



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 299 OF 2011**

**HENRY KINYUA .....PLAINTIFF**

**V E R S U S**

**KENYA PLANTERS CO-OPERATIVE UNION LIMITED.....DEFENDANT**

**JUDGMENT**

The Plaintiff herein sought by amended plaint dated 22<sup>nd</sup> February, 2008 judgment against the Defendant for -

- a. Kshs. 109,884,500/-.
- b. Interest on the above at 12% from 1<sup>st</sup> April 2007 until payment in full.
- c. Costs of the suit.

The Plaintiff's case as set out in the plaint is that at all material times (1964- 1988) he worked for the Defendant and that at the time of his retirement, he acted in the capacity of Managing Director of the Defendant; that effective 1<sup>st</sup> January 1978, the Plaintiff's employment as Managing Director was governed by an Agreement in writing between the parties; that by clause 17 of the said agreement the Plaintiff was entitled to retire after 15 years continuous service with the Defendant in which event he was entitled to pension equivalent to 100% of his last monthly salary (gross salary plus all benefits) until attainment of Seventy years after which an equivalent of 80% of his last monthly salary would be payable; that he retired on 14<sup>th</sup> July 1988; that his last monthly salary constituting basic pay and allowances was Kshs. 382,432/-; that by agreement between the parties in 1983, the Defendant agreed to pay premium to the Insurance Company of East Africa (ICEA) in respect of a pension fund which he has duly received; that due to this agreement, the Plaintiff is entitled to Kshs. 241,246/- being the amount payable until attainment of 60 years and KSHS. 164,759/- until his death.

that the Defendant notified the Plaintiff through a letter dated 6<sup>th</sup> September 1988 that it was unilaterally revoking the agreement as it no longer held itself bound to pay the pension; that he was then not paid his dues other than the Kshs. 141,186/- from the ICEA. The Plaintiff further pleaded that as a result he has suffered loss and damage.

The Defendant duly entered appearance and filed a statement of defence and counter-claim amended on 19<sup>th</sup> November, 1996. It admitted having employed the Plaintiff from 1964 to 1988. It pleaded, *inter alia*, that the agreement dated 1<sup>st</sup> January 1978 existed but was not binding on it as it was entered into

without its knowledge and authority or that of its Board of Directors; that the Plaintiff in his capacity as Managing Director of the Defendant occupied a fiduciary position and owed it a duty to act in a bona fide manner by not allowing his personal interest to conflict with his duty to the Defendant (particulars of the breach of duty are enumerated in paragraph 4)

In the alternative the Defendant pleaded that if the agreement was entered into, the same was *ultra-vires* as the Board of Directors exercised their powers in breach of their fiduciary duties and as a result, the said agreement was voidable at the instance of the Defendant; that the agreement was entered into and obtained by fraud on the part of the Plaintiff in collusion with some of the Defendant's Directors; that the agreement was contrary to the provisions of Section 192 of the Companies Act; that the Plaintiff's resignation came at a time when the Defendant's affairs were to be investigated and it is suspicious that the Defendant's Finance and Executive Committee recommended a substantial increase in his salary and subsequently a larger pension than he would have received; that the agreement to pay pension premiums to the ICEA fraudulently thus it is not liable to pay any sums.

The Defendant counter-claimed for all the monies received and receivable by the Plaintiff by the ICEA and sought an account for it claiming that it was entitled to all future payments under the said agreement; the gift of a motor vehicle Mercedes Benz 260 SE donated to the Plaintiff by the Directors of the Defendant in breach of their fiduciary duties worth Kshs. 3,306,950/-; declaration that the Plaintiff is a constructive trustee for the Defendant of all the sums received by him up to the date of judgment and costs of the counter-claim.

On 5<sup>th</sup> December, 1996 the Plaintiff filed an amended reply to defence and defence to the counter-claim; he joined issue with the Defendant upon its defence.

The suit was part-heard by Khaminwa J. The Plaintiff (PW1) adopted his witness statement filed on 24<sup>th</sup> January 2012 as his testimony. He also presented his documents filed on 26<sup>th</sup> February 2009.

