



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL SUIT NO.19 OF 1999

CHRISANTUS ONYAIN.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANKDEFENDANT

J U D G E M E N T

The Plaintiff, by an Amended Plaint dated 6th March, 2004 and filed in court on 9th March, 2004, sought the following prayers:-

- (a) a declaration that the Plaintiff has always been and is still a lawfully salaried employee of the defendant bank from 1.3.1995 to the date of judgment hereof and that he be paid his monthly salary, at ksh.51,063/- with salary arrears.
- (b) The defendant company do specifically perform their part of the voluntary early retirement agreement dated 24.2.1995 and that sums thereof be calculated and adjusted taking into account the period from 28.2.1995 to the date of judgment.
- (c) General damages in terms of paragraph 13 above.
- (d) Interest on (b) and (c) above from 28.2.1995.
- (e) Any other relief.

The Plaintiff's prayer (b) above, that the Defendant do specifically perform the company's part of the contract contained in the defendant's letter dated 24.2.1995 of necessity, directs us to the said letter whose terms and conditions therein contained are as follows, in summary:-

A.	1. Payment in lieu of notice	-	Ksh.71,841.00
	2. Lumpsum payment at 1.25 months basic salary for every completed year of service	-	Kshs.568,741.25
3.	Leave payment	-	3,936.50
	Total		644,518.75
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B. The Defendant Bank also undertook to write off a 25% of the Plaintiff's outstanding liabilities in respect of Housing, Car, and Shamba Loans, provided they are liquidated in full by 28.2.1995.

Such liabilities stood at kshs.1,063,547.40.

The said letter also stated that payment or compensation of the above sums of money by the Defendant, would comprise the final payment from the defendant to the plaintiff under the relevant contract of employment now under scrutiny by this court.

The plaintiff apparently accepted the terms of the letter aforesaid by signing copy thereof, on 7.3.1995.

It is in the pleadings of the Plaintiff and in his evidence before this court, that by a letter dated 27.3.1995 written by the Head of Human Resources of the defendant, the latter decided to withhold the Plaintiff's entitlement in terms of compensation or payment earlier hereinabove stated to be due and payable to the Plaintiff. This effectively stopped the payment to the plaintiff of the sum of kshs.644,518.75 due to him under the terms of the retirement agreement at which time the plaintiff had already retired from his said employment. The reasons advanced by the defendant for withholding the payment, was that there was an investigation touching certain lost funds in the defendant bank which had first to be completed.

Either side gave evidence against the other through a single witness.

The summary of the Plaintiff's evidence is that he worked for the defendant for about 20 years and he was a good and honest worker. That he considered an early retirement after he was convinced that it was a good one and which might benefit him. That he offered to retire accordingly knowing that he would be paid the compensation in the letter dated 24.2.1995. He believed also that he would use the benefits to do business whose training had been made available as part of the retirement package and which he indeed inter undertook. To him the retirement terms formed a new business beginning.

It was plaintiff's further evidence that the defendant's unilateral decision and act of withholding the repayment of the retirement benefits of kshs.644,178.75, was a breach of the contract arising from the retirement terms. The breach would according to plaintiff lead to liability in general damages which the Plaintiff presented as follows:-

1. The sum of kshs.644,518.75 less ksh.136,000/- paid to plaintiff as an advance to do business leaving the balance at kshs.508,518/- which should attract interest at a rate of 20% during the whole period until settlement

2. The interest on the kshs.136,000/- released to the plaintiff later for the period it had not been released (March 1995 – October 1998).

Besides the above claim which should include the refund of kshs.508,118 still unrefunded, the plaintiff orally sought general damages for breach of contract arising from the unlawful withholding of his retirement benefits. He claimed that he was financially embarrassed for a period of 17 years, so much so that he had to beg for an advance of funds to enable him pay to school fees of his children and other imperative needs of day today living. In his written submissions, plaintiff requested the court to award general damages of kshs.1,500,00/- on the ground of the plaintiff's suffering and embarrassment caused by the defendant on the said refusal to release the said funds.

On its part the defendant generally denied the Plaintiff's claim. It admitted that the plaintiff voluntarily retired from its employment after working for a period of 20 years and that the terms of retirement are those stated by the plaintiff as contained in its letter to him date 24.2.1995. It also admitted that it indeed, contrary to those terms, refused to release the plaintiffs retirement funds of kshs.644,518.75. The defendant stated that the reason it withheld the funds was because there arose a criminal investigation into funds stolen from the bank in a scheme of fraud in which the plaintiff was a suspect. That the bank decided to and withheld the plaintiffs retirement benefit until 1998 when the investigations and a court criminal case against third parties ended. The defendant further admitted that although the criminal investigation ended and that the plaintiff was cleared and was instead made the prosecution witness, it nevertheless continued to withhold the plaintiffs retirement funds during the prosecution period lasting three years till 1998. The defendant further admitted that it, in 1998, unilaterally applied the funds to reduce the plaintiffs outstanding loans with the bank although such application was not authorized by the retirement pact. The defendant asserted that it did so because the plaintiff had meanwhile, in the period of 1995 to 1998, failed to service his three outstanding loans taken before and outside the retirement agreement aforesaid but again admitted that it had no source of authority to withhold the plaintiff's said funds at all.

