REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 501 OF 1997

SAMMY C. L. AKIFUMA.....PLAINTIFF

-VERSUS

SHELL DEVELOPM ENT (K) LIMITED .....DEFENDANT

JUDGMENT

A. SEEKING GREATER BENEFITS OF "RETRENCHMENT", RATHER THAN THOSE OF "EARLY RETIREMENT": PLAINTIFF'S PLEADINGS

The plaint in this suit was dated and filed on 28th February, 1997. The plaintiff averred that he had joined the defendant company's employ as a computer operator, on 28th December, 1970, and on divers dates between 28th December, 1970 and 0ctober, 1994 he had been promoted in his official designations and duties within the company and its affiliates, up to the position of Financial Controller, to which he was appointed in 0ctober, 1994. One year thereafter, on 18th 0ctober, 1995 the plaintiff received a letter from the General Manager, one Mr. W. H. N. Craig, informing the plaintiff of the intention to retire him on his 50th birthday, as the decision had been taken to abolish the position of Financial Controller. The decision itself was stated to be in line with a downsizing of the defendant company which had taken place in the 1993/94 period. About one year later, on 29th November, 1996 the General Manager again wrote a letter to the Plaintiff, informing him of the company management's decision to offer him retirement on or about 31st December, 1996. A further letter of the General Manager, of 30th December, 1996 confirmed to the plaintiff the early-retirement decision, and enumerated his Provident Fund dues as well as other terminal benefits.

On 8th January, 1997 the plaintiff responded to the General Manager's letter of 30th December, 1996; he protested the early-retirement decision and contested the defendant's enumeration of his terminal dues. The plaintiff, on that occasion, contended that in view of earlier correspondence from the General Manager, what was now being described as "early retirement" was, in fact, a "retrenchment". The plaintiff indicated his acceptance of the company decision but only if his case was treated as one of retrenchment and so accompanied with the package of benefits which was being offered during the 1993/94 retrenchment exercise.

The Plaintiff averred that nobody in the defendant company's management ever responded to his protest against his early retirement, and against the package of benefits he was being offered. He pleads that the defendant had arbitrarily and unfairly offered him early-retirement without offering him corresponding retrenchment benefits, such as had been offered during the 1993/94 downsizing when he could have been retrenched. As a consequence of the impugned early-retirement, the plaintiff pleaded that he would lose certain benefits: (i) retrenchment benefit (1 month's salary for every completed year, up to a maximum of

20 months at the current monthly salary of Kshs.98,306/=) in the sum of Kshs.1,966,120/=; (ii) housing assistance – to the equivalent of 12 months' salary totalling to Kshs.1,179,672/=. The plaintiff had further claims in addition to the foregoing; and he prayed for judgement against the defendant for: terminal benefits, costs of the suit, and interests.

B. PLAINTIFF ACCEPTED RETIREMENT, RETIREMENT NOT OCCASIONED BY DOWN-SIZING – DEFENDANT'S PLEADINGS

The statement of defence dated 17th March, 1997 was filed on 14th April,1997. The defendant denies that the plaintiff was its employee before June, 1990. It is pleaded that the size of the defendant company had no bearing on the decision to retire the plaintiff. The defendant averred that the plaintiff had not refused the terms offered for his early retirement, but had only queried those terms. Indeed, the defendant goes on to plead that its offer of early retirement was accepted by the plaintiff, who has already accepted payment from the Provident Fund and the Pension Fund, of a total of Kshs2,896,271/10. On that basis the defendant asserted that the plaintiff is estopped from denying that he has accepted early retirement. The defendant pleaded that the plaintiff has not been made redundant, and so he is not entitled to any payment on the basis of redundancy.

C. ISSUES FOR RESOLUTION

This suit gives rise to certain specific issues for resolution which were agreed upon by the respective advocates for the parties, dated 15th September, 1997 and filed on 17th September, 1998. These issues may be set out here:

(i) Is the defendant a limited liability company registered in the United Kingdom and operating a regional office in Kenya?

(ii) Was the defendant previously carrying on business as Crop Protection Chemicals Limited?

(iii) Did the plaintiff join Shell BP Services Limited on 28th December, 1970?

(iv) Was the plaintiff employed by the defendant prior to June, 1990?

(v) Was the plaintiff offered early retirement by the defendant on 18th October, 1995; and if so, was the offer in line with a significant down-sizing of the company, done in 1993/94?

(vi) Had the size of the company anything to do with the said offer?

(vii) Did the defendant offer the plaintiff the same term of retirement as other employees during the 1993/94 restructuring of the defendant?

(viii) Did the plaintiff protest the retirement offer as being different from the package of 1993/1994?

(ix) By virtue of accepting the sum of Kshs.2,896,271/10, is the plaintiff estopped from denying that he accepted early retirement?

(x) Was the Plaintiff declared redundant, and is he entitled to redundancy benefits as was awarded to others during the 1993/94 restructuring?

(xi) Is the plaintiff entitled to the benefits enumerated in paragraphs 9 and 10 of the plaint, or any of them?

(xii) Who bears the costs of this suit?

D. TESTIMONIES

Testimonies in this case were heard completely by Mr. Justice Hayanga, beginning from 27th July, 2003 when Mr. Ongaya and Ms. Kirimi, respectively for the plaintiff and the defendant, appeared before him with their witnesses.

