REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 65 of 2006

SIMON P. KAMAU…….……..……PLAINTIFF

VERSUS

TEACHER SERVICE COMMISSION..……RESPONDENT

JUDGMENT

This is a representative or class-action. Leave to institute it was granted to the plaintiffs in Nakuru HC Misc. Appl. No. 497 of 2005. The 20 plaintiffs, who are retired teachers, claim in their plaint that, at the material time, they were all employees of the Teachers Service Commission (the defendant) and that they were all members of the Kenya National Union of Teachers (the union). They further claim that following protracted negotiations between their union and the defendant, on 11th October 1997, an agreement was reached between the union and the defendant to increase the teachers' salaries country-wide. The salary increments were based on percentages applicable to various categories.

The agreement, which was published in Gazette Notice No. 534 of 1997, was to apply to all the teachers, including those on leave pending retirement and those in the process of being retired, but who were in the service of the defendant as at 1st July 1997.

In breach of the said agreement, the plaintiffs claim that the defendant refused and/or neglected to add to their retirement benefits the increments as a result of which they have suffered loss. In paragraph 8 of the plaint, they have given particulars of the losses suffered by each of them. They therefore claim a declaration that they, and all the retired teachers they represent, are entitled to retirement benefits calculated on the basis of the entire salary increments of 1997 and an order compelling the defendant to pay them the shortfall in the form of lump sum payment and the monthly pension.

In its defence, the defendant admits the negotiations culminating the salary increment of the teachers but aver that the increment was implemented in phases and the plaintiffs having retired in 1997 they were only entitled to the 1997 phase which formed the basis of calculation of their pension.

The parties called one witness each. For the plaintiff, Simon Peter Kamau Mbugua, the first plaintiff, testified on his own behalf and on behalf of all the plaintiffs and the teachers they represent. His testimony was that upon attaining the retirement age of 55 years each retiring teacher is paid a lump sum of pension and monthly pension sums based on his last salary. He said on his retirement on 31st December 1999, he was paid a lump sum of Kshs.677,655/- and has since been getting a monthly pension of Kshs.8,470.70. Both of these payments were based on his salary with only one increment

implemented. He said if the total increment he was entitled to had been implemented, both his lump sum payment and the monthly pension could have been much higher. He produced several documents in support of their case which I will refer to later in this judgment. He concluded that the same happened to the other plaintiffs and all the teachers who retired before all the phases were implemented and prayed for judgment to be entered in their favour as prayed in the plaint.

The defendant called its Chief Human Resource Officer, Reuben Anyasi, DW1. He admitted that the plaintiffs were employees of the defendant at the time of the salary increment. He testified that before one retires from the employment of the defendant one is given one year's notice of retirement showing one's last date of work and requiring one to return several documents to the defendant. On the basis of the returned documents the defendant then prepares Form GP 178 showing the history of the teacher's service and the last salary earned. It is then forwarded together with the returned documents to the Pension Department in the Ministry of Finance.

It was Mr. Anyasi's testimony that after that the employer/employee relationship between the teacher and the defendant is terminated and any queries the teacher may have on his pension are to be directed to the Director of Pensions. If there is any query on the documents forwarded to the Pensions Department, he said it is that Department that seeks clarification from the defendant. In his view therefore, this suit does not disclose any or any reasonable cause of action against the defendant and is bad in law. He said, it should have been filed against the Pension Department. Because the Government was not able to pay the increments at once he said it was agreed that the increment be paid in phases. The implementation aspect of the contract was in phases and did not have retrospective effect. The unimplemented phases could therefore not apply to the plaintiffs or their ilk who had retired.

In cross examination, Mr. Anyasi admitted that the negations and the agreement were between the union and the defendant and that the Pensions Department was not party to either of them. He also admitted that the plaintiffs' retirement benefits and pension was based on the last salary earned by each and did not take into account the unimplemented phases of the increment. He conceded that the agreement, **Ex. 9**, has no qualification that once a teacher retires he loses the benefits under that agreement.

