



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 227 OF 1997

ABUBAKAR MOHAMED ALAMIN PLAINTIFF

- VERSUS -

STANDARD CHARTERED BANK LTD. DEFENDANT

J U D G E M E N T

The Plaintiff ABUBAKAR MOHAMED AL-AMIN (AL-AMIN) was by an undated letter of appointment appointed to join the Defendant Company STANDARD CHARTERED BANK LTD. (BANK) to the position of a Bank's Clerical staff from the 15.1.1967. He accepted the said appointment by signing the same on the 28.3.1967. The said letter did contain the Terms and conditions of his employment. The relationship between the two continued with the plaintiff rising up to the position of a Bank Officer Grade III on 6.11.1991, a position he held until September, 1992. In the month of May, 1991, the Bank issued a circular to its staff referred to as circular No. 11/1991 dated 28th May, 1991 and was headed "PROVISION FOR EARLY RETIREMENT". The said circular gave the Defendants staff members two options for early retirement. The plaintiff alleges that as a result of the said circular he was asked by his employer to retire before he attained the age of 50 on the understanding that he would be paid his pension on attaining 50 years. It was the failure on the part of the Defendant to comply and pay the plaintiff his pension at 50 years that lead to the institution of the claim by the plaintiff filed on 30th July, 1997. The prayers sought are as follows:

- (a) An order for specific performance of the agreement made between the plaintiff and the Defendant in or about 1992 - that the Defendant do forthwith pay to the plaintiff his terminal benefits including his pension, or
- (b) In the alternative, the said sum of Kshs.608,478/= together with interest thereon at the market rates prevailing from time to time since 31st October, 1992 until payment in full.
- (c) General Damages
- (d) Costs of the suit
- (e) Interest on © and (d) at Court rates
- (f) Any other or further relief that this Honourable

Court may deem fit to and just to grant"

The Defendant filed a Defence on 12.9.97 in which it admitted having issued the circular No.11/1991. The plaintiff was the only one to testify in support of his case and stated that sometimes in June, 1992, he

was approached by three Senior officers of the Bank namely Mr. Ochieng Oloo, Mr. Peter Kisia, and Mr. J.K. Mwatha and in a meeting held at the had office at Nairobi they requested him to retire with full benefits since he was aged 47 years. He was then instructed to write the letter for retirement. He was happy with the inducement and complied and on 12.6.92 he submitted the letter which reads as follows:

Mr. A.M. AL -AMIN,”

C/O P.O. BOX 90170,

MOMBASA.

The Manager,

Standard Chartered Bank Kenya Ltd.,

Treasury Square Branch,

P.O. Box 90170,

MOMBASA.

Dear Sir,

I hereby wish to retire prematurely from the Bank's Services with effect from 30 th June, 1992. I am 47 years of age, married with six small children who are still schooling and I have an old mother who is 81 years of age. Also I have a liability of about Shs.43,000/= with the Bank.

Therefore I will be extremely grateful Sir, if you will kindly accept this retirement notice with full benefits and pension entitlements to me. I beg Sir, you will kindly consider my case sympathetically and on human grounds as I have no other source of income to live on.

Awaiting the courtesy of your reply in due course.

Yours faithfully.

A.M. AL -AMIN”

On the same day, the Bank send the plaintiff on what is referred to as local leave. The letter is quiet brief and the substance contained in two sentences reads as follows:-

“We advise that you will commence your local leave from 13 th June, 1992 until further notice Please acknowledge on duplicate of this letter.”

It was not until the 24.8.92 that the plaintiff received an acknowledgement to his letter of the 12th June, 1992 and in the said letter the Bank advised him that his request for retirement effective 1st October, 1992 had been accepted. In the same letter they advised him on a without prejudice basis that the Pension fund scheme Regulations stipulated that the minimum retirement age for one to qualify for pension was 50 years. They also advised him to revive the issue with the Bank on attaining the age of 50 years.

The Plaintiff then proceeded on his retirement and on attaining 50 years he revisited the issue of his benefits by his letter dated 6.1.96. The Bank's response vide their letter dated 10.4.96 informed the plaintiff that he could not access his pension at 50 years and had to wait till he attained the age of 55 years. In the same letter the Bank further informs him that it was an error on the part of Bank to have told him he could access his pension at 50 years, because he had neither retired under the provisions of circular 11/1991 nor under the very early Retirement terms (V.E.R)” This letter opened the way for the current suit.

In its defence, the Bank called two witnesses. In the defence dated 8th September, 1997. The Bank admits the existence and issuance of circular 11/1991. The other substantive parts of the defence are as follows:-

“4. The plaintiff was a member of the Standard Chartered Bank Kenya Pension Fund and was subject to the rules made there under. The Defendant shall crave leave of this Honourable Court to refer to the said rules at the hearing of this suit for the full meaning tenor and effect.

5. The Plaintiff was aged 46½ years and accordingly not eligible to benefit from early retirement scheme to his knowledge at the time the Defendant provided the plaintiff with an option either to retire or be dismissed pursuant to the contract of employment entered into between the plaintiff and the Defendant.