1. Plaintiff's Case

P.W. 1, Sammy Akifuma (the plaintiff) was on 21st July, 2003 sworn and conducted through the evidence-in-chief. He testified that he lived at Kitale, and had been employed by Shell BP on 28th December 1970 as a computer operator. In 1972 he was transferred to the Audit & Methods Department as a Junior Auditor. In 1975 he was moved to Shell Chemicals Company of East Africa, which was part of the Shell Group, in the capacity of Accounts Supervisor. In 1978 the plaintiff was designated Area Accounts Controller, and his responsibilities included dealing with Shell Accounts for East Africa. In 1980 he was promoted to the rank of Senior Auditor. In 1983 Shell Chemicals Company of East Africa reconstituted itself as a business unit, by amalgamating with Kenya Farmers Association (KFA) and Agricultural Development Corporation (ADC) to form a new company known as Crop Protection Chemicals Limited. With this company, Shell held 50% of the shares; ADC held 25% of the shares; KFA held 25% of the shares. Shell then deployed the plaintiff in the new company, in the capacity of Finance and Administration Manager, a position he held until 1985; after which he returned to the Audit Department, as Regional Auditor covering Kenya, Uganda, Tanzania, Ethiopia and the Sudan. In 1989 the plaintiff was transferred to the headquarters as Supervisor of Import and Export. In 1991 the plaintiff was designated Import and Export Manager, and moved from Crop Protection Chemicals Limited to Shell Chemicals which had by now transformed itself into Shell Development (Kenya) Limited. Between 1994 and 1996 the plaintiff held the position of Financial Controller at Shell Development (Kenya) Limited. It was while serving in that capacity that his services were terminated in 1996.

On 18th October 1995 the plaintiff received a letter from his employer which expressed the intent to terminate his employment. The letter, which came from the General Manager, Mr. W.H.N. Craig, read in part as follows:

> "It is over three months since I had to suspend you on 1st July …
>
> "I have decided you will not return to the Financial Controller position; indeed I will now follow my predecessor's advice over a year ago and permanently disband that position as unnecessary in a small company. …
>
> "In view of your age and the significant downsizing of the company in 1993/4 … as advised to you orally, we have decided you will be retired on your 50th birthday in December 1996 … . This as you will know has not been an uncommon practice in Shell Chemicals worldwide in recent years."

Mr. Craig the General Manager again wrote to the plaintiff on 29th November, 1996 making reference to the earlier letter of 18th 0ctober, 1995. The General Managers did "confirm the management's decision to offer you early retirement from the company's employment on 31st December, 1996". The letter went on to state: "Your retirement is in accordance with the Company's policy as per the [Human Resource] Manual and the payments to be made to you will be governed by the regulations therein". The General Manager stated the plaintiff's entitlement as follows:

> "You will be entitled to the following:
>
> 1) Your own and the company's contributions to the Shell Kenya Provident Fund, together with interest as at 31st December, 1996. The precise calculations will be according to the Fund Regulations. This payment is not taxable in your hands and you will receive approximately shs.2,645,500/60.
>
> 2) An annual pension of shs.413,605/85 before commutation of part of your pension lump sum. If you wish to commute the maximum lump sum however, the annual pension will be shs.375,689/80.

3) A further payment of shs12,500/00 towards a tangible Farewell gift (based on 26 years of service) will be made." The plaintiff testified that he did not receive the sum of Kshs12,500/= which had been mentioned in the General Manager's letter of 29th November, 1996. He averred that certain moneys payable to him as terminal benefits had not been paid, and that he did not sign the "early retirement" letter from the General Manager dated 30th December, 1996. The plaintiff had written to the General Manager of Shell Development (K) Limited on 8th January, 1997. In his letter he had remarked that the normal retirement age was 55 years and not 50 years; and also that "My early retirement and/or termination is actually a retrenchment from the organization since I am/was ready, willing and able to work at any other position within the company". He asked that since the early retirement, for all practical purposes, was a retrenchment, he be treated as retrenched staff, in accordance with the down-sizing scheme which had been put into effect in the 1993/94 period. The plaintiff remarked in his letter: "I sincerely and earnestly feel that what you have offered me is unkind considering the fact that I have spent over half of my life with the Shell Group."

P.W.1 was cross-examined on 22nd July, 2003 and affirmed that his employment postings were in different companies of the Shell Group – Shell Development (K) Limited being the last company in the Shell Group with which he had worked. P.W.1 considered all the Shell Group Companies with which he had worked, over the years, to be merely faces of one and the same employer. He testified that in the 1993-94 period of down-sizing in the company, he had received no letter declaring him redundant, and he continued working with Shell Development (K) Limited Until 31st December, 1996.

It was P.W.1's understanding that the defendant had a discretion to retire him, but on the specific facts surrounding his employment, his early retirement was being effected improperly. There were no good reasons, as he saw it, for the early retirement, and the applicable procedure should have been retrenchment.

On re-examination, P.W.1 testified that had he been retrenched, he would have been paid one month's salary for 18 or 20 years on the basis of his very last salary figure – and that would have amounted to Kshs1,900,000/= which figure he was now claiming.

2. The Defendant's Case

D.W.1 Isaac Njoroge Gitoho testified that he was the General Manager of Shell Chemicals, and had gained familiarity with the instant case through reading the records held by the company. He testified that Shell Protection Chemicals Company Limited had been incorporated on 14th May, 1977 and Shell Development (K) Limited was registered in June 1990. He averred that the Plaintiff was appointed at Shell Development (Kenya) Limited on 26th June 1990; and the plaintiff continued with his appointment until he was retired on 31st December, 1996. A down-sizing of the company took place in October-December, 1993 but the plaintiff was Financial Controller as at 30th July, 1996. He averred that the Plaintiff was not entitled to the benefits which he was seeking in the instant suit.

