



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL SUIT NUMBER 1042 OF 2002**

**EPHRAIM MUTHIGA KUBAI. .... PLAINTIFF**

**VERSUS**

**KENYA BREWERIES LIMITED. .... DEFENDANT**

**J U D G M E N T**

This is a case where parties have elected not to give evidence in court.

These proceedings were commenced by a plaint filed on 21<sup>st</sup> June 2002 by M/s Mohamed & Muigai Advocates on behalf of the plaintiff. In the said plaint it is alleged as follows: -

- ***By a letter of appointment dated 20<sup>th</sup> December, 2000, the defendant employed the plaintiff in the capacity of Managing Director, which appointment was acknowledged by the plaintiff in a letter dated 22<sup>nd</sup> March 2001 of (sic) the Defendant Company.***
- ***By a letter of resignation dated 21<sup>st</sup> December, 2001 prepared by the Defendant and signed by the plaintiff, the plaintiff resigned as the Managing Director of the Defendant. The said resignation was accepted by one Pat Healy, a Director of the Defendant by appending his signature thereto.***
- ***By an endorsement on the foresaid letter of resignation, the said Pat Healy altered the effective date of resignation from 21<sup>st</sup> December, 2001 to 24<sup>th</sup> January, 2002.***
- ***The plaintiff claims from the Defendant the sum of Ksh.1,042,149.00 being arrears of salary and benefits payable by the Defendant to the Plaintiff for 23 days in the month of January, 2002 that the plaintiff remained an employee of the Defendant.***
- ***The plaintiff further claims interest on the aforesaid sum of Ksh.1,042,149.00 at 23% per annum until payment in full.***

In view of the foregoing, the plaintiff made the following claims in the plaint against the defendant: -

**a) Ksh.1,042,149.00**

**b) Interest on (a) above at 23% p.a. from 24<sup>th</sup> January, 2002 until payment in full.**

**c) The costs of this suit together with interest thereon at court rates from the date of judgment until payment in full.**

The defendant filed a short defence, whose main contentions were as follows: -

- **In answer to paragraph 3, 4, 5, 6 and 7 of the plaint, the defendant avers that the parties herein negotiated a special retirement package for the plaintiff, and the same was ultimately executed by the parties on 24<sup>th</sup> January, 2002.**

- **Under the terms of the special retirement package, the plaintiff accepted the payment of Ksh.8,900,000/- in full and final settlement of all amounts, claims, expenses, losses, liabilities, rights, benefits or entitlements (whether known or unknown) whether under contract, deed, statute, common law or in equity of whatsoever nature and in particular all or any claims rights or applications of whatsoever nature that the plaintiff had or may have or could make in or to any court of law.**

- **Having executed the "Release" dated 24<sup>th</sup> January 2002, the plaintiff is estopped from raising any claims and/or tendering any evidence of the matters alleged in paragraphs 6 and 7 of the plaint, or at all.**

The plaintiff, through his counsel filed a reply to defence on 2<sup>nd</sup> August 2002 in which the main contentions were as follows: -

- **In reply to paragraph 3, 4 and 5 of the defence, the plaintiff avers that the sum of Kshs.8,900,000.00 paid by the defendant to him under the agreement dated 24<sup>th</sup> January 2002 is separate and independent from the sum claimed herein and hence did not include the aforesaid sum.**

- **In reply to paragraph 6 of the defence, the plaintiff denies that he is estopped as alleged or at all.**

After the close of pleadings, parties on 27<sup>th</sup> January, 2003 filed a statement of agreed facts, signed by their respective advocates. I will reproduce the same verbatim hereunder. They are as follows:-

**1. The plaintiff was by a letter dated 20/12/2000 offered employment by the defendant, which he accepted vide a letter dated 22<sup>nd</sup> March 2001.**

**2. The plaintiff tendered his resignation to the defendant on 21<sup>st</sup> December, 2001, which resignation was to take place with immediate effect.**

