango delivered on 24<sup>th</sup> September 2013 and therefore intends to appeal to the Court of Appeal against the whole decision, which appeal has high chances of success for the following reasons:
  - i. Having listed the Grievants' entitlements under section 40 of the Employment Act and the Collective Bargaining Agreement, which list correctly did not include ex-gratia payment, the learned Judge erred in law and in fact by subsequently including ex-gratia payment in her

- calculation of the Grievants' entitlements to arrive at the total amount that they were entitled to;
- ii. In view of the inclusion of ex-gratia payments as an entitlement of the Grievants, the total amounts due to them according to the learned Judge's miscalculation increased by Kshs.2,300,365.65 and Kshs.959,917.00, thus totaling an erroneous colossal increase of Kshs.3,260,273.65.
  - iii. The learned Judge erred in law by finding that the Grievants were entitled to gratuity payments contrary to the express terms of the Employment Act and the collective Bargaining Agreement, thus further increasing the amounts due to the Grievants by Kshs.2,516,490.50 and Kshs.1,065,246.30.
  - iv. Although the Grievants had been paid packages far in excess of their statutory and Collective Bargaining Agreement entitlements, the above erroneous increases resulted in an Award that was far in excess of the Grievants' lawful entitlements.
4. The Applicant is apprehensive that unless restrained by this court, the claimant will proceed to extract a decree and execute the same against the Applicant.
  5. Unless this application is heard and determined urgently the applicant will suffer substantial loss and further, the said appeal, if successful, shall be rendered nugatory.
  6. This application has been made without unreasonable delay.
  7. It is in the interests of justice that this application be allowed.

The application was heard by me ex-parte and I granted stay pending inter-parties hearing of the application on 25<sup>th</sup> October 2013. On 7<sup>th</sup> November 2013 the Respondent was granted leave to argue the application by way of written submissions.

In its submissions the applicant .....

I have considered the application filed by the Respondent, the grounds thereof, the affidavit in support and the authorities filed by the Respondent. I have also considered the Claimant's replying affidavit and submissions.

My understanding of the respondent's position and grounds for the intended appeal, is that I erred in not including the ex-gratia payment in the terminal benefits for the Grievants, and further that I erred in including gratuity, and that by including both, ex-gratia and the gratuity, the amount awarded was inflated. The Respondent does not appear to have any objection to payment of what is provided for under the law and under the Collective Bargain Agreement.

The collective agreement provides for terminal benefits at clause 18 for redundancy and clause 20 for gratuity. Clause 18 provides as follows;

**18. REDUNDANCY**

- a. *The union shall be notified of an employer's intention to declare employees redundant by giving 30 days notice before such redundancy takes effect.*
- b. *The Principle of last in first out shall apply subject to merit, suitability and ability being equal.*
- c. *Employees declared redundant shall receive 15 days pay for every completed year of service by way of severance pay.*

Clause 20 provides as follows;

- a. *An employee shall be entitled to a minimum of 30 days pay for every completed year of service by way of gratuity to be based on the employee's wage at the time of termination of service, provided that an employee who is dismissed for misconduct will not be entitled to a gratuity.*
- b. *The effective date for working out the benefits under this scheme shall be 1<sup>st</sup> January 1966, i.e an employee shall not be entitled to any gratuity for service prior to 1<sup>st</sup> January 1996.*
- c. *The benefits under the scheme will only be paid up to September 1966 when the NSSF was introduced.*

***An employer who has been operating his own non-contributory Provident Fund Scheme for the benefit of his employees prior and subsequent to the implementation of the NSSF shall be exempt from the provision of his scheme, proved that if any payment from the non-contributory Provident fund Scheme is less than the amount of gratuity due under this scheme, no lesser total than the agreed gratuity shall be paid.***

The application of the CB Avis-a-vis the employment Act is provided for at Section 26 of the Employment Act which reads as follows;

## ***26. Basic minimum conditions of employment***

***(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.***

***(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.***

Ex gratia is not provided for under the law. Ex gratia is defined in the concise Oxford English dictionary (2011) edition as (with reference to payment) done from a sense of moral obligation rather than because of any legal requirement. Black's Law Dictionary 9<sup>th</sup> Edition defines ex gratia as a favour; not legally necessary and Ex gratia payment as "A payment not legally required".

What I did in this case was to apply the foregoing law. I considered what was provided for under the law and the CBA and determined that the CBA has better terms than the law. So I applied the redundancy clause and the gratuity clause of the CBA.