On cross-examination, D.W.1 said he had worked with Shell for 17 years.

E. SUBMISSIONS BY COUNSEL

When learned counsel, Ms Kirai and Mr. Muthui for the plaintiff and the defendant, respectively appeared before me on 13th February,2004 they were of the view, which they had also expressed before the Duty Judge on 26th January, 2004 that this case should be tried de novo, following the retirement of Hayanga, J. On that occasion I made the order that the matter be heard afresh. However, when both learned counsel returned before me on 22nd February, 2005 they reported that they had revised their thinking on the matter, and now requested that judgment be given on the basis of the proceedings which had taken place before Mr. Justice Hayanga. I accepted this request, and directed that judgment be prepared on the basis of the earlier proceedings, save that counsel would make their submissions. On 14th November, 2005 learned counsel Ms. Lavuna and Mr. Kiragu respectively for the plaintiff and the defendant commenced upon their oral submissions, which were preceded in each case by written submissions filed in Court (for

the plaintiff on 29th July, 2003, and for the defendant, on 30th July, 2003).

1. Down-sizing, Abolition of Post, Redeployment mean "Retrenchment" – Submissions for the Plaintiff

Learned counsel restated the specific claims of the plaintiff as follows:

(a) Provident Fund Contribution …….Kshs.2,645,000/00

(b) Leave buy-out……..Kshs.46,736/00

(c) Farewell gift ……Kshs.12,500/00

(d) Twenty-five years' long-service award …. ?

(e) Outstanding car-loan write-off ……..Kshs.146,250/00

(f) Annual Pension …….Kshs.375,689/00

(g) Retrenchment benefits (being one month's

Salary for every completed year up to a Maximum of 20 months at the current Monthly salary of Kshs98,306/=)…Kshs.1,966,120/00

(h) Housing assistance to the equivalent Of 12 months' salary ……..Kshs.1,179,672/00

(i) Costs of the suit …….?

(j) Further and other relief as the Court may Deem fit ……?

Of the above-numbered heads of claim, counsel stated from the evidence that items (a), (b) and (f) had already been paid. The remaining claims, therefore, which stood to be resolved in this suit were heads (c), (d), (e), (g), (h), (i) and (j). Ms. Lavuna proceeded to submit on the status of those outstanding claims.

The figure of Kshs.12,500/= for farewell gift was in appreciation of the plaintiff's 26 years of service to the defendant. Learned counsel noted that the defendant had raised no substantive objection to the plaintiff's claim under this particular head.

As regards the 25 years' long-service award, the plaintiff had averred that all employees of the defendant had been given gifts every five years; and the plaintiff on completion of his tenth year of service had been given a gift of shs.10,000/=. Although he did not recall the value of the gift he earned at the end of his fifteenth year of service, he recalled that he was given a gift of Kshs20,000/= at the end of his twentieth year of service. In his reckoning, he, the plaintiff merited a gift of Kshs.50,000/= at the end of his twentyfifth year of service.

Learned counsel submitted, on the basis of the documentary evidence, that the defendant in its termination letter had undertaken to write off a car loan to the plaintiff which, as at 31st December, 1996 stood at Kshs146,250/00. He urged that the plaintiff was entitled to this write-off.

The most substantial claim being made by the plaintiff was retrenchment benefits. This is also the most controversial point, as whereas it was the conviction of the plaintiff that he was being retrenched (and so must be entitled to retrenchment benefits), the defendant maintained that he was only being retired early, and so was not entitled to retrenchment benefits which would have been more substantial than normal retirement benefits.

Learned counsel submitted that the plaintiff had been retrenched. It was urged that the natural meaning of

the defendant's letter of 18th 0ctober, 1995 which stated that the plaintiff's position of Financial Controller was being permanently disbanded, was that the plaintiff was being retrenched, because his position was unnecessary in a small company.

The plaintiff had thereafter been redeployed, to stand-in for colleagues in other departments as they proceeded on leave. Her was also assigned special duties – such as business process analysis, and insurance review.

Learned counsel submitted that the plaintiff had to leave the defendant's employ because the organization had become too small following the down-sizing of 1993/94, and consequently the position of Financial Controller became unnecessary.

Ms. Lavuna submitted that the defendant's own regulations had defined the rights of an employee who is retrenched, and these included –

· One calendar month's notice expiring on any day of the month;

· A resettlement allowance equivalent to two months' basis salary;

· An ex gratia non-taxable payment based on one month's basic salary for each completed year of service, for a period of 18 years; and in this regard the maximum number of years had been amended to 20 years.

On those principles, learned Counsel submitted, the plaintiff was entitled to payment as follows:-

· One month's salary in lieu of a month's Retrenchment notice……Kshs.98,306/00

· A resettlement allowance equivalent to Two months' basic salary …….Kshs.196,612/00

· ex gratia non-taxable payment for a maximum Of 20 years of service, being 20x98,306 ……..Kshs.1,966,120/00

· Total……...Kshs.2,261,038/00

With regard to housing, learned counsel submitted that the defendant had operated a housing assistance scheme. Under this scheme, a loan was advanced to an employee, on condition that if the employee remained in service for six years, the loan would be written off. The advance was, thus, non-refundable, so long as the employee served for six years.

