



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 226 of 2004

STANLEY OSANGO EKAYA.....PLAINTIFF

VERSUS

BRITISH AMERICAN TOBACCO (K) LTD.....DEFENDANT

JUDGMENT

The plaintiff herein moved to the seat of justice vide a plaint dated 10/3/2004 and filed on the same date. The salient features of the same are that the plaintiff was an employee of the defendant effective 17th day of April, 1967 until he was retrenched on the 31st day of July, 2002 after having worked for the defendant for a period of 36 years and 2 months. The plaintiff was a member of the prudent fund from 1967 to 31st July, 2002 and was therefore entitled to 6,325,108.00 as at the time of his retrenchment. That the said amount of Kshs.6, 323,108.00 has not been fully paid as at the time the plaintiff moved to court and initiated these proceedings. The plaintiff also seeks interest on the afore said sum of at the rate of 20%.

The plaintiff was also a member of the staff pension scheme from 1968 to 2002 and is thus entitled to kshs.980, 000.00 on winding up of the said scheme plus interest thereon at the rate of 20% from 31st day of July, till the date of payment in full. The plaintiff was also a member of the Retirement benefits scheme from 1977 to 2002 and is thus entitled to Kshs.2, 880,745 plus interest thereon from 31st July, 2002 till the date of payment in full. This being the computation per the rules less capital values of the provident Fund and NSSF company parts Kshs.2,880,745.00

According to the plaintiff it is his stand that as at the time of retrenchment the plaintiff was entitled to the following payments:-

- (1) One month salary in lieu of notice Kshs.78,241.00**
- (2) One months house allowance of Kshs.4,000.00**
- (3) One months salary for the months of July, 2002 Kshs.78,241.00**

- (4) One months house allowance of Kshs.4,000.00**
- (5) Severance pay being 4 days salary for every worked month i.e. $56.1 \times 78,241 = 4,389,367.71$**
- (6) July 2002, salary Kshs.78, 241 as per rule 31 of Voluntary Early Retirement.**
- (7) July 2002 house allowance Kshs.4, 000 as per rule 31 of Voluntary Early Retirement.**
- (8) Refund of provident Fund company's part on 1.3&6 Kshs.15,648.00**
- (9) Leave earned but not enjoyed committed to cash at the rate of Kshs.92/30 days
 $\times 78,241 = \text{Kshs.}234,144.00$**
- (10) Transport of house hold goods from Nairobi to Kitale on retrenchment being Kshs.100, 000.00.**

In consequence thereof the plaintiff prayed for judgment against the defendant for.

- 1. Payment of Kshs.15, 305,254/= less any dues paid.**
- 2. Costs of this suit.**
- 3. Interest on 1 and 2 above from 31st July, 2002 till date of payment at 30% per annum and from the date of filing this suit till date of payment at court rates.**
- 4. Any other or further relief the court deems fair and expedient to grant in the circumstance.**

The defendants response to this claim is vide a defence dated the 8th day of April, 2004 and filed the same date. The salient features of the same are that upon the plaintiffs written request dated 20th May, 2002 seeking voluntary early retirement, the parties entered into an agreement for a voluntary retirement package (herein after referred to as "**the agreement**"). That it was inter alia from the said agreement that the plaintiff would receive-

- (a) 12 months pay including house allowance with effect from 31st July, 2002.**
- (b) Refund of provident Fund contributions in accordance with the rules of the Fund.**
- (c) Retirement benefits in accordance with the rules of the Retirement benefits scheme.**
- (d) Leave pay earned but not taken up to 31st July, 2002.**
- (e) The month of July would serve as the notice period.**

It is the defendants' further contention that in the said agreement, the plaintiff had agreed that upon payment of the afore stated agreed payments the plaintiff would have no further claims against the defendant in connection with his retirement package.

In pursuance to the retirement package agreed upon as between the plaintiff and the defendant the defendant paid to the plaintiff the sum of Kshs.5,395,678.85 being the amount agreed with the plaintiff pursuant to the said agreement. For this reason the defendant agrees that the plaintiff has been paid all his dues and there are no outstanding dues. Denied that the plaintiff had not been paid his full dues and put the plaintiff to strict proof with regard to the contents of paragraphs 4, 5, 6 and 7 of the plaint. That as per the agreement afore stated the plaintiff is not entitled to be paid the sum he is seeking in the said paragraphs and in the circumstances the claims for interest cannot lie not with standing that the same was not a term of the agreement afore said. Reserved the right to raise a preliminary objection to the effect that there is no cause of action disclosed in paragraphs 4,5,6 and 7 of the plaint and that the entire claim is

legally defective and incompetent. By reason of the fact that the plaintiff has been paid his entire dues it is the contention of the defendant that the plaintiff claims as laid cannot lie by reason of the equitable principle that he cannot approbate and reprobate at the same time.

In consequence thereof the defendant sought to have the plaintiff's suit dismissed with costs.

Parties were heard. The plaintiff was the sole witness on his side. The plaintiff's evidence is based on the content of documentary exhibits tendered in evidence. In a summary the certificate of employment exhibit 1 reveals that the plaintiff joined the defendant's service on 17/4/1967 and continued in the said service rising from a trainee accounts clerk to Treasury accounts assistant as at the time of 31/7/2002 when he left the defendant's service earning a salary of Kshs.63,508/00 per month. Events leading to the filing of these proceedings stem from a situation whereby the defendant company was allegedly facing financial constraints and decided to come up with plan to **"beat up the stom"** This gave rise to the issuance of a circular produced as exhibit 1 dated 26th April, 2002. A reading of the same in a summary reveals that the company was allegedly going through harsh economic conditions which necessitated restructuring, right sizing and realigning resources in favour of a leaner efficient and effective operation. The document is titled **"voluntary early retirement scheme."** The scheme was open to all staff and the staff members were given 2 weeks to respond by 10th May, 2002. Of importance is the content of the last paragraph. It reads:-

"Whereas all are welcome to positively take up this offer, it is important to note that the scheme is at the discretion of the company and hence it is the prerogative of the company to review all applications and respond as may be deemed fit. In certain situations such as changes in organizational processes, scope of current role set up and depends upon the up take of the voluntary scheme, compulsory cases may be applied where necessary"

The terms and conditions of redundancy are the same as those applied in 2000/2001 namely:-

- (1) Salary upto and including the last day of employment.**
- (2) One month's basic pay and one month's salary in lieu of notice.**
- (3) 4 days pay (calculated on basic pay including house allowance for each completed month of service with the company.**
- (4) Accrued leave and leave allowance as per individual entitlement in the CBA.**
- (5) Waiver of resting period that is stipulated in the rules of the provident fund**
- (6) Transfer of household effects**
- (7) Entrepreneurship training at the expense of the company.**

The plaintiff respondent to the invitation vide his letter exhibits 2 dated 29/4/2002 offering to avail himself of the scheme. It is his stand that the terms were however not favourable as they were not in line with the company's redundancy rules. He allegedly complained verbally to a member of the management a Mr. Kiamba. The terms were allegedly varied and he was told to put that request in writing which he did vide his letter dated 20/5/2002 exhibit 6.