6. The plaintiff was advised by the Defendant to raise the issue of his relevant benefits with the Trustees of the Trust aforesaid who had the sole right to determine whether the plaintiff is entitled to benefit for his pension at the age of 50 years notwithstanding his having retired before attaining the said age.

7. The Defendant denies paragraphs 13, 14, 15, 16 and 17 of the plaint and puts the plaintiff to strict proof thereof. Before the commencement of hearing, Counsel for the defence applied to argue a preliminary point. This is on the issue of limitation which is raised in paragraph 2 of the defence. However the court declined to allow the same as no notice had been issued to the other side of the intention to argue the said point outside the main hearing as was stated in the defence. Paragraph 2 of the Defence reads:

“The Defendant shall contend at the hearing of the suit that the suit is bad in law and is otherwise barred by limitation of Action Act”.

The parties filed 10 agreed issues and I shall endeavour to tackle them as exhaustively as possible. Issues 2, 5, 6 and 7 are interrelated. The plaintiff testified and produced his letter of appointment. He also produced letter dated 24.9.92 by which the Bank informed him his salary would be paid up to and including the 30th September, 1992 and although the defendant in paragraph 3 of its defence denies the same, the defendant has not adduced any evidence to show that the said letters are not genuine. In any case, throughout the trial, this was not an issue and the defence did not dwell on it. This leads us to the issue No.5 which in my opinion is the center care in this dispute. It seeks a determination of whether the plaintiff and the Defendant agreed that in consideration of the plaintiff agreeing to early retirement, the Defendant would pay him his full terminal benefits and his pension on reaching the age of 50 years.

I have herein before reproduced the letter by the plaintiff dated 12.6.92 which set things in motion. He, the plaintiff claims he wrote this letter after he was induced to do so by the three Bank officials he referred to and that they had promised him that he would get his pension on attaining the age of 50 years. My reading and understanding of the letter is simply that the plaintiff had opted to retire early for reasons he does not disclose. The first paragraph reads:

“I hereby wish to retire prematurely from the Banks services with effect from the 30 th June, 1992”

Underlining mine

There is no doubt the retirement was premature as he was aged 47 years though he stated in his evidence in chief he was at the time 46½ . Thereafter he goes on to say what obligations towards his family he has to meet including a liability to the Bank of Kshs.43,000/=. In the Third and Fourth paragraph he goes on to write:

“Therefore I will be extremely grateful Sir, if you will kindly accept this retirement Notice with full benefits and pension entitlements to me”

I beg sir, you will kindly consider my case sympathetically and on human grounds as I have no other sources of income to live on.”

Underlining mine

Although his case is that he was induced by the three officers in a meeting held at Nairobi to resign on the understanding that he would get all his benefits and pension by the age of 50 years, his letter does not reflect the same. If it was truly the Bank that had asked him to retire, why is he passionately begging the Bank in his letter, to use his words, “if you will kindly accept this retirement notice with full benefits and pension entitlements to me” In the first paragraph he says, “I hereby wish to retire prematurely’. If the the Bank imitated the process why doesn’t he refer to the meeting or discussion? The answer to this is found in the internal memo dated 13th April, 1992 from Ochieng O’loo to Mr. J.K. Mwathe who are two among the 3 officers the plaintiff says held discussions with regarding the retirement. The relevant parts of the said letter read as follows:

“FRAUD CASE OF KES.256,217.25 TREASURY SQUARE BRANCH MOMBASA

The Personnel Committee in it’s meeting of 9 th April, 1992 approved the following actions regarding above case” 1. That the following be dismissed instantly for their involvement in the fraud ----- .

That Mr. AL – AMIN who counter -signed the cheque be requested to resign from the Bank or alternatively dismissed”

Underlining mine

The Bank has neither denied the existence of the said memo nor it’s contents. And as to whether the information contained therein was availed to the plaintiff during the discussion with the three officers still remains a mistry as the parties opted not to say anything about it.

In the absence of any other explanation, the contents of the plaintiff’s letter are clear that it is he who was applying to retire prematurely and not through the instigation of the Defendant. The Defendant’s reply to the said letter is dated 24.9.92 and the first 2 paragraphs are relevant. It reads:

“Standard Chattered Bank Kenya Ltd.

Treasury Square Branch,

P.O. Box 90170,

MOMBASA.

Mr. Abubakar Mohamed Al -Amin,

P.O. Box 90170,

MOMBASA .

Date: 24 th September, 1992

Dear Sir,

RE: RETIREMENT

We wish to advice that your request for retirement effective 1 st October, 1992 has been accepted. Your salary will be paid up to and including 30 th September, 1992 .”

On receipt of this letter, the plaintiff did not write back or attempt to inform the Bank that their interpretation of his letter dated 12.6.92 was wrong in that it was not him who requested for the retirement but the Bank. Instead he comfortably sits back and only Communicates to the Bank by letter dated 6.1.96 and only to enquire about his pension.