If an employee's service fell short of six years, then part of the advance would be recovered on a pro-rated basis, in relation to the actual number of years served. The plaintiff had testified that early in 1995 he had applied for housing assistance. If he had left employment on normal retirement at the age of 55 years, he would have worked for slightly below six years – in which case he would have refunded a prorated sum out of the housing assistance advance, a sum attributable to just one year. The defendant's case was that the plaintiff would not be so entitled, as those who had already benefited from the first and second housing loan during service with the company, would not be entitled, while the plaintiff had applied for a third advancement in early 1995.

Learned counsel submitted that it was conceded by the defence, that the said limitation to housing advancement, came into force only on 30th November, 1995. Counsel submitted that while the operation of the housing advance scheme was subject to one limitation (availability of funds), the defendant had brought no evidence to the negate the supposition that there had been no funds limitation. The Plaintiff therefore claimed housing assistance the equivalent of 12 months' salary, being 12x98,306, totalling to Kshs.1,966,120/60 – but less one year refundable by the plaintiff, and that lessened the total to Kshs1,638,433/30.

Ms. Lavuna made specific submissions on the several issues in dispute, in the suit, along the following lines: (i) the defendant was a duly incorporated company with its office in Kenya, and the defence witness was its General Manager; (ii) the defendant had previously carried on business as Crop Protection Chemicals Limited, and it changed its name on 12th June, 1990; (iii) the Plaintiff joined the employ of Shell BP Services Limited on 28th December, 1970 and this is clear from the certificate of service produced in evidence; (iv) the General Manager of the defendant, by his letter of 18th 0ctober, 1995 stated clearly, in effect, that the plaintiff was being retrenched – because his position of Financial Controller had been permanently disbanded, as a consequence of down-sizing which had taken place in the 1993-94 period; (v) the defendant did not offer the same terms of retirement as the retrenched employees of the down-sizing period of 1993-94; and the plaintiff expressly objected to being treated upon termination of his services as an early retiree rather than a retrenchee; (vi) the defendant had made a payment to the plaintiff following commencement of this suit, and this responded to some of the heads in the plaintiff's original claim, namely, Provident Fund payment, pension and leave buy-out – but he was entitled to these payments whether he was being retired or retrenched; (vii) the plaintiff was claiming the sum of Kshs.4,108,221/30 with interest from date of filing suit, until payment in full; (viii) the plaintiff prays for costs of the suit.

2. Arrangements existed for Early Retirement, No Redundancy

Notice issued – Submissions for the Defendant Learned counsel Mr. Kiragu began with the signification of the word "redundancy", drawing from the content of s.2 of the Trade Disputes Act (Cap.234); the word is thus defined:

> "The loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business …".

Counsel submitted that the burden of proof rested on the plaintiff to show that his services were deemed superfluous and were no longer necessary to the company; that he, the plaintiff, was given notice of redundancy; and that indeed, by the practice of "first in last out", the plaintiff had been retrenched.

Learned counsel placed emphasis not on the same point, in the defendant's letter of 18th 0ctober, 1995 relied on by the plaintiff, but on a remark in the same letter regarding a VAT fraud in respect of which the plaintiff's conduct had been and was still the subject of investigation. Was the plaintiff being retired early due to such investigation, or due to down-sizing of the defendant's business?

The significance to the defendant of the said investigation was not, in my view, obvious since the General Manager of the defendant was still ready to, and did, deploy the plaintiff in apparently – important operations.

Mr. Kiragu disputed the retrenchment claim, also on the ground that when, in the 1993-94 period the retrenchment exercise took place, the plaintiff was one of the few employees to remain in their positions.

Learned counsel maintained that the General Manager's letter to the plaintiff, of 18th 0ctober, 1995 was not a redundancy notice – because long after receiving the said letter he remained in employment, until his 50th birthday in December, 1996. In the words of counsel: "The letter was simply an intimation that come his 50th birthday, he would be sent on early retirement, a practice not uncommon in the defendant's companies worldwide"

Counsel submitted that the defendant's Staff Manual allowed the company to propose early retirement for any employee who is entitled to and qualifies for immediate pension; and noted that this position had not been disputed by the plaintiff. Counsel noted further that the same Staff Manual also provided for termination of employment by retrenchment; and in that Manual the defendant attached significance to the clause which states: "retrenchment is seen as a last resort after thorough and vertical review of job alternatives". The implication, learned counsel noted, was that even if one job in the defendant company

ceased to exist, an alternative job would first be sought for the person affected, before an employee could be retrenched; and such, in counsel's submission, is not what happened in the instant case. He contended that as the plaintiff had attained the age of 50, the defendant quite properly exercised its discretion, to retire him.

After the decision to retire the plaintiff was communicated to him, a computation of his terminal benefits was worked out by the defendant, and he was requested to sign an accompanying letter of 30th December, 1996 to enable the payments to be made. His refusal to sign the letter, "insisting that he ought to be paid on the terms and package offered during the downsizing that took place in 1993/94", counsel submitted, had no justification at all. Since the sum of Kshs3,067,425/= covering the claims in paragraph 10, items (i), (ii) and (vi) had been paid, Mr. Kiragu submitted, the plaintiff had accepted early retirement, and was estopped from denying this fact. The payments had been made to the plaintiff's advocates; they had been duly acknowledged; they were not accepted on a "without prejudice" basis. So, counsel submitted, the plaintiff could not deny that he had accepted early retirement.

