

Kenya Farmers Association (*Co-operative Limited*) hereinafter referred to as "**KFA**"). In its heyday KFA employed thousands wherever it had its stores for the supply farming inputs, certified seed, fertilizer and other crop development and protection supplies.

Its success also sowed seeds of its decay and over the years it sought to stay in business with varying success. As in all business enterprises, its biggest cost was its employees. A major favourite for cost cutting strategy for most businesses is to down size the number of employees from time to time. KFA was no exception. The plaintiffs fell victim to this strategy, and their services were terminated by KFA, and they were paid what KFA says in its Defence were terminal benefits in accordance with their respective terms of contract or employment. The plaintiffs held a different view, and hence this suit, the subject of this judgment.

THE PLEADINGS

(a) The Plaintiff

By the Plaintiff dated 26th January 2000, and filed on 27th January 2000, the Plaintiffs claimed that they were pre-maturely retired before the normal retirement age of 55 years, and that as KFA breached their terms of employment and that the termination of their employment before reaching the retirement age of 55 years was unlawful and that therefore they suffered damages. The plaintiffs then prayed for -

(i) *a declaration that the retirement was unlawful and breach of the contract of employment,*

(ii) *damages and costs of the suit.*

(b) The Defence

In a 13 page defence dated and filed on 28th February 2000, the Defendant KFA raised issues of jurisdiction, misjoinder of alleged causes of action that do not relate to the same act or transaction, or a series of acts or transactions, and also pleaded that the cause of action as pleaded was bad in law. KFA denied that the termination of the plaintiffs' employment was unlawful, and prayed that the plaintiffs' be dismissed with costs.

3. THE EVIDENCE

As already indicated in the introduction, the plaintiff's were employees of KFA. This was at least clearly so from the evidence of the 1st, 2nd and 3rd plaintiffs. The 4th - 13th plaintiffs did not testify. This suit not being a test suit, but a joint action by them with the other three plaintiffs, they failed to prove their claims and their action as against the Defendant remains unproved, and is therefore dismissed with costs against them.

The evidence herein therefore concerns the 1st, 2nd and 3rd plaintiffs. The 1st plaintiff was retired at 50 years. He was paid three months salary in lieu of notice. He claimed he had five more years to serve. The 2nd plaintiff claimed that he was retired at 51 years so he had 4 years. This plaintiff later changed his testimony on re-examination and testified that he was properly retired. His action therefore failed on his own testimony.

4. THE ISSUE FOR DETERMINATION

Although counsel for the plaintiffs, in their submissions, raised five issues for determination there is really one issue for determination in this suit, and that issue is whether or not the termination of the plaintiff's employment was lawful. The consequences of the determination will flow either way. To determine that question, the court will look at **firstly**, the terms of employment of the plaintiff's, and **secondly**, the mode of termination or determination of their employment.

(a) The terms of employment

The plaintiffs relied upon two documents, the General Terms and Conditions of Employment (December 1995 - November 1997) which applied to unionisable staff.

The relevant provision regarding relevant age and benefits is set out Clause 22(a) thereof it says -

22. RETIREMENT AGE AND BENEFITS

(a) *AGE - Normal retirement age shall be 55 years, but the union shall reserve the right to retire any employee at an earlier age or retain the services of an employee past the retirement age with consent of the employee and satisfactory medical report.*

The 3rd plaintiff in particular relied upon another document, the **Kenya Grain Growers Cooperation Union Scheme of Service**. This is the name which the Defendant was baptized during its turbulent years. The relevant provision applicable was Section V AGE/AGE RETIREMENT (2) which provided -

2. Age of Retirement

2.(a) Each employee shall, on attainment of 55 years of age retire from the employment of the Union. The Union shall give to the employee an appropriate notice of its intention to retire the employee. Such notice will be as set out in Section VII (a) of these Terms and Conditions, and it shall expire on or before the 55th birthday and upon such expiry, the employee shall retire.

(b) (i) If the employee has served the Union for a period of not less than 10 years, and is within 10 years of his retirement age as in (a) above, the employee may apply to retire and if application is approved, the employee shall receive the benefits as if she has retired at 55 years of age.

(ii) provides for retirement on grounds of ill-health.

(c) under the provision of this clause, the employee shall be entitled to full salary upto to the expiry of the notice period or to payment of an equivalent sum in lieu of such notice in addition to payment stipulated in Section 1(II)(M) of these Terms and Conditions of Employment.

Section 1(II)(M) relates to payment for public holiday, which are deemed to be additional days of leave for all employees.

5. ANALYSIS OF EVIDENCE AND LAW

In this case, the 2nd plaintiff gave the fullest documentary evidence of both his appointment promotion, and retirement. He was retired in terms of clause IX(2)(b) of the Scheme of Service as set out above. He admitted in re-examination by his counsel that he was properly retired in terms of the said provisions. On his own evidence therefore, he has no claim against the Defendant. His claim is therefore dismissed with costs against the Defendant.

This leaves me with the claims by the 1st plaintiff. This plaintiff admitted that he was an unionisable staff when he was retired and that he was retired in accordance with the terms of clause 22A of the General Terms and Conditions of Service. He however contended that he was not consulted when he was retired before attaining the age of 55 years. Counsel for the plaintiffs followed this line of argument in his submissions.

With respect to counsel and to the plaintiffs, I disagree. What Clause 22(a) of the General Terms and Conditions of Service does, is to give the employer, in this case, the Defendant two rights, **firstly**, to terminate an employee's employment before the attainment of the age of 55 years or **secondly** with his

consent or to retain the services of such employee after the attainment of the age of 55 years. Or put differently, upon the attainment of the age of 55 years, the employee has a right to retire, and if the employer requires his services, the employee's consent in writing must be obtained.

The employer does not under Clause 22(a) require the consent of the employee to retire him. If this were so, employers would have the burden of retaining employees they could not afford to pay any longer, while the employees would have the right to walk away from the employer as they pleased. That is a situation which the law does not countenance, for in as much as the employee has a right to determine his employment with an employer, so has the employer the right to determine the employment of any of its staff. A contrary situation, would lead to servitude on either side. That modern day or post industrial revolution slavery is not countenanced by the law, I therefore reject the plaintiffs' counsels' argument to the contrary.

CONCLUSION

Having come to the above conclusions, that neither the 1st and 2nd Plaintiff's arguments are sustainable, and dismissed them, it must follow that the plaintiffs' entire suit falls, and I so find. I declare that the termination of all the plaintiffs' services with the Defendant then was in accordance with both the General Terms and Conditions of Employment Unionisable Staff December 1995 - November 1997, and the **Kenya Grain Growers Cooperative Union Scheme of Service**.

Costs usually follow the event, but taking into account that this matter has taken over ten years to determine and ten out of twelve plaintiffs did not testify and had probably lost interest in the matter, and also taking into account the fact even those who testified contradicted themselves as to the appropriateness of their termination of their services, I would put the costs of the suit at the door of each party. The action fails, and is dismissed with a direction that each party will carry its own costs.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 6th day of October 2011

M. J. ANYARA EMUKULE
JUDGE