The receipt of exhibit 6 prompted the issuance of exhibit 3 dated 21st day of June, 2002 forming the basis of an agreement between the plaintiff and the defendant spelling out the terms and conditions of the plaintiff's exit from the defendant's service. There is no dispute that it is signed by one David Kiamba as Head of Human Resource and the plaintiff. It is clear from its content that it was responding to the plaintiff's application for voluntary early retirement dated 20th May, 2002 exhibit 2. The terms of offer made by the defendant and accepted by the plaintiff are as follows:-

- (1) 12(12) months pay including house allowance with effect from July, 2002.**
- (2) Refund of provident fund contribution in accordance with the rules of the fund.**
- (3) Retirement benefits in accordance with the rules of the Retirement Benefits scheme.**
- (4) Leave pay in accordance with rule 12(1) leave entitlement-applicable on outstanding leave earned but not taken up to 31st July,2002”**

It is the stand of the plaintiff that he raised complaints verbally; those complaints gave rise to the issuance of the content of another agreement executed by the same signatory as those in exhibit 3. Two other items are added in exhibit 4 and these are:-

- (1) 12(twelve) months pay including house allowance with effect from 31st July, 2002.**
- (2) Refund of provident fund contribution in accordance with the rules of the Fund.**
- (3) Retirement benefits in accordance with the rules of the Retirement Benefits Scheme.**
- (4) Leave pay in accordance with Rule No.12 (1) leave entitlement –applicable on outstanding leave earned but not taken up to 31st July, 2002.**
- (5) Transfer of house hold goods.**
- (6) Entrepreneurship training at the expense of the company.**

It is the stand of the plaintiff that he executed the agreement on the terms afore said because he had no otherwise but to sign and then complain after words hence these proceedings. He has come back to court to be paid the short fall of the benefits he was entitled to which have been particularized in the plaint and for purposes of the record and as per the explanation of the plaintiff. The short fall arises as here under:-

- (1) On one months salary in lieu of notice the plaintiff was paid at the rate of Kshs.63,80.00 instead of Kshs.78,000.00**
- (2) One months house allowance of Kshs. 4,450.00**
- (3) One months salary of July at Kshs.78,000.00 instead of Kshs. 63,000.00**
- (4) House allowance of Khss.4, 450.00 for July, 2002.**
- (5) Severance pay being 4 days salary for each month of service. The plaintiff was entitled to 56.1 months and yet he was paid for only 12 months the short fall is 44.1 months.**
- (6) One extra month salary in lieu of notice in accordance with rule 31 at the rate of Kshs.78, 000.00.**
- (7) Item 7 deleted.**
- (8) Refund of provident fund dues calculated at the new salary. It is 10% of the contribution based on the new salary.**
- (9) Payment for leave earned for 112 days computed :**

112 X 78,000.00

Which comes to Kshs.317, 662.00

(10) Transport of house hold goods from Nairobi to Kitale Kshs. 100,000.00.

(11) Kshs.50, 000.00 deducted from his terminal benefits allegedly utilized by his family as medical dues. The plaintiffs claims this amount because to him the medical scheme still covered him.

Further on payments the plaintiff added that the Kshs.50, 000.00 which he had claimed for medical expenses allegedly incurred by his family were refunded to him upon service of the plaint. Also paid to him was Kshs.83, 000.00 equivalents of 40 days leave earned but not taken leaving a balance of 72 days not paid to him.

As for the benefits from the retirement scheme the plaintiff stated that he was talking about the staff pension scheme. As pleaded, he says he was a contributor to this scheme. It is governed by the rules in an explanatory Book let produced as exhibit 7. The plaintiff joined the scheme when he joined the wages section as the in charge on 1/6/68 which elevated him to the management cadre. He is aware that when he left he was the only remaining member of that scheme. He was aware the Kitty had Kshs.980, 000.00 which he feels it should be paid to him. He concedes that there are no rules saying that the last member should be paid the balance. He also concedes contribution into the Kitty come from other contributor who had left the service upon being their dues from the Kitty.

When cross-examined PW1 responded that indeed he was an employee of the defendant working as a treasury accounts clerk; he was aware of the circular dated 26/4/2002; he read and understood it; the intention of the defendant was to reduce over heads in order to increase profits; the earlier circular targeted all employees; the circular stated the retirement was voluntary although the company had a discretion to accept some and reject other. It is his stand that the company could not act unilaterally outside the collective bargain agreement. They should have negotiated any variation of the payment; it should have been negotiated between the company and the union. Him plaintiff was a unionizable member. He is aware that the union took up his case but since the union had internal problems he decided to pursue this claim in court. All he is interested in is that his dues should be worked out in accordance with the collective bargain agreement. He concedes when he signed exhibit 6 he did not mention that he had other claims pending with the company. He is aware there are some staff members whose applications had been rejected.

The plaintiff further concedes that he did not indicate in the letters he signed accepting payments that he wished to be paid according to the CBA collective Bargain agreement but he is aware that was the binding agreement. He concedes to have received two payments of Kshs.4, 254,235.68 and 2,070,872.68 but these were not the correct payments to be made to him.

The sole reason for claiming the Kshs.980, 000.00 is because he is the last surviving member of that scheme. There is no rule which says he should not get or that he should get and he asks the court to order that it be paid to him.

Concerning the formula for working out the benefits, the plaintiffs argue that they should have used the new salary of Kshs.78, 241.86 as basic pay instead of using Kshs.63, 508.00.

According to the plaintiff any body leaving the service of the company before retirement leaves under redundancy clause 31, 33. Although he left under the Early voluntary retirement arrangement, there is no way he could have been paid outside the CBA. He concedes he was paid 2 months salary in lieu of notice where as under the CBA it is supposed to be one month's salary in lieu of notice. He concedes that the document signed as comprising the package did not indicate that he was to be paid house allowance. Concede not to have written to the defendants asking them to transport his goods to Kitale on retirement nor demand of refund and lastly that the last pay advise of 24/9/2002 paying him Kshs.5,395,678.85 does not indicate that there are other pending claims which he should be paid.

When the plaintiffs was re-examined he denied allegation of attempts to enrich himself. All he wants

is to ensure that he is paid according to the collective bargain agreement. He signed the letter on E.V.R because somebody had already been brought to take over his office and that he signed the letters under intimidation or duress. Confirmed he has been paid Kshs.2, 070,872.68 from the new provident fund and Kshs.4, 254,235.68 from the old provident fund. He also confirmed having been paid Kshs.153, 413.00 from the RBS but to him the computation was wrong leaving an entitlement of Kshs.2, 727,332.00. All he knows is that it is only the CBA which could govern early retirement and nothing more

On house allowance, there is a short fall of Kshs.500.00, on leave there is a short fall of 72 days. As for staff pension scheme the same had been established under rule 11. He has knowledge it was frozen when the scheme refused to accept new members leaving the plaintiff as sole member when he joined. There were those he found already in the scheme and when they retired he assumed they were paid their benefits leaving him as the only beneficiary and that is why he is claiming that amount. He recalls the scheme was frozen in 1976 but it was kept alive.

