REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 254 OF 2013

DAVID NYAGUDI OKOTH.....1ST CLAIMANT

SAMWEL OUMA OKEYO .....2ND CLAIMANT

- VERSUS -

CORN PRODUCTS KENYA LIMITED CURRENTLY INGREDION HOLDINGS LLC.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 27th June, 2014)

JUDGMENT

The claimants filed the memorandum of claims on 12.08.2013 through B. I. Otieno & Company Advocates. The claimants prayed for pay in lieu of termination notice, severance pay, annual leave, gratuity, house allowance, 12 months compensation under **section 49 (1) (c) of the Employment Act, 2007** and less the terminal dues already paid. For the 1st claimant, the sum claimed was Kshs.6,578,599.20 and for the 2nd claimant was Kshs.7,350,093.60 making a total of Kshs.13,928,692.80.

The respondent filed the statement of response on 11.09.2013 through Hamilton Harrison & Mathews Advocates and prayed that the claim be dismissed with costs. The reply to the memorandum of response was filed for the claimants on 17.10.2013.

The respondent opted to rely on the pleadings and documents on record without calling any witness. The 1st claimant testified to support the claimants' case.

The 1st claimant was employed by the respondent since February, 1990 as an engineering draughtsman. The 1st claimant worked for 22.5 years and was promoted to a project manager in 2007. The last payslip for the claimant for September, 2012 shows that the last basic salary was Kshs.85,677.00.

At the end of June 2012, the respondent placed a notice on the company notice board conveying that the company would close for 3 weeks for undertaking pest control measures and employees were to report back on 23.07.2012 at 10.00 o'clock. Upon reporting back as scheduled, the claimant testified that the workers were locked out and later allowed in the respondent's premises for a meeting. The respondent's managing director addressed the meeting and conveyed that the respondent was closing down. The

employees were given termination letters.

The claimants were given each a letter dated 23.07.2012 conveying that in light of the prevailing situation, the positions held by each of them would be re-evaluated in the coming weeks and it was likely that the positions will eventually be eliminated. The letter addressed to each claimant then continued to state as follows:

"This is no doubt a difficult situation for everyone and will result in a number of changes being effected. In consideration of your continuing to work for Corn Products Kenya Limited, you will receive in addition to your current remuneration, half a month of your present base salary for each month worked after August 23, 2012.

If your position is eliminated in the new structure, you will be notified 30 days in advance and you will receive the same severance package and outplacement conditions being received by the employees who have received notice of intention to terminate their contracts.

During this difficult time for all of us, we count on you to continue your work diligently. It is important to maintain the same level of service and support to our internal and external customers.

Business activities will resume July 26th at 10 am by a team briefing. Please make sure to be present at the indicated day and time.

Yours sincerely

CORN PRODUCTS KENYA LIMITED

Signed

Alan Bradley,

MANAGING DIRECTOR"

The claimants worked up to 30.9.2012 having been served with the notice of termination on 30.08.2012. The claimants refused to sign the document for computation of their respective final dues because the salary used to calculate the dues was not as per the total after the additional pay as promised and given in the letter dated 23.07.2012. The last payslip for September, 2012 showed that the respondent never honoured the remunerative increment and claimant's case was that the severance pay of 24 days for each year worked was not properly calculated because the additional salary was not taken into account.

The claimants' further case was that the respondent in computing the due pay for the severance pay, the respondent used a denominator of 30 days instead of 22 days that the claimants actually worked in a month and the claimants claimed that they were underpaid.

The claimants' further case was that the respondent failed to pay the due 15 % house allowance following the consolidation of the salary around early 2000. The claimants' case was that there was no understanding on the consolidation of pay. The claimants say they were subsequently paid the wrong computation through their bank accounts less bank loans that were deducted and remitted to the bank because the respondent had guaranteed the bank loans.

The court has considered the pleadings, the documents, evidence and the submissions on record and considers that the only issue for determination is whether the claimants are entitled to the remedies as prayed for. The court makes the following findings:

1. As submitted for the respondent, the claimants were drawing a monthly pay. Section 40(1) (g) of Employment Act, 2007 provides for minimum severance pay of 15 days pay for each completed year of service. The court holds that the payment is a function of the days in a year and not days

in a year actually worked by the employee. The court further holds that the pay of 24 days of thirty days in a month was more favourable severance pay than the statutory pay. In the circumstances, the court finds that the computation based on 30 days was fair and the claimants' claim for a computation based on 22 days will fail.

