



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 231 of 2005**

SAMUEL OKOTH.....APPELLANT

VERSUS

CONSOLIDATED BANK OF KENYA LTD....RESPONDENT

J U D G M E N T

1. This appeal arises out of a suit which was filed in the magistrate's court at Milimani by Samuel Okoth, (hereinafter referred to as the appellant). He had sued his former employer, Consolidated Bank of Kenya Ltd, (hereinafter referred to as the respondent), who had terminated his employment on the 22nd December, 2000. The appellant was initially employed on 13th June, 1984 by Union Bank of Kenya Ltd which was taken over by the respondent on 22nd February, 1990.
2. The appellant claimed that having rendered uninterrupted service to both the Union Bank of Kenya Ltd, and the respondent, up to the date of termination, he was deemed under Section 11(1) of the Consolidated Bank of Kenya Act, to have been on a single continuing employment of the respondent from the date of his employment.
3. The appellant therefore sought a declaration that the respondent is liable to pay:
 - (a) The unpaid severance pay based on Section 11(1) of the Consolidated Bank of Kenya Act together with interest thereon at commercial rates from the 23rd December, 2000 until payment in full.
 - (b) An order that the defendant does issue the plaintiff with a comprehensive certificate of service as pleaded in paragraphs 9 and 10 herein.
 - (c) Costs of this suit together with interest thereon at court rates.
4. In its defence filed on 7th August, 2002, the respondent contended that the appellant did not render uninterrupted service, but resigned from Union Bank of Kenya Ltd in December, 1998, after which he applied and was engaged afresh by the respondent from 1st January, 1999. The respondent therefore claimed that the appellant's claim for unpaid severance pay was unmaintainable. The respondent further contended that the appellant was issued with a certificate of service which was proper, given his interrupted service.
5. During the hearing of the suit in the lower court, the respondent produced his letter of employment with Union Bank of Kenya Ltd which showed that he was employed on 14th June, 1984. Later, Union Bank of Kenya Ltd was taken over by respondent and the appellant continued working for the respondent. The appellant produced a staff card which was issued to him by the respondent. The

appellant also produced several correspondences addressed to him from the respondent between the year 1992 and 1995. In one letter the respondent promoted the appellant to section head, in another the respondent approved the appellant's leave, while in another, the respondent through its managing director sent a condolence message to the appellant for the death of his wife. Also produced was certificate of pay and tax deductions for the years 1991, 1992, 1993 and 1994, signed by the respondent as the appellant's employer.

6. The appellant testified that in December 1998, he was asked to write a letter formally resigning from Union Bank of Kenya Ltd and applying to join the respondent. The appellant did as instructed.

Thereafter the appellant received a letter of appointment dated 19th January, 1999 from the respondent, which letter the appellant signed duly accepting the terms of employment. The appellant maintained that his service was continuous and that he was merely intimidated into signing the letter of resignation and the new letter of employment.

7. The respondent testified through its Human Resource Officer, Purity Gitogo. The witness produced a letter dated 6th January, 1999 written by the appellant to the manager of Union Bank of Kenya Ltd tendering his resignation. A letter dated 8th January, 1999 written by the appellant to the respondent applying for employment, and a letter of employment dated 19th January, 1999 duly signed by the respondent and accepted by the appellant on the 4th March, 1999 were also tendered in evidence. The witness maintained that the appellant worked for the respondent between 19th January, 1999 and 18th December, 2000 when his services were terminated.

8. Counsel for each party filed written submissions, each urging the court to find in favour of his client. For the appellant it was submitted that the appellant worked with Union Bank of Kenya Ltd up to February 1990, when Union Bank of Kenya Ltd ceased to exist and its employees, assets and liabilities were taken over by the respondent. It was submitted that the appellant was in the respondent's employment in 1999 when the appellant was coerced into writing a letter applying for a job and also signing the letter of appointment. It was maintained that the respondent violated the provisions of Section 11 of the Consolidated Bank of Kenya Act No.5 of 1991, in failing to pay the appellant severance benefits and also failing to give him a certificate of service, based on his uninterrupted 16 years service.