Mr. Kiragu questioned the basis of the plaintiff's claim of Ksh12,500/= as "farewell gift". This item, learned counsel submitted, was "by its very nature … at the discretion of the giftor", and a giftor cannot be compelled to give a gift. It was not contractual, but only a practice to recognise good and long service where it was deserved." Counsel submitted that there could be "no legal basis for this claim."

Learned counsel contended that the claims for "long service award" (Kshs.50,000?) and car-loan write-off (Kshs146,250/=), once again, were only discretionary and not contractual; and that, besides, these were not specifically pleaded as required by law. It was contended, further, that the offer to write off the car loan had been withdrawn when the plaintiff failed to sign for the early retirement package.

Learned counsel submitted that the plaintiff was not entitled to retrenchment benefits – because he had "accepted early retirement by the receipt of his terminal dues, and indeed, having worked for the company until he attained the age of fifty". Since the plaintiff was the defendant's Financial Controller until December, 1996 earning a salary of Kshs.93,306/= per month, counsel urged, it was not right for him to claim that he had been declared redundant in 0ctober, 1995; and so any payment he could claim under the head of redundancy, could only be in pursuit of unjust enrichment.

Mr. Kiragu advanced a legal point, which is part of the defendant's case – that the plaintiff had worked for different employers over the years. Counsel's essential argument runs as follows: although the plaintiff had worked for the Shell Group of Companies, each of these companies was itself a distinct legal entity – and thus the plaintiff must be taken as having been the employee of different juristic persons. Shell Development (Kenya) Limited only came into being in 1990 and it is in that company (now the defendant) that the plaintiff was issued with a letter of appointment. This argument was in aid of the claim that, were redundancy dues if any, to be computed in favour of the plaintiff, then the dating of the duration of service ought to be taken as 12th June, 1990.

With regard to the plaintiff's claim of housing assistance in the sum of Kshs.1,709,672/=, counsel noted that early retirement had been assigned as the reason for denial of the same. Yet the plaintiff's fundamental claim is that he was declared redundant, and should not be treated as having been retired. Counsel submitted that the claim of housing assistance could not have been made if, indeed, the plaintiff had been declared redundant. The claim for housing assistance, therefore, counsel urged, was inapplicable. Even if it was applicable, Mr. Kiragu submitted, the plaintiff was not entitled to this particular benefit. It was stated in clause 6.1.1 of the Staff Manual (defendant's exh. No. 6) that entry into the housing assistance scheme was at the discretion of the company and was dependent on the company's ability to fund the capital outlay; it was not contractual, and was not an automatic arrangement. Under Clause 6.1.3 of the said Staff Manual it was provided that employees who had already benefited from the first and second housing loan were not eligible for further assistance; and the plaintiff had confirmed that he had indeed benefited from the housing assistance on two different occasions; consequently he was not eligible for a third assistance which he was claiming. The scheme had also provided for topping-up of the loan arrangement, but only to those who had benefited from the first housing loan only; and this was in a figure equivalent to twelve (12) months' salary and was to be written off after five years of service.

Counsel submitted that since the plaintiff had already benefited twice, this top-up arrangement was not available to him.

Learned counsel submitted that the housing assistance scheme was, in fact, a loan scheme, and thus it was not a right which the plaintiff could demand. The consideration, in the dispensation of this loan, was that the employee worked for five years – after which it was deemed to have been paid in full. Besides, the employer required the beneficiary to deposit security – the title deed for the property in question. Counsel submitted that grant of housing assistance was not a contractual obligation to be discharged by the defendant – and thus the plaintiff could not lay claim to this money. Were such money to be disbursed, counsel wondered, how did the plaintiff intend to repay?

Learned counsel submitted that the plaintiff had not been retrenched, but had continued in employment until he went on early retirement and, at that time, the plaintiff had been paid all his entitlements. Counsel submitted that delayed receipt of the said entitlements by the plaintiff, was occasioned entirely by the plaintiff who had been reluctant to facilitate the processing of the same.

Mr. Kiragu submitted that the disbandment of the position of Financial Controller by the Defendant did not take place while the plaintiff was still an employee – and that on this account the plaintiff could not claim to have lost his position through redundancy.

3. Authorities Relied on by Counsel

(a) Plaintiff

Learned counsel Ms. Lavuna submitted that the defendant could only propose early retirement to the plaintiff who needed to give consent, before there was a contractual understanding for his early retirement. In support of this argument he cited the High Court's decision (Khaminwa, J.) in Silas Obengele v. Kenya Ports Authority Mombasa HCC No. 654 of 1995. The learned Judge there held:

> "Under regulation B11 the Managing Director must have a reason why the employee is to be called upon to retire.

The employee must have reached the age upon which he can be lawfully retired under the provisions of the pension regulation. The employee must be advised that his retirement is under consideration and the employee will be given an opportunity to make representation on the matter …"

On the basis of the Obengele case, learned counsel submitted that early retirement has to be voluntary; whereas in the instant case, "early retirement" was unilaterally decided by the defendant. This "retirement", counsel submitted, was involuntary; the position of Financial Controller was permanently disbanded, because it had become unnecessary, as the company had been down-sized.