2. The second issue is whether the computation based on salary minus half salary awarded by the respondent in the letters of 23.07.2012 was fair. On this issue, the court upholds its holding in **Fredrick Ngari Muchira and 99 others –Versus- Pyrethrum Board of Kenya [2013]eKLR**, thus, **"Subsection 40(1) (f) is clear that the payment is on the basis of at least one month wage. Wage is not defined under the Act. The Black's Law Dictionary, 9th Edition defines wage as payment for labor or services based on time worked or quantity produced and for which the employer must withhold income tax. The meaning is elaborated when the phrase "minimum wage" is considered and which the Dictionary defines to mean lowest permissible hourly rate of compensation for labour. Thus, the court's opinion is that wage as used in the subsection means the net price the employer pays for labour as a factor of production and whose traditional measure is the amount of time worked or the output of production attributable to the individual employee. It is the further opinion of the court that work-related expenses such as those for transport, medical care or housing that may be paid to the employee by the employer as allowances or imprests or other form of payment do not form part of the wage; such are costs that facilitate labour as a factor of production towards production and do not constitute the consideration of price paid for labour and called wage or salary or more precisely, basic salary."** For the respondent, it was submitted that from the letter of 23.07.2012 it was clear that there would be paid to the claimants the then current remuneration but on top of that there would be another compensation of half monthly salary to represent the period after the redundancies. The court finds that in line with the respondent's submission, the further half pay was to cushion the claimants as compensation for the extra work done to satisfy the respondent's customers in circumstances that were difficult following the redundancy. Section 40(1) (g) provides for pay of severance pay on the basis of pay for each completed year of service. The court holds **"pay"** in absence of any agreement between the parties means **"wage"** and in this case, the court finds that there is no doubt that the additional pay was a wage, part of the price the respondent agreed to pay the claimants in view of the continued employment and at extra workload following the down-sizing. The court finds that invariably, the extra pay was not meant to meet expenses for attending work but was to compensate claimants for the extra workload. It was a wage. In this case, it is the opinion of the court that the half additional salary awarded was to be included as the basis of the computation of severance pay. The court finds that the claimants were entitled to the final dues calculated at the rate of their last wage being inclusive of the half additional salary as the base salary on termination.

3. The claimants have claimed that the termination was unfair and they have prayed for 12 months gross salaries. The court holds that a termination will be unfair if the reasons for termination are invalid or not genuine as envisaged in section 43 of the Act or the employee is not accorded fair procedure as envisaged in section 45 (2) (c) of the Act. In this case, redundancy situation as the reason for termination has not been disputed. Further, the respondent complied with the procedure of serving a notice as provided for in section 40 of the Act. Accordingly, the court finds that the termination was not unfair and the prayer for 12 months' gross salaries in compensation will fail.

4. The claimants claimed house allowance effective about 2000 when the respondent started paying a consolidated remuneration. The claimants did not urge that their gross pay reduced when the salary was consolidated and there is no evidence of dispute on the issue until at the time of the proceedings in this suit. The 1st claimant admitted that at no point did his gross salary reduce even after the consolidation of his pay. The court holds that the respondent was entitled to pay the claimants a consolidated pay inclusive of sufficient provision for housing accommodation. After consolidation, the claimants' gross pay never reduced and the court finds that as envisaged in section 31 (2) (a) the consolidated pay had a clear element intended to be used by the claimants as rent and enabled the claimants to obtain reasonable housing accommodation. Accordingly, the court finds that the claimants' claim for unpaid house allowance will fail.

5. As submitted for the respondent, the claimants were members of the National Social Security Fund and are not therefore entitled to service gratuity in view of the provisions of section 35 of the Employment Act, 2007.

6. The court finds that the claimants have not established the basis of the claim for three months pay in lieu of the termination notice. The court further finds that it is not disputed that the respondent served the claimants the relevant statutory notice. In the circumstances, the claim and prayer for pay in lieu of 3 months notice will fail.

7. As there was no dispute on the amount of money deducted from the claimants' final dues to satisfy the bank loans, the court finds that the respondent as the guarantor was entitled to deduct the loans from the claimants' final dues.

8. The claimants did not provide evidence on the claim for annual leave and both parties did not submit on that issue. The court finds that the claimants abandoned the claims and prayers on annual leave.

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

1. The declaration that the claimants are entitled to the final dues calculated at the base salary on termination of Kshs.128,515.50 for 1st claimant and Kshs.141,847.50 for the 2nd claimant.
2. The declaration that in computing the severance pay, the respondent was entitled to use the ratio of 24 days to 30 days.

3. The claimants to compute their respective final dues as per the declarations (1) and (2) above less the dues already paid to claimants and bank loans deducted and to serve the respondent within seven days for recording the due money on a mention date convenient to all the parties.

4. The respondent will pay the dues in (3) above by 15.08.2014, failing, interest at court rates will be payable from the effective date of the redundancy till full payment.

5. The respondent shall pay the claimants' costs of the suit.

Signed, dated and **delivered** in court at **Nakuru** this **Friday 27th June, 2014.**

BYRAM ONGAYA

JUDGE