



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 6 of 2004

KINGSLEY D.K. KABIRU.....PLAINTIFF

VERSUS

AON MINET INSURANCE BROKERS LTD.....DEFENDANT

JUDGMENT

By way of a Plaint dated 11th December 2003 the plaintiff brought this suit against the defendant claiming that his contract of service were wrongfully terminated and sought judgment for:

- (a) Special damages
- (b) General damages for wrongful termination of contract
- (c) Interest on special damages
- (d) Costs of the suit; and
- (e) Any order relief as to this court may appear to be just to grant.

The Defendant upon being served with summons filed a defence denying the claim.

Briefly the facts of the case are as follows:

The Plaintiff entered in an employment contract with the Defendant's Predecessor (Minet ICDC Ltd) in June 1978. Between June 1978 and December 1989, the Plaintiff rose through the ranks to the position of Assistant Divisional Director, a position he held until his employment came to an end. On 1st May 2001 the plaintiff and the defendant executed an Employment Agreement. Clause 17 of the Agreement provided terms of Early Retirement as follows:

“Whilst the company compulsory retirement age is 60 years the following early retirement options will be available:

Clause 17:1 The Executive may request for early retirement on attaining the age of 50 or thereafter by giving the company no less than the Notice period of the said early retirement (the executive will be under no obligation to give reason for the request)

Clause 17:2 The company may request the Executive to take early retirement on attaining age 55 or thereafter by giving the executive no less than the Notice period or pay in lieu of the Notice Period (the company will be under no obligation to give reasons for the request).

Clause 17:3 Where either option under sub-section 17'1' or 17 '2' is exercised, there will be no penalty on either side and the executive can retire on reduced pension as per table in Pension Scheme Trust Deed and Rules or can cash his or her benefits.

By a letter dated 5th July 2002 the Defendant requested the Plaintiff to take early retirement under the provisions of the

Employment Agreement. The letter read:

PRIVATE & CONFIDENTIAL

MR. KINGSLEY D.K. KABURU

MINLARK DIVISION

Dear Kingsley,

RE: EARLY RETIRMENT

I write further to our meeting/discussions of the 3rd January 2002, when your performance and continued working in Minlark Division was reviewed. It was then agreed that you will take early retirement on attainment of age 55. Succession planning in the Division has been done with this knowledge and understanding in mind.

As per terms of your employment contract, we write to request and notify you that you will be retiring on attainment of age 55 which will be 30th October 2002. Take this letter to be the formal notice.

As per our discussions of 4th July, you have 24 days accumulative leave and 15 days leave earned todate.

It was therefore agreed:-

- (i) You will proceed on leave with effect from Monday the 15th July.
- (ii) It is the wish of the company for you to serve the notice period at home but on call and at full pay
- (iii) Due to accumulated leave days you will be on payroll for the period up to 30th November, with the early retirement taking effect from 1st December 2002. On behalf of the shareholders the Board and Management; I would like to take this opportunity to thank you for the 24 years you have served the company. They have been years of learning and benefit to the company and those you worked with on their behalf I say THANK YOU. Wishing you success and satisfaction in your future endeavours.

With kind regards.

Yours sincerely

J.M. MACHARIA

MANAGING DIRECTOR

The Plaintiff on receipt of this letter filed this suit in January 2004 claiming inter alia general damages for

breach of contract. It is the defendant's case that although in accordance with the terms of the Contract of Employment between him and the Defendant stipulated retirement age at 55, and 3 months notice or 3 months salary in lieu of notice, he was retired before the age of 55 and without notice.

But the Defendant contends that it had exercised its option three (3) months notice before the Plaintiff's 55th birthday and this is not denied. However the effective date was extended to 30th October 2002 and the requisite three (3) months notice was given thereby making the effective date of retirement the 1st December 2002.

Mr. Monari submitted that the contract between the Plaintiff and the Defendant stipulated a termination clause and the employer and the employee intended to be bound by it. What existed between the Plaintiff and the Defendant was a contractual relationship freely entered into with all attendant consequences since it is strite law that freedom of a contract should prevail so long as the contract is neither illegal nor immoral, the Employment Agreement validly governed the relationship between the Plaintiff and the Defendant.

In the case of KENYA

ELD SERVICES LTD VS. PETER NJOROGE CIVIL APPEAL NO. 124 OF 1985 (unreported) the Court of appeal said:

“Where the employer and the employee enter into a Service Contract which stipulates a termination clause or notice to terminate the employment there is no difficulty in such a contract because the employer and the employee intended to be bound by the termination clause or notice regardless of the nature of employment.

In the instant case Clause 17:2 of the Employment Agreement provided that the company may request the Executive to take early retirement on attaining age 55 or thereafter by giving the Executive no less than the Notice Period (or pay in lieu of the Notice Period) the company will be under no obligation to give reasons for the request. By a letter dated 5th July 2002 the Defendant requested the Plaintiff to take early retirement under the Provisions of the Employment Agreement and it is admitted by the Plaintiff that he was given the three (3) months notice and there is documentary evidence to establish the same.

The Plaintiff's pension was calculated in accordance to Clause 17:3 amounting to Shs.4,591,502/= and he was paid.

In the result plaintiff has failed to prove his case on balance of probabilities. Accordingly the Plaintiff's claim is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 24th day of April 2007.

J.L.A. OSIEMO

JUDGE