



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

**Civil Suit 2049 of 1998**

**FRANCIS CYRUS MUGO.. .....PLAINITFF**

**VERUS**

**BARCLAYS BANK (K) LTD.....DEFENDANT**

**JUDGEMENT**

The plaintiff Francis Cyrus Mugo Njuguna was employed by the Defendant for 27 ½ years before his employment was ended by an early retirement in February 1997. The Plaintiffs present case is that the Defendant coerced him to accept early retirement without his consent and is therefore entitled to claim damages in form of the salary he would have received at the age of 60. In the alternative the plaintiff's case is that he ought to have retired from the defendant's employment on the 31<sup>st</sup> of March 1997.

On the other hand the defendant case is that on being offered an opportunity to take early retirement the plaintiff accepted that invitation and accordingly retired on the 1<sup>st</sup> of February 1997. The defendant denies that the plaintiff is entitled to any claim for damages.

The plaintiff in his evidence stated that he began to work for the Defendant at the age of 20 years that was on the 29<sup>th</sup> of September 1969. According to the contract of employment he ought to have retired when he was at the age of 60 which would have been the year 2008. The plaintiff referred to the defendant's staff pension fund rules particularly to rule No. 20 C which provided the normal retirement age for clerical staff to be 60 years. That rule also provided that a member of staff of the defendant would be granted a pension calculated according to certain conditions as provided that:-

- (i) has attained the age of 60 years at the date of retirement; or**
- (ii) has been permitted under the terms of General Rule A15 to retire on account of ill health before reaching the age of 60 years: or**
- (iii) has not attained the age of 60 years but the Directors consider it desirable that he should retire on the grounds of unsatisfactory service: or**
- (iv) has retired at the request of the Directors before reaching the age of 60 years after satisfactory service or by reason of redundancy;**

The plaintiff evidence is that he would have worked for the defendant up to the age of 60 unless he did anything wrong that would have led him to be terminated. That the defendant on or about 1993 started to

send its employees on early retirement. The Plaintiff stated that that policy of early retirement was contained in the Defendants staff Circular No. 18 dated 3<sup>rd</sup> March 1992. For better understanding it is important to reproduce that circular in this judgment:-

## **STAFF CIRCULAR NO. 18**

### **EARLY RETIREMENT SCHEME**

**After long and careful consideration, the bank has now decided to introduce an Early Retirement Scheme. This has become necessary due to the fact that there is a growing number of staff who are on top of their scales and are unlikely to receive further promotions. A number of such staff have also been enquiring about such a scheme for quite some time.**

**While appreciating the need for the Bank to give staff the opportunity to leave the Bank especially when they have reached their maximum potential, such a scheme must be applied very sparingly as we do not want to weaken our overall staff experience levels. To this end therefore, it has been decided that participants in the scheme will be by invitation.**

**The Bank is in the process of compiling a list of staff who will be invited to join scheme.**

**We attach herewith details of how the scheme will operate.**

**In case clarification is needed, please refer to the undersigned.**

**N MTUWETA**

### **Chief Manager Personnel**

The plaintiffs stated that this circular related to those who had reached their potential and those who had no hope of promotion at all. He said that this did not apply to him because by a letter dated 31<sup>st</sup> of January 1992 he was promoted to the position of Supervisory grade. He however stated that in June – July 1996 whilst he was working at the defendant's Limuru branch the defendant's Personnel Manager visited their branch. That he began by calling members of staff one by one into the office and he eventually called the plaintiff. The plaintiff said that the personnel manager is called Albert Ruturi. The plaintiff on being requested by the said Personnel Manager to volunteer to retire early he said that his response was that he was not ready. By the end of 1996 the plaintiff proceeded on his annual leave and he was due to report back on duty on the 28<sup>th</sup> of January 1997. The plaintiff confirmed that he did report on duty on that day. That on that day since he had the responsibility of looking for schools for form 1 for his two children he requested for a few days of leave to enable him to do so. He said that he requested the leave from the branch manager Mr. Mwangi. On looking at the staff annual leave chart Mr. Mwangi suggested that the plaintiff would go on immediate leave which leave would end on the 3<sup>rd</sup> of March 1997. Whilst on leave on the 24<sup>th</sup> of February 1997 since the defendant often paid its staff on that day the plaintiff went to the defendant's Limuru branch with an intention of withdrawing some money. Whilst he was at the branch he said that the Manager's secretary handed to him a letter dated the same day. In that letter the defendant stated that they were pleased to advise the plaintiff that they were in agreement with his request to go for early retirement with effect from 1<sup>st</sup> February 1997. The letter informed the plaintiff that a lump sum of kshs 615, 432. 00 would be credited in the plaintiff account with the defendant. The same letter stated that that amount would be used to clear the plaintiff's loans with the defendant. The letter finally informed the plaintiff that he would continue to enjoy the medical cover benefit and at the age of 50 he would begin to receive his pension. The plaintiff said that he had not written to the defendant requesting to go for early retirement. He said that it was a procedure that whoever wished to go on early retirement would write to the defendant to that effect. The branch at which the employee worked would respond by giving conditions for the early retirement and would request the employee to counter sign that letter in acceptance of those conditions. The plaintiff said that on receiving the afore stated letter he checked his account and found that the defendant had not credited the amount therein. He