According to appendices NMG 2, 3, 4 and 5 of the Respondent's further Memorandum of response, it admitted paying the Grievants as follows;

### **ONESMUS KILONZO**

- i. 3 months notice Kshs.481,470
- ii. Severance pay Kshs.962,940
- iii. Exgratia Kshs.2,300,356.65
- iv. 41 leave days Kshs.219,336.35

### **REBECCA NANDWA**

- i. Notice Kshs.317,037
- ii. Ex gratia kshs.959,917.60
- iii. Leave pay Kshs.95,111.10

According to my interpretation of the law, Onesmus Kilonzo was not paid gratuity while Rebecca Nandwa was not paid severance pay and gratuity. Gratuity as provided for in the CBA is not payable only in the event of dismissal for misconduct. This therefore means that both Grievants were entitled to gratuity as they were terminated by way of redundancy and not by summary dismissal.

On the issue of ex-gratia the claimant had already paid the same. Since this was expressly ex-gratia payment, it did not replace payment of legally due terminal benefits. There was no prayer by the claimants to treat the ex gratia payment as legally due terminal benefits and I had no reason to do so. It is my opinion that it is too late for the respondent to ask for conversion of ex-gratia payment into a legally due terminal benefit. The respondent has referred me to the following authorities in support of the application for stay.

1. Bernard Ngugi v 945 Security Service (2013) eKLR.
2. Julius Nganga Mbugua v Rafiki DTM(K) LTD (2013)eKLR.
3. Beatrice Achieng Osir v Board of Trustees of Teleposta Pension schme (2012) eKLR.
4. Fred Obare v Kenyatta University & Another cause 240 of 2009.

The common thread in the first 3 decisions referred to is that the court declined to award service gratuity or service pay. I agree with those decisions and would have arrived at the same decisions had the cases been brought before me. The decisions are however not applicable to the present case.

Section 35 (5) and (6) of Employment Act provides as follows;

***(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.***

***(6) This section shall not apply where an employee is a member of—***

***(a) a registered pension or provident fund scheme under the Retirement Benefits Act;***

***(b) a gratuity or service pay scheme established under a collective***

***agreement;***

***(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and***

***(d) the National Social Security Fund.***

In the present case, the gratuity that I ordered to be paid is what is referred to at Section 35(b) as **gratuity or service pay scheme established under a Collective Bargaining Agreement**. The section states that where an employee is entitled to such gratuity, the employee is not entitled in addition, to the service pay provided under subsection 35(5). There is absolutely no contradiction in my decision as the gratuity I awarded is provided for in clause 20 of the CBA.

As for the principles to be satisfied by an applicant in an application for stay of execution pending appeal, the same are well set in both the law and in judicial precedents. The applicant must convince the court that it has;

1. A Prima facie case with probability of success.
2. There will be irreparable loss if stay is not granted.
3. If in doubt, on a balance of probabilities.

In the present case, the only grounds of appeal as stated in the claimants application are that this court erred in failing to include ex gratia in the total legal entitlements of the Grievants leading to a miscalculation of the Grievants entitlement by an additional kshs.2,300,356.65 and Kshs.959,917 for the 1<sup>st</sup> and 2<sup>nd</sup> Grievants respectively and by including gratuity.

I believe that both grounds are based on misapprehension of the law, that is, section 26, 35(5) and (6) and Section 40 of the Employment Act and ex-gratia payments. In my opinion ex-gratia payments are supposed to be paid outside the legal obligations of an employer. In this case the Respondent paid the 2 Grievants ex-gratia payment but failed to pay legal entitlements. They cannot substitute the ex-gratia payment for the legal entitlements of the Grievants. Having paid ex-gratia, the entitlement to the legal terminal benefits still remained outstanding. It is the outstanding legal entitlements that I awarded the grievants.

I find that the intended appeal by the Respondent does not disclose a prima facie case with probability of success as it is based on a misapprehension of the law.

In the case of MS Port Reitz MATERNITY V JAMES KARANGA KABIA CIVIL APPEAL NO. 63 of 1997 the court had this to say;

***“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”.***

In the present case the Grievants were awarded the sums contested by the Respondent on 24<sup>th</sup> September 2013. They are entitled to the fruits of their judgment unless there is a just cause to deprive them of the fruits of the award. I find no such cause in the present case.

Having found that there is no arguable appeal, I do not have to consider the other 2 grounds to be satisfied for an order of stay to be granted. The result is that I decline to order stay of execution and dismiss the application with costs.

The Respondent has leave to file its appeal and to seek stay in the Court of Appeal as the court may have an opinion different from mine.

Orders accordingly.

Read in open Court this 13<sup>th</sup> day of February 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Onesmus Kilonzo** for 1<sup>st</sup> Claimant

**Mwangi** for Respondents