Redundancy is defined in Halsbury's Laws of England, 4th ed., Vol. 16 (1992) at paragraph 412:

> "An employee who is dismissed is taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:
>
> 1) The fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
>
> 2) The fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish."

Applying the foregoing principles, Ms. Lavuna submitted that the plaintiff had been made redundant, and his employment terminated on that basis; and that consequently he was entitled to redundancy payment.

The governing principle in this regard was found in the same volume of Halsbury's Laws of England at paragraph 382:

> "Where an employee who has been continuously employed for the requisite period, that is to say, the period of two years ending with the relevant date:
>
> 1) is dismissed by his employer by reason of redundancy; or
>
> 2) is laid off or kept on short-time and complies with the special requirements, the employer is liable to pay him a sum (a 'redundancy payment') calculated in accordance with the prescribed conditions."

Learned counsel submitted that under s. 16Aof the Employment Act (Cap. 226), termination of an employee's services on grounds of redundancy was not allowed unless the contract provides for it; and for a person declared redundant, severance pay – at least 15 days' pay for each completed year of service – was required to be made. Counsel submitted that the defendant's General Manager had admitted in his letter of 30th July, 1996 that the plaintiff had served for a total of 26 years: and so this period of time should be the basis of calculation of severance pay.

(b) Defendant

Learned counsel Mr. Kiragu submitted that although the plaintiff was claiming longservice award and car-loan write-off, he had not made proper pleadings in support.

Paragraph 10 of the plaint of 28th February, 1997 simply enumerates the said two items; but there was no pleading to lay a basis for those claims. Counsel relied on the Court of Appeal decision in Herbert Hahn v. Amrik Singh (1982-1988) 1 K.A.R. for the principle that "a claim for special damages … must not only be specifically pleaded but also strictly proved …" (p. 739). Since paragraph 10 of the plaint had not been amended as necessary, it was submitted that the claims for car loan and long-service award must fail. Counsel submitted that it was improper for the plaintiff's advocate to attempt to repair the defect in the pleading, by inserting figures in the written submissions, for the claimed car loan and longservice award. The submission being made for the plaintiff, counsel argued, had to rest not only upon proper pleadings, but also on evidence.

As regards the plaintiff's claim for housing assistance, Mr. Kiragu noted that the figure in the pleadings was Kshs.1,179,672/= while that in the submissions was Kshs1,638,433/30; and counsel urged that in the absence of an amendment to the plaint, only the figures given in the pleadings could be considered.

Mr. Kiragu contested the plaintiff's reliance on the High Court's decision in Silas Obengele v. Kenya Ports Authority HCCC No. 654 of 1995 – because that case turned on its own peculiar facts and on the governing statutory law.

Learned counsel identified common elements in the instant case, and the Court of appeal decision in Rift Valley Textiles Limited v. Oganda, Civil Appeal No. 27 of 1992. It was in that case remarked by the Court:

> "The contract of employment between the appellant and the respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period, namely, to pay the other party for the notice period. …
>
> "In our view, even though the respondent's summary dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of the contract … .
>
> "[The] rules of natural justices have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here, then an employer

need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise."

Such was also the position in the instant case, Mr. Kiragu submitted; in lieu of notice, the Plaintiff had been duly paid his pension and his Provident Fund contributions. The basis of damages, on the principles in the Rift Valley Textiles case, was the notice period – counsel submitted.

F. ANALYSIS AND DECREE

Many issues have featured in the claims between the plaintiff and the defendant. But the main question is whether the plaintiff had been sent on early retirement, or had been retrenched. The difference between the two is significant: the benefits payable to an employee who is retrenched are more substantial than the terminal benefits payable to one who is retired. The plaintiff herein claims to have been retrenched, whereas the defendant maintains that he had been quite properly retired, under an early-retirement arrangement which was provided for in the governing Staff Manual.

It is common cause that the defendant company had, in the 1993/94 period, effected a down-sizing of its operations, with consequential retrenchments of staff duly recognised as such, and the employment – contract consequences were dealt with on that basis.

Then on 29th November, 1996 the defendant's General Manager Mr. W.H.N. Craig wrote a letter to the plaintiff, who had not been the subject of retrenchment and who held the position of Financial Controller, conveying "the management's decision to offer you early retirement from the Company's employment on 31st December 1996". Early retirement as contemplated, was not being put to the plaintiff for the first time. More than a year earlier, on 18th 0ctober, 1995 the same General Manager had written to the Plaintiff as follows:

> "I have decided you will not return to the Financial Controller position, indeed I will now follow my predecessor's advice over a year ago and permanently disband that position as unnecessary in a smaller company …
>
> "In view of your age and the significant downsizing of the company in 1993/4 … as advised to you orally, we have decided you will be retired on your 50th birthday in December 1996 (subject to the Court case outcome). This as you will know has not been an uncommon practice in Shell Chemicals worldwide in recent years."

It is, I think, significant that the context and the reason for "early retirement" is set down to advice tendered to the General Manager sometime in 1994 – and it should therefore be assumed that disbandment of the post of Financial Controller had been contemplated in the 1993/94 period when, it is not controverted, the defendant company was effecting downsizing and consequential retrenchments of staff. In his letter of 18th 0ctober, 1995 the General Manager says: "… you were one of the few people with an agrochemicals background to remain after the divestment …" This clearly suggests that staff with the plaintiff's background as agro-chemists, were retrenched during the 1993/94 down-sizing; and the picture I am getting is that during the down-sizing exercise, the plaintiff only just managed to remain as an employee of the company.