The defendant bank had filed a set-off and a counter-claim against the plaintiff of kshs.34,000,000/- which sum it claimed, was involved in the fraud in respect of which the plaintiff was suspect. During the hearing of this case the defendant led no evidence to the of proof of the set-off or counterclaim of 34,000,000/-. Infact the defendant abandoned it after concurring with the plaintiff that the plaintiff had been cleared of any wrong doing in relation to the lost funds and that there was no basis for set-off or counterclaim against the plaintiff.

The defendant in its evidence accordingly admitted that it did not honour the retirement pact in so far as it withheld the sum of kshs.644518/75 payable to the plaintiff. Despite the admission stated above the defendant went ahead to assert that it was entitled to use the funds due to the plaintiff, as it did, to clear his liabilities to the bank arising from his outstanding loans.

In respect to the failure by the plaintiff to service his loans, purportedly on the ground that the defendant's failure to release the funds denied him an opportunity to do business to raise funds to repay the loans, the defendant said that it was upon the plaintiff to raise funds from his own sources to pay his loans. Thus, the defendant denied any responsibility in plaintiff's failure to service his loans.

I have carefully perused and considered the pleadings and the evidence from each side. Certain issues were either not denied or were conceded by the relevant party or were admitted by both parties. It is the courts view that such issues should be identified from the start and be settled without spending time on them.

They include the following:-

(a) Did the plaintiff's employment extend beyond his retirement Date of 28.2.1995?

The plaintiff sought a declaration that he continued being the defendant's employees after his early retirement on the ground that the defendant had failed to pay him his retirement sum of kshs.644,518/75. During his testimony, however, the plaintiff admitted that his claim and prayer on retirement cannot be right since he indeed retired and practically left his job. The plaintiff accordingly conceded in his evidence that the letter, notifying the withholding of his retirement benefit did not indeed cancel his retirement which had already taken effect. He also agreed that his early retirement benefits were properly and correctly calculated although not fully paid. In the circumstances, plaintiff's prayer for a declaration that he remained an employee of the defendant bank after his retirement makes little sense and must fail.

The second issue which should be resolved at the earliest stage is the one concerning the defendant's set-off and counterclaim against the plaintiff for kshs.34,000,000. The defendant conceded that the plaintiff was cleared of any wrong doing concerning the loss by the defendant bank of the said amount. Instead, the plaintiff was identified as a witness against third parties. The defendant accordingly admitted that the plaintiff was not to blame in respect of the fraud committed against it which led to the loss. Indeed the defendant for the same reason decided to and led no evidence in support of the set-off, or counterclaim both of which in the circumstances, must fail.

The third issue is the plaintiff's prayer (b), that the defendant company do specifically perform their part of the voluntary early retirement agreement dated 24.2.1995. The agreement was contained in the defendant's letter dated the same date which the plaintiff accepted and relied on to go into early retirement. He expected to be paid the kshs.644,518/- to start a business now that he would retire early.

I have considered the issue in view of the fact that the plaintiff heavily relies on it as the basis of his case. I have come to the conclusion that the defendant breached the agreement and term in it to release the plaintiff's early retirement benefits. That finding is based on the evidence of the plaintiff as well as the admissions of the defendant through its only witness Mr. Patrick Maina Gikonyo. He stated in his evidence:-

“Plaintiff was entitled to get his kshs.644,518/- Retirement sum in March 1995. he did not get it as the defendant bank did not give it to him. I agree the bank did not honour the retirement agreement as signed. Kshs.136,000/- was paid to him in 1998 upon his letter and on humanitarian grounds exposed in the letter.”

There is no need to say any more about it. It is clear that even the little portion of kshs.136,000/- which the defendant released was paid to the plaintiff because someone in the defendant Bank sympathized. Having suffered much because of losing his job prematurely and having failed to enter into business because his former employer refused to pay him the money intended to start him in the business, the plaintiffs wrote a pathetic letter to the defendant asking them to have sympathy on him and release part of his money. The letter dated 7.5.1998 is exhibit D2 and in it the plaintiff promised a lot towards his intention to start servicing his loans.

The plaintiff assertion in his evidence that the defendant's deliberate failure to pay the early retirement benefits caused plaintiff's failure to go into business, is not in my view, an idle claim. I hold that the assertion has merit and the court accepts it. I also find that the plaintiff suffered financial embarrassment and inconvenience. He was most probably and most likely hampered in educating his children due to lack of finances to pay school fees and school requirements. He must finally have lived a less satisfying life from lack of finances.