9. For the respondent it was submitted that the documents produced were clear that the appellant had resigned from the Union Bank of Kenya Ltd, on 6th January, 1999, and was employed by the respondent on 19th January, 1999. It was submitted that the appellant having failed to plead any coercion in his plaint, he could not go outside his pleadings. Relying on ***Provincial Insurance Company (EA) Ltd vs Mordecai Wanga Nandwa CA No.179 of 1995***, counsel for the respondent submitted that the appellant had neither pleaded, nor established his claims of coercion. It was maintained that the appellant's employment with the respondent was not continuous. It was further submitted that the appellant's claim in respect of unpaid severance pay was a special damage claim which ought to have been specifically pleaded. The case of ***Coast Bus Ltd vs Cisco E. Murunga Ndanyi & Others CA 191 of 1992***, was cited for the proposition that the failure by the appellant to specifically plead his claim was fatal to his suit.

10. In his judgment the trial magistrate found that the appellant had failed to prove that he was coerced into signing the letters. The trial magistrate held that there was a fresh engagement between the appellant and the respondent. The trial magistrate further found that there was no evidence of what the benefits accruing from the previous employer were. He therefore found that there was no continuous employment and accordingly dismissed the appellant's suit.

11. Being aggrieved by that judgment, the appellant has filed this appeal raising 7 grounds as follows:

(i) The learned magistrate erred in fact in holding that the plaintiff's employment with the defendant was not continuous.

(ii) The learned magistrate erred in fact and in law in holding that the plaintiff was not coerced to sign the letter of 6th January, 1999.

(iii) The learned magistrate erred in fact in failing to hold that the plaintiff was in the defendant's continuous employ from 1984 as proved by exhibit 3 (defendant's staff card) and exhibits 4, 5, 6 and 7 (defendant's letters to the plaintiff).

(iv) The learned magistrate erred in fact and in law in failing to consider the overwhelming evidence against the defendant in finding that the plaintiff's claim had not been proved.

(v) The learned magistrate erred in holding that the letter of 6th January 1999 by the defendant signified a fresh engagement while it was not shown that the plaintiff was ever interviewed or confirmed after the purported probation period.

(vi) The learned magistrate erred in failing to find that paragraph 6 of the defendant's letter dated 6th January, 1999 acknowledged the continuity of employment as envisaged by Section 11 of the Consolidated Bank of Kenya Act.

(vii) The learned magistrate erred in fact and in law in failing to hold that no evidence was tendered by the defendant to warrant a finding that the plaintiff was only employed on 6th January, 1999.

12. Mr. Nthiga who argued the appeal on behalf of the appellant referred the court to the Employment and Identification Card, and the letter dated 27th May, 1992 from the respondent which showed that the appellant was in employment of the respondent. With regard to the letter of appointment signed by the appellant in 1999, it was maintained that the same was signed under coercion. The court's attention was drawn to the letter dated 7th January, 1999 from the Union Bank of Kenya Ltd purportedly accepting the appellant's resignation which letter was actually signed by the respondent. The court was urged to find that the appellant's employment was in fact a continuous employment of Union Bank of Kenya Ltd and the appellant.

13. Mr. Otenyo who appeared for the respondent opposed the appeal, maintaining that the letter of resignation and appointment were duly signed by the appellant. He contended that Section 11 of the Consolidated Bank of Kenya Act was subject to any notice of termination or resignation. He argued that since there was a letter of resignation from the appellant and a letter of appointment, the appellant's employment was not continuous. Mr. Otenyo reiterated the submissions made in the lower court and urged the court to uphold the judgment of the lower court.

14. I have carefully reconsidered and evaluated the pleadings, the evidence which was adduced in the lower court, and the submissions made before the lower court and this court. I find the following facts undisputed.

(i) That the appellant was employed by Union Bank of Kenya Ltd from 1984.

(ii) That Union Bank of Kenya Ltd was taken over by the respondent pursuant to Section 3 of the Consolidated Bank of Kenya Act No.5 of 1991.

(iii) That the appellant continued in his employment until December, 1999, when he wrote a letter resigning from the employment of Union Bank of Kenya Ltd and was given a letter of appointment by the respondent.

(iv) That the appellant's services were terminated by the respondent on 18th December, 2000.

