



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 143 OF 2012

KENYA DOCKWORKERS UNIONCLAIMANT

VERSUS

KENYA PORTS AUTHORITYRESPONDENT

RULING

INTRODUCTION

What is before the court for determination is the Notice of Motion dated 21st February 2014 purportedly brought by the claimant. It is brought under Section 24 of the Labour Relations Act (LRA) and Article 35(1) (b) & 159(2) (b) (d) of the constitution of Kenya. It seeks the following orders:-

a. **That the Chief Accountant or the officer managing the employee records of the respondent do file in court under oath, a record of the earning history of the 122 members of the applicant showing:**

(i) **what each of the 122 members of the applicant earned for the period between January 1999 to June 2001.**

(ii) **All the deductions effected on the earnings of the 122 members of the applicant for the period between January 1999 to June 2001**

(b) That the Managing Director of Kenya Ports Authority be summoned in court to show;

(i) **The steps the respondent has taken to comply with the award of the predecessor to this court issued on 5/4/2007**

(ii) **reasons why the award issued on 5/4/2007 has not been complied with.**

(c) That this court do direct the Deputy Registrar to coordinate the calculations of the final award together with the accrued interest and report to the court within a limited period.

(d) That this court do issue directions on payment of the proceeds of the award as the justice of the case merits.

(e) That the costs of this application be provided for.

The Motion is founded on the grounds set out in the body of the Motion and it is supported by the affidavits of Siocha Okwemwa and Pius Omondi sworn on 21/2/2014. The gist of the Motion is that although the predecessor of this court made an award in favour of the grievants in this suit, the respondent has not honoured the said award to date especially for 122 members who have now grouped themselves under the umbrella of Dockworkers Retirees Association. The claimant needs the earning history for the 122 grievants for purposes of pursuing execution. According to the claimant the Deputy Registrar of this court should coordinate the calculation of the aggregate and place the same before the court for further orders in execution because this court has the jurisdiction to execute awards passed by the former Industrial Court.

The claimant has contended that this court should not be bound by legal technicalities. She concluded by contending that unless the orders sought are granted there may be a miscarriage of justice.

The respondent has opposed the Motion by replying affidavit of Muthoni Gatere sworn on 19/5/2014 which raises preliminary objection on two grounds. Firstly, the respondent contends that the Motion is incompetent because the supporting affidavits is sworn by an unauthorized person. According to her, Mr. Pius Omondi Owuor has not proved that he is an official of the claimant union or whether he has the requisite authority to swear the affidavit. Consequently the respondent prays that the Motion should be struck out because it is being prosecuted by a person who lacks authority to do so on behalf of the claimant union.

Secondly, the respondent contends that this court lacks jurisdiction to grant the orders sought because the matter was fully concluded and the court became *functus officio*. Consequently, according to the respondent the request for history of earnings for purposes of audit and calculation of the aggregate under the watch of the Deputy Registrar of this court would amount to reopening the trial which is a breach of the law.

In addition to the foregoing preliminary points of law, the respondent has contended that the legal obligation created under Section 74 of the Employment Act 2007 did not apply to this case because as at the time the cause of action arose the said law had not been enacted. According to her no other records other than what she filed on 15/4/2013 can be availed because all former records were lost after she migrated from manual system to digital system (ICT). She challenged the grievants to avail their employment contracts and payslips because they were issued to each of them indicating their salaries and contributions to the pension scheme.

Lastly the respondent contended that all other information about the control and management of the contributory pension scheme is known to the scheme itself and not the respondent. The motion was disposed of by written submissions filed by 3 separate law firms purportedly representing the claimant on one hand and the counsel on record for the respondent on the other hand. The said submissions cited important judicial precedents, which the court has considered.