Now that the main down-sizing operation had passed, in 1993/94, is it plausible that the plaintiff, in 0ctober 1995 could still have been a target for retrenchment? In the light of the background which I have set out above it is quite clear to me that the plaintiff remained a candidate for retrenchment, and that if he was retrenched, this would be within the scheme of the 1993/94 down-sizing.

Such facts must have lain in the background to the vigorous submissions of learned counsel for the plaintiff Ms. Lavuna, who maintained that the plaintiffs case based on redundancy was a valid one. She fortified her case with the definition in Halsbury's Laws of England, 4th ed. Vol. 16 (paragraph 412): redundancy denotes a cessation of employment where the employer "has ceased, or intends to cease, to

carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed"; or "the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or are expected to cease or diminish."

The General Manager's (Mr. W.H.N. Craig) letters aforementioned are clear on their face: (i) the plaintiff would have been retrenched during the 1993/94 down-sizing operation, and wise counsel then received, was in favour of retrenchment; (ii) down-sizing is now the preferred policy of Shell Chemicals, and it ought to cover the defendant herein – Shell Development (K) Limited; (iii) the plaintiff's position of Financial Controller was no longer necessary, in a down-sized establishment, and it would be disbanded permanently. On consideration of issues of substance, I think it is right to take the position, as I hereby do, that the plaintiff's position of Financial Controller had become redundant, and this is the reason why his employment was terminated. So, was that termination a "retrenchment", or an early retirement? The General Manager's letters to the plaintiff only speak of "early retirement", a position which learned counsel for the defendant, Mr. Kiragu has strenuously defended.

I was unable, however, to perceive s.2 of the Trade Disputes Act (Cap. 234) relied upon by learned counsel, as consistent with anything but redundancy in the instant case. By that section, redundancy refers to -

> "[the] loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee as superfluous …"

Mr.Kiragu submitted that the General Manager's letter to the plaintiff, of 18th 0ctober, 1995 was not a redundancy notice – because long after receiving the said letter (c. one year) he remained in employment, until his 50th birthday in December, 1996. The said letter, rather than being a redundancy notice, counsel submitted, "was simply an intimation that come his 50th birthday, he would be sent on early retirement, a practice not uncommon in the defendant's companies worldwide".

I think there is more merit on the side of redundancy having been exercised than on the side of "early retirement" having been effected; and so I see no significance in the age of 50 years at which the plaintiff's employment came to an end.

Once the redundancy-or-early-retirement point is decided, in the manner in which I have decided the point, the issue then arises as to just how long had the plaintiff been in employment, and for whom? This is not a complex question, unlike the parties had deemed it to be. I have just cited a reference by learned counsel Mr. Kiragu to "the defendant's companies worldwide" – and the point was that all such companies belong to the defendant, and they follow common practices in relation to down-sizing and to the declaration of redundancy. The General Manager, W.H.N. Craig was clearer still on the point. He stated that the practice of redundancy during down-sizing is "not … an uncommon practice in Shell Chemicals worldwide in recent years". And in his letter to the plaintiff of 29th November, 1996 he proffered the plaintiff "a tangible farewell gift (based on 26 years of service) …" It is clear from uncontroverted evidence that the said 26 years of the plaintiff's service had spanned service at different Shell-owned companies: Shell Chemicals Company of East Africa; Crop Protection Chemicals Limited; Shell Development (K) Limited. From uncontroverted evidence, the plaintiff in his relocation from one Shell company to another Shell company, was not being invited to new interviews ahead of posting; he was being deployed by the same Human Resources office of Shell. I must conclude, in these circumstances, that for 26 years the plaintiff was in continuous service for Shell, and that his instant suit which is brought against his employer at his latest Shell posting, namely Shell Development (K) Limited, was properly filed within the law; and it is on that basis that issues of liability may be considered.

On the basis that the plaintiff had been retrenched, and therefore should have been paid retrenchment and not retirement benefits, he makes certain claims:

(a) Farewell gift;

(b) 25 years' long-service award;

(c) Car-loan write off;

(d) Retrenchment benefits (being one month's salary for every completed year up to a maximum of 20 months at last monthly salary of Kshs.98,306/=);

(e) Housing assistance, to the equivalent of 12 months' salary;

(f) Costs of the suit.

I will consider these items in turn, and determine whether and to what extent the plaintiff would be entitled to these claims.

(a) Farewell Gift

The plaintiff was claiming Kshs.12,500/= as farewell gift, and he considered that the defendant had no serious objection to this claim. But learned counsel Mr. Kiragu had submitted that this is a claim which was "by its nature … at the discretion of the giftor". Counsel argued that this was not contractual and could not be claimed by the plaintiff.

There is evidence that the said sum of Kshs12,500/= had indeed been proffered by the defendant; and so it seems the defendant is now changing its mind. True, this claim would not sound in contractual obligation. But, bearing in mind that the plaintiff had served the Shell companies for about quarter of a century, and that he himself felt he could continue to serve of course in a relationship in which contractual obligation was fundamental, I would consider the farewell gift to be an employment spin-off that fell easily within the category of legitimate expectations; and such expectations should be upheld by this Court, in the exercise of its equitable jurisdiction. Therefore I would hold that the said sum of Kshs12,500/= is due to the plaintiff.