Upon cross-examination, he stated that he was the Managing Director of the Defendant from 1971 to 1978; that there were several committees an example being the Finance and Executive Committee which had to make recommendations before they could go to the Board; that it had power to pass resolutions on matters regarding finance; that this power was derived from the Board and the Articles and Memorandum of Association of the Defendant; that this committee was appointed by the Board whose role was to approve all resolutions whether recommended or not; that while he sat in both the Committee and the Board, the other members would send him out if they wanted to discuss anything to do with him; however in the meeting of 29<sup>th</sup> December 1977, he did not leave when the meeting took place.

while the service contract is dated 1<sup>st</sup> January 1978 he could not recall when the contract was issued and whether it was a public holiday as he is suffering from memory lapse for which he is undergoing treatment; that the increase of his remuneration was recommended by the committee to the Board; that while he is familiar with the term 'conflict of interest', the witness insisted that the Board declined to sit in his absence and it would be incorrect to say he influenced members of the Board or do anything against the norm; that the exchange he had at the Ministry of Agriculture on 10<sup>th</sup> September 1978 left him very clear that there was no future for him in the coffee industry; that is when on 14<sup>th</sup> September 1978, he called a meeting of the Finance and Executive Committee and told them he was leaving; that while the Board discussed and tried to persuade him to stay, and on the advice of one of them he was let go.

He insisted he did not in any way influence the raise of his emoluments nor was there anything fraudulent in the gift he got at his retirement; that he does not owe the Defendant any money equivalent to the value of the Mercedes Benz; that he did not receive any pension from the ICEA otherwise he wouldn't have filed suit; that since leaving the Defendant's employment he has not been paid any money.

Upon re-examination he stated that he produced a witness statement.

The second witness for the Plaintiff Wycliffe Wangamati (PW2) a qualified actuary employed by

Alexander Forbes for 12 years produced his witness statement dated 28<sup>th</sup> April 2015. He testified that he was personally involved in calculating the Plaintiff's pension. That while there were discrepancies in the calculations, this was rectified as the discrepancies were occasioned by interest calculations which were finally reflected correctly. He maintained that clause 17 of the agreement dated 1<sup>st</sup> January 1978 provided how the calculations were to be carried out if the Plaintiff had worked for over 15 years at the time of retirement and also defined the last monthly salary as the 'gross salary at the date of retirement...'. He contended that he was guided by the payslips for the months of June and July 1988 in formulating his report which figures appear as special damages in the plaint.

Upon cross-examination, PW2 maintained that statutory deductions form part of the salary but it also depends of the definition of pensionable salary in the particular contract. In this case it meant gross pay including all statutory deductions amounting to Kshs. 182,156/-. According to the witness there are different tax rates as far as pension is concerned hence the calculation at clause 10 of his report dated 8<sup>th</sup> November 2007.

In re-examination, the witness averred that Kshs. 141,186/- had been paid to the Plaintiff and that is why it did not form part of special damages.

The Defendant called one witness Joseph Kioko (DW1) the Managing Director of the Defendant at the time of testifying. He adopted the contents of his witness statement as his evidence-in-chief. He also produced the Defendant's bundle of documents as evidence.

Upon cross-examination, he claimed that the agreement dated 1<sup>st</sup> January 1978 between the parties is not binding, he however pointed out that there was no document to show that the law firm-Hamilton Harrison and Mathews that drew the agreement was not instructed by the Defendant. In fact he pointed out that they were the Defendant's advocates at the time. He contended that the Defendant's seal was affixed without its proper knowledge or authority between January 1978 and September 1988 though he had no document to support his assertion. He holds a contract of employment with the defendant executed on 18<sup>th</sup> December 2013, he negotiated his terms while there was no conflict of interest as opposed to the Plaintiff's terms which were negotiated when he was an employee of the Defendant. DW2 asserted that while his contract term is 5 years, if he was to seek renewal of the same, he would still go through the process the Plaintiff went through while still serving as the Managing Director.

While recommendation for renewal of his contract would be made by the staff committee to the Board, that of the Plaintiff was done by the Finance Committee which link to the Board could not be established. While being referred to the minutes of the Finance and Executive Committee of the Defendant held on 29<sup>th</sup> December 1977, the witness contended that there was no favourable treatment extended to the Plaintiff as two employees were being considered for a salary raise.

