

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION NO. 37 OF 2013
PAUL MASINDE SIMIDI.....PETITIONER

VERSUS

**NATIONAL OIL CORPORATION OF
KENYA LIMITED.....1ST RESPONDENT/APPLICANT**

SUMAYYA ATHMANI HASSAN..... 2ND RESPONDENT

RULING

1. The 1st respondent/applicant filed a successful appeal before the Court of Appeal in a judgment delivered on 6th December, 2019 reversing the judgment by Linnet Ndolo, J. delivered on 30/11/2015 in which the respondent was awarded and paid Kshs.5,644,317.22 together with interest at Court rates of 12% per annum from date of payment until payment in full.
2. The application is based on grounds set out on the face of the application and buttressed in the supporting affidavit of Gladys Kelechi, Corporation Secretary of the National Oil Corporation of Kenya, the applicant.
3. The application is opposed by the petitioner/respondent, in a replying affidavit sworn by the respondent on 30/9/2020 in which he deposes *inter alia* that the contents of the application as set out in paragraph 1, and 2 of the application and paragraphs 3,4,5,8,9,10 and 11 of the Supporting affidavit are not in issue. In other words the respondent

admits having been paid the decretal sum and having lost the appeal before the Court of Appeal.

4. However, the respondent states that a sum of Kshs.2,322,562.22 out of the total sum paid were terminal dues which were payable to him without a Court Order and which sum was arrived at by Consent of the parties and was therefore a contract between the parties.
5. Further, the Court of Appeal did not annul or set aside the said contract of Kshs.2,322,562.22.
6. That the Court of Appeal did not expressly Order that the respondent refund the lawfully paid and contractual terminal dues.
7. Furthermore, the Court of Appeal did not expressly order that the respondent to refund the Kshs.3 million damages awarded by Ndolo, J.
8. That the application has no basis in law, is fatally incompetent and it be dismissed with costs.
9. The applicant relies on Section 13 and 20(3) (viii) of the Employment and Labour Relations Act, 2011, Sections 34 and 91 of the Civil Procedure Act and Order 9 Rule 9 of the Civil Procedure Rules, 2010.

10. The applicant did not cite any authority determined by Courts in Kenya or elsewhere on the issue of refund of a decretal sum duly paid upon judgment which judgment is subsequently reversed upon appeal.
11. Section 13 of the Employment & Labour Relations Court Act, 2011 as amended reads:-

"Enforcement of Court Orders.

A judgment, award, Order or decree of the Court shall be enforceable in accordance with the rules made under the Civil Procedure Act."

And Section 20(3) of the said Employment & Labour Relations Court Act, 2011 was deleted by Act No. 18 of 2018.

12. On the other hand, Section 34 and 91 of the Civil Procedure Act reads:-

"34(1) All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.

13. Whereas Section 91 provides:-

" Application for restitution

- (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied

on or reversed and for this purpose the Court may make any orders, including Orders for the refund of costs and for the payment of interest, damage, compensation and mesne profits, which are consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1)”

14. The Court has considered the deposition and respective submissions by the parties and has carefully considered the judgment by the Employment & Labour Relations Court, per Ndolo, J. delivered on 30/11/2015 in view of the submissions made by the parties and the decision by the Court of Appeal delivered on 6/12/2019 and has arrived at the following conclusion:-

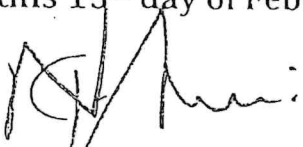
- (a) The lower Court awarded the claimant/respondent Kshs,3,000,000 in general damages.**
- (b) Terminal benefits computed by the parties at Kshs.2,322,562.22.**
- (c) Award of Certificate of Service.**
- (d) Costs of the suit.**

15. The Court of Appeal on the other hand made the following final Orders:-

- (i) The appeal is allowed.**
- (ii) The judgment of the lower Court is set aside in its entirety.**
- (iii) The Cross -Appeal is dismissed.**
- (iv) The 1st respondent shall pay the costs of this appeal and the costs in respect of the cross-appeal.**

16. It is pertinently clear from the foregoing that the entire judgment and decree of the Court Aquo was set aside. The effect of the Order of the Court of Appeal was to nullify the entire award by the lower Court including the award of damages, terminal benefits; grant of Certificate of Service and granted costs of the suit before the lower Court and at the Appeal Court to the appellant/applicant.
17. Accordingly, the applicant is entitled to restitution of the entire decretal sum and interest at Court rates from date of payment till payment in full.
18. The Court therefore allows the application and makes the following Orders:-
- (a) **The Petitioner/Respondent Paul Masinde Simidi to restitute the entire decretal sum paid to him by the 1st respondent /applicant National Oil Corporation of Kenya Limited pursuant to the judgment of Ndolo, J. delivered on 30/11/2015 in the sum of Kshs.5,644,317.22 together with interest at Court rates of 12% per annum from date of payment until payment in full.**

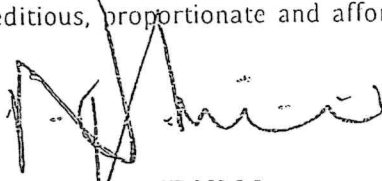
Dated and delivered at Nairobi this 15th day of February, 2021.


