



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI LAW COURTS

Civil Suit 781 of 2003

ANTONY KABIMBA GUSINJILU (suing for and on behalf of **112 Plaintiffs**.....**PLAINTIFFS**

VERSUS

THE KENYA TRYPANOSOMIASIS RESEARCH INSTITUTE.....**DEFENDANT**

J U D G M E N T

1. The Plaintiffs in this suit filed suit on 29/07/2003 seeking special damages of Kshs.41,987,120/80, General damages plus interest with effect from 20/05/2002 and costs of this suit. Leave to file suit was granted by Nyamu J (as he then was) on 18/07/2003. Authority to **Antony Kabamba Guanjilu** to sue on behalf of himself and the 112 others was given by the 112 on 17/07/2003. The same was filed contemporaneously with this suit.

2. In the plaint dated 18/07/2003, the Plaintiffs allege that they were at all times material to this suit employees of the Defendant and that by a letter dated 20/05/2002, they were notified by the Defendant of a programme of early retirement known as Early Retirement Scheme and that each of the 113 Plaintiffs had been identified for early retirement under the said scheme. According to paragraph 5 of the plaint, each of the 113 Plaintiffs identified for early retirement would be entitled to the following payments:-

- (i) ***3 months' salary in lieu of notice***
- (ii) ***Severance pay of 3 months basic salary for each year of service completed.***
- (iii) ***Golden handshake – Kshs.100,000/=***
- (iv) ***Pension from the Provident Funds and/or institute's Gratuity***
- (v) ***Transport Allowance***
- (vi) ***Leave Allowance***

3. The Plaintiffs further allege that the Defendant fraudulently, unlawfully and unilaterally and secretly calculated the early retirement package and benefits for the Plaintiffs, as a consequence of which the Plaintiffs were underpaid and deprived of part of their entitlements. The Plaintiffs allege that the Defendant was fraudulent and is guilty of misrepresentation in that:-

- (i) ***The package due to the retirees was calculated in secrecy without involving the plaintiffs.***

- (ii) The retirees/plaintiffs only came to know of their entitlement only after clearing from the institute houses and surrendering Institute properties thereby denying them a chance to question the illegalities. (sic)**
- (iii) Deliberately making wrong calculation based on wrong principles and assumptions.**
- (iv) Refusing to consider complaints raised by the retirees/plaintiffs.**
- (v) Paying the plaintiffs using wrong previous basic salary scales and grades.**
- (vi) Paying other retirees of first batch golden handshake of Kshs.100,000/= whereas the plaintiffs were paid Kshs.40,000/= under similar circumstances.**
- (vii) Refusing to pay the plaintiffs transport allowances of between Kshs.10,000/= and Kshs.20,000/= each based on distance to cover.**
- (viii) Refusing to pay the plaintiffs Trypension Fund between 1990 and July 1997 without compound interest in terms of the policy with Kenya National Assurance Company Limited.**
- (ix) Underpaying the plaintiffs Staff Provident Fund and Life Assurance Scheme with ICEA Limited contrary to the terms of the Scheme which took effect on 1st July 1997.**
- (x) The Plaintiffs were never given an opportunity to object and or appeal against the decision of the Institute to retire them.**
- (xi) The Plaintiffs were not educated on the effect of early retirement as required thereby subjecting them to pain and anxiety.**
- (xii) Refused to pay leave allowance to the plaintiffs and actually recalled others then on leave and sent them on early retirement.**

The Plaintiffs seek an order of this honourable court declaring that the earlier payments to them as computed by the Defendant were erroneous, fraudulent and based on wrong principles and further that the Defendant is liable to pay to the Plaintiffs the balance of their entitlements. The Plaintiffs therefore pray for judgment against the Defendant for:-

- (a) Kshs.41,987,120/80**
- (b) General damages**
- (c) Costs of this suit and interest at court rates from 20/05/2002**
- (d) Any other relief that this honourable court may deem fit and just to grant.**

5. The Defendant filed its defence dated 28/08/2003 on the 1/09/2003. The Defendant denies that it underpaid the Plaintiffs or any of them and therefore that it is not liable to the Plaintiffs. The Defendant also avers that each of the Plaintiffs voluntarily and without duress agreed with and accepted the terminal benefits and that consequently they are estopped from making any further claims against the Defendant. The Defendant wants the Plaintiffs' suit dismissed with costs.

6. On the 19/12/2003, this court entered judgment on admission against the Defendant for the payment of the Defendants dues together with that with the Insurance Company of East Africa; the case thus came up for formal proof on 26/11/2008 and 19/02/2009.

