



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 453 of 2007**

**RONALD KIMATU NGATI ..... APPLICANT**

**Versus**

**UKULIMA SOCCO SOCIETY LIMITED ..... RESPONDENT**

**JUDGMENT**

The Plaintiff who was an employee of the Defendant in this suit wants Judgment against the said Defendant for

- (a) **“Principal amounts Kshs.7,644,626/=**
- (b) **General damages for breach of contract**
- (c) **Costs and Interest of this suit**
- (d) **Any other relief the court may deem fit.”**

The reason for that claim is that the Plaintiff having been employed by the Defendant and having worked his way up to the status of a Permanent and Pensionable employee, the Defendant in the end forced the Plaintiff to pre-mature retirement, thereby making the Plaintiff suffer loss.

What happened was that at the time the Plaintiff was employed by the Defendant on 21<sup>st</sup> March, 1989 the Plaintiff always believed he was born in 1947 the year of “**Mwolyo Famine**” according to what his parents used to tell him. But in 1996, the Plaintiff’s elder brother, an educated man, told the Plaintiff that he was born in 1953.

Following that information from his brother, the Plaintiff says he rectified the error in the office of the Registrar of Persons and indeed showed this court the identity card he says was issued to him on 5<sup>th</sup> November, 1997 as a result of the rectification. It is identity card No. 5389881, showing his date of birth as 21.3.1953, photo-copy having been compared with the original identity card was produced as Plaintiff exhibit 5.

The Defendant whose General Manager, Henry Echale Nakaya, gave evidence as DW1, denies the Plaintiff’s case and insists that it retired the Plaintiff when the Plaintiff attained the retirement age of 55 years in reliance upon details given by the Plaintiff himself at the time of his employment, which age was the one considered by the Defendant when the defendant decided to employ the Plaintiff. The Annual Staff Appraisal Report which the Plaintiff had talked about to the effect that they used to show the date of

birth were, after the year 1996 changed to a form which did not show the date of birth and Mr. Nakaya said, concerning the Plaintiff's retirement dues, that the Plaintiff was fully paid up to the date of his retirement and that there was therefore nothing remaining for the Plaintiff to claim.

But before they closed their case, the Defence brought in an element which, to say the least is suspect and indeed the same is in their filed written defence to the effect.

**“That when the Plaintiff gave the Defendant an Identification Card showing he was born in 1953 they asked the Registrar of Persons to confirm the correct date of birth and the Registrar confirmed 1947 and puts the Plaintiff to strict proof of the contrary.”**

Mr. Nakaya told the court that the Defendant did so through a letter dated 4<sup>th</sup> October, 2002 which elucidated the reply dated 16<sup>th</sup> October, 2002 he produced as Defence exhibit 3.

This is a case where one witness gave evidence on each side with the Plaintiff conducting the case in person while the Defendant was represented by Mrs., Grace Kiptui from the law firm of Kiptui Mbabu & Co. Advocates. At the time Defendant's exhibit 3 was produced, I had not had the opportunity of knowing how it was but now as I write this Judgment I do realize that the said exhibit raises a number of unanswered questions some of them attracting the following comments.

Firstly, the decision to retire the Plaintiff was made by the Defendant in March, 2002 and it was therefore in their letter dated 18<sup>th</sup> March, 2002, which is Plaintiff exhibit 6, that they gave the Plaintiff six months notice up to 30<sup>th</sup> September, 2002 to retire so that 1<sup>st</sup> October, 2002 was to be the effective date for the retirement. That decision could not have been assisted by the contents of Defendant's exhibit 3 or even that of the Advocate's unknown to court letter dated 4<sup>th</sup> October, 2002 the contents of which the court does not know.

Secondly, the decision by the Defendant to dismiss the Plaintiff's appeal as communicated to the Plaintiff in the letter dated 25<sup>th</sup> October, 2002, which is Plaintiff's exhibit 8, could not also have been influenced by the contents of Defendant's exhibit 3 even if by any chance the Defendant could have seen their Advocate's letter to the Principal Registrar of Persons dated 4<sup>th</sup> October, 2002 the contents of which I have said this court does not know. That is because the contents of the Principal Registrars' letter dated 16<sup>th</sup> December, 2002, now in Defendant exhibit 3, came to be known almost two months after the Plaintiff's appeal had been rejected by the Defendant.

Thirdly, the Principal Registrar of Persons addressed that letter directly to the Defendant's Advocates and the contents show clearly that the Advocates are the ones who had asked for information. It was not explained how the learned Advocates had come into the matter so early, in fact 4 ½ years before this suit was filed by the Plaintiff in this court. However, during the hearing, it was the Defendant's General Manager, DW1, who produced that letter as Defendant's exhibit 3 the impression being given that it is the General Manager or his staff or the management or Committee of the Defendant who asked for the information directly from the Principal Registrar and were replied directly by him.

