

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1154 of 2001

HENRY KINYUA PLAINTIFF

VERSUS

KENYA PLANTERS' CO-OPERATIVE UNION DEFENDANT

RULING

The plaint herein was first filed in 1994 but amended on 22/2/2008. The dispute is between employee (plaintiff) and employer (the defendant). The plaintiff was employee in terms of an agreement first on 1964 until 1988 July counting from 1st January 1978.

The plaintiff was appointed Managing Director under a written agreement. Clause 17 of that agreement provided that the plaintiff was entitled to retire after 15 years continuous service with the defendant in which event the plaintiff is entitled to a pension equivalent to 100% of his last monthly salary until he attains age of sixty years, after which he is entitled to a pension of 80% of his last monthly salary.

The plaintiff's "last monthly salary" is defined under Clause 17 (iii) to mean the gross salary plus all benefits payable to the Managing Director as his current monthly salary at the date of retirement. "Continuous service" is deemed to have commenced on 1/7/1964.

The plaintiff wrote to the Chairman on 9/1/88 stating of his desire to retire as Managing Director with immediate effect. By letter dated 14/1/88, the Board accepted the plaintiff's request to retire after expiry of 6 months' leave. The plaintiff's last monthly salary was Kshs.382,432/=. Other payments are stated under paragraph 8 and 9 of amended plaint.

By letter dated 6/9/1988 the defendant purported to revoke the agreement unilaterally and the defendant has failed to pay to the plaintiff kshs.141,186/= per month in respect of pension. And the plaintiff has suffered loss and damage namely; special damages as specified under paragraph 12 of the amended plaint totaling Kshs.109,884,500/= with interest at 12% p.a. and costs of this suit. The suit was filed and employment was terminated before the Employment Act Cap.266 was amended. Only issue outstanding is payment of pension.

The defendant on a point of law submits that this court has no jurisdiction and that this suit should be transferred to Industrial Tribunal in terms of the amended law.

I have considered submissions of the parties and authorities offered. The interpretation and General Provisions Act, Cap. 2, Section 23 (3) (b) provides that:-

"Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not (3) (b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed or (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed (3e) thereof affect an investigation legal proceeding or remedy in respect of a right privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing written law had not been made."

In the case of Ghelani vs. Radia 1968 E.A. 311 the Act – Limitation Act (Cap.70) Laws of Uganda came into force on May 7, 1959 and had transitional provisions. That case was dealing with the issue of Limitation, the court found that the cause of action accrued when the defendant received the money to which he is not entitled and thus became unjustly enriched or when the plaintiff pays money on defendant's behalf. The provision of Section 35 transitional provisions did not alter the period of Limitation applicable which was 6 years.

It is my view that the Parliament did not intend the new statutes dealing with Labour matters namely' (1) Employment Act No.11 of 2008 and (2) The Labour Institutions Act to operate retrospectively so as to affect proceedings already ongoing.

The preliminary objection is overruled with costs in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 22nd day of October 2009.

JOYCE N. KHAMINWA

JUDGE