The defence also called one witness one David Kiambi. The sum total of his evidence is that the material time when the events leading to these proceedings were set in motion the defendant was going through what is called lean periods and it was therefore necessary to come up with a policy which would cut down on costs and concentrate on issues beneficial to the company. That is how the company come up with the Early voluntary retirement scheme affecting all staff but not made mandatory. It was discretionary and or voluntary. The company had a discretion to decide who to turn down and who to accept.

With regard to the plaintiff subject of these proceedings, DW1 recalled the plaintiff put in his application for early retirement exhibit 2 which DW1 discussed with one Tom Hext who was the head of the leaf department. The reason for deliberationS was because the position of the plaintiff was not one of those targeted for reorganization and secondly the plaintiff only had one year to retire officially from the establishment.

Upon discussion DW1 and Mr. Tom Hext called the plaintiff and informed him of their decision but he appeared adamant and keen on leaving and that is why they found a middle ground by allowing him to leave with all his retirement benefits and in addition pay him 12 months salary. The 12 months were to cover the period he would have remained in the employment of the defendant to the normal retirement time for him.

It is DW1s stand that no force or duress or intimidation was applied on to the plaintiff. All they did was to give him sufficient time to think over it as nobody had taken over from him. It is only after he had thought over it is when he wrote exhibit 6 to which the management responded vide exhibit 3. This letter exhibit 3 did away with the terms of the Early Voluntary Retirement scheme and set out new terms for the plaintiff deemed to have been a normal retirement for the plaintiff. For purpose of the record these are given as:-

- (1) 12 months pay.**
- (2) Refund of provident fund in accordance with the rules.**
- (3) Retirement benefits under the RBS.**
- (4) Leave pay in accordance with rule 12 of the CBA.**

DW1 concedes that the plaintiff even after signing exhibit 3 came back for further discussions and the defendants management agreed to accede to two further requests made by the plaintiff namely transportation for his goods to Kitale and entrepreneurs training at the expense of the company. These new additions are reflected in exhibit 4.

DW1 was firm that the plaintiff signed exhibit 4 on 3/7/2002 without complaint of having other claims which had not been captured.

In further support of their case DW1 relied on the documentary exhibits tendered in evidence and produced in a bundle as exhibit D1. In summary these comprise the plaintiff's application for admission to the provident fund dated 26/7/67 and indicating that he was admitted to the provident fund on the 25th September, 1967. There is also reliance placed on the CBA and it is the stand of DW1 that rule 33 (b) does not cover the plaintiff's case because it covers situations where the company moves on its own to declare an employee redundant and not in a situation whereby the employer moves on his own and then volunteers to retire. Rule 31 of the same CBA does not also apply to the employee when the company has declared redundant of which the plaintiff was not as the defendant never declared him redundant. DW1 confirmed that by reason of this application the plaintiff was entitled to benefit from the said fund which was in two categories namely the old fund and the new fund and DW1 has knowledge and can confirm that the plaintiff received his payments under these two funds found at pages 37-38 of the bundle:

New -Kshs.2, 070,872.68

Old -Kshs.4, 254,235.68

The reason why these were split into two was that under the old arrangement the sum was exempt from tax. Whereas after 1991 by reason of an enactment of an act of parliament the fund became taxable. The fund had been previously under the management of a board of Trustees but that had since changed since 2004. The fund is now administered by a committee.

Turning to the complaint on the salary, DW1 was firm that the plaintiff pay slips show that the plaintiff was earning a salary of Kshs.63, 508.00 as shown by the pay slips for the month of May, June and July, 2002 produce as exhibit D2.

As for the increment DW1 conceded that vide the letter dated 7/6/2001 salary had been negotiated and he was aware that employees salaries were to go up each year by Kshs.2, 400.00 and if the plaintiffs salary in the year 2001 was Kshs.61, 194.67 one notch high would give the plaintiff Kshs.63, 508.00 which he was earning in 2002. He does not know how the plaintiffs pay could have shot up from Kshs.61, 194.67 in the year 2001 to Kshs.78, 000.00 in a year.

As for leave entitlement this is governed by clause 12 of the CBA which does not allow an employee to accumulate leave beyond 40 days. According to their records found at pages 22-31 they all show that the plaintiff had earned only 40 days leave earned but not taken. They are strangers to the other leave days claimed by the plaintiff. Their leave were worked out and the plaintiff was paid Kshs.83, 518.00 which the plaintiff has acknowledged.

With regard to the letter of 7/6/2001 produced as exhibit 8, DW1 conceded that if the defendant was agreeing and undertaking to honour the salary increases for employees who would be affected by redundancy initiated by the defendant company and not the employee on their own and for this reason the plaintiff is not covered.

On computation of dues payable to the plaintiff they rely on the documentation in the defence bundle found from pages 34 which show how calculations were carried out less any dues owed to the defendant which was reduced and balance of which was paid out to the plaintiff who acknowledged receipt of the same without any reservation and signed last pay certificate.

As for the funds from the retirement benefits scheme it is DW1s evidence that these were properly calculated.

As for transport the defendants contends that there is no time the plaintiff informed the defendant that he wished to have his goods transported to any destination. He is not aware of any funds due to the employee from staff pension scheme.

When cross-examined DW1 reiterated the evidence in chief and then responded that he is the one who processed the plaintiff's departure from the defendants employment but the accounts department is

the one which worked out the figures; DW1 signed exhibit 4, concedes it mentions existence of a discussion between the plaintiff and Tom Hext whose content is not disclosed; it is Tom who communicated his (Toms) discussion with the plaintiff. It was not in writing but verbally.

Reiterates under the Early voluntary retirement scheme the employer had a discretion to reject or accept an employees' offer to retire under the said scheme; that it is DW1 who rejected the plaintiffs offer to retire since he had only one year to go but did not have the said letter with him. Concedes that the Union was not involved in the negotiations to come up with the terms of Early voluntary retirement scheme. There is nothing explicit in the said terms to show that if one had only one year to retire he could retire under the Early Voluntary Retirement. Concedes the letter of 21/6/2002 contains the results of the discussion between the plaintiff and Tom Hext to which he was not party.

On computation DW1 conceded that the document does not show the salary used to work out the plaintiffs benefits. Concedes that as at the time the plaintiff left there was a case pending in the industrial court between the union and the defendant where by employees leaving the company on redundancy would earn a salary increase but it is DW1s stand that the plaintiff never left the plaintiffs employment under the redundancy provisions. He concedes the salary increment in 2001 would have been 12% and 10% in 2002. To DW1 early retirement is not redundancy.

On leave days what the plaintiff was paid of 40 days is what he was entitled to. DW1 confirmed that the plaintiff belonged to both the old and new staff provident fund and he received benefits there from as such.