**3. The plaintiff signed a Release on 24<sup>th</sup> January, 2002, which set out the terms under which he accepted the payment of his terminal dues.**

**4. The Release stipulated that the plaintiff accepted from the defendant the payment of the sum of Ksh.8,900,000.00 in full and final settlement of all claims he might have had against the defendant.**

**5. In compliance with the terms of the Release the defendant paid to the plaintiff the sum Ksh.8,900,000/-, which was accordingly accepted by the plaintiff.**

The parties also through their advocates, on 8<sup>th</sup> July, 2003 filed one joint agreed issue, which I will again reproduce verbatim for the sake of clarity. It is as follows: -

**"In the light and terms of the accord and satisfaction agreement stated 24<sup>th</sup> January 2002, and the payment made thereunder, is the plaintiff stopped from raising any claim(s) against the defendant? If**

***not, is he entitled to the amount claimed?”***

The parties, having agreed that the matter be determined through the procedure set out under Order XIV of the Civil Procedure Rules (Cap 21), filed written submissions and elected not to tender evidence.

The submissions of the plaintiff were filed on 18<sup>th</sup> October 2010. After highlighting the above agreed single issue, it was contended that a contract such as the “***Release Agreement***” herein could not extinguish rights that were conferred by law under section 17 of the Employment Act (Cap 266) which requires an employer to pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly. It was further contended that the release agreement related to a “***retirement package***”, which means that the payment was in the form of retirement benefits as defined under the Retirement Benefits Act, and therefore did not relate to entitlements that had no connection with retirement dues.

The court was urged to construe the release agreement with reference to its object, and therefore its whole context must be considered. The court was requested to ask itself the following questions. What were the parties trying to do? What were they trying to achieve? What was the overall dominant thrust? It was contended that the agreement was entered subsequent to the plaintiff’s employment benefits for January 2002 becoming due and payable to him, thus such were payable separately. Counsel emphasized the part of the agreement which states: -

***“In consideration of the payment to me by Kenya Breweries Limited (the company) of the sum of Kshs.8,900,000/- being the special retirement package terms based on 8 years of service.....”***

It was the contention of learned counsel, that, in view of the above contents of the agreement, it was not the intention of the release agreement for the plaintiff to give up his employment dues and entitlements, as what was to be paid in terms of the agreement were retirement dues.

It was contended that though it was not open for the court to revise the words used by parties in a contract or to put upon them a meaning other than that which they ordinarily bear, the court has a duty to endeavour to breathe life into the intentions of the parties. Therefore, the court was called upon to restrict, transpose, modify, supply or reject terms in a document, provided the intention of the parties is clear irrespective of the words used. Reliance was placed on the case of **FORSIKRINGS VESTA –VS- BUTCHER & ANOTHER [1986] 2 ALL ER 488**. Reliance was also placed on the case of **MANNAI INVESTMENT CO. LTD –VS- EAGLE STAR LIFE ASSURANCE CO. LTD [1997] 3 AER 352** wherein Lord Hoffman stated: -

***“It is true that the law is not concerned with the speaker’s subjective intentions..... The meaning of words as they would appear in a dictionary, and the effect of their syntactical arrangement as it would appear in grammar, is part of the material which we use to understand a speaker’s utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also ..... to understand the speaker’s meaning, often without ambiguity, when he has used the wrong words”.***

Reliance was also placed on the case of **INVESTORS COMPENSATION SCHEME LTD –VS- WEST BROMICH BUILDING SOCIETY [1998] 1 ALL ER 98**, wherein Lord Hoffman stated: -

***“The meaning which a document (or any other utterance would convey) to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.”***

Counsel for the plaintiff therefore invited the court to find that the facts leading to this case demand that the court analyses the circumstances giving rise to the release agreement.