said that in fact that money was not credited until the 26<sup>th</sup> of February 1997. That the account had an overdraft and loans which the defendant debited from his account. The balance that was left in the plaintiffs account was kshs 19, 000. 00. The plaintiff said that on finding that there was no credit in his account on 24<sup>th</sup> of February 1997 he went to the defendants head office to see the Personnel Manager. On seeing the Personnel Manager he was told to go home that he would be contacted in due course. The plaintiff said that he did not receive his salary for February 1997. Additionally he did not receive the leave allowance that he was entitled to of kshs 17, 000/-. From February 1997 the plaintiff began to engage the defendant in correspondence. He said that since the employees that had been retired early previous to him had been threatened by the defendant when they questioned that early retirement the plaintiff accepted to retire early but stated that such retirement should start from 31<sup>st</sup> of March 1997. He said that he did not want to leave before that date because he wanted to do certain things for his children. What he wanted to do for his children in the interim was to obtain loans to pay for their education. Plaintiff reiterated that he had been given permission to go on leave which was to end as the 3<sup>rd</sup> of March 1997. On making enquiry about the leave days that he was entitled to and which ought to have been paid for by the defendant kshs 17, 000. 00 he said that the defendant had bought those leave days from him. The plaintiff stated that the defendant as at the 1<sup>st</sup> of March 1997 brought out another Staff Circular No. 14. This circular provided a much more advantageous compensation for those who agreed to go on early retirement. In his case, since he was aged 48, according to that circular he was entitled to a salary of 3 ½ years. The plaintiff said that his monthly salary was kshs 51, 286. 00. He said that that amount multiplied by 12 and again by 3 ½ years would have earned him a compensation of kshs 2, 256, 584. 00. That however under the earlier circular the defendant had given him a compensation of kshs 615, 432. 00 that this amount related to one year's salary. The plaintiff said that the difference between the amount that was paid to him and the amount that ought to have been paid to him is kshs 1, 641, 152. 00. The plaintiff on being cross examined confirmed that the members of staff were offered to go to early retirement. He however said that when he was requested to go on early retirement he declined. He said that he was not affected by the policy in the circular No. 18 since he had received promotion just before the process of early retirement was started by the Defendant. On being questioned about his claims for 10 million shillings the plaintiff stated that this was in respect of his loss of career. That he ought to have worked up to the age of 60 and in calculating the years that he was not allowed to work his claim comes up to 10 million shillings. He however accepted that there was no guarantee that one could work up to the age of 60.

The defence evidence was given by Christine Orono. She said that she works in the Human Resource Department as an adviser for the defendant. She has now worked for 13 years. She confirmed that the normal retirement age of the defendant bank is 60 years. She however stated that there were occasions that members of staff would retire earlier than 60 years. That the plaintiff retired under the early retirement scheme which was based on the staff circular 18 dated 3<sup>rd</sup> of March 1992. She also confirmed that for one to retire early they have to have reached maximum potential. That for one to be invited to retire early they had to have a minimum of 40 years and they ought to have worked for at least 20 years for the defendant. The witness said that the plaintiff met those conditions. She confirmed that he was retired early and he was fully paid for his dues. The witness said that the plaintiff accepted the invitation to retire early. To support her evidence the witness referred to the plaintiff letter dated 14 of May 1997. To just quote a part of that letter:-

**“Sometimes last year the then Director of personnel Mr. Ruturi visited our branch and we discussed the possibility of my early retirement. I told him I was ready to start my retirement on or after 31<sup>st</sup> March 1997.”**

The witness however stated that the retirement was to take effect from the 1<sup>st</sup> of February 1997. She confirmed that the plaintiff was paid his dues, that is one year salary. That this amount was credited into his account and that some of the amount paid off the plaintiffs loans. That the plaintiffs loans except housing and shamba loans became payable immediately on retirement. That the housing and the shamba loan were to continue at the staff rate up to the age of 50. The witness said that the Staff Circular no. 14 dated 28<sup>th</sup> February 1997 was not applicable to the plaintiff. She said that it was not applicable because the plaintiff had left the defendant employment as at 1<sup>st</sup> of March 1997. The witness stated that there was

no guarantee that the plaintiff would have continued the defendant's employment up to the age of 60. She further stated that the plaintiff since leaving the defendant's employment one of his children benefited from the defendant's bursary scheme which went into paying university fees. That that scheme is run by the defendant. The witness further stated that from the record of the plaintiff's file with the defendant she was able to say that the defendant was not malicious towards the plaintiff. The persons who had been mentioned by the plaintiff in his evidence in chief the witness said had all retired from the defendant's employment. On being cross examined by the plaintiff's advocate the witness responded that all the information that she had given the court she had obtained it from the plaintiff's file.