With reference to the full board meeting held on 13<sup>th</sup> April 1978 the minutes of 29<sup>th</sup> December 1977 were duly adopted. He averred that after going through the minutes of meeting held on 13<sup>th</sup> April 1978 he did not find any point where the Board of Directors rejected the recommendations of the Finance and Executive Committee meeting of 29<sup>th</sup> December 1977. Despite this when the Board of Directors sat on 1<sup>st</sup> January 1978 they deliberated on a contract that had already been executed and signed on the basis of a committee recommendation which according to him did not depict proper management practice.

The Board of Directors never got the chance to see the contract as what was circulated in that meeting were the minutes of 29<sup>th</sup> December 1977 though he could not verify that the contract had not been circulated to the members before the meeting. He concurred that from 1978 to 1988 no member of the Board ever complained that they were unaware of the Plaintiff's contract terms. The witness further concurred that the Advocates who drew the service contract never produced a statement to show that they had no instructions to draw that contract.

He could also not produce any document showing that the Chairman and Secretary of the Board had been put to task for drawing the contract; that he was could not tell whether the Defendant had acted on the

contract especially in payment of pension to the Plaintiff.

DW1 concurred that even as at 1982 based on the minutes of 9<sup>th</sup> November 1982 of the Finance and Executive Committee, the Defendant was taking advice from its Lawyers and Auditors with regard to the Plaintiff's contractual obligations; that based on the minutes dated 16<sup>th</sup> November 1982, it is clear that there was a practice for the Finance and Executive Committee to table recommendations to the Board of Directors and was not only done when the Plaintiff's contract was being considered; that vide a letter dated 22<sup>nd</sup> June 1983, the Defendant instructed the ICEA to pay the Plaintiff's benefits which makes it clear that the Defendant was giving full effect to the contract between the Defendant and the Plaintiff.

According to the records of the Defendant no statement has been put across that the contract caused hardship to either party. He concurred that while the contract dated 1<sup>st</sup> January 1978 was executed before the Board of Directors met in April of that year, there is no evidence that any member of the Board declined to approve it as it had been executed prior to its approval. According to the witness, it was suspicious how the Plaintiff's salary increment fell under the category 'Any Other Business' while it should have been a stand-alone substantive agenda as is the normal practice though he could not produce minutes where that practice was adopted.

The Board of Directors resolved to honour its contractual obligations to the Plaintiff in the absence of the Plaintiff during the meeting. The Board adopted and confirmed the minutes of 13<sup>th</sup> and 14<sup>th</sup> January 1988; he confirmed that he did not have any document to prove his statement that the Plaintiff's pension was illegally magnified. That while he made an assertion that the Plaintiff bulldozed the Board of Directors to commit an illegality, he did not have any report or document to back that assertion. The Defendant's auditors in a letter dated 8<sup>th</sup> April 1988 confirmed that the salaries paid to the Plaintiff and other senior staff members were in agreement with the rates approved at the finance and executive meeting and the Annual General Meeting held on 21<sup>st</sup> December 1987 and 10<sup>th</sup> December 1987 respectively. In the minutes of the Board of Directors meeting held on 2<sup>nd</sup> September 1988 the service contract of the Plaintiff was the only agenda discussed and how the President and Vice- President were uncomfortable with the Plaintiff's terms of service- this could have been the main reason why the Plaintiff's contract was terminated.

Based on the minutes of the Board of Directors dated 5<sup>th</sup> September 1988, it is evident that while members had approved the Plaintiff's terms in an AGM, because of concerns of the Government particularly the Vice President, it was resolved to terminate his contract. That according to Article 90 of the Articles of Association of the Defendant, Directors have express power to establish and maintain insurance schemes and power to give donations to employees.