The defendant, through their counsel filed written submissions on 5<sup>th</sup> November, 2010. The following words in the release agreement were highlighted: -

***“ .... I accept the payment will be in full and final settlement of all amounts, claims .... benefits or entitlements (whether known or unknown), ..... and in particular all or any claims, rights or applications of whatsoever nature ..... arising from my employment with Kenya Breweries Limited or any other company within the group of companies of which Kenya Breweries Limited is a member and termination of that employment, other than in relation to any rights that I may have as a member of any pension scheme as a result of my employment with Kenya Breweries Limited.”***

It was contended by counsel for the defendants that the terms of the contract between the parties were binding. It was therefore the duty of the court to give effect to the intention of the parties in the Release Agreement. On this, reliance was placed on the Ugandan case of **OSMAN –VS- MULANGWA [1995 – 1998] 2EA 275**.

It was further contended by counsel that it is not the duty of the court to rewrite a contract between parties. Reliance was placed on the English case of **SMITH –VS- COOKE (1891) AE 299**, which was cited with approval in **JIWAJI –VS- JIWAJI [1968] EA 547**. It was emphasized that the release agreement herein covered all benefits or entitlements payable to the plaintiff arising from his employment with the defendant. It was the contention of counsel that the words ***“being the current special retirement package terms based on eight years of service”*** – were used as the basis on which the amount was arrived at. That period covered was much longer than the one year that the plaintiff worked as Managing Director. The court was urged not to concentrate on individual words, but to consider the meaning of the Release Agreement as a whole. It was argued that it was wrong for the court to go into the background of documents. The correct approach, it was contended, was to construe the words used in the agreement as they stand. Reliance was placed on the Ugandan case of **MTN(U) LTD –VS- UGANDA TELECOM LTD [2005] EA 225** as well as the English case of **PRENN –VS- SIMMONDS [1971] IWL 1381**.

The cases relied on by the plaintiff were distinguished. On the case of **MANNAI INVESTMENT CO. LTD –VS- EAGLE STAR LIFE ASSURANCE CO. LTD** (supra) relied on the plaintiff, it was argued that, unlike in the present case where words were clear, in that case the wrong words had been used resulting in ambiguity in the document. Again, in the case of **INVESTORS COMPENSATION SCHEME LTD –VS- WEST BROMISH BUILDING SOCIETY**, (supra) relied on by the plaintiff, the wrong words or syntax were used. However, counsel agreed with the statement in the latter case that the meaning in a contract is not what the plaintiff thinks but what a reasonable man would understand the words to mean.

It was also contended that since the plaintiff presented to the defendant that he would accept payment of the Kshs.8,900,000/- and the defendant acted on the same, it would be inequitable for the plaintiff to go back on his promise. Reliance was placed on the English case of **CENTRAL LONDON PTY TRUST LTD –VS- HIGH TREES [1947] KB 130**, where a landlord was estopped from making a claim based on the original contract, where he had previously agreed to receive lesser sums as payment for rent during World War II.

It was contended, in the alternative, that even if the court finds that the terms of the contract in issue herein were what the plaintiff is alleging, the terms of contract would debar him from any additional payments. Reliance was placed on clause 5 of the plaintiff’s Letter of Appointment, which states: -

***“Your employment with the company may be terminated by yourself giving 6 months notice in writing or by your paying the company 6 months salary, at your current salary at that time in lieu of such notice”***

It was contended that, because the plaintiff resigned from his employment, the above terms would apply to him. From his allegation that his salary for 23 days was Ksh.1,042,149/-, then if he was to pay the company 6 months salary in lieu of notice, he would have been indebted to the defendant in the sum of Ksh.5,210,745/- being the equivalent of the balance in lieu of 5 months notice period.

Lastly, it was contended that a party who signs contractual documents is bound by the documents even though he had not read the terms, unless he signed the documents through misrepresentation. Reliance was placed on the case of **SECURICOR COURIER (K) LTD Vs BENSON DAVID ONYANGO [2008] eKLR** and the English case of **LESTRANGE –VS- F GRAUCOB LTD [1934] 2KB 394**.

