



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

**PETITION NO 42 OF 2013**

**KENNEDY OMENDA .....1ST PETITIONER**  
**EVANS OMONDI.....2ND PETITIONER**  
**JULIUS NZIOKI.....3RD PETITIONER**  
**BERNARD MULI.....4TH PETITIONER**  
**JAMES SEDA.....5TH PETITIONER**  
**LILIAN KIPTOO.....6TH PETITIONER**  
**JOHNSON MIANO.....7TH PETITIONER**  
**CYRIL WAYONGO.....8TH PETITIONER**  
**NELSON MUTEA.....9TH PETITIONER**  
**BEDAN THENDU.....10TH PETITIONER**  
**CAROLYN MBITI.....11TH PETITIONER**  
**ELIUD WANGA.....12TH PETITIONER**  
**MANOAH YUKA.....13TH PETITIONER**  
**DANISH OKATCH.....14TH PETITIONER**  
**JOHN WAWERU.....15TH PETITIONER**  
**JOHN NDAMBUKI.....16TH PETITIONER**  
**MUTIA MWANIKWA.....17TH PETITIONER**  
**FRED AMARA.....18TH PETITIONER**  
**RICHARD CHEROP.....19TH PETITIONER**

**VS**

**KENYA CIVIL AVIATION AUTHORITY.....RESPONDENT**

## JUDGMENT

### Introduction

1. The Petitioners are all employees of Kenya Civil Aviation Authority, the Respondent herein. They came to Court by way of a Petition and a contemporaneous Notice of Motion under certificate of urgency all dated 15th November 2013 and filed in Court on even date.
2. The matter first came before me *ex parte* on 19th November 2013 when I was the Duty Judge and I granted interim orders restraining the Respondent from charging enhanced rents with respect to houses occupied by the Petitioners. By consent, the parties agreed that the interim orders be extended and the main Petition be heard on priority basis.

### The Petition

3. In their Petition, the Petitioners state that by virtue of being employees of the Respondent, they are housed at the East African School of Aviation, a facility owned by the Respondent. The Respondent pays house allowance to all its employees and those who are housed pay rent to the Respondent through a check off system.
4. On 28th May 2012, the Respondent issued a notice for rent review and subsequently tabulated and commenced charging increased rent in arrears dating back to August 2012. The Petitioners state that the houses they occupy are in a state of disrepair and the increased rent is therefore not justified.
5. They further plead that the Respondent's decision to charge increased rent only with respect to the houses at the East African School of Aviation while not effecting the increment on other units is discriminatory and unfair and in contravention of Articles 27, 41, 43 and 47 of the Constitution of Kenya, 2010.
6. The Petitioners seek the following reliefs:
  - a. A declaration that the decision by the Respondent to increase rent is contrary to Articles 27, 43 and 47 of the Constitution of Kenya, 2010;
  - b. A declaration that the Respondent has violated the provisions of Article 2 of the Constitution of Kenya, 2010 and International Labour Organisation (ILO) conventions and standards;
  - c. An order compelling the Respondent to stop charging increased rent in respect of its premises at the East African School of Aviation;
  - d. An order compelling the Respondent to refund to the Petitioners any rent deducted from their salaries pursuant to increment of rent effected in the year 2012.

### The Respondent's Reply

7. In a Replying Affidavit sworn by the Respondent's Director in Charge of Corporate Affairs, Joseph Kiptoo on 27th November 2013, it is deponed that housing is not an entitlement due to employees who are paid house allowance. According to the Respondent, all its employees inclusive of the Petitioners are paid competitive house allowances.
8. Moreover, the rents charged to the employees who occupy the Respondent's premises are much lower than the house allowances paid to these employees. Additionally, the Respondent does not house all its employees as only 88 out of 653 employees representing 13% of the establishment are housed at the East African School of Aviation.

9. The Respondent's Human Resource Manual at paragraph E19 provides that available institutional houses are to be leased out to employees of the Respondent on a business basis. Kiptoo further depones that the rent increment was necessitated by the need to realise the Respondent's strategic plan.

10. In preparation for the rent increment, the Respondent asked the Ministry of Housing to undertake a rental assessment of its houses with a view to recommending a fair market rental value. An inspection was undertaken and a report submitted to the Respondent on 3rd January 2012. The rent recommended by the report was the basis upon which the Respondent arrived at the increased rent. The rent increment was however phased out to allow for refurbishment of the houses and to give the Petitioners room to adjust comfortably.