Maintains the CBA has nothing to do with the plaintiffs claims because they are governed by a special negotiated terms in the in the Early Voluntary retirement scheme and that the defendant did not force the plaintiff out of its employment. He left on his own.

DW2 Sammy Mbugua Kariuki gave evidence to the effect that he is an employee of AON Minet Insurance brokers who are the administrators of the RBA provident fund. The fund comprise contributions from both the employer and the employee in defined percentages whose purpose is to act as a form of saving for the employee. They run both the old fund and the 1991 fund. Computation of the benefits is based on the formula found in the Trust deed which is found at page 37-38 payments also carry interests.

When cross-examined the witness confirmed that they have documents relating to the plaintiff's claim under their care regarding calculations of his entitlement but he did not have document on the contributions made by the plaintiff and the employer.

At the close of the entire case parties filed written submission. Those of the plaintiff are dated the 31st day of January, 2008 and filed on 1st day of February, 2008. The salient features of the same are that:- The plaintiff had been employed by the defendant effective 17th April, 1967 and as at the time of departure he had worked for the defendant for a total of 35 years and 3 ½ months; He was then aged 55 years as at the date of departure and he only had 2 years to retire at the age of 57 years; The early voluntary retirement scheme was initiated by the company on its own and employees were asked to volunteer to avail themselves of the terms made there under; It is undisputed that the plaintiff availed himself of the said opportunity but since his offer was accepted under terms other than those contained in the document, he is deemed to have been declared redundant; The defendant failed to regularize the plaintiff's terms under redundancy hence these proceedings; the plaintiffs claim is as stated in the plaint and the defendant's response there to is as stated in its defence; Each side filed its own issues for guidance of the court. The plaintiff's evidence support the plaintiffs claim as laid in the plaint and how the calculations were arrived at and the court is invited to adopt the same as the correct calculation; the defence evidence shows that the Early Voluntary Retirement scheme was an in house arrangement as answer to the defendants depressed earnings and was to reduce the burden by paying of staff; DW1 agreed that the plaintiff's retirement was worked out between him DW1 and one Tom Hext and the plaintiff but the exact term on how these were worked out has not been given; DW1 asserts that indeed the plaintiff did not leave the defendants services either under redundancy but under special negotiated terms and when the plaintiff complained is when

they threw in piece meal items to make it acceptably; DW1 agreed that indeed the plaintiff was a unionizable employee and for this reason he fell under the terms and conditions of service contained in the CBA collective Bargain agreement; It is the contention of the plaintiff that since DW1 failed to explain the connection between Voluntary Early Retirement and redundancy on the one hand and since the Voluntary Early Retirement has all the elements of Redundancy the court is invited to hold that the **“Beating the storm”** has all the elements of the Redundancy scheme and apply Redundancy as the reason for the plaintiffs departure from the defendants employment.

The defendant’s submissions are dated the 15th day of May, 2008 and filed on the same date. The salient features of the same are that the plaintiff conceded to have signed exhibit 4 and 6. His attempt to say that he signed under duress hold no water as he did not explain the kind of duress used against him;

(i) The court is invited to hold that in view of what has been stated in number (i) above the plaintiff agreed to leave the defendants’ employment under the E.V.R and his coming back to file these proceedings is nothing but an attempt to renege his agreements in exhibit 4 and 6 with a view to enriching himself considering that the allegation of duress only came up at the hearing and were not even pleaded as part of the content of the plaint. The court is invited to believe the evidence of DW1 David Kiambi that when the plaintiff applied to leave the defendants service under the E.V.R. he was advised against because he was in eligible as he only had one year to retire but he was adamant hence the findings of a middle ground outside the E.V.R with special terms tailor made for the plaintiff which the plaintiff signed without indicating that he had other claims to raise with the defendant.

The plea of duress is not available to the plaintiff as he has demonstrated that he acted under compulsion of fear of any personal suffering of any injury to the body or from confinement actual or threatened. It stands ousted. More so when it was not pleaded. The court is invited to note that it is not trite that courts have no power to rewrite contracts for parties and for this reason the court should not rewrite the contract between the plaintiff and the defendant. It is not true the E.V.R. is a form of redundancy as its intention was solely for purposes of enabling the defendant to reduce costs. The content of the scheme does not measure up to the definition of Redundancy contained in the Trade Disputes Act which defines redundancy as the loss of employment, occupation, job or career through no fault of an employee where the services of an employee are superfluous. This was a mutually consensual arrangement between the employer and employee and the employee herein had not been forced out.

The court is invited to believe DW1s evidence that the plaintiff’s office was not abolished; Although it is correctly argued that the special terms granted to the plaintiff were outside the CBA nor the E.V.R but submit that there was no legal provision in the CBA or the old employment Act which prevented parties from contracting outside those provisions if they so wished more so when an employee is paid all his dues like in the case of the plaintiff herein who never indicated in the last pay certificate that he had any dues still outstanding; the court is invited to hold further that upon the plaintiff signing a disclaimer twice he is not entitled to bring the current suit; the terms of CBA are not applicable and were not applicable to the plaintiff upon his departure from the service.

With regard to the specific claims laid by the plaintiff the court is invited to make findings that items 5(5) 7(6) 7(7) do not fall under the CBA and are ousted by the two agreements he signed as shown by exhibit 6; No evidence was led item 7(8); item 7(1) 7(2) they are not provided for; item 7 (3) 7(4) or a repetition of 7(6) 7(7).

On leave, the court is invited to go by the documentation provided by the defendant to show that the plaintiff had been fully paid for leave earned and not taken. As for the Claim on transport to be rejected because it was not demanded from the defendant by the plaintiff. The claim for Kshs.50, 000.00 had been settled before trial. On salary the court is invited to be guided by the plaintiffs’ pay slips which showed what his salary was as at the time of departure and that the letter of 7th June, 2001 was not applicable to the plaintiff because he had not been rendered redundant. The court is invited to ignore the document annexed to the submission as a basis for the plaintiffs entitlement from the provident fund as this document was not tendered in evidence. Contends no evidence was adduced as to how the calculations from the provident fund were wrong and the court is invited to ignore the plaintiffs allegations that these

should have been calculated based in his salary of Kshs.78,000.00 and to go by the evidence of DW2 that the calculations by the accounts department were correct.

The oral amendment of the plaint in court did not include the figure of Kshs.72, 140.08 from the provident fund. As for Kshs. 980,000.00 in the staff pension scheme this is not available to him as no rule was cited to show that the plaintiff is entitled to this sum. As for the claim under the RBS which the plaintiff has mentioned, the statement attached to the submissions and evidence cannot hold as the plaint was not amended to include a sum of Kshs.2, 727,332.00. The claim for interests is not available. There is no reasonable cause of action in so far as the plaintiff accepted the payments. Vide exhibit 4 and 6. Secondly by reason of the fact that the claim in the provident fund, the Retirement Benefit scheme and staff pension scheme are held by other entities and for this reason the plaintiff is advised to recover any shortfall should follow those bodies.

