



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.31 OF 2000

CHARLES OKWAYO ONDICHO..... PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AGENCY DEFENDANT

JUDGMENT

The plaintiff's claim against the defendant is for special and general damages arising from the defendant's failure to register the plaintiff with its Insurance scheme. He also prays for interest and costs.

The defendants employed the plaintiff as a factory manager in 1975. In July 1981 he was promoted to post of Group Factory Manager in Job Group C. He retired with effect of 31st December 1990 having attained the mandatory age of 55 years.

He told the court that the company maintained an insurance scheme with I.C.E.A. Ltd. for its Senior Staff in Job Group A, B and C. This scheme was established in 1982 and was compulsory to all employees in those scales. He was one of those who should have been enrolled.

However after retirement in 1991 he discovered that he was not enrolled to the scheme. He wrote to the company demanding payment. His other colleagues who had retired had been paid. The company however failed to pay him. He was only paid shs.163,361/= as ex-gratia. He filed this suit in the year 2000.

Defendant denied liability. First it was submitted the suit was time barred. It was filed in the year 2000 after 6 years had long elapsed.

Secondly the defendant maintained that the plaintiff failed to fill and return forms sent to him to enable him to be enrolled in the scheme. It was said forms were sent to him through the post but he never returned them. He was therefore to blame for the failure to register him.

I have carefully and keenly evaluated the evidence and submissions. The first and most pertinent issue is that of limitation of time. In par.9 of its amended defence the defendant pleaded the same and stated he will raise a preliminary objection. Mr. Kariuki tried to raise the issue before the hearing commenced but court ruled the issue should go for trial. There is no dispute the relationship between the plaintiff and defendant was that of a contract. The plaintiff retired on 31st December 1990 and the defendant submitted that, that is when time started running. Six years therefore elapsed on 31st December 1996. Thus when the suit was filed 23rd March 2000 it was four years late.

On the other hand the plaintiff contended that the defendant appointed a panel to arbitrate the issue. He wanted to be paid as recommended until the defendants wrote to him on 18th June 1997 telling him he is owed nothing. That was after he was paid shs.163,361/= in February 1996. He submitted therefore that

time started running from 1997 and by the time of filing the suit only 3 years had elapsed. Further defendant submitted that the plaintiff appointed a panel to arbitrate on the issue and it was recommended he be paid. It was only in 1997 defendant told him they won't pay. He had acknowledged his indebtedness. He was therefore using it to defraud the plaintiff. Plaintiff discovered the fraud in 1997. Having considered the submission and law on this point, I, with respect, disagree with the plaintiff. The contract between the plaintiff and the defendant ended on 31st December 1990. That is the day time started to run for any claim the plaintiff had against the defendant. He pleaded and submitted that it was in 1991, soon after retirement, when he learnt that he was not enrolled in the scheme. In par.5 of his plaint he pleaded that the defendant failed to register him through fraud and he enumerated particulars of fraud. That may be so but he should have brought his claim in court within 6 years after that. The claim in his submission that the plaintiff also committed fraud when he acknowledged indebtedness was never pleaded or proved.

The plaintiff was said to have appointed a panel to arbitrate in the matter. I don't think this was so. True an internal committee was appointed to advise but that was not an arbitration panel. Plaintiff was not a member and neither was he represented in that committee. In any case that committee made their recommendations in 1991. This suit was brought 9 years later. Thus from whichever angle one looks at the issue, the only conclusion one can reach is that the suit was time barred. S.4(1)(a) of the Limitation of Actions Act provides that any action based on a contract should be filed within 6 years. This was not done.

The plaintiff should have first made an application for extension of time to be allowed to file the suit out of time. He did not do this. For the above reasons alone I find the plaintiff's case has to fail. The same is dismissed with costs.

KABURU BAUNI

JUDGE

23/6/04

Dated and delivered on 23rd June 2004.

Mr. Otiso for Mr. Oguttu and Njenga for Kariuki