11. The Respondent procured the services of independent contractors to carry out renovations in the houses as recommended by the Ministry of Housing. Kiptoo goes on to depone that the Petitioners' resistance to the new rents is an impediment to the Respondent's resolve to renovate the houses which are admittedly in a state of disrepair.

12. In a further affidavit sworn on 22nd May 2014, Kiptoo depones that the Respondent had no funds set aside for renovation of staff houses. The decision to increase rent was therefore taken to enable the Respondent meet its obligations. The income from the rent increment was captured in the Respondent's books of account as a debt owed by the employees to the Respondent.

### **Findings and Determination**

13. By the time the Petition came up for hearing, the Respondent had renovated some of the houses occupied by the Petitioners and the parties were agreeable that the new rents were chargeable on the renovated houses. Consequently, the only issue pending determination by the Court has to do with rent arrears from August 2012.

14. The Petitioners urge the Court to find that the enhanced rents could not be levied prior to renovation of the houses in question. Mr. Nyamu, Counsel for the Petitioners submitted that in effecting the new rents, the Respondent departed from the recommendations by the Ministry of Housing that the houses be renovated before the new rents were levied. The increased rents were only applicable upon renovation of the houses in accordance with the Respondent's own rent assessment reports.

15. On its part, the Respondent admits that the houses occupied by the Petitioners have been in a state of disrepair and adds that its decision to levy increased rents was informed by the need to undertake renovations on these houses. The Respondent further states that the house allowances paid to the Petitioners are in fact much higher than the enhanced rents charged to them.

16. Section 31 of the Employment Act, 2007 obligates an employer to either house its employees or to pay them a reasonable house allowance. In the instant case, it would appear that the Respondent's policy is to pay house allowance to all its employees and then collect rent from those it houses through a check off system. This is a peculiar arrangement which presents unique challenges in the event of a disagreement such as the one before the Court.

17. The Respondent's defence suggests that because it pays its employees a reasonably high house allowance, then the Petitioners should not complain about rent increment. I find neither a legal nor a business basis for this argument. While the level of house allowances paid to employees is a factor of employee remuneration, rent charged is based on the physical condition of the premises and prevailing market rates. In my view, there is no nexus between the two.

18. The Respondent also cites the need to raise funds for renovation of the houses as a justification for levying enhanced rents. To my mind, this argument presents a case of a landlord taking capital from a tenant without the tenant's consent and without any capital benefit accruing

to the tenant.

19. Section 17 of the Employment Act, 2007 provides for protection of employee salaries and the only lawful instances in which deductions may be made are provided under Section 19 of the Act. In my view, recovery of increased rent is not one of the instances contemplated under Section 19.

20. In support of its decision to charge the enhanced rents, the Respondent relies on a report and rental assessment prepared by the Ministry of Housing. A perusal of this report however reveals that the recommended rents were to be charged upon full refurbishment of the houses. Yet, the Respondent sought to charge these rents without first undertaking refurbishment as recommended. In fact, the Respondent sought to raise funds for the refurbishment by charging the new rents. While appreciating the Respondent's predicament, the Court was unable to find any basis to support the Respondent's action.

21. Citing the Court of Appeal decision in *East African Cables Limited Vs Public Procurement Complaints Review and Appeals Board [2007] eKLR* Counsel for the Respondent, Mr. Simiyu asked the Court to consider the consequences of its decision. In particular, Counsel asked the Court to take into account the Respondent's financial situation and the fact that a number of employees had accepted to pay the rent arrears on account of enhanced rents.

22. This Court is fully aware that the consequences of its decisions must always be in view. However, Courts do not run institutions and management must take responsibility for its decisions. From the evidence presented before the Court, the decision to charge enhanced rents prior to renovation of the subject houses was taken without any legal or business basis and no matter how hard the Court tries, it cannot create a justification for the Respondent's action.

23. In view of the foregoing, the Court finds that the Respondent's decision to charge enhanced rents to the Petitioners prior to renovation of the subject houses was unlawful. The staff debts thus created are nullified and the Respondent is directed to refund to the Petitioners any monies recovered on account thereof.

24. The Respondent will pay the costs of this Petition.

Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2014**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 25TH DAY OF SEPTEMBER 2014**

**MAUREEN ONYANGO**

**JUDGE**

**Appearance:**

Mr. Nyamu for the Petitioners

Mr. Simiyu for the Respondent