7. PW1 was **Felix Chomba**, the head of Actuarial Department at the Insurance Company of East Africa (ICEA). He confirmed to the court that each of the Plaintiffs had an account with ICEA into which their

contributions from the Defendant were made to secure their pension. He gave details of each member's entitlement depending on the number of years worked and that each Plaintiff was, upon retirement entitled to payment of accumulated contributions plus interest. He also said that in the year 2002, ICEA received instructions from the Trustees of the Defendant's Pension Scheme to pay the Plaintiffs' their accumulated contributions plus interest and that thereafter ICEA paid out Kshs.25,020,914/= to the members whose claim forms had been received by the Trustees of the scheme. PW1 testified further that as far as ICEA was concerned, all the benefits relating to the members in question were paid in one single cheque to the Defendant between 11/01/2002 and 31/12/2000. He said that he expected the Trustees to ensure payment to the Plaintiffs. He produced as PExhibit 1 the Trust Deed governing the scheme to which the Plaintiffs belonged.

8. PW2 was **Tabitha Mwaniki**, the Company Secretary to Kenya National Assurance Company (2001) Ltd. After giving a brief history of the company she stated that by a Court Order dated 19.03.2002, the Closed Life Fund of the defunct Kenya National Assurance Co. Ltd was transferred to the Special Manager. She also said that subsequently, the Special Manager compiled a Report which showed that KETRI was owed Kshs.38,942,299/45 as at 31/12/2003. She explained that this amount was to be disbursed in 3 instalments of Kshs.12,980,766/48. She also said that in September 2008, the Company was now able to pay the balance of Kshs.63 360 576/20. The said payment was duly made and Discharge Vouchers executed.

9. PW2 stated further that by the year 2002, her company had not paid the full pension sums due to the Plaintiffs to which they were entitled. PW2 produced as exhibit 8 a list showing the individual Plaintiffs and the amount due to each. She said that by the time of her testimony, her company had released all the money due to the Plaintiff, and that under the Trust Deed the Trustees were obligated to make payments to individual members of the Fund in accordance with PExhibits 8 and 9 which show employer and employee contributions.

10. When PW1 was recalled, he told the court that ICEA paid out Kshs.25,020,914/= and that the 113 Plaintiffs were paid only Kshs.11,192,712/= out of the above sum. He said that the said Kshs.11 192 712/= was paid out by ICEA to the Defendant and that it was now the duty of the Trustees to ensure that the amounts were transmitted to the Plaintiffs. PW1 stated that from about year 2002, the Retirement Benefits Authority requires payment of sums due directly to individual members.

11. The Plaintiffs filed written submissions through their advocates, M/s Omboga & Co. Advocates. Since the question of liability is already adjudicated upon, it is only the question of the quantum due to the Plaintiffs that needs to be determined. According to the detailed submissions, the Plaintiffs are asking the court to enter judgment for Kshs.54,750,651/35.

12. I have considered the evidence as adduced by both PW1 and PW2 and on the basis of that evidence I am satisfied that each of the 113 Plaintiffs is entitled to be paid the balance between amounts received to date and what they ought to have received. PW1 and PW2 have confirmed that the requisite sums were forwarded to the Defendant in several tranches.

I note that persons who had retired prior to the Plaintiff's retirement were paid Kshs.100,000/= for Golden Handshake, while the Plaintiffs each received only 40,000/=. There is no explanation given by the Defendant as to why there is disparity in these figures. My view is that the Plaintiffs are each entitled to a further payment of Kshs.60,000/= as golden handshake balance, I also accept evidence given by PW1 that each of the Plaintiffs was entitled to transport costs and severance pay as stipulated in the circular on the Early retirement Benefits Scheme. I however note that the amounts as now computed by the Plaintiffs for outstrip what they have asked for in the plaint. The Plaintiffs have not amended the plaint so as to justify this new figure of Kshs.54,750,651/35 as opposed to the sum of Kshs.41,987,120/80. It is my considered opinion that the sum claimed in the plaint took account of all the benefits enumerated in the Early Retirement Scheme.

13. In the circumstances, I enter judgment for the plaintiffs in the sum of Kshs.41,987,120/80. The Plaintiffs shall also have the costs of the suit and interest at court rates from 20/05/2002. I am unable to

enter on general damages since the Plaintiffs did not adduce any evidence to support the same.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of July 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:

..... for the Plaintiffs

..... for the Defendant

..... – court clerk