



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 791 (N) OF 2009

BETWEEN

ELLY OUMA HONGO..... CLAIMANT

VERSUS

KENYA NATIONAL UNION OF TEACHERS (KISUMU EAST BRANCH)...1ST RESPONDENT

KENYA NATIONAL UNION OF TEACHERS.....2ND RESPONDENT

RULING

1. The Claimant Elly Ouma Hongo obtained an Award against the two Respondents on 25th February 2011. The Court Ordered:-

- (a) The Claimant's suspension is hereby lifted, and the Claimant is to report back to his office at the Respondent (1st), with effect from the date of the delivery of this Award.
- (b) The claimant be paid all his salaries to-date, at the rate of Kshs.74,771 per month, from the date of suspension.
- (c) The Monetary Award be satisfied within 60 days from the date of the delivery of this Award.
- (d) Parties will pay their own costs.

2. The Respondents terminated the Claimants' contract on 10th May 2011. The Claimant initiated a second Claim, *Industrial Court Cause No. 897 of 2011* against the Respondents, claiming for unfair and unlawful termination.

3. On 16th March 2012, the Parties recorded settlement in Court on both Claims. The terms of settlement were agreed as follows:-

- The attachment of the 1st Respondent's Account be and is hereby lifted forthwith.
- The Claimant ceased being an Employee of Kenya National Union of Teachers Kisumu East Branch, with effect from 1st March 2012.
- *Industrial Court Case No. 791 (N) of 2009 and No. 897 of 2011*, and any other suit or cause pending between the Claimant and the Respondents, be and are hereby marked as settled, on the following terms:-

- (i) The 1st Respondent to pay to the Claimant Kshs.3,016,149 in full and final settlement of the Claim.
- (ii) The said amount be liquidated in monthly instalments of Kshs.100,000, with effect from 1st March 2012 and, thereafter on the 1st day of each month until payment in full.
- (iii) In default of any one instalment, balance as at the default date becomes due and the Claimant be at liberty to execute decree for the same by way of garnishee proceedings.
- (iv) Costs incurred by the garnishee be paid by the 1st Respondent.

4. In an Application for Review dated 29th November 2013, the Claimant returned to Court, alleging the consent recorded by the Parties, incorrectly adopted the Staff Terminal Benefits Scheme in place before the year 2003. The correct Scheme was the 2003 Scheme, which computed Terminal benefits on the basis of the number of years worked, up to a maximum of 25 years. He claims he is entitled to a balance of Kshs.2,723,232, based on the post - 2003 KNUT Scheme. He prays the Court to review the Consent Award, and grant him the enhanced terminal benefits.

5. The Parties filed their submissions on this Application, and the Claimant's Advocate made a brief address to the Court, to underscore his position on review. The Claimant relied on this Court's Award in *Cause No. 282 of 2012 between George Wesonga Ojwang' v. KNUT (2014) e-KLR*, in which the Court endorsed the post – 2003 KNUT Scheme.

The Court Finds and Orders:-

6. The Award in Cause No. 282 of 2012 was based on an agreement between the Claimant and the Respondent therein, and is of little relevance to the Claimant in the present proceedings. The Parties in Cause No. 282 of 2012 expressly adopted the number of years worked up to a maximum of 25 years, in arriving at the retirement benefits due to Mr. Ojwang'.

7. In the consent recorded in this Court between Mr. Hongo and KNUT, there was no such agreement as was the case in Cause No. 282 of 2012. The Parties sat and agreed on specific terms of settlement in an on-going litigation. They were not bound to follow either the pre or post – 2003 KNUT Terminal Benefits Schemes. The Claimant was offered terms of an out-of-Court settlement, which he deemed to be attractive. He accepted this, and a valid Consent Award ensued. He entered into a contract with the Respondents which has been given judicial endorsement, becoming the decision of the Court. It is not proper for him to vex the Respondents with fresh claims.

8. The Claimant was initially granted an order by this Court to return to work, and receive back pay from the date of suspension. He reported back, claimed to be frustrated by the Employer, and eventually left employment on termination. He filed Claim for unfair and unlawful termination, and agreed terms of settlement whereof he has received Kshs.3,016,149. There is no reason to pray the Court to once again intervene, and assist him to extract more money from the Respondents.

9. A Consent Award can only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or any other ground which would invalidate a contract. The Claimant has not shown common mistake, misrepresentation or fraud, or any other ground which would invalidate a contract, leading to the Consent Award registered on 16th March 2012.

10. Lastly, the Claimant has failed to show there is a discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the Claimant's knowledge, at the time the Consent was adopted. There is no error, mistake and the Consent Award did not breach any written Law. No clarification of the Consent Award is sought, the Parties themselves having authored the terms of settlement. There is no sufficient reason given by the Claimant, to warrant interference with the Consent Award. In sum, the Claimant has not established any of the matters articulated under Rule 32 of the

Industrial Court (Procedure) Rules 2010, to merit review. ***The Application dated 29th November 2013, is declined with no order on the costs.***

Dated and delivered at Nairobi this 17th day of September 2014

James Rika

Judge