REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO 789 OF 2002

FRANCIS WARUINGI RICHU……...……. APPELLANT

VERSUS

DIVERSEY LEVER EAST AFRICA LTD ……...…….. RESPONDENT

JUDGMENT

This is an appeal from the Judgment of Mrs. N. A. Owino, SRM in Milimani CMCC No 9051 of 2000 delivered on 15th August, 2002. Although there are six needlessly long and wordy grounds of appeal outlined, the only issue in this appeal is whether the Appellant was entitled to "severance pay" upon the termination of his employment on medical grounds after 29 years of service with the Respondent. The basic facts are not in dispute. The Appellant worked for the Respondent as a machine attendant for 29 years. He could not continue that work on grounds of ill-health, and was sent on early retirement. He was paid all his dues including pension and two month's salary in lieu of notice.

The lower court disallowed his claim for severance pay, delivering itself, in part, as follows:

> **"It's clear that the Plaintiff was an employee of the defendant company from 1971 to 2000. It's also not disputed that the Plaintiff opted to voluntarily retire on medical grounds. He was paid his benefits which included his pensions. The Plaintiff admitted that the Collective Bargaining Agreement he produced was effective only up to 31st December, 1999. It's therefore not relevant to this case. It's also admitted that the Plaintiff was not declared redundant. He was therefore not entitled to any severance pay. This court has therefore no duty to reinstate the contract – between the Plaintiff and the defendant company. The claim of the Plaintiff is not proved on a balance of probabilities as required by the law. It's consequently dismissed with costs to the defendant."**

Mr Wanyama, Counsel for the Appellant, relied heavily on the Collective Bargaining Agreement (CBA) dated 11th January, 1999 arguing that clause 20 (b) of the said Agreement applied to the Appellant; and that under the said Agreement he ought to have been retired under the Redundancy Provisions and paid 21 days salary for each of the 29 years he worked for the Respondent. He admitted, however, as did the Appellant in cross-examination in the lower court, that the Collective Bargaining Agreement had expired on 31st December, 1999, at least two months before his retirement. Counsel argued that notwithstanding its expiry, the Collective Bargaining Agreement continued to govern the terms and conditions of the Appellant's employment. He submitted that because the Respondent had paid the Appellant two months salary in lieu of notice, a term contained in the Collective Bargaining Agreement, that the Respondent is deemed to have recognized the continuation of the Collective Bargaining Agreement as the contract governing the parties.

Ms Kirimi, Counsel for the Respondent, argued that the Appellant's case in the lower court was premised on his contract of employment; that he had made no reference to the Collective Bargaining Agreement; that in any event the Collective Bargaining Agreement having expired, was inapplicable and could not be relied upon; that the Appellant had resigned voluntarily; that he had not been declared redundant, and hence "severance pay" was not payable. This Court agrees with Counsel for the Respondent that the Collective Bargaining Agreement having expired, it was inapplicable and could not be relied upon. It is not for this Court to speculate why the Collective Bargaining Agreement was not

renewed, and whether, notwithstanding its expiry, the parties intended to treat the same as valid. There was no evidence about these issues at the lower court. The evidence that is not in dispute is that the Collective Bargaining Agreement had indeed expired. And just because the Respondent agreed to pay 2 months salary in lieu of notice, instead of one month, does not of itself mean that the Respondent recognized the validity of the Collective Bargaining Agreement.

In the absence of the Collective Bargaining Agreement or any contract for employment stipulating the terms and conditions of service the parties are governed by the Employment Act, Cap 226. Section 16 A of that Act provides, in material fact, as follows:

> ***16 A (1) A contract of service shall not be terminated on account of redundancy unless th e following conditions have been complied with:***
>
> ***(f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.***
>
> ***16 A (2) "redundancy" has the meaning assig ned to it in Section 2 of the Trade Disputes Act.***

The Trade Disputes Act defines redundancy as follows:

> ***"the loss of employment, occupation, job, career by involuntary means through no fault of an employee, involving termination of employment at the initi ative of the employer, where the service of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment due to Kenyanisation of a business."***

It is, therefore, clear that the Appellant would have been entitled to severance pay only if he had been declared "redundant".

However, the evidence is clear that he had not been declared redundant. By his own admission, his job, which he could not perform because of his own ill-health, was taken by another person. Indeed, he was not retrenched, his job was not abolished, neither had it become superfluous. He was, therefore, not entitled to severance pay, and his appeal must fail. Accordingly, I dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 8th day of December, 2004**.**

ALNASHIR VISRAM

JUDGE