As it is clear from the above the plaintiff is claiming for loss of earnings from the time of retirement up to the date he would have attained the age of 60. His claim for this loss of earnings is for KShs 10,794,260.00. The plaintiff further and in the alternative claims for compensation for early retirement whose working is based on the Staff Circular No. 14 which comes up to KShs 2,256,584.00. The plaintiff's claim that he did not voluntarily retire early is not supported by the evidence before court and not even by his own documents. Even by the plaintiff's very first letter which was dated 26<sup>th</sup> of February 1997 the plaintiff after being informed that he had been put on early retirement as of 1<sup>st</sup> of February 1997, his immediate response was not to dispute that he had requested to go on early retirement indeed his energy in the said letter is concentrated on ensuring that the defendant would allow him to continue to pay for his car loan and his consumable loan. He stated in that letter that he needed this concession to enable him to use the funds that he had to start a small business. The plaintiff even by his subsequent correspondence maintained that he was going on early retirement. What however the court finds which has not been controverted by the defendant is that the plaintiff requested to start his early retirement as at the 31<sup>st</sup> of March 1997. It does seem that the defendant's invitation to employees to go on early retirement was on the basis that it was on a voluntary basis. If that be the case then it does seem that the plaintiff volunteered to retire as of 31<sup>st</sup> of March 1997. The defendant has failed to prove that the plaintiff ever sought to retire on the 1<sup>st</sup> of February 1997. It does indeed seem that the plaintiff did request to retire as at 31<sup>st</sup> of March and this seems to have been accepted by the defendant by its letter dated the 11<sup>th</sup> of August 1997. Just to quote a sentence of that letter:-

**“On expiry of the leave on the mentioned date, you were expected to resume duty pending retirement from the services of the Bank on 31<sup>st</sup> March, 1997”**

One would ask what is the importance on the date on which the plaintiff chooses to retire. The answer would be that the date is important because upon determination of the date of retirement different compensation packages apply. If the plaintiff is taken to have retired as the 1<sup>st</sup> of February 1997 as the defendant contends the compensation he was entitled to is what he actually received which is KShs 615,432.00. This was worked out as per Staff Circular No. 18. If the plaintiff retired on 31<sup>st</sup> of March 1997 as he contends in this case in the alternative he ought to have received a compensation as per staff circular No. 14 which ought to have been KSh 2,256,584.00. I find that the uncontroverted evidence in this case is that the plaintiff chose to voluntarily retire early as at 31<sup>st</sup> March 1997. It ought to be noted that the plaintiff also claimed in his plaint that his constitutional rights under section 72, 73, 74 and 82 of the Constitution had been violated. The plaintiff in tendering his evidence in this case failed to prove those violations. That part of the plaintiff's claim must and does fail. The plaintiff's claim for his salary for February 1997 was sufficiently responded to by the defendant who proved that the balance of the plaintiff's leave days that were due to him were bought off him and were part of the package that was paid to him.

In considering the evidence that has been presented before court it becomes obvious to the court that there are only two issues to be decided by the court. The first is did the plaintiff voluntarily offer to retire early? The court's response is that the plaintiff did offer to voluntarily retire early from his employment with the defendant. The second issue is if indeed the plaintiff offered to retire early when was his retirement to commence? As it has been stated herein before the uncontroverted evidence is that the plaintiff offered to retire as at 31<sup>st</sup> of March 1997. Having so found the plaintiff will then be entitled to judgment as per staff circular NO. 14 and per prayer (d) in the Plaint. However as it will be recalled the

plaintiff was paid by the defendant kshs 615, 432, 00. This amount that having been paid to the plaintiff will be deducted from the judgment amount. The court does not find that the plaintiff is entitled to any other claim made in the plaint other than the claim for costs. The judgment therefore of this court is that the plaintiff is hereby granted judgment for kshs 2, 256, 584. 00 less the amount paid to the plaintiff of kshs 615, 432. 00. The plaintiff is also awarded costs of this suit.

Dated and delivered this 25th day of January 2007

**MARY KASANGO**

**JUDGE**