Correctly, in view of what happened in this case, it is the Principal Registrar of Persons himself or his officer who ought to have been brought by the Defendant's Advocates to the court to produce that letter. Otherwise the Advocates who wrote the letter dated 4<sup>th</sup> October, 2002 to the Principal Registrar in the law firm of Kiptui Mbabu & Company or any other Advocate from that firm, ought to have produced Defendant exhibit 3 in this court and could have answered for the Principal Registrar how, having issued the Plaintiff with a new identity card saying he was born on 21<sup>st</sup> March, 1953 replacing the former identity card in which the same Principal Registrar had told the world that the Plaintiff had been born on 21<sup>st</sup> March, 1947, the very same Principal Registrar i.e. his office, without saying anything about the existence of the identity card having the date of birth as 21<sup>st</sup> March, 1953, is telling the law firm of Kiptui Mbabu & Company only, as he leaves the Plaintiff deal with the rest of the World carrying the identity card with the birth date 21<sup>st</sup> March, 1953, that

**“According to our record Mr. KIMATU’S correct date of birth is 1947 and not 1953.”**

The Principal Registrar of Persons or the said Advocates ought to have been in this court to explain why he is saying so only in this case when he seems to see it proper and perhaps lawful to leave the Plaintiff, and has already left the Plaintiff for more than four years, continue dealing with the World using the identity card which shows he was born in 1953. This is a serious matter and I am surprised the parties don’t seem to see the matter as serious.

But now that I have reached this stage of the suit and I am not, in this suit, supposed to determine the age of the Plaintiff but to leave it in the form and manner in which it was presented in the evidence so far before me, I will move further in this Judgment to state what follows under.

**I, note there is no evidence that the Plaintiff in a formal manner wrote to the Defendant informing the Defendant of the Plaintiff’s official changed date of birth. In fact the Plaintiff does not even pretend to say in his evidence that he did that as all he claims to have done is that which is found in his exhibit 7 where he stated that “After serious thought” he wished to state that his birth date is 1953 and not 1947 as stated in the Defendant’s letter dated 18<sup>th</sup> March, 2002. His exhibit 7 is his letter dated 25<sup>th</sup> July, 2002 addressed to the Defendant’s General Manager in re-action to the said General Manager’s letter dated 18<sup>th</sup> March, 2002 under the heading “RETIREMENT ON AGE GROUNDS.” and giving the Plaintiff six month’s notice for retirement at the end of the of the notice period. The Plaintiff produced that letter as exhibit 6, and in exhibit 7, the Plaintiff went on to state as follows:-**

**“UPDATE**

**Sometimes in July last year, I advised you verbally, when you went round the offices validating staff ages. The same information was later included in the revised staff data, now in the computer.”**

The Plaintiff, through exhibit 7, asked the General Manager to peruse through the computer data and kindly reconsider the decision to retire the Plaintiff.

Exhibit 7 was written by the Plaintiff four full months after the Defendant had written Plaintiff’s exhibit 6. Apparently there was a reply which has not been produced in these proceedings along with other relevant correspondence between the parties such as a letter UCSCS/STAFF/076 of 26<sup>th</sup> July, 2002 Mentioned in Plaintiff’s exhibit 8.

Evidence of the Plaintiff’s appeal referred to in his exhibit 8, was therefore not brought and the said exhibit 8 also refers to the Plaintiff’s letter dated 21<sup>st</sup> August, 2002 which was not produced. Exhibit 8 is a letter dated 25<sup>th</sup> October, 2002 addressed by the Defendant’s then Ag. General Manager H.E.Nakaya to the Plaintiff under the hearing:

**“RETIREMENT ON AGE G ROUNDS – AN APPEAL”**

and states in the relevant part as follows:

**“I refer to your letter dated 21<sup>st</sup> August, 2002 to our National Chairman on the above.**

**I regret to advise that the appeal was turned down by the Central Management Committee which resolved that you proceed for the retirement as was communicated to you vide our letter UCSCS/STAFF/076 of 18<sup>th</sup> March, 2002 and UCSCS/STAFF/076 of 26<sup>th</sup> July, 2002.”**

What the Defendant said in reply to statements made by the Plaintiff in his exhibit 7 is therefore not known to this court; what the Plaintiff said in his appeal is also not known to this court.

On the whole therefore, I find that is a case where parts of some vital evidence have been kept away

from the Court while some which ought not to be brought has been brought, as the Plaintiff fails to pass the most vital test of discharging the burden squarely upon him that indeed he formally and properly or satisfactorily in writing informed the Defendant of the official and lawful change of his date of birth from 21<sup>st</sup> March, 1947 to 21<sup>st</sup> March, 1953. At the same time, the court has been given contradicting evidence from the Principal Registrar of Persons in Plaintiff's exhibit 5 and Defendant's exhibit 3. Yet the parties did not care to bring the said Registrar in court to testify in person. It follows I am not satisfied the Plaintiff has succeeded in proving this suit against the Defendant even on the balance of probabilities.

Accordingly I do hereby dismiss the suit. However following on the comments I have made in this Judgment relating to the Principal Registrar of Persons, each party in this suit to bear its own costs of this suit.

Dated this 17<sup>th</sup> day of July, 2008.

**J.M. KHAMONI**

**JUDGE**

**Present**

Plaintiff in person

M/s Kiptui Mbabu & Co. for the Defendant

Kabiru Court Clerk