The defendant having expressly admitted to have failed to release the plaintiff's retirement benefits, nevertheless asserted that he was entitled to do so in order to apply the funds to service and reduce plaintiff's outstanding loans with the defendant bank..

I have considered the above defence. There is clear evidence from both the plaintiff and the defendant that the three outstanding loans i.e. Shamba Loan, Car Loan and House Loan, were prior and independent arrangements before the parties entered into the Early Retirement Contract. Each loan from the evidence was secured by a valuable security. The securities were the Shamba, the car and the house which the bank bought for the plaintiff. While the plaintiff obtained a possible discount of 25% if the plaintiff paid off the loans before a given date, the arrangements were independent and mention of them in respect of the 25% discount, appears to have been merely mentioned to encourage the plaintiff to clear the loan voluntarily, earlier rather than later.

I accordingly find that if the plaintiff failed to service any or all the loans, as he indeed ended doing, the defendant would only proceed to recover the loans as provided in the relevant mortgage's. That is to say that the defendant had no right nor authority to unilaterally concert the plaintiffs independent funds to pay the loans which had adequate and separate methods of being satisfied. In choosing to convert plaintiff's retirement benefits to pay the loans, the defendant acted unlawfully and outside the terms of the Early Retirement Agreement. I find that the defendants act was tortious and if the same caused any damage to the Plaintiff, the law would require the defendant to compensate the plaintiff.

Having arrived at the above finding which in summary hold that the defendant breached the terms of the Early Retirement Contract signed between the parties, I further now hold that the defendant is liable to pay general damages arising from the breach. I will now turn to the issue of assessing such damages.

There is no doubt that under prayer (b) of the Amended Plaint, the plaintiff is entitled to the payment of the sum which was payable to him as an Early Retirement Benefit amounting to Kshs.644,518/75. This sum would attract interest that was payable to the banks in relation to funds advanced particularly the then prevailing interest payable to the defendant bank. Such interest would be so payable from the 20.2.1995 when plaintiff was due to receive the payment above until October 1998 when the defendant bank released the kshs.136,000/- to the plaintiff. Thereafter the balance of kshs.508,518 will continue earning the same or prevailing interest from time to time payable until settlement in full.

Turning to the issue of general damages, I have ruled that they are payable by the defendant to the plaintiff for breach of contract for unlawfully withholding the plaintiff's retirement benefits. The defendant thereby caused him financial embarrassment, inconvenience, as well as caused the plaintiff to live a less satisfying life due to lack of finances. This was after the defendant trained the plaintiff to start his own business when he would retire, a situation the defendant made attractive by offering a retirement benefit, then decided to dash all his hopes by withholding the funds which would form plaintiff's liquid capital.

There is evidence on the record that the defendant suspected the plaintiff to have been involved in the fraud that made defendant lose kshs.34,000,000/- to thieves. At one stage the defendant bank believed that the plaintiff was at the least negligent. But there was no evidence to that end apparently and the plaintiff, although originally arrested on suspicion of complicity, was not charged but made a prosecution witness, who however was not called to testify.

The plaintiff seeks a sum of kshs.1,500,000/- under the above heading. He, however, never tried to persuade the court with any relevant legal precedent. The one he cited i.e. **Abubakar Mohamed Al-Amin vs Standard, Chartered Bank** – Mombasa HCCC No 227 of 1997 – shows that the court had awarded kshs.200,000/- where the plaintiff had Early Retirement by five years, formerly earned kshs.15602/- a month and had suffered mental anguish for lacking money to care for his family.

In this case whose facts are a little different but led to the suffering of the plaintiff, the plaintiff was earning a monthly salary of about kshs.51,000/- on a retirement, more than three times what the plaintiff earned in **Abubakar Mohamed Al Amin** case. Doing the best I can, I am persuaded to award the plaintiff for the breach of contract and the suffering that ensued from it, a sum of kshs.1,200,000/-.

The final total awards will accordingly be as follows:-

1. The release of the early retirement benefits agreed to be kshs.644518/75 less ksh.136,000/- paid and received in 1998	- 508,518.00
2. Commercial interest on kshs.644518/75 from March 1995 to October 1998 at the Rate of 20% p.a.	- 37596.00
3. Commercial interest on kshs.508,518/75 From October 1998 to 28.2.2011 At 20%	- 1525554.00
4. General Damages for breach of contract As described hereinabove	- <u>1,200,000.00</u>
	3,271,668.00
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The above sum is to be paid to the Plaintiff with court interest until full settlement.

Costs in the claims and counterclaims are to the Plaintiff.

Orders accordingly.

Dated and delivered at Busia this 9th day of February 2011.

D.A. ONYANCHA

J U D G E