



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

**CAUSE NO. 250 OF 2013**

**RASHID NDIEMA.....CLAIMANT**

**- VERSUS -**

**PRINCIPAL SECRETARY FOR HEALTH.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 9<sup>th</sup> May, 2014)

**JUDGMENT**

The claimant is **Rashid Ndiema**. He filed the statement of claim on 08.08.2013 through Geoffrey Otieno & Company Advocates. The claimant prayed for judgment against the respondents for a sum of Kshs.871,683.00 comprising of:

- a. **salary arrears for July 2009 – June 2010 Kshs.235,764.00;**
- b. **salary for July 2010 – August 2010 Kshs.39,294.00;**
- c. **outstanding one month salary for 2008 Kshs.20, 838.00;**
- d. **one month salary in lieu of 30 days notice Kshs.21,227.00;**
- e. **refund of house rent illegally deducted Kshs.69,600.00;**
- f. **special duty allowances from September, 2000 – 30<sup>th</sup> August, 2010 Kshs.476,910.00; and**
- g. **commuter allowance for July and August 2010 Kshs.8,000.00.**

The respondents filed the memorandum of defence on 24.09.2013 through Ms. Yvonne Khatambi, Litigation Counsel. The respondents prayed that the claimant's suit be dismissed with costs. The claimant gave evidence on 20.02.2014 and the respondent opted not to call any witness.

The only issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:

- a. The claimant has prayed for salary arrears for July, 2009 – June, 2010 being Kshs.235,764.00. The claimant testified that from end of June, 2009, his salary was stopped for no good reason till he left service at end of August, 2010. For that period, the claimant testified that he worked and was not issued with the necessary pay slips as expected. The respondents have not rebutted the claimant's evidence and the court finds that the claimant is entitled to **Kshs.235,764.00** as prayed for.
- b. The claimant has prayed for salary arrears for July, 2010 – August, 2010 being Kshs.39,294.00. The court finds that the claimant has already been awarded the pay as claimed in (a) above and the

prayer shall fail.

- c. The claimant prayed for outstanding one month salary for 2008 being Kshs.20,838.00. The claimant testified that his salary was stopped from March, 2008 for 4 months to end June, 2008 without explanation. He was not given payslips for the 4 months. He wrote to the 1<sup>st</sup> respondent the letter dated 20.3.2009 to complain and the salary was reinstated effective end of July, 2008. The salary arrears were paid at end of August, 2008 but only 3 months were paid as per the relevant pay slip. The claimant therefore claims the one month pay and the court finds that the claimant is entitled to **Kshs.20,838.00** as prayed for.
- d. The claimant prays for one month salary in lieu of 30 days notice being Kshs.21,227.00. The claimant testified that he became frustrated with unexplained stoppage of salaries and he voluntarily opted to apply to retire under the 50 year rule. His retirement followed that application and the court finds that the claimant is not entitled as prayed for.
- e. The claimant prayed for refund of house rent illegally deducted being Kshs.69,600.00. The claimant's case was that while serving at Loitoktok sub-district hospital, he occupied government housing accommodation from 1.10.2003 to 25.02.2007. Upon vacating the government house on 25.02.2007, the claimant moved to a private housing accommodation but the 1<sup>st</sup> respondent continued to deduct the claimant the rent for the government house from March, 2007 to June, 2009. The payslips show that the claimant continued to be deducted as testified and the court finds that the claimant is entitled to the refund of **Kshs.69,600.00** as prayed for.
- f. The claimant has prayed for special duty allowances from September, 2000 – 30<sup>th</sup> August, 2010 being Kshs.476,910.00. The claimant testified that he was employed as a clerical officer in the 1<sup>st</sup> respondent's service effective 1979. By the letter dated 27.9.2000, he was posted from the Provincial Medical Office in Nakuru to Londiani Hospital to act as the Health Administrative Officer III. He was to report effective Monday, 2.10.2000. By the letter dated 20.06.2003, the 1<sup>st</sup> respondent conveyed to the claimant that it had been decided that he be paid special duty allowance for performing duties of Health Administrative Officer III Job Group 'H' with effect from 1.7.2000 for a period of 12 months or until the post is substantively filled whichever was earlier. The letter stated that the resultant arrears would be paid in due course. Subsequently the claimant continued to be deployed as Acting Health Administrative Officer. The position was thereafter never substantively filled because the letters dated 18.10.2007 and 22.01.2008 on the claimant's supplementary list of documents show that the claimant continued to be deployed in the acting capacity as claimed. The court finds that the claimant rendered services as Acting Health Administrative Officer and as deployed by the 1<sup>st</sup> respondent to various health institutions. The court finds that he is entitled to the fruits of his labour. Thus, the court finds that the claimant is entitled to **Kshs.476,910.00** as prayed for.
- g. The claimant prayed for commuter allowance for July and August, 2010 Kshs.8,000.00. It was his testimony that the allowance had been introduced but he was not paid. There is no reason to doubt the claimant's evidence and in absence of contrary evidence, the court finds that the claimant is entitled to **Kshs.8,000.00** as prayed for.

It was submitted for the respondents that the claimant could not claim the special duty allowance because the cause of action was time barred under section 90 of the Employment Act, 2007. The court considers that claims by parties in the employment contract remain alive until the date of separation. In this case, the court finds that the claims remained alive until the separation at end of August, 2010. The suit was filed on 08.08.2013 and the court finds that the suit and the claims were not time barred as they accrued at end August, 2010. The court finds that the special duty allowance continued to accumulate until the date of the separation – it was a claim that effectively accrued at separation when the respondents failed to pay as expected. The court further holds that until the date of separation, it was open for the parties to resolve the disputes administratively and until the same did not resolve at separation did a valid cause of action accrue.

In conclusion, judgment is entered for the claimant against the respondents for:

- a. The respondent to pay the claimant **Kshs.811,112.00** by 1.06.2014, in default, the respondents to pay interest at court rates from the date of the suit 08.08.2013 till full payment.
- b. The respondents to pay costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday 9<sup>th</sup> May, 2014**.

**BYRAM ONGAYA**

**JUDGE**