No case law was referred to court by the plaintiff. The defendant on the other hand referred the court to Halsbury's laws of England fourth edition volume 9(1) pg.454 pr. 710 where there is observation that:-**"By duress of persons at common law is usually meant the compulsion under which a person act through fear of personal suffering as from injury to the body or from confinement, the case of R.L COSTEEL FABRICATORS LIMITED AND ANOTHER VERSUS COMMERCIAL BANK OF AFRICA AND 3 OTHERS DECIDED BY Ibrahim J as he then was (now Judge of Supreme Court) wherein the learned judge drew inspiration from the case of NATIONAL BANK OF KENYA LIMITED VERSUS PIPE PLASTIC SAM KOLIT (K) LIMITED (2002) 2EA 503 that a court of law cannot rewrite 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..."** on that account the court rejected the move to fault the contract because the plaint had not pleaded coercion, fraud or undue influence..." There is also reliance on extracts from a degest page 276 Pr. 1478 and 1479 where there is observation that **"Donee accepting benefits must give effect to the whole instrument and cannot claim under and against instrument; at page 277 in the same digest Pr.148- on the doctrine of approbate and reprobate or the doctrine of election- whereas a deed or will prefers to make a general disposition of property for the benefit of a person named in it such person cannot accept a benefit under the instrument without at the same time confirming to all its provisions and renouncing every right in consistent with them..."**

Lastly the case of **KENYA REINSURANCE CORPORATION VERSUS V.E. MUGUKU MURIU t/a M/S V.E. MUGUKU MURIU & COMPANY** decided by the court of appeal on the 19th day of October ,1996 wherein the law lords of the CA wherein the court upheld the content of an undertaking.

Each party filed own issues for the guidance of the court in the determination of the matter. In its response to these issues separately the court will bear in mind the rival pleadings, evidence, submissions and principles of case law cited to court by the defence. The issues filed by the plaintiff are 10, dated 1st day of March, 2005 and filed on the 9th day of March, 2005. The court bears them in mind globally and with thereto proceeds to make the following findings with regard thereto:-

1. It is undisputed that indeed the plaintiff was an employee of the defendant herein, joined the establishment in 1967 or thereabout. He rendered continuous service up to the time the events leading to the filing of these proceedings were set in motion by which time he had a bout 2 years to go to normal retirement.

(ii) It is also common ground that the plaintiff was in the management cadre and for this reason he was privileged to belong to unionizable employees of the defendant.

2. It is also undisputed that the binding instrument for engagement between the plaintiff and the defendant is the collective bargain agreement CBA produced by the defence in support of their case. In their bundle of documents whereas the plaintiff annexed an up dated version effective first April, 2001.This document contains provisions relevant to the issues in controversy herein namely Redundancy under rule 31 and retirement and early retirement under Rule 33. "Rule 31 provides:

“31 Redundancy: In the event of employees being declared redundant, they will receive the following:-

- **One month’s basic wage plus one month’s salary in lieu of notice.**
- **4 days pay (calculated on basic wage including house allowance for each completed month of service with the company.**
- **Leave pay in accordance with rule 12 (1) leave entitlement waiver of the vesting period that is stipulated in the rules of the provident fund.**
- **Contribution to the staff pension scheme option outlined in the rules of the scheme.**
- **Transportation of house hold effects.**
- **Entrepreneurship at the expenses of the company.**
- **Clause 12(1) (i) All established employees will be entitled to paid leave at 2.5 (two and a half) consecutive days for each completed months of service. For purposes of calculating leave, Sun days and Gazetted public holidays will be additional to leave entitlement”**

“33 Retirement.

(a) Retirement Age

An employee will normally be required to retire from the service of the company on reaching the age of 57 years.

(b) Early Retirement.

The company may require an employee to retire within 10 years of reaching the maximum age of 57 years. Where the company so requires the employee to retire early, payments to the employee will be as per the Redundancy clause No.31 and provident Fund rules.

(c) ...”

3. It is not disputed that the CBA collective Bargain agreement is the binding contract between the parties and the disputants were so bound by it as at the time events leading to the filing of these proceedings were set in motion.

4. It is also common ground that the terms of the said collective bargain agreement are negotiated terms between the defendant and the union of which the plaintiff was a member.

5. It is common ground that during the pendency of the said CBA the defendant on its own decided to embark on a plan to come up with own home grown policy termed “Early Voluntary Retirement” (E.V.R) common to both parties but produced by the plaintiff as exhibit 1. It is conceded that the union was not involved in the formulation of the said policy.

6. It is to be noted that both clause 31 and 33 on redundancy and Retirement leave no room through which the company, the defendant can of its own volition come up with another scheme such as exhibit 1.

7. It is conceded that exhibit 1 makes no reference to the CBA. it was christened “**Beating the storm**” and was offered to the defendant staff with the only caveat being that the company had the last say on who should be availed the said scheme and who should not.

8. It is undisputed that the plaintiff herein availed himself of that opportunity and put in an application exhibited herein. It is further uncontested that the said home grown V.E.R. had terms peculiar to itself. A perusal of the same reveals that item 7 has been lifted from the redundancy clause (Supra) while items 1 and 5 are peculiar to exhibit 1.

9. It is common ground that the plaintiff herein availed himself of the opportunity as demonstrated by the content of exhibit 2,3,4 and 6. It is however peculiar to the plaintiff that he commenced negotiations for better terms for himself. These terms were negotiated between the plaintiff and one Tom Hext who did not give evidence. Those verbal Terms are not available to court. But it is clear that these gave rise to two contracts dated on the same date of 21st day of June, 2002 but one signed on 24/6/2001 and another on 3/7/2002. The first one signed on the 24/6/2006 has four items. Item 2, 3 and 4 have been lifted from clause 31. Item 1 of 12 (twelve) months pay including house allowance with effect from July, 2002 is peculiar to itself. The one signed on 3/7/2002 has six items. The first four and 2 other additional ones are also lifted from clause 31 on Redundancy. There is only one item under clause 31 which has not been included in favour of the plaintiff namely 4 days pay. (Calculated on basic wage including house allowance for each month completed with the company. (Exhibit 4 just like its counter part exhibit 3 was transacted outside the circular.

10. It is common ground that exhibit 4 gave rise to the calculations found in the defence bundle and also admitted by the plaintiff. It is also common ground that the plaintiff duly signed the last pay certificate. Both the last pay certificate and exhibit 3 and 4 all contain words **“in full and final settlement”** it is also agreed that there is no indication made by the plaintiff on the said documentation that he had any other claims to lay against the defendant.

11. The foregoing in number 10 notwithstanding, the plaintiff moved to the seat of justice seeking the reliefs sought. The plaintiff's arguments though agreeing that he has been paid he has alleged that he had not been paid all his entitlements upon departure.

