



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI.**

**(Present: Charles P. Chemmutut, J.,**

**A.K. Kerich & J.M. Kilonzo, Members.)**

**CAUSE NO.48 OF 2001.**

**KENYA ENGINEERING WORKERS' UNION.....Claimants.**

**- v -**

**NDUME LTD.....Respondents.**

**Issues in Dispute:-**

- 1. Annual Leave.**
- 2. Leave Travelling Allowance.**
- 3. Sick Leave.**
- 4. Medical Treatment.**
- 5. Compasionate Leave**
- 6. Safari Allowance.**
- 7. Redundancy.**
- 8. House Allowance.**
- 9. Death of an employee.**
- 10. Gratuity/Retirement Benefits.**
- 11. Basic Minimum Wages.**
- 12. General Wage Increase.**
- 13. Effective Date.**
- 14. Transport of workers.**

No appearance for the Claimants (hereinafter called the Union).

No appearance for the Respondents (hereinafter called the Company).

**A W A R D.**

The Notification of Dispute in Form 'A', dated 13<sup>th</sup> December, 2000, together with the statutory certificate from the Labour Commissioner under Section 14, subsections (7) and (9)(e) of the Trade Disputes Act, Cap.234, Laws of Kenya, were received by the Court on 10<sup>th</sup> May 2001, and the dispute was listed for mention on 15<sup>th</sup> June, 2001. On this occasion, Messrs. Joseph A.N. Omolo, Industrial Relations Officer, and L.W. Kariuki, Senior Executive Officer, F.K.E., who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 22<sup>nd</sup> June, 2001 and 30<sup>th</sup> July, 2001 and the dispute was fixed for hearing on 25<sup>th</sup> September 2001. The Union belatedly submitted its memorandum on 19<sup>th</sup> July, 2001, but withdrew it and submitted a new one on 22<sup>nd</sup> August, 2001. The Company did not file any reply thereto.

Consequently, the parties sought several adjournments, which were granted, to negotiate an out of Court settlement; and on 23<sup>rd</sup> October, 2002 they came to an amicable settlement on all other issues except issue No.13, re: Effective Date. The said memorandum of settlement was duly signed by Mr. Charles Natili, General Secretary, for the Union, and Mr. L.W. Kariuki, Senior Executive Officer, F.K.E., for the Company; and the parties prayed that an award by consent be entered or made in terms of the settlement, which is reproduced below:-

“The parties have agreed to settle the above court case as follows:

- (1) Basic minimum wages shall be raised by 8% each year.
- (2) The general wage shall be 8% each year.
- (3) Housing allowance – 800/= for the first year and 850/= for the 2<sup>nd</sup> year.
- (4) Leave traveling allowance – 800/=.
- (5) Safari allowance to be raised by 6%.

The parties further agreed to retain the following clauses in their outgoing C.B.A.

- (1) Annual leave.
- (2) Sick leave.
- (3) Medical treatment.
- (4) Compassionate leave.
- (5) Redundancy.
- (6) Death of an employee while in service of the employer.
- (7) Gratuity/Retirement benefits.
- (8) Transport for workers”.

Accordingly, I award in terms of the settlement hereinabove.

As regards the effective date, the Company in their reply statement on this issue which was filed on 24<sup>th</sup> October, 2002, pleaded inability to pay, and urged the Court to award that 1<sup>st</sup> January, 2002 be the effective date of the collective agreement; but the Union demanded that the collective agreement should come into force on 1<sup>st</sup> May, 1999. Mr. Kariuki vehemently submitted that the negotiations for a new collective agreement started on 15<sup>th</sup> February 1999, but the parties were unable to agree. Consequently, a Conciliator, Mr. F.L. Okello, was appointed to assist them, but in their meeting held on 1<sup>st</sup> December, 2000, negotiations broke down once again because the management insisted “that the Company is in a serious financial crisis due to poor sales”, and are unable to back-date the collective agreement to 1<sup>st</sup> May, 1999. (R. App.I). In support of his contention, Mr. Kariuki relied on the audited accounts of the Company by M/S. Ernst & Young, Certified Public Accountants, which show that the Company posted the following substantial losses during the period under consideration (R. App.II):-