After the evidence, counsel for the parties filed written submissions. In his submissions, counsel for the plaintiffs submitted that had the Government been able to pay the increased salary at once the plaintiffs' terminal benefits and pension could have been much higher than what they are now. He dismissed the defence claim that this suit should have been filed against the Pensions Department arguing that it is the defendant which failed to advice the Pensions Department of the plaintiffs' correct salaries and had it done that this suit could not have been filed.

On his part counsel for the defendant submitted that the plaint does not disclose any or any reasonable cause of action as the plaintiffs' claims are vague and unintelligible. Without prejudice to that he submitted that upon submission of the plaintiffs' documents to the pensions department the defendant became *functus officio*. After that, according to him, claims by any aggrieved persons should be lodged against the Director of Pensions under **Section 3** of the **Pensions Act** (the Act). The defendant, he said, is therefore non-suited. And on the basis of the clause 'TO WHOM APPLICABLE' in the TSC Circular No. 13/97 the unimplemented phases did not apply to the plaintiffs.

From these submissions and the pleadings in this case two main issues arise for determination. They are whether or not the defendant, having submitted the plaintiffs' documents to the Director of Pensions, is *functus officio* and therefore non-suited and whether or not the unimplemented phases should have been taken into account in calculating the plaintiffs' pension and retirement dues. The determination of the second issue will dispose of the first one. I will therefore start with the second one.

I have perused the pleadings and considered these submissions along with the evidence on record. It is not in dispute that following protracted negations between the union on behalf of the plaintiffs and other teachers in the country on the one hand and the defendant on the other, on 11th October 1997, the defendant agreed to increase the teachers' salaries as stated in L.N. No. 534 of 1997 with effect from 1st July 1997. It is also not in dispute that the plaintiffs were employees of the defendant at the material time

entitled to the salary increment. What has caused the problem giving rise to this suit is clause 3 of that agreement which relates to the implementation of the terms of that agreement. To get the import of the issue at hand let us read the relevant part of the agreement. It reads:-

"**MEMORANDUM OF AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KENYA AND THE KENYA NATIONAL UNION OF TEACHERS (K.N.U.T.)**

Following intensive and very frank negotiations between the Government of the Republic of Kenya and the Kenya National Union of Teachers as directed by His Excellency the President, Hon. Daniel T. Arap Moi, on the occasion of Moi Day on the 10th October, 1997, it has been agreed as follows:-

1. That the Government accepts the recommendations of the Teachers Service Remuneration Committee (1997) submitted to the Minister for Education on 2nd July, and

2. The Minister for Education will prepare a remuneration Order directing that the remuneration of teachers shall be determined in accordance therewith, and

3. The recommendations embodied in the remuneration order will be implemented over a period of five (5) years with effect from 1st July, 1997, as per the schedule annexed hereto, and

4. The remuneration of Teachers order made on 25th September, 1997, by the Minister for Education and published as Legal Notice No.180 of 1997 shall be revoked."

Pursuant to clause 2 of this agreement the Secretary of the Teachers Service Commission issued a circular--**TSC CIRCULAR NO. 13/97** which set out the new salaries of the teachers and categorically stated:

"**TO WHOM APPLICABLE**

The new conditions of service apply to all teachers in the service under Teachers Service Commission on or after 1st July, 1997 including those on leave pending retirement or final termination of appointment on or after that date."

As already stated the newly negotiated salary package was gazetted in Legal Notice No. 534 of 1997. The defendant's contention as is clear from paragraph 5 of the defence is that "at the time of their retirement, the plaintiffs benefited from the 1997 phase which then founded the only logical and legal basis for the calculation of [their] pension…." I cannot accept this contention.

As I have already stated it is not in dispute that the plaintiffs were employees of the defendant at the material time entitled to the salary increment. It was DW1's evidence that the reason for staggering the payment of the agreed salary increment was because of the financial constraints on the part of the Government. If the Government had money it could have implemented the increment at once and had that happened the plaintiffs' salary at the time of their retirement could have included the entire increment in which case the defendant would have submitted to the Pensions Department the plaintiffs' last salary slips reflecting the entire increment. That did not happen as the plaintiffs retired in 1997 when only one phase had been implemented. Does that deprive them of their entitlement before retirement? I think not.