12. Another complaint raised by the plaintiff is that his dues were calculated based on the wrong salary of Kshs.63, 508.00 instead of Kshs.78, 241.00. he agrees that indeed all the pay slips exhibited read Kshs.63, 508.00 but alleges that he was entitled to two salary increments at 10% in 2001 and 12% in the year 2002 in his stand that increments had been worked out by the Union and the defendant and he was covered by the said increment because they were to take effect in 2001/2002 of which period he was still in the defendant's employment, that there is a communication to that effect. The defence do not dispute the existence of the mentioned communication namely exhibit 8 dated 7th June, 2001. The defence through DW1 concedes the existence of this communication but qualified its operation in favour of the plaintiff on account of him not having left the defendant's service under the redundancy clause. A perusal of exhibit 8 reveals that it was authored by DW1 David Kiambi and the relevant portions of the letter relied upon by the defendant to exclude the plaintiff's claim are in the last paragraph. These read:-

“British American Tobacco Kenya assures that for any people affected by redundancy after 1st April, 2001, any changes in terms and conditions in the new CBA will be honoured in computing their terminal benefits”

13. The content of the incoming CBA was exhibited in the bundle of documents exhibited by the plaintiff. Scheming through it reveals that its prescriptions were to take effect effective 1st April, 2001. There is mention that for house allowance for those in job group E was to be Kshs.4, 450.00. The benefits on Redundancy remain as that in clause 31. The prescriptions on retirement remains as those in clauses 33. DW1 had no issue over those prescription save that he said they were available to the plaintiff because he had not been declared redundant by the company (defendant).

14. The plaintiff also lays claim to the pension scheme contribution of Kshs.980.00. the reason being that he was the last contributor to that scheme and since the scheme was discontinued, he should be paid the entire sum notwithstanding that there is no rule which says he should or he should not get the said money. The defence through DW1 simply said that the plaintiff is not entitled to the same.

Turning to the issues filed by the defendant these are dated the 30th day of August, 2005 and filed on the same date. A perusal of the same reveals that they formed the basis of the defendants written submissions which itemized them and then made submissions on each of them as already reflected on the record. A global appraisal reveals that they fell into two segments. The first segment dealing with liability on the basis of the operational agreement and on terms on retirement and the second one dealing with proof of the claims laid by the plaintiff's. The court will address the first segment first.

(1) With regard to issue number 1 the court adopts its findings with regard to the global assessment of the issues raised by the plaintiff and applies them in the assessment of issue number (1) herein.

(2) It is undisputed that the operational main contract document governing the terms and conditions of engagement between the plaintiff and the defendant is the CBA.

(3) It is common ground that this document had been given a face lift by another one effective 1st April, 2001. As found by this court's observation; clause 31 and 33 on Redundancy and Retirement were left intact in the said incoming CBA.

(4) It is common ground that the company of its own motion and without the involvement of the employees and the union came up with the circular on the "**beating of the storm**" (Supra)" Exhibit P1.

(5) It is admitted by the defence that the content of this circular do not apply to the plaintiff's manner of exit from the defendant's employment.

(6) The defendant is in agreement that the circular was the first vehicle of exit for the plaintiff when he first put in his application for Early Voluntary Retirements but the plaintiff negotiated out of the circular with one Tom Hext which negotiations gave rise to the issuance of exhibit 3 which superceded the circular.

(7) It is common ground that further negotiations were carried out between the plaintiff and the same Tom Hext which yielded the content of exhibit 4 which superceded exhibit 3.

(8) It is common ground that the plaintiff in his own hand before appending a certificate to exhibit 4 wrote a letter or note to the defendant dated 20/5/2002.

"20.5.2002.

Stanley Osango

No. 2012

H.R.M.

B.A.T. (K) limited

NAIROBI

Dear Sir,

RE: VOLUNTARY EARLY RETIREMENT.

I refer to my application for the above and subsequent discussion with Tom Hext and you and I agree to take your offer of 12 months salary/house allowance.

Thank you

Signed"

(9) Exhibit 6 was followed by the plaintiff appending a certificate of release of the employer from further liability towards him in exhibit 4. It reads:-

"I Stanley Osango accept the written offer detailed herein and have no further claim from British

from proceeding on with his plan of Early Voluntary Retirement but he was adamant a fact denied by the plaintiff. As such there is no proof.

(i) Since the Early Voluntary Retirement termed “Beating the storm: was involuntarily conceived by the company with an aim of laying off employees the exercise falls into the definition of Redundancy in the Employment Act.

(14) For the reasons given in number 13 above it is the findings of this court that the plaintiff was entitled in the circumstances to renege on exhibit 4 as fortified by exhibit 6 and then insist on being given full terms under the CBA on redundancy.

(15) The court also proceeds to make a finding that the prescription on Redundancy are the proper prescriptions to apply to the plaintiff herein because he left prematurely before attaining the compulsory retirement age. The discretion to retire prematurely has been given to the company. Since it is on record that the circular exhibit is the compulsory’s home grown document, it can be taken that this was the company’s invitation to its employees to retire prematurely which invitation the plaintiff availed himself of and since clause 33 does not say that the parties could contract outside the prescriptions in clause 31, the court rules that the said invitation as well as acceptance was subject to the prescriptions in clause 31. More so when clause 33(b) indicates that where an employee leaves prematurely before his retirement age he is deemed to have left under the redundancy clause 31.

Having disposed off the issue of liability, the court proceeds to make an assessment of the claims. Being a special claim, it is bound by the now crystallized principles of law applicable to its assessment namely the decision in the case of **OUMA VERSUS NAIROBI CITY COUNCIL (1976) KLR 297** a decision of a court of concurrent jurisdiction and as refined and crystallized by the court of appeal in the case of **HANN VERSUS SINGH (1985) KLR 716** wherein it was held inter alia that: **“Special damages must only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depend on the circumstances and the nature of the acts themselves”**

When applied to the plaintiffs claim herein, the court finds that the plaintiff complied with the parameters set by law by pleading the claims and particularizing them and all that he is left with is the issue of proof which will be determined in the assessment

ASSESSMENT

The court adopts its reasoning and findings on liability and applies them as further reasoning for the assessment and findings on the specific claims laid by the plaintiff.

1. Vide paragraph 4 of the plaint the plaintiff lays claim to benefits from the provident fund which he alleges had not been paid fully. The shortfall arises from the fact that the calculations were based on salary of Kshs.63, 508.00 which was the old salary. It is the plaintiff’s arguments that these should have been calculated on the basis of his retiring salary which was Kshs.78, 241.00. The increase in the salary arises from the contention that new salaries had been negotiated in a new CBA which took effect during the time the plaintiff was still in employment but left before the changes had been effected and for this reason the changes should have been effected in his favour and the workings for his dues adjusted accordingly. This court has already made a finding that indeed there is such an agreement on the basis of which salary increment as well as house allowance were given. It is produced in evidence. The defence concedes its existence. The only reason given for disentitling the plaintiff to be availed of the said benefits was that the plaintiff’s retirement did not fall under clause 31 of the CBA a fact this court has discounted meaning that since the plaintiff’s retirement falls under clause 31 he is entitled to the said increments.