15. The main issue was whether the appellant remained in continuous service between 1984 and 18th December, 2000, to justify his qualifying for severance pay in accordance with Section 11(1) of the Consolidated Bank of Kenya Act. Section 11(1) of the Consolidated Bank of Kenya Act states as follows:

“Any person who is employed by a subsidiary immediately before the vesting day shall on that day

become an employee of Consolidated Bank on the same terms and conditions of service as his existing terms and conditions, and subject to any subsisting notice of termination, resignation or variation, and such employment with the subsidiary and Consolidated Bank, shall be deemed to be a single continuing employment.”

16. The respondent maintained that the appellant’s employment could not be considered as a single continuing employment from 1984 when the appellant was employed by Union Bank of Kenya Ltd. This was because of the letter of resignation which was written by the appellant in 1999. It was argued that that letter of resignation brought the appellant’s employment with the Union Bank of Kenya Ltd to an end and a new employment with the respondent took effect.

17. Nevertheless, the evidence which was adduced before the trial magistrate, showed that in effect the respondent took over as the appellant’s employer from 1990, when the respondent took over Union Bank of Kenya Ltd. Indeed, the exhibits produced before the trial magistrate, i.e. the employment identification card (P.Exh.4), letter of promotion dated 22nd May, 1992 (P.Exh.3), and letter dated 11th September, 1992 (P.Exh.5), letter dated 15th December, 1992 (P.Exh.6), and letter dated 28th June, 1995 (P.exh.7), all confirmed that the respondent was in fact the appellant’s employer during that period. Any further doubt in that regard is removed by the appellant’s Income Tax Department certificates of Pay and Tax for the years, 1991, 1992, 1993 and 1994, (produced in a bundle as P.Exh.8), which were all duly signed by the respondent as the appellant’s employer.

18. Moreover, from Legal Notice No.332 of 1995, the Consolidated Bank of Kenya vesting order 1995, it is apparent that the vesting order envisaged by Section 11(1) of the Consolidated Bank of Kenya Act came into effect on 14th June, 1991 pursuant to which all the undertakings of the Union Bank of Kenya Ltd vested in the Consolidated Bank of Kenya Ltd. By virtue of that vesting order, the appellant became an employee of the respondent on the same terms and conditions of service as he had with Union Bank of Kenya Ltd, his employment being deemed to be a single continuing employment from the time of employment with Union Bank of Kenya Ltd.

19. The purported resignation of the appellant from the employment of Union Bank of Kenya Ltd in 1999 was therefore a sham, as that employment was no longer in existence, the same having been taken over by the respondent. Indeed, the acceptance of the letter of resignation by the respondent confirms this position. It is evident to me that the attempt by the respondent to enter into a new employment with the appellant in 1999 was a clever ploy to deny the appellant his benefits under Section 11(1) of the Consolidated Bank of Kenya Act.

20. I find that the appellant had rendered continuous service up to the date of termination of his employment in December, 2000. In accordance with Section 11(1) of the Consolidated Bank of Kenya Act, the appellant was entitled to his severance pay up to that period.

21. In his plaint the appellant sought a declaratory order relating to his right to be paid his severance pay in accordance with Section 11(1) of the Consolidated Bank of Kenya Act together with interest thereon at commercial rates from 23rd December, 2000 until payment in full. Order II Rule 7 of the civil Procedure Rules states as follows:

“No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.”

22. I find that in this case, although the appellant could file a claim for a specific amount in respect of the severance pay, the appellant was not barred from seeking an order merely declaring his right to the severance pay as he did. However, the claim for interest could only accompany a liquidated claim and cannot be anchored on a mere declaration.

23. For the above reasons, I come to the conclusion that the trial magistrate was wrong in dismissing the appellant’s suit. I therefore set aside the judgment of the lower court and substitute it thereof with a

judgment in favour of the appellant and declare that the respondent is liable to pay the appellant severance pay based on Section 11(1) of the Consolidated Bank of Kenya Act. I further order that the respondent do issue the appellant with a comprehensive certificate of service for all the years worked. The respondent shall pay costs of the suit in the lower court and costs in this appeal.

Those shall be the orders of this court.

Dated and delivered this 12th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Muli H/B for Nthiga for the appellant

Advocate for the respondent absent

Erick – Court clerk.