It is true that **Section 10(1)** of the **Pensions Act** and **Regulation 20(1)** thereof provide for a retiree's last pay as the basis for the calculation of his gratuity and pension. The Section 10(1) of the Pensions Act reads:

"**A pension granted to an officer under this Act shall not exceed the full pensionable emoluments drawn by him at the date of his retirement."**

Regulation 20(1)(a) thereof reads:

"**For the purpose of computing the amount of the pension or gratuity of an officer who has had a period of not less than three years' pensionable service before his retirement—**

(a) in the case of an officer who has held the same office for a period of three years immediately preceding the date of his retirement, the full annual pensionable emoluments enjoyed by him at the date in respect of that office shall be taken"

A superficial perusal of these provisions would give one an impression that the defendant acted within the law by calling for and submitting to the Pensions Department, inter alia, the plaintiffs' last pay slips. That is, however, not correct. On the facts of this case those provisions should be given an interpretation that will do justice to both parties.

Statutes should not be given pedantic interpretations that end up causing injustice. I concur with what the authors of Francis Bennion's "Statutory Interpretation", 3rd Edition stated at P.614 that:-

"It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislature intended to observe this principle. The court should therefore strive to avoid adopting a construction that leads to injustice."

In this case the Section 10(1) of the Pensions Act should therefore be interpreted as though it stated that "**the full pensionable emoluments drawn or supposed to be drawn by him at the date of his retirement."** To interpret it otherwise will obviously cause injustice to the plaintiffs.

While the duty to pay remuneration is far from being the employer's only duty under the contract of employment, it is certainly the central element and basic obligation of the employer. It is not a privilege that the employer accords an employee. Remuneration is the employee's constitutional right. Section 70 of our Constitution makes that explicitly clear. It states:-

"**Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all the following, namely—**

(a)……

(b)……

(c) Protection for the privacy of his name and other property and from deprivation of property without compensation."

Property includes choses in action, money gratuity and/or pension.

The Government should be the role model by being the first obeyer of the law. Otherwise what moral duty will it have to enforce the same law it has itself transgressed against errant employers seeking to oppress their employees?

In this case the Government cannot be allowed to run away from what it had clearly contracted in writing to pay to the plaintiffs. That it had no money to pay the teachers at once does not alter the fact that it had committed itself to the increment. The fact remains that the plaintiffs and those they represent were, before their retirement, entitled to the full increment only that some of it was to be paid at a later stage. Therefore for purposes of the calculation of their gratuity and pension, I find that the defendant should have advised the Pensions Department of the plaintiffs' correct salary entitlements. If the defendant had done that the correct salary the plaintiffs were entitled to could have formed the basis of their gratuity and pension calculations and this suit could have been averted. The defendant having provided erroneous

information it cannot be heard to claim that it is *functus officio.* In the circumstances I hold it is accordingly liable.

The plaintiffs have particularized their claims in paragraph 8 of the plaint. In response the defendant made a general denial of those claims and in his evidence DW1 did not in any way dispute those particulars. In the circumstances those claims remain unchallenged and the plaintiffs are therefore entitled to judgment as claimed.

In the result I grant the declarations that the plaintiffs and all the other retired teachers covered by the agreement dated 11th October 1997 between the defendant and the teachers' union KNUT as read with the TSC Circular No. 13/97, are entitled to their retirement benefits being based on the entire salary increment contained in that agreement and Circular. On the basis of that increment I order the defendant to pay or to liase with the Pensions Department to pay to the plaintiffs and those they represent the unpaid gratuity and pension dues to date and base all their future pension payments on the entire salary increment of 1997 as per the particulars stated in paragraph 8 of the plaint. The plaintiffs shall have the costs of this suit.

DATED this 23rd day of October, 2008.

D.K. MARAGA

JUDGE.