I have considered the matter. Indeed, the agreed issue is one. At the risk of repetition, it is reproduced hereunder as follows:-

***“In the light and terms of the accord and satisfaction agreement dated 24<sup>th</sup> of January, 2002, and payment made thereunder, is the plaintiff estopped from raising any claims(s) against the Defendant? If not, is he entitled to the amount claimed?”***

The satisfaction agreement referred to in the above agreed single issue, reads as follows: -

***“Inconsideration of the payment to me by Kenya Breweries Limited (the “company”) of the net sum of Khs.8,900,000.00 being the current special retirement package terms based on eight years service, a breakdown of which is availed from the company (the “payment”), I hereby agree and this letter witnesses that I accept that the payment will be in full and final settlement of all amounts, claims, expenses, losses, liabilities, rights, benefits or entitlements (whether known or unknown), whether under contract, deed, statute, common law or in equity of whatsoever nature and in particular all or any claims rights or applications of whatsoever nature that I have or may have or could make in or to any court of law, including any rights arising from any known or unknown (whether within or beyond the present contemplation of any of us) express or implied breaches of duty owed to me by the company, any of its directors, officers or employees arising from my employment with Kenya Breweries Limited or any other company within the group of companies of which Kenya Breweries Limited is a member and the termination of that employment, other than in relation to any rights that I may have as a member of any pension scheme as a result of my employment with Kenya Breweries Limited. I acknowledge that clause 9 (confidential) and clause 10 (covenant in respect of future business) of the letter of appointment dated 20<sup>th</sup> December 2000 shall continue to apply following termination of my employment. In witness whereof this Release has been signed by Ephraim Kubai the day and year first above written.”***

The issue here turns on the interpretation of the above release agreement. It is agreed that the plaintiff was, before appointment as Managing Director, an employee of the company in another capacity. It is agreed that by a letter dated 20<sup>th</sup> December, 2000, he was appointed as Managing Director. The said letter of appointment had very comprehensive terms on salary, termination and retirement, among others. It is agreed that by a letter of resignation initially dated 21<sup>st</sup> December 2001 but endorsed in ink with a date of 24<sup>th</sup> January, 2002 the plaintiff resigned as such Managing Director with immediate effect. The plaintiff claims that the initial date of immediate resignation was 21<sup>st</sup> December, 2001. However, a Director of the defendant Pat Healy changed the date to 24th January 2002 – forcing the plaintiff to work for the defendant up to 23rd January 2002. The plaintiff claims that he was not paid for the extra 23 days of work. The plaintiff now wants the Release Agreement to be interpreted to mean that the salary for the 23 days worked was not included in the sum paid through the agreement, and that such amount be awarded by the court, together with interest and costs. The defendant contends that the Release Agreement is clear, and it covered all payments that were due from the defendant to the plaintiff.

As was held in the English case of **CENTRAL LONDON PROPERTY TRUST LIMITED –VS- HIGH TREES HOUSELIMITED 1947 KB 120**: -

***“(1) where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent it will not allow him to act inconsistently with it even though the promise may not be supported by considerations in the strict sense and the effect of the arrangement made is to***

**vary the terms of contract under seal by one of less value.”**

The Release Agreement was clearly made after the letter of appointment. Its terms, are at variance with the letter of appointment in certain aspects including the requirement of 6 months notice by the plaintiff, or payment of 6 months salary in lieu of notice. There is no dispute that both parties acted in accordance with this agreement. Therefore, it is binding on them, to the extent that it varies the terms of the original contract of employment.

