



REPUBLIC OF KENYA

High Court at Kisumu

Cause 1'A' of 2013

1. RICHARD NYAEGA ONDIEKI
2. GEOFFREY MOKAYA MARIITA
3. FRANCIS NYAMWARIO NYANCHAGA

4. CHRISTOPHER MOSE

ORINA

5. EZEKIEL NYAAYO

NYACHANCHU..... CLAIMANTS

-VERSUS-

WAKENYA PAMOJA SAVINGS & CREDIT

SOCIETY LIMITED RESPONDENTS

JUDGMENT

The claimants herein Richard Nyaega Ondieki, Geoffrey Mokaya Mariita, Francis Nyamwario Nyanchaga, Christopher Mose Orina and Ezekiel Nyaayo Nyachanchu filed their Statement of Claim on 31/1/2013 against the respondent Wakenya Pamoja Savings & Credit Society Ltd.

The respondents were served with this Statement of Claim on the 1st day of February, 2013. They were expected to file their reply within 15 days as envisaged under Rule 13(1) of the Industrial Court (Procedure) Rules 2010. However the respondents failed to file their response as expected until 25/3/2013 and this without leave of the court. In the meantime, the claimants filed a request for judgment on 21.2.2013 and thereafter their case was set for hearing. Given that the response was filed out of time and without court's leave it was expunged out of the record and the matter proceeded for formal proof.

The claimant's case is that they worked for the respondent's in various capacities as follows:-

1. Richard Nyaega Ondieki - Branch Manager

2. Ezekiel Nyaayo - Branch Manager
3. Christopher Mose Orina - Branch Manager
4. Francis Nyamwario Nyanchaga – Ag. CEO
5. Geoffrey Mokaya Mariita - Public Relations Officer.

The claimants further aver that the respondent is a Limited Liability Company registered under the Co-operative Societies Act with its registered offices situated at Kisii town within Kisii County. They further aver that the respondent is also a Society within the meaning and regime of the co-operative Society Act and under the control and directive of the Ministry of Co-operative Development and Marketing and is also to act in accordance and within the scope and confines of the Co-operative Society Act and under direction, supervision and management of the Commissioner of the Co-operative Society. They submitted that, this Commissioner is responsible for the growth and development of the Co-operative Societies for their organization, registration, operation, advancement and dissolution and for administration of the provisions in accordance with the mandate and powers conferred under Section 3(3) of the Co-operative Act, Cap 490 LOK.

The claimants further averred that, having been employed by the respondents for almost over 25 years, their terms of employment envisaged a scenario that they would retire upon attaining the mandatory retirement age and enhanced from the previous limit of 55 years to the current of 60 years which change affected the contract of employment executed between the claimants and the respondents herein.

The claimants submit that with a view to give effect to the new government policy enhancing the mandatory retirement age in respect of public entities/servants, the Commissioner of Co-operative Development vide a letter dated 30th November, 2009 communicated the change in retirement age from 55 to 60 years in regard to Co-operative Society Movement, which included the respondents herein. That this communication was promptly relayed to all Co-operative Societies within the Republic of Kenya through the Provincial Co-operative Officers and at grass root level, through the District Co-operative Officers, vide a Circular dated 24th March, 2010.

The claimants aver that due to this Circular from the Government conveyed vide the Commissioner of Co-operative Societies through the letter dated 30.11.2009, their retirement age was effectively raised from 55 to 60 years old. That effectively this Circular which was couched in mandatory terms, superseded all prior and existing instruments purporting to fix the retirement age at 55 and thus the respondent could not after the date of enhancement herein purport to forcefully retire the claimants from its service on allegations that they had reached the mandatory retirement age.

The claimants contend that despite receipt of the letter from the Commissioner of Co-operative and the Permanent Secretary Public Service dated 30th November, 2009 and 20th March, 2009 respectively, the respondents in a bid to defeat and circumvent justice, unilaterally and without according the claimants a right to be heard, issued retirement notice letters to the claimants herein who were about to reach their 55th birthday, sending them on compulsory leave, vide the letter authored by the respondents Ag. Operations Manager dated 5th November, 2012.

The letters/Circ were from the Commissioner of Co-operative/Permanent Secretary were all part of the claimant's list of documents filed before this court. The notice of retirement letters are also part of the claimants documents filed before this court.

The claimants have further contended before this court that the respondents have since declined to allow them to resume duty even after the issue herein had been clearly pointed out to them that their letters dated 5th November, 2012 purporting to direct the claimants herein to proceed on compulsory premature leave, awaiting retirement was issued in error and misapprehension of the current retirement age within the Co-operative Society Movement. The respondents, the claimants aver have now purported

to compute terminal benefits payable to each claimant against the dictate of Law and natural justice.