ANALYSIS AND DETERMINATION

After carefully reading the Motion and the affidavits and upon considering the submissions filed by the counsel for the two sides, the following issues arose for determination

- 1. Whether the Motion is incompetent and bad in law**
- 2. whether the court lacks jurisdiction to grant the orders sought.**
- 3. Whether the Motion has merits and ought to be granted.**

Incompetent and bad in law

The respondent believes that the Motion is incompetent because it is supported by an affidavit sworn by an authorized person. Under Section 73(1) of the LRA a dispute under the said Act can only be

referred to this court in accordance with the rules of this court. Rule 6 of the ICPRs allows only the authorized persons to refer disputes to this court on behalf of Trade Unions. Section 2 of the LRA defines authorized representation of a trade union as the General Secretary of the union or any person appointed in writing by the authorized representative to perform the functions of the authorized representative.

In the present case, there is no evidence to prove that the Motion herein was initiated by the General Secretary for the claimant or another person appointed by the General Secretary in accordance with Section 2 of the LRA. On that ground alone the Motion is fatally incompetent and as the affidavits in support of the Motion is incompetent.

Jurisdiction to grant the orders sought

The respondent has contended that granting the orders would expose the court to two major errors. Firstly it would be reopening the case unprocedurally after judgment. According to the respondent the suit was heard to conclusion and as such the court becomes *functus officio*. Secondly, according to the respondent, granting the order for a joint audit and calculation of aggregate dues under the watch of the Deputy Registrar of the court would be abdicating from its judicial duty and transferring it to a forum which has no jurisdiction to determine the quantum of benefits payable to the grievants. The respondent cited **C.A NO. 60 of 2013 TELKOM KENYA LTD vs- JOHN OCHANDA on behalf of 996 others** where the Court of Appeal set aside a ruling of the High Court which granted orders similar to the one sought by the present Motion.

In the said cited case, the respondent, who was the plaintiff in the primary suit applied and obtained orders after judgment to compel the defendant to file an affidavit setting out in respect of each plaintiff the number of completed years of service and their monthly salary at the time of their retrenchment. In addition the defendant was ordered to file calculation of the severance pay due to each plaintiff at the rate of 2 ½ months salary for each completed year of service. The plaintiffs were given the liberty also to file their affidavit(s) after which the court was to make further orders. The Court of Appeal held that the court was in error in making such orders because it had become *functus officio* after pronouncing its judgment. In the appellate court's view, all the High Court could have done after judgment is only to review the same but not to make orders whose effect was to reopen the trial.

What the Court of Appeal was saying in other words, and this court is bound, is that after a court pronounces its orders over a dispute it lacks jurisdiction over the same dispute except for matters of review of the said decision. All other grievances in respect of the decision should be dealt with by escalations to the appellate court.

In the same case (*Telkom kenya Ltd*) the Court of Appeal cited its own decision in ***Kenya Revenue Authority -vs- Menginya Salim Murgani [2010]e KLR*** where the court held that both the award and the determination quantum of damages is a judicial function which cannot be delegated and that a judgment must be complete and conclusive when pronounced and it cannot be left to the deputy Registrar to perfect. The reasoning of the Court of Appeal was that assessment of damages is not a ministerial act and any judgment without assessment of damages would be incomplete and patently a nullity. Without belabouring the point, the orders sought by the present Motion herein have the effect of reopening trial as it happened in the ***Telkom Kenya Ltd Case***. Going by decision in the said ***Telkom Kenya case*** this court is already *functus officio* and lack jurisdiction to grant the orders sought. In addition, even if the jurisdiction existed, which is not the case, any order directing the deputy registrar of the court to over see the requested joint audit and calculate the claimants aggregate dues would be illegal and a nullity because that is not a ministerial act but a judicial one.

Consequently, and in addition to the earlier finding that the Motion is incompetent the court further finds that it lacks jurisdiction to grant the orders sought by the claimant's Motion and has no other option but to down its tools without going to the merits of the Motion.

DISPOSITION

In consideration of all the matters stated above, the Notice of Motion dated 21/2/2014 is struck out for being incompetent and for this courts lack of jurisdiction. No orders as to costs.

Dated, Signed and delivered this 25th July 2014.

O. N. Makau

Judge