Upon re-examination he insisted that according to him, the Plaintiff's demand is excessive especially given the manner in which it was procured. he stated that he was interviewed by the Human Resource Committee and the matter presented to the full board which accepted his terms of employment. That the agreement dated 1<sup>st</sup> January 1978 is suspicious considering the Defendant's staff don't work on Sundays. As 1<sup>st</sup> January is a public holiday on the face of it the contract is defective. According to him, the contract that should be adhered to is the 1973 one. That a committee cannot reduce its recommendations into a contract this has to be approved by the full Board of Directors. That the Board by 1<sup>st</sup> January 1978 had not reduced the minutes of the Committee into a contract neither did it delegate its powers to the committee to reduce its recommendations into a contract. That the Plaintiff in the meeting of 29<sup>th</sup> December 1977 was present which is not the norm as he was expected to step aside. That the Board of Directors could not retrogressively endorse something that had already been effected. That according to Article 72 of the Memorandum and Articles of Association, Directors determine remuneration of the Managing Director. That in relation to pension it was agreed in the meeting dated 9<sup>th</sup> November 1982 that the Defendant had to take advice from its lawyers and Auditors with regard to the Plaintiff's pension which was not done. That during the full Board meeting of 16<sup>th</sup> November 1982, the recommendations of the Finance and Executive Committee adopted did not include the advice from its lawyers. That it is unusual for the Managing Director's salary to be increased by 40% and more so discussed as 'Any Other

Business'. That there is also no document showing that the increment was reduced into a contract. Further there was no indication that the Board of Directors approved the minutes of the Finance and Executive Committee of 13<sup>th</sup> January 1988 where they agreed that the Plaintiff's dues should be paid. That after the letter of retirement dated 9<sup>th</sup> January 1988, the Plaintiff sat in a full Board of Directors meeting on 19<sup>th</sup> January 1988. That since he had indicated he wished to retire immediately upon advice by his doctor, it is surprising that he proceeded to sit in the Board of Directors meeting 10 days later. That he owed a duty of care to the Defendant from which he is claiming such benefits. That salary adjustment in any way had to be reduced into a contract. That as the Defendant has just come from receivership, its shareholders should not be subjected to another burden such as this.

That was the close of the hearing. Parties filed written submissions which the Court has duly considered.

The issues to be considered in this suit are –

1. Was there an agreement between the parties dated 1<sup>st</sup> January 1978 and if so what were the terms?
2. Did the Plaintiff unduly influence the Board of Directors in order to raise his salary and subsequently his pension?
3. Is the Defendant in breach of this agreement and if so what amount of pension is the Plaintiff entitled to?
4. Is the Defendant's Counterclaim statute barred?

The agreement between the two parties dated 1<sup>st</sup> January 1978 is said to have come about after the Defendant's finance and Executive Committee meeting held on 29<sup>th</sup> December 1977 deliberated on the retirement benefits of M/S. Jackson and the Plaintiff. In minute 2735 of that meeting it was agreed that the Plaintiff's retirement age would remain 60 but after 10 years continuous service, he could opt to retire prematurely .....and in any event the Defendant would pay him 100% of his salary as at the date of retirement until attainment of 60 years and thereafter 80% of his monthly salary for the rest of his life. The meeting also authorised the Chairman and the Managing Director to finalise the legal service contract of the Plaintiff.

This committee was acting in its capacity as a delegate of the Board as empowered by article 86 of the Defendants Articles. These minutes were duly adopted by the Board of Directors in their meeting held on 13<sup>th</sup> April 1978. This was therefore an endorsement of the deliberations of the Finance and Executive Committee and bound the Defendant to the resolution of the Committee. The Plaintiff served for 10 years before he chose to retire without any query being raised on his terms by the Board of Directors. On a balance of probability therefore, I hold that the decision to vary the Plaintiff's contract was accordingly deliberated by the Board of Directors of the Defendant.

The Defendant's Advocate implored the Court to extend leniency upon the Defendant as it had just come from receivership and would be greatly strained if it were to award the Plaintiff the amounts claimed. In *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Limited* 2 EA [2002] 503 the learned Judges noted –

**“a Court of Law cannot re-write a contract, between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of *Fina Bank Ltd v Spares and Industries Ltd* [2000]1 EA 52: “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain” ”**

On whether the Plaintiff fraudulently procured the Contract, apart from its saying so, the Defendant did not lead any evidence to substantiate this claim. It could have for example called one of the Directors sitting in the Board at the time to lend credence to its allegations. DW1 was at pains during cross-examination to explain his assertions in his evidence-in-chief and seemed to agree with the Counsel for the Plaintiff that without any documentation to back his statement, it was better left unsaid.