Now, did the Release Agreement exclude the 23 days salary of the plaintiff from its ambit? I will start by stating that parties are bound by the terms of a contract which they sign. It is not for the court to impose or make terms of contracts for parties. Since parties are bound by the terms of their signed contracts, the function of the courts is to give effect to the clear intentions of the parties. This was what was clearly elaborated by the Ugandan Supreme Court in the case of **OSMAN –VS- MULANGWA [1995 – 98] 2EA 266 (SCU)** wherein it was held: -

***“Courts will not make contracts for the parties but will give effect to the clear intentions of the parties – JIWAJI -VS- JIWAJI [1968] EA 547 followed. A study of the sale agreement showed that the parties intended that the purchaser’s possession of the suit premises was not contingent upon payment of the purchase price. However, transfer of the title in the suit property was dependent on the completion of payment of the purchase price.”***

In my view, courts can only go into trying to interpret the meaning or intent of a contract or its terms, where there is a clear ambiguity like in the case of **FORSIKRINGS VESTA –VS- BUTCHER [1986] 2 ALL ER 488** where there was ambiguity in the terms of the contract relating to the applicability of either English or Norwegian Law. In that case the court held: -

***“Although it was an almost invariable rule that there was only a single proper law of a contract which governed all aspects of the contract, the principle to be applied was that the choice of law was a matter for the actual or imputed choice of the parties and that they were free to choose that different parts of the contract be governed by different laws. It followed that although the reinsurance contract itself was, and remained, a contract governed by English law, it was in the direct contemplation of the parties that that contract was made with reference to, and on the terms of, the contract of original reinsurance which was governed by Norwegian law.”***

The court intervened to interpret the contract because the terms were ambiguous. In my view, in our present case the terms are very clear. The parties changed the terms of the original letter of appointment in terms of the Release Agreement which was signed. Though the plaintiff claims that there should be a payment of 23 days because of the change of the effective date of resignation from 21<sup>st</sup> December, 2001 to 24<sup>th</sup> January, 2002, even that change of date on the letter of resignation cannot support the plaintiff’s demand for payment for 23 days. The letter was dated 21<sup>st</sup> December, 2001, which means that there was 10 days to the end of the month of December. The date was changed to 24<sup>th</sup> January, 2002, which was another 23 days. If we were to go by simple arithmetic, the underpayment would be for 33 days rather than 23 days claimed. No explanation has been given for the 10 days in December 2001, and I will not speculate on the same. In my view, the plaintiff is just trying to mystify the clear terms of the Release Agreement, which covered the whole period of 8 years service.

Secondly, the plaintiff accepted the net amount of Ksh.8,900,000/- as ***“...full and final settlement for all amounts, claims, expenses, losses, liabilities, rights, benefits or entitlements (whether known or unknown), whether under contract, deed, statute, common law or equity of whatsoever nature....”*** This is what the Release Agreement states. The letter of appointment which was accepted by the plaintiff in early 2001 was a contract of employment. The word used above clearly show that all amounts, claims, benefits and entitlement in the said contract of employment, whether known or unknown were covered in the Release Agreement. It is abundantly clear to me that the payment for any period worked by the plaintiff is covered. There can be no extra payment for work done up to 24<sup>th</sup> January, 2002.

It has been argued by counsel for the plaintiff that because the amount is described as “**current special retirement package**” – it therefore excludes the salary and merely covers terminal benefits. In my view, that is not the position. A retirement package can be broader than the entitlement under a pension scheme or retirement scheme. It can include what is agreed by parties as amounts to be paid in lieu of salary and allowances and benefits, and can even include loss of future earnings. This is why it is a “**special retirement package.**” It is not the normal retirement that would have occurred as per the letter of appointment. In fact, my interpretation of the Release Agreement is that pension benefits under any existing pension scheme were excluded from the amount of Ksh.8,900,000/-. In my view, that is the purport of the words “**...., other than in relation to any rights that I may have as a member of any pension scheme as a result of my employment with Kenya Breweries Limited.**” Therefore, the amount paid was not meant to include any payment that could accrue to the plaintiffs by virtue of being a member of a pension scheme as a result of his employment with the defendant.

In the result therefore, I find that this suit lacks merits. I dismiss the same. The plaintiff will pay the defendants costs of the suit.

Dated and delivered at Nairobi this 8<sup>th</sup> day of February 2011.

.....  
**GEORGE DULU**  
**JUDGE**

**In the presence of**

Mr. Mogere for plaintiff

Mr. Muthui for defendant

C Muendo – court clerk