



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 5 OF 2013**

**(Formerly Cause No. 1674 of 2011 at Nairobi)**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS  
AND ALLIED WORKERS.....CLAIMANT**

**-VERSUS-**

**BOARD OF GOVERNORS GILGIL DAY SECONDARY  
SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 7<sup>th</sup> March, 2014)

**RULING**

The court delivered the judgment in the case on 4.10.2013 in favour of the claimant against the respondent for:

- a. A declaration that the termination of the grievant's employment was unfair.
- b. The respondent to pay the grievant **Kshs.163,865.00** by 1.12.2013, failing interest to be payable at court rates from the date of the judgment till full payment.
- c. The respondent to pay costs of the case.

In satisfaction of order (b) of the judgment, it is not disputed that the learned Counsel for the respondent wrote to the claimant and the grievant the letter dated 26.11.2013 Ref. No. AG/NKR/EDU/1/13/20 conveying that cheque No. 000080 for Kshs.163,865.00 was ready and available for collection during working hours. It is not disputed that the grievant collected the cheque on 17.12.2013 in presence of the claimant's official.

A day after collecting the cheque, the claimant drafted the application dated 18.12.2013 and filed it under certificate of urgency on 20.12.2013. The application was brought under **section 16 of the Industrial Court Act 2011 and Rule 32 of the Industrial Court (Procedure) Rules 2010**. The claimant prayed for orders:

1. **That the honourable court does certify this application urgent and be dispensed with ex-parte in the first instance.**
2. **That the honourable court does set aside the award of this court dated 4.10.2013 pending the hearing and determination of the suit.**
3. **That the hearing and determination of this application be given priority as the grievant is**

**not in any gainful employment.**

4. **That the court be pleased to order any relief it may deem just and fit.**
5. **That the respondent bears the costs of the application.**

The application was supported by the attached affidavit of Albert Njeru. The main grounds urged to support the application are that the court failed to grant the grievant terminal dues as provided for in the collective agreement including service gratuity for continuous service of ten years as provided for in *clause 31* of the agreement and pay of three months' salary in lieu of the termination notice.

The respondent opposed the application by filing the grounds of opposition on 07.01.2014. The respondent stated:

1. That the motion is brought after inordinate delay. It was submitted that the application was filed after the respondent had been paid the judgment money.
2. The award had been satisfied or compromised and application was an afterthought. It was submitted that the claimant had received the pay in satisfaction of the judgment long before filing the application.
3. The application contravened the express provisions of the Civil Procedure Rules 2010 and the Industrial Court Rules. It was submitted that the application was frivolous, vexatious, and scandalous and brought in bad faith as was an abuse of court process. In particular, it was submitted that the claimant had failed to establish any of the prescribed grounds for review.

The court has considered the grounds and submissions as urged for the parties and makes the following findings.

1. In the judgment, the court stated thus, **“The court finds that the claimant has failed to establish the basis for claiming the salary arrears, underpayments and gratuity as the respondent has shown that the collective agreement did not apply. The court finds that the grievant being a member of the claimant, the claimant was entitled to sue but only on the basis of the agreement between the respondent and the grievant. Prayers founded upon the collective agreement will therefore fail. The grievant admitted being paid Kshs.86,000.00 as a token for her long service. The court has considered that pay and her membership at NSSF and finds that her claim for gratuity will fail.”** The court upholds that finding and further finds that the claimant has not established any basis for the court to find that the CBA applied whereas the grievant's employment was governed by an express contract concluded between the grievant and the respondent and which did not incorporate the CBA. The court upholds that the grievant could only sue on the express contract between the parties and not the collective agreement.
2. The court finds that the claimant's application was misconceived and an abuse of court process because it prayed for setting aside of the judgment after the claimant had benefited the fruits of the litigation as ordered in the judgment. In the opinion of the court, it was gross abuse of due process to seek to set aside the judgment in circumstances whereby the respondent had substantially shifted its position by complying with the judgment. Thus, as submitted for the respondent, the application meant to have been one for review was made, in the circumstances of this case, after inordinate delay.
3. Finally, while urging for review of the judgment, the court finds that the claimant did not in fact pray for review orders and the court finds that the application was misconceived. The court further finds that the claimant failed to establish any of the grounds prescribed in the rules that would justify the making of orders for review.

In conclusion, the application is dismissed with costs fixed at Kshs.10,000.00.

**Signed, dated and delivered** in court at **Nakuru** this **Friday**,

**7<sup>th</sup> March, 2014.**

**BYRAM ONGAYA**

**JUDGE**