MATHEWS N. NDUMA
JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with *Order 21 rule 1 of the Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by *Article 159(2)(d)* of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under *Article 48* of the Constitution and the

provisions of *Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



MATHEWS N. NDUMA
JUDGE

Appearances

1st respondent/applicant-Mr. Kisaka

Mr. Gachuba for petitioner/respondent

Ekale Court clerk.

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

INDUSTRIAL COURT PETITION NO. 37 OF 2013

BETWEEN

PAUL MASINDE SIMIDIPETITIONER

AND

NATIONAL OIL CORPORATION OF KENYA LIMITED.....1ST RESPONDENT/APPLICANT

SUMAYYA ATHMANI HASSAN.....2ND RESPONDENT

(IN COURT ON 15TH FEBRUARY 2021 BEFORE THE HONOURABLE JUSTICE MATHEWS
N. NDUMA)

DECREE

APPLICATION FOR

- (a) The firm of Wekesa & Simiyu Advocates be granted leave to act for the 1st Respondent/Applicant in this Petition in the place of Iseme, Kamau & Maema Advocates.
- (b) The Petitioner/Respondent, Paul Masinde Simidi and or his lawyers Paul Mungla & Co. Advocates do make restitution and refund to the applicant, the sum of Kshs. 5,644,317.22/= together with interest at court rates of 12% per annum from the date of payment until payment in full, being monies obtained by them from the 1st Respondent/Applicant pursuant to a Judgment and order of Linnet Ndolo, J. delivered on 30th November, 2015 in this Petition which Petition was dismissed by the Court of Appeal by the Judgment and Order delivered on 6th December, 2019.
- (c) The said restitution and/or payments be made within thirty (30) days failure to which 1st Respondent/Applicant shall execute for Kshs. 5,644,317.22/= and interest thereon at court rates.
- (d) Costs of this Application.

BY THE RULING of this Court dated, signed and delivered on the 15th day of February, 2021 by Honourable Mr. Justice Mathews N. Nduma

1. THAT the Petitioner/Respondent Paul Masinde Simidi to restitute the entire decretal sum paid to him by the 1st Respondent/Applicant National Oil Corporation of Kenya Limited pursuant to the judgment of Ndolo, J. delivered on 30/11/2015 in the sum of Kshs. 5,644,317.22 together with interest at court rates of 12% per annum from date of payment until payment in full.

Given under my Hand and the Seal of the Court this 15th day February, 2021

ISSUED at Nairobi this 16th day of May 2021



Deputy Registrar

EMPLOYMENT AND LABOUR RELATIONS COURT

NAIROBI

REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
INDUSTRIAL COURT NPETITION NO. 37 OF 2023

BETWEEN

PAUL MASINDE SIMIDI.....PETITIONER

AND

NATIONAL OIL CORPORATION OF KENYA LIMITED..... 1ST RESPONDENT/APPLICANT

SUMAYYA ATHMANI HASSAN..... 2ND REPODENT

PRINCIPAL AMOUNT	5,644,317.22
INTEREST FROM 15.04.16 TO 28.02.23 AT THE RATE OF 12% P.A	12.0%

PRINCIPAL AMOUNT: 5,644,317.22

	days	interest
Interest from 15.04.16 to 31.12.16	261	484,328.81
Interest from 01.01.17 to 31.12.17	365	677,318.07
Interest from 01.01.18 to 31.12.18	365	677,318.07
Interest from 01.01.19 to 31.12.19	365	677,318.07
Interest from 01.01.20 to 31.12.20	365	677,318.07
Interest from 01.01.21 to 31.12.21	365	677,318.07
Interest from 01.01.22 to 31.12.22	365	677,318.07
Interest from 01.01.23 to 28.02.23	59	109,484.29

TOTAL INTEREST 4,657,721.50

a) Principal amount	5,644,317.22
c) Interest from 15.04.16 to 28.02.23	4,657,721.50
TOTAL	10,302,038.72

	Days interest @ 12% p.a	
Interest per month thereafter	30	55,669.98

Dated at Nairobi.....day of2023

WEKESA AND SIMIYU
ADVOCATES/ APPLICANT