(ii) As per the pay slips produced herein and as fortified by a letter from the defendant to the plaintiff dated 30th day of March, 2000, the plaintiff’s salary had been adjusted upwards to Kshs.63,508/00. DW1 conceded in evidence that staff increment was at the rate of 10% for 2001 and 12% increment for 2002. The plaintiff left July, 2002 meaning that he was entitled to benefit from the said increments. These

would work out as Kshs. $63,508/00 \times 10/100 = 6,359.80$ which brings up the plaintiffs salary to kshs.69,858.80 for the year 2001. 12% of the resulting figure would work out as Kshs. $69,858.80 \times 12/100 = 8,383.05$ bringing the figure to Kshs.78,241.85 rounded up to Kshs.78,241.00. In the premises the court is therefore satisfied that the plaintiffs retiring salary was Kshs.78,241.00 which should have formed the basis for calculation of his benefits from the provident fund and the Retirement benefits Fund.

2. Vide paragraph 5 of the plaint the plaintiff has claimed payment to him of Kshs.980,000/= on winding up the staff pension scheme. It is common ground that the plaintiff was the last contributing member after the scheme had been frozen by the employer. It is also common ground that there are no specific rules on what was to become of the fund after the last surviving member leaves. The rules governing the operation of the Fund produced in court as exhibit 7 by the plaintiff do not have a provision as to what is to become of the fund after the last member retires. That is the reason as to why the plaintiff seeks that he be paid the balance of the amount remaining in the fund. DW1 apart from saying that this money cannot be paid out to the plaintiff, did not offer any reason as to why the company should keep it or offer guidance on how the company could utilize it. Neither has the defendant put in a counter claim for this money. In the premises the court is satisfied that in the absence of any rule which stipulates that the last surviving member of the scheme cannot be paid all that is available in the kitty, and also considering that the defendant has not counterclaimed for this money. Neither has it shed light on how it stands to utilize it for the beneficiaries of the fund past and present or that effort will be made to trace them and share out the resulting figure in the premises, the court is satisfied that on the basis of the facts before this court, the plaintiff has laid a lawful claim on to the said balance of the fund as the last surviving contributor and he is adjudged to be entitled to the said amount of Kshs. 980,000.

3. Vide paragraph 6, there is a claim to Retirement Benefits scheme. Just like the claim under paragraph 4 of the plaint, the source of the grievance is that a wrong salary was used to calculate the same. In the premises the court is satisfied that the correct salary which should have formed the basis for calculation of the plaintiffs benefits under this scheme should have been calculated basing on the last salary of Kshs.78,241.00.

4. As for claims under paragraph seven (7), for the reasons given under number 1 above :-

(a) Item 3 and 6 are allowed and the court makes a finding that the plaintiffs correct salary as at the time of departure from the defendants employment is Kshs.78,241.00 which he is entitled to claim.

(b) Item 2, 4 and 7 on the claim of house allowance, the CBA agreements admitted to have been operational effective 1st April, 2001 makes provision for adjustment of house allowance and since the agreement became effective when the plaintiff was still in the defendants employment, the court makes a finding that the plaintiff is entitled to the said house allowance as a benefit which had accrued to him before his retirement from the defendant.

5. Item 5 is on severance pay being four days salary for every worked month. This claim is one of the benefits under clause 31 of the CBA. The court having ruled that the plaintiffs retirement falls under this clause there is no way the plaintiff can be denied benefit of this claim. It is recalled that in the evidence the plaintiff gave a calculations of how the resulting figure should be worked out but the court takes note of the fact that there are other entities involved in the verification of the correctness of the tabulations. Firstly these have to be worked out by the defendants accounts section, then verified by the entity administering the fund whose employee is DW2 before the final figure can be arrived at. The court also notes that the plaintiff has appended a calculation sheet to his submissions. But as submitted by the defence this is to be treated with caution as it is not known who did the allocutions, information used in the calculations secondly neither was the said calculation tested in cross-examination.

6. Item eight (8) on the refund of the provident fund arises from the short fall worked out for the benefits of the plaintiff. The court having ruled that the plaintiff is entitled to a salary at Kshs.78,241.00 as at the time of retirement, and having knowledge that the plaintiffs dues were not calculated based on the said salary but on the previous salary, the court makes a finding that the plaintiffs benefits under the provident fund be recalculated using his new salary of Kshs.78,241.00 less what he was paid and then he be paid

the resulting short fall.

7. On leave earned but not utilized, the plaintiff had initially claimed the value of 112 days but upon filing the plaint he was paid the value of 40 days leaving a balance of 72 days. No document was produced by the plaintiff to show the leave computation. The defendants on the other hand rely on the documents in their bundle to maintain that indeed the plaintiff had leave days earned but not utilized in respect of what he was entitled to payment and for which he was in fact paid being 40 days. The court has revisited the said documentation and gone through them and finds that the earliest document exhibited bears the date of 7/2/2000 when a total of 50 days were shown to have been brought forward. As at April, 2001 (9/4/2001) It showed leave available was 40 days. 8 (eight) had been applied for leaving a balance of 32 days. As at 6/8/2001 it was shown that the number of leave duly available were 52 days for 2000. The plaintiff applied for 33 days. A total of 30 days leave had been awarded for the year 2001. That left a balance of 49 days. As at 20/8/2001 the tabulation showed leave available of 49 days. 11 days were applied for leaving a balance of 38 days. On 21/8/2001 there was leave days of 38 days less one day applied for leaving a balance of 37 days. On 21/12/2001 leave available was shown as 20 days less 4 days applied for leaving a balance of 16 days. Then on 19/3/2002 leave days available was shown as 16 days less 2 applied for leaving a total of 14 days. As at 8/4/2002, leave computation showed that 13 days had been carried forward from 2001. Leave entitlement for 2002 was 30 days making a total of 43 days. Leave applied for was 3 days leaving a balance of 40 days which are paid. From the afore set out historical survey, it is clear that indeed the plaintiff had 40 days leave earned and not taken to his credit as at the time of his departure from the defendants employment. The plaintiff had access to the said documentations on leave. There was no mention that these were not authentic or that they were a fabrication. He did not produce any document of his own to controvert the entries in the defendant's records. The court has no alternative but to hold that the plaintiff only had 40 days leave outstanding in respect of which he was fully paid.

8. Item 10 deals with transportation of goods from Nairobi to Kitale. Indeed this is an item provided for in exhibit 4 as well as rule 31 of the CBA. The plaintiff stated in his evidence that he was resident in Nairobi and that he never made efforts to approach the defendant with a view to requesting them to facilitate his transportation to his home in Kitale a matter confirmed by DW1. No evidence was adduced to show how the figure of Kshs.100, 000.00 had been arrived at. Being a special claim, the law requires it to be strictly proved. In order to earn it the plaintiff should have annexed receipts as proof of having spent that money. In the premises this claim is disallowed as the rules under which the same is claimable does not provide for global payments in monetary terms.