“**Fraud**” is defined in <http://dictionary.law.com> as –

**‘The intentional use of deceit, a trick or some dishonest means to deprive another of his/her/its money, property or a legal right’**

The standard of proof for fraud is very high, approaching but below proof beyond reasonable doubt; the Defendant has failed to prove that the Plaintiff acted fraudulently, and apart from creating suspicion in the mind of the Court as to the circumstances surrounding the contract dated 1<sup>st</sup> January 1978, it has not done more to satisfy this Court of how the fraud came to be.

On whether the Plaintiff unduly influenced the Board of Directors to continually change his terms of service, one would have expected, given the gravity of allegations the Defendant raised against the Plaintiff and the value of the claim that, it would have filed suit to set aside all these the resolutions of its Board way before this suit was ever filed by the Plaintiff. In any case, it came out clearly in cross examination of DW1 that in the Board of Directors meeting of 5<sup>th</sup> September 1988 (minute 251/88) that the Government’s attitude towards the Plaintiff’s contract could have influenced the Defendant’s turnaround and revocation of that contract.

Is the Plaintiff entitled to his pension? Clause 17 of the contract dated 1<sup>st</sup> January 1978 clearly spelt out what the Plaintiff would be entitled to upon retirement and in the Plaintiff’s case clause 17(ii) is material. It states –

**“(ii) in the event of the Managing Director retiring after Fifteen years of continuous service or on request by the Company, the Managing Director shall be paid a pension by the Company equivalent to one hundred per cent (100%) of his last monthly salary until he attains the age of Sixty (60) years. Upon the attainment of the age of Sixty (60) years the Managing Director shall continue to receive a pension from the Company equivalent to Eighty per cent (80%) of the last monthly salary for as long as he shall stay alive;**

**(iii) For the purposes of this clause, the term ‘last monthly salary’ shall mean the gross salary plus all benefits payable to the Managing Director as his current monthly salary at the date of retirement and ‘continuous service’ shall be deemed to have commenced on the first day of July One Thousand Nine Hundred and Sixty-four (1<sup>st</sup> July 1964).”**

The clause on payment of pension could not have been clearer than this. What is left for the court is to determine how much the Plaintiff is entitled to. PW2, the expert witness produced his report which is in form of a letter dated 8<sup>th</sup> November 2007 in which he computed the sum payable to the Plaintiff. In it he states that he used the last payslip being June 1988 where gross salary amounted to Kshs. 352,432/00 (the motor-car allowance was not included but in a letter dated 22<sup>nd</sup> December 1988 the Financial Controller of the Defendant he was paid for use of the car for three and a half months amounting to Kshs. 105,000/-). This means he was entitled to motor-vehicle allowance of Kshs. 30,000/- per month. Therefore the gross salary per month amounted to Kshs. 382,432/00.

The amount payable to the Plaintiff after deducting what was paid by the ICEA amounts to Kshs. 241,246/00 for the period between 15<sup>th</sup> July 1988 until 20<sup>th</sup> April 1996 being his 60<sup>th</sup> birthday and thereafter Kshs. 164, 759/00 until he dies. The formula of calculating the pension which was not contested by the Defendant is as follows –

Pension Arrears from 1 July 1988 to

April 1996=

94 months X 241,246/00= Kshs. 22,677,124/00

Pension Arrears from May 1996 to

April 2007=

131 months X Kshs. 164,760/00= Kshs. 21,583,560/00

Interest on Pension Arrears to

1<sup>st</sup> April 2007 at 12% p.a. = Kshs. 54,723,816/00

The present value of future pension

Payments from 1<sup>st</sup> April 2007 Kshs. 10,900,000/00

Actuarial value of arrears and

Future payments Kshs. 109,884,500/00

In summary, there will be judgment for the Plaintiff for the sum of KShs. 109,884,500/00 plus costs of the suit. The Defendant's counterclaim being time barred as it was brought eight years after the cause of action arose is dismissed. There will be orders accordingly.

***Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of July, 2016***

**A. MBOGHOLI MSAGHA**

**JUDGE**