<u>Year.</u>	<u>Sales.</u>	<u>Cost of Sales.</u>	<u>Losses.</u>
	<u>K.Shs.</u>	<u>K.Shs.</u>	<u>K.Shs.</u>
1998	49,513,877	45,677,579	5,960,511.
1999	42,823,487	39,840,288	9,763,375.
2000	37,539,620	31,283,882	3,083,962.
2001	36,391,350	30,541,958	4,110,666.

He opined that it would be fair if the parties concerned would equally share in the Company's fortunes and misfortunes too, otherwise if the effective date of the collective agreement is back-dated to 1<sup>st</sup> May, 1999, it would amount to penalizing the Company for making losses. Mr. Kariuki submitted further that if the demand by the Union of approximately 16.64% is back-dated as stated hereinabove, the arrears would amount to Kshs.2,000,000/=, which the Company can ill-afford; but it would inevitably lead to its liquidation and the resultant cost would be huge in terms of direct loss of income for the 43 unionisable employees and their dependants. In the circumstances, the Company would be at pains to raise in excess of Kshs.4 million for the employees' terminal dues.

Mr. Kariuki pointed out that the Company's business is solely agriculture-based; and due to down-turn of the economy, farmers do not have the money to order for implements, while most of the commercial farmers have abandoned farming altogether. Furthermore, local manufacturers are now competing with importers of duty free equipment and machinery, e.g. mills, harrows, guromovers, sedess, e?t?c?, and this has adversely affected the Company's business severely. He also produced a schedule of creditors, which shows that the Company owes them Kshs.22,044,699.70 (R. App.IV), against Kshs.6,000,000/= which is owed to it by its debtors. In the circumstances, Mr. Kariuki, expressed some misgivings about the Company's ability to pay the 8% wage increment each year, as well as the creditors' demands. He pointed out that the last profit posted by the Company was in 1995, and its directors neither earn any salaries nor are they entitled to any benefits, e.g.???? cars, housing, e?t?c?. Accordingly, Mr. Kariuki urged the Court to safeguard the few remaining jobs by awarding that the effective date be 1<sup>st</sup> January, 2002.

In his brief verbal reply, Mr. Omolo opposed the demand on the ground that the effective date had been agreed upon by the parties to be 1<sup>st</sup> May, 1999.

He accused the management of the Company of being insincere in presenting a list of their creditors and omitting to produce the list of their debtors as well. He asserted that the Company has no competitors in view of the fact that its production and sales stood at 360, 154 and 381 mills in 2000, 2001 and 2002 respectively. The Company has also advanced some loans to its employees, which would be off-set against the arrears of their wages arising from this dispute. Mr. Omolo, therefore, prayed that the effective date be 1<sup>st</sup> May, 1999.

It is undoubtedly a fact that the Company has suffered massive or heavy losses between 1998 and 2001 and the management have not been able to convert the business to a profitable one to-date. In *Cause No.31 of 2001* between this *Union* and *Brollo Kenya Ltd.*, I observed as follows:-

“Normally in a situation like this, the employer and the employees have to accommodate and support each other till such time that the financial position of the company substantially improves”.

The retrospective effect of an award cannot, therefore, be claimed as a matter of right, but the Court must take into account the impact of the financial burden on the paying capacity of the Company. The balance sheet and the profit and loss account on the record show that the condition of the Company is not such that it would warrant the effective date to operate retrospectively. In the circumstances, and in order to safeguard the existing jobs in the Company, I reject the demand by the Union that the effective date be back-dated to 1<sup>st</sup> May, 1999; and award and order that the effective date be 1<sup>st</sup> January, 2002.

On consultation, the two Members of the Court support this decision.

**DATED** and delivered at Nairobi this 31<sup>st</sup> day of October, 2002.

Charles P. Chemmutter,

**JUDGE.**