9. The plaintiff has claimed interests at 20% and 30% on certain items. As submitted by the defence counsel no reasons were given or evidence adduced as to why the plaintiff should be awarded such a percentage of interest. The court notes that from the evidence of DW2 the provident Fund Trust deed has its own inbuilt prescriptions on how interest on the invested funds should be calculated the premises, it is therefore unsafe for the court to award an interest rate which is likely to be at variance with the interest provided for in the Trust Deed. In the premises the court is of the opinion that where the plaintiff has succeeded on certain items where he is also entitled to interest, it will be more appropriate and just to order that the resulting sums do carry interest at the rate provided for in the specific instruments governing those funds and only after the assessment has been done is when the plaintiff can have interest accruing to him at court rates from the date of assessment till payment in full.

10. Considering the findings of this court in number five above, that it is fair and just that the recalculations be done by the respective entities charged with the duty of taking care of the concerned funds, the court is of the opinion that this is a proper case where an interim decree can be issued pending the recalculations by the relevant bodies. The plaintiff's rights which have accrued and crystallized by the assessment herein can be safely safeguarded by the court issuing declaratory orders on entitlement.

For the reasons given in the assessment the court proceeds to make the following final orders in the disposal of this matter.

LIABILITY

1. For the reasons given in the assessment, the court makes an order that the plaintiff was entitled to approach the seat of justice with a view to seeking further claims from the defendant because:-

(a) Both the plaintiff through the Union and the defendant as an employer are bound by the Terms of the CBA (Collective Bargain Agreement) which is the main and or parent contract as amended from time to time with the participation of both parties. No where in the said instrument is there a provision permitting parties to the said agreement to contract outside its provisions.

(b) It is common ground and it was admitted by DW1 that a new CBA had been agreed upon by the defendant and the Union which had taken effect on 1st April, 2001 and was to remain in force up to the year 2003 which had clear provisions demonstrating intention to have employees of the defendants who leave the defendants employment on account of redundancy benefit from the fruits of the said CBA, among them are salary increments at 10% for 2001 and 12% for 2002 as well on increases on house allowance.

(c) Further proof that parties could not contract outside the CBA is signified by the fact that the contents of exhibit 3 and 4 were simply lifted from clause 31 of the CBA on redundancy.

(d) It is also demonstrated by the easy way in which the defendant's agents discarded the prescriptions in the circular on "**beating of the storm**" and gave out to the plaintiff prescriptions from clause 31 though pieces meal.

(e) The plaintiff was entitled to disregard the negotiations between him and one Tom Hext and as executed by DW1 on behalf of the said Tom Hext as not binding on the plaintiff so as to oust the prescriptions in the CBA because no where in the evidence of DW1, does DW1 say that the said Tom Hext or him DW1 had been properly mandated by the relevant authority of the defendant namely the Board of Directors to engage in the said negotiations with a view to binding the defendant as a company.

(f) Proof of the defendant's desuading the plaintiff not to retire prematurely and him plaintiff being adamant about his move to retire prematurely has not been demonstrated as the same was not pleaded and it must be an after thought. Neither was it proved to exist.

(g) The ideals behind the defendant's circular exhibit 1 "**beating the storm**" were aimed at laying off the employees in voluntarily and that action falls into the definition of Redundancy in the employment Act.

(h) Clause 33 of the CBA is explicit that any employee of the defendant leaving the defendants employment prematurely before retirement is deemed to be leaving the defendants employment under clause 31 (Redundancy).

(i) All the benefits given to the plaintiff with the exception of I had all been lifted from clause 31 of the CBA.

(j) By reason of what has been stated in number (a) (b) (c) (d) (e) (f) (g) (h) and (i) above allegations of the plaintiff wanting to enrich himself have been negated.

2. QUANTUM

For the reasons given in the assessment, the plaintiff proceeds to make the following orders on quantum in respect of each item claimed.

(a) Vide paragraph 4 of the plaint an order be and is hereby made, ordered and directed that the plaintiff's benefits from the provident Fund be recalculated by the said relevant authority on the basis of the retiring salary of Kshs.78,241.00 in accordance with the rules governing the said Fund.

(b) Vide paragraph 5 of the plaint an order be and is hereby made and ordered that the plaintiff is entitled to be paid the sum of Kshs.980,000.00 on winding up the staff pension scheme because:-

(a) He is the only surviving contributing member of that scheme.

(ii) The rules governing the said scheme produced in court as exhibit 7 do not contain a provision as to what should happen to the funds should the surviving contributing member retire from the defendants employment. As such there is nothing to bar the plaintiff from seeking that the balance of the Funds in the Kitty be released to the plaintiff.

(iii) The defendant company has not asserted any right over this money. Neither has it shed any light on how it intends to use the said funds for the benefit of the contributors who were meant to benefit from the said fund inclusive of the plaintiff.

(c) Vide paragraph 7 of the plaint. For the reasons given in the assessment.

(i) Items 1, 3 and 6 are allowed at Kshs.78, 241.00 as the plaintiffs retiring salary.

(ii) Items 2, 4 and 7 are allowed at Kshs.4, 000.00 as the plaintiffs retiring house allowance.

(iii) Item 5 is allowed save that it has to take into consideration the plaintiffs benefit under item 1 of exhibit 4 (four) so that he does not benefit twice what he had already been paid under item 1 of exhibit 4 to be reduced from the resulting figure calculated.

(iv) Under item 8 an order be and is hereby made and declared that the plaintiff is entitled to have his entitlements under the Provident Fund recalculated on the basis of his retiring salary of Kshs.78,241.00 by the relevant authority having charge over the said Fund and the resulting figure forming the short fall of what he had been paid be paid to him.

(v) Item 9 is disallowed for the reasons given in the assessment.

(vi) Item 10 is disallowed for the reasons given in the assessment.

3. For the reasons given under 2(a) and 7(iv) an order be and is hereby made that an interim decree will issue in respect of and for the sums adjudged in favour of the plaintiff under 2(b), 7(i) and (ii) above.

4. Interest on items falling under 2(a) and 7(iv) will be calculated at the rate of interest provided for in the instruments governing the creation of those funds.

5. Upon the funds being recalculated under 4 above they will start attracting interest at court rates from the date of calculation till payment in full.

6. The sums allowed under 2(b) and 7(i) and (ii) above will carry interest at court rates from the date of filing till payment in full.

7. Under any other or further relief that the court may deem fit to grant the court grants the interim decree in terms of item 3 above.

8. Also under any other or further relief that the court may deem fit to grant the court makes a declaratory order that for the reasons given in the assessment the plaintiff has made it a case for a recalculation of benefits payable to him under the provident fund and the Retirement benefits scheme on the basis of his retiring salary of Kshs.78,241.00 and retiring house allowance of Kshs.4,000.00

9. Also under any other or further relief that the court may deem fit to grant the court grant liberty to apply to either party.

10. The plaintiff will have costs of the suit.

11. The delay in the drafting and delivery of the judgment which is highly regretted was occasioned by

systemic work constraints.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA

**DATED, READ AND DELIVERED AT NAIROBI BY HON. MR. JUSTICE MAJANJA ON THIS
28TH DAY OF SEPTEMBER, 2012.**

JUDGE