The claimants have submitted that they are about 55 years of age and in the event their services are determined prematurely as threatened by the respondents, the same shall be extremely prejudicial to them and discriminatory decision in violation of their Constitutional rights. The claimants also submitted that they were issued with a retirement note one year earlier to their 55th birthday and compelled by the respondents to proceed on compulsory leave, which act was illegal and a violation of their rights. The claimants further aver that they were issued with premature retirement note in order to create space for recruitment of relatives of the respondents senior officer which fact was done immediately without competitive and transparent tendering procedures being followed.

The claimants now seek orders for reinstatement in their employment with such a time as they attain their mandatory retirement age of 60 years together with payment of any salary which may be outstanding during the period of compulsory leave they have been serving.

In the alternative, claimants seek payment of all their salaries and allowances for the remainder of their period of service until they reach 60 years as computed by them in their statement of claim.

The claimant also prays that this court compels the respondent to reinstate them to work in their respective position. They also seek a declaration that the decision of the respondent to retire them premature amounts to violation of their Constitutional rights and constitutes impunity and disregard of law. They also seek costs of this court and any other relief that this honourable court may deem fit and just.

Having considered the claimants evidence, the issues for determination by this court are as follows:-

1. whether the respondents are justified in retiring the claimants before the age of 60 years.
2. Whether the remedies sought by the claimants can be awarded by this court.

In relation to the 1st issue above, I will start by considering the employment contract between the claimants and the respondents vide the appointment letters the claimants were appointed on separate dates. Richard Ondieki was appointed on 1.10.1987 as Savings Controller Clerk. His national identity card shows that he was born in 1958. Geoffrey Mokaya Mariita's appointment letter was not annexed but his identity card shows that he was born in 1958. Francis Nyamwario Nyanchaga was employed on 1.11.2001 as Internal Auditor. His identity card indicates he was born in 1958. Christopher Mose Orina on the other hand was employed as Cashier II on 1.7.1998. The identity card attached to the application is not legible as to when he was born. Ezekiel Nyaayo Nyachanchu was appointed on 6.8.1985 as a Savings Clerk and his date of birth is 1958.

From the document attached to this application, the claimants were all informed of their impending retirement age at 55 years and were asked to proceed on leave pending retirement. According to the letter from the Commissioner for Co-operative Development and the circular from the office of the President, Ref: no. OP.CAB.2/7A, the retirement age of all public servants had been reviewed from 55 years to 60 years.

The circular from the Commissioner for Co-operative Development is very explicit it reads in part:-

“We have received several inquiries regarding the retirement age for Co-operative Movement staff in light of the extended retirement age for public servants to 60 years.

The Public Officer Ethics Act 2003 under S. 2 defines a Public Officer to mean any officer, employee or member including an unpaid part time or temporary officer, employee or member of a Co-operative Society established under the Co-operative Societies Act. This section thus recognizes a Co-operative Society as a Public Institution.

In this regard, it has been deemed necessary to review the retirement age for the Co-operative Movement employees from 55 years to 60 years so as to be in tandem with the current retirement age policy for Public Officers.

Please communicate the contents of this circular to all Co-operative Organization under your jurisdiction”.

Signed

FF – Odhiambo, Mbs

Commissioner For Co-Operative Development

This circular shows that the staff working in Co-operative Societies were covered and are affected by the review of retirement age from 55 years to 60 years.

The move by the respondents in attempting to retire the claimants before the age of 60 years was therefore not justified.

The claimants sought orders to be reinstated to work until they attain the retirement age. Under S. 12 (vii) of the I.C. Act. 2011 one of the remedies the Industrial Court can grant is;

“an order for reinstatement of any employee within three years of dismissal subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law---”

This same remedy is envisaged under S. 49(3) (a) of the Employment Act 2007 which provides that;

“reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated.”

The remedy sought by the claimants is therefore a remedy envisaged under the Laws of this Country. Since the claimants have committed no misgivings and since there is no valid reason which would warrant them being retired before the attainment of the retirement age of 60 years, I find for all the claimants and order that they be reinstated to their employment with immediate effect with no loss to seniority or increments. The notice of retirement is hereby declared null and void. They should be paid any pending salaries/allowances since the time of such notice and should continue to be paid as per their employment contract until they attain their retirement age as the case may be unless otherwise dismissed/terminated for any other lawful reason or unless they choose to voluntarily retire.

HELLEN WASILWA

JUDGE

16/04/2013

Appearances:-

All Claimants present

Miss Kusa for Claimants present

Indimuli h/b Omariba for Respondent present

CC. Sammy Wamache