(b) Long-service Award

The plaintiff claims a twenty-five year long-service award. It was the plaintiff's evidence that the defendant had been making gifts of money to each of its employees every five years, and even the plaintiff had benefited from such gifts. This time he was claiming as much as Kshs50,000/=, even though at the end of his twentieth year of service he had been given Kshs.20,000/=. The logic of the multiplier used remains unclear. But more fundamentally, learned counsel Mr. Kiragu submitted that such a gift was by no means contractual, and was purely discretionary. Counsel also submitted that this claim had not been properly pleaded and proved, and as there was no basis for granting it.

The relevant pleadings are in paragraphs 9 and 10 of the plaint of 28th February, 1997. These are the relevant parts of the pleadings:

"9. The plaintiff's contention against the defendant is that by arbitrarily and unfairly offering him early retirement without offering him corresponding retrenchment benefits as was offered during the year 1993/94 downsizing when he was supposed to be retrenched, he will lose:

"10. The plaintiff's claim against the defendant therefore is for: …

(iv) Twenty five (25) year-long service award."

Is the claim not specifically pleaded? From both the oral and the documentary evidence, it is clear to me that the defendant had the regular practice of giving awards to employees, depending on how long they had served. While it is true as Mr. Kiragu has urged that such awards did not bear obligatory contractual

elements, the fact that they were regularly given suggests that, so long as the scheme had not been discontinued, these awards formed part of the employees legitimate expectations. As I received no evidence that the scheme was no longer operational by the time the plaintiff left employment, I would hold that he was entitled to this item, as the pleading is, I believe, reasonably clear. However, there would be a basis for allowing the claim at Kshs25,000/=, but not at Kshs.50,000/= as is sought by the plaintiff.

(c) Car Loan

I am not in agreement with counsel for the defendant that the pleading in respect of car loan is fatally defective. It is common cause that the defendant has in the past offered to write-off the plaintiff's car loan, but that it later withdrew the same. I have already set out details of the contractual framework of the twenty-six year relationship between the parties.

I will hold that such a condition of work necessarily generates legitimate expectations, and I would regard the car-loan write-off as one of them. Therefore I will grant this prayer of the plaintiff's.

(d) Retrenchment Benefits

This is the main head of claim in the plaintiff's case. As I have already held that the plaintiff was indeed retrenched from the defendant's employ, it follows that he will be entitled to retrenchment benefits.

Although learned counsel Mr. Kiragu had submitted that the plaintiff accepted early retirement, and thus was not entitled to retrenchment benefits, I would not agree, as the correspondence on file does not show that acceptance. What I see is, in effect, a stand-off between the parties, reaching a climax in the instant proceedings. I have already held, in departure from Mr. Kiragu's submissions, that the plaintiff is not to be regarded as having been employed by employers other than the defendant, during his 26 years of working life. I will, therefore allow the claim for retrenchment benefits as prayed in the plaint.

(e) Housing Assistance

It is common ground that the defendant's housing loan assistance was a loan, which was to be written off if a recipient employee remained in service for six years. It is clear from the evidence that the last such loan which the plaintiff took was the third one, even though the practice was that only two loans were allowed. This housing loan was taken early in 1995; and the plaintiff left employment at the end of 1996. Had he not left employment at the age of 50, he would not have completed the required six years of service, by the time he would retire at 55; and he would have refunded a pro-rated sum attributable to the one year during which he would not have worked for the defendant. It was argued for the defendant, however, that the plaintiff would not have been entitled to a third housing loan.

Mr. Kiragu submitted that once it is taken that the plaintiff had been retrenched then it followed that he would not qualify for the housing assistance loan. Retrenchment, quite clearly, would be terminating the plaintiff's employment, on the ground that the company no longer requires his services. So, would it be proper, in those circumstances, for the plaintiff to calculate the value of his benefits with reference to a future retirement age of 55 years? I think not.

But learned counsel raised another point, that by clause 6.1.1 of the defendant's Staff Manual, entry into the housing assistance scheme was at the discretion of the company and was dependent on the company's ability to fund the capital outlay; that it was not contractual, and was not an automatic arrangement. This reasoning, so far as it goes, would in my view be valid, save that there was no evidence conveying doubts as to the defendant's financial standing; and I would still hold that the parties' obligations in contract would have spawned certain legitimate expectations which, in a proper case, would be upheld, in the Court's exercise of its equitable jurisdiction.

The foregoing analysis leads me to decree as follows:

1. The defendant shall pay to the plaintiff Farewell Gift in the terms of prayer 10(iii) of the plaint.

2. The defendant shall pay to the plaintiff a twenty-five year award in the sum of Kshs25,000/=.

3. The defendant shall write-off the outstanding balance on the car loan which as at 31st December, 1996 stood at Kshs.146,250/00; and the tax arising out of the written-off loan shall be paid by the defendant.

4. The defendant shall pay to be plaintiff retrenchment benefits, in the terms of prayer 10(vii) of the plaint.

5. The plaintiff's prayer for housing assistance in the terms of clause 10(viii) of the plaint is refused.

6. The defendant shall bear the plaintiff's costs to the extent of 65%; and the same shall bear interest at Court rate with effect from the date of filing suit

DATED and DELIVERED at Nairobi this 17th day of February, 2006

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff: Ms. Lavuna, instructed by M/s. s. Musalia Mwenesi Advocates

For the Defendant: Mr. Kiragu, Instructed by M/s. Hamilton Harrison & Mathews