In view of this, was the plaintiff induced to retire early by making certain promises to him? I have analyzed the contents of his letter dated 12.6.92 and found that there is no indication that the Defendant instigated the said retirement. However from the reading of the Internal memo to Mr. J.K. Mwatha from Ochieng Oloo advising that the plaintiff be requested to resign or be dismissed, there is a likelihood that the plaintiff knew about it and possibly it was the center of their discussion in the meeting held at Nairobi. I say this because of the plaintiff's tone in his letter in which he sounds desperate. The question would then be, if truly it was the Defendant who had asked him to resign, why the different tone in his letter. The answer to this is simply because he had only two options, either to resign or be dismissed. And if any promises were made, his own evidence fails short of proving the same.

The plaintiff has further testified that his retirement was also on the basis of the circular No.11/1991. The circular is clear in its terms and has given 2 options under which one may benefit under the Early Retirement Scheme. The first one is where the employee requests and second one is where the employer requests. In both cases there is a qualification that mutual consent will be required. The conditions to be fulfilled under each category is given as follows:-

“(a) EARLY RETIREMENT AT THE REQUEST OF THE EMPLOYEE

The rules of the Pension Fund have been amended to allow a member to proceed on early retirement. At his her request provided that:

(i) The employer (management) agrees.

(ii) The member has reached 50 years or is within five years of normal retirement whichever is greater.

(iii) Retirement will be on a pension hoes calculation will be based on service and pensionable salary at the time of such application”

In this case, the plaintiff applied for early retirement and condition No.(i) is fulfilled. As for Condition a(ii), he was not yet 50 years nor within 5 years of normal retirement. Although his letter of the 12.6.92 does not specifically request for retirement under the terms of the said circular, it cannot be assumed to have been so when he does not meet the conditions set.

What about under the second category? The plaintiff's claim is that he was induced to retire early by the Defendant on the understanding he would get his pension at 50 years. Paragraph (b) of Circular No.11/1991 reads:-

(b) “EARLY RETIREMENT AT THE REQUEST OF THE EMPLOYER ”

A member of the Bank's Staff may proceed on early retirement at the request of the employer provided: -

(i) The member of staff is happy with the inducement offered. The enhanced benefit it offered to induce a member of staff to take early retirement will be at the discretion of the employer.

(ii) The selection of who is offered this is at the discretion of the employer considering primarily the efficient running of the Bank

(iii) The employee has the right to decline the offer”

The plaintiff did in his evidence refer to a meeting in which he was offered and/or induced into early retirement. If this is so one would expect the employer to put it to the plaintiff in writing or the plaintiff's letter of the 12.6.92 would have been expected to have been a response to the alleged offer either accepting it or rejecting it. This is not the case.

As to the issue whether the Defendant did induce his request to retire on the understanding that he would access his pension on attaining 50 years, I again go back to his letter of the 12.6.92. In the said letter the plaintiff once again does not refer to any discussion touching on pension. To the contrary he is pleading for consideration as he has no other income to live on. If the employer as alleged had indeed promised him access to his pension at the age 50 years why is he pleading for the same unless he had reason to believe it may not be available to him.

"Therefore I will be extremely grateful Sir, if you will kindly accept this retirement notice with full benefits and pension entitlements to me"

The Bank did not respond to his letter immediately and yet when the plaintiff was asked to proceed on indefinite leave on the same day, he did not question the decision nor did he in between the 3 months and 12 days even attempt to find out if his request to retire prematurely with Pension was acceptable to the Bank. Finally when the Bank's reply came, they had the following to say on the issue of pension.

"Regarding your request for immediate payment of pension we not and advice without prejudice that the Bank's Kenya Pension Fund Scheme Regulations stipulates that minimum retirement age for one to qualify for pension is 50 years. The option left for you, therefore, is to proceed on early retirement (Deferred Retirement Scheme) and revive the matter when you attain age of 50"

On receipt of this response it was clear to the plaintiff that his request to early retirement benefits had been rejected. He did not at this point go back to the employer to say their offer to him to retire early was in the said circumstances not acceptable. He instead accepted to wait for his pension at the age of 50 years. He had the option to reject it and immediately express his displeasure in the manner his whole retirement issue was handled.

The plaintiff has failed to prove that indeed it was the Bank that induced him to retire prematurely upon the promise that he would get his pension on attaining 50 years of age. The plaintiff's own Exhibit No.14, that is the Internal memo referring to the action to be taken by the Bank against those involved in a cheque fraud and of which the plaintiff was one of them, casts doubt as to the truthfulness of his evidence as regards the circumstances surrounding his retirement. In the circumstances, was the plaintiff entitled to Pension at the age of 50 years? The letter by the Bank of the 24.9.92 states as follows as regards the issue:-

1) ----- the Bank's Kenya Pension Fund scheme Regulations stipulates that minimum retirement age for one to qualify for Pension is 50 years. The option left for you, therefore, is to proceed on early retirement (Deferred Retirement Scheme) and revive the matter when you attain the age of 50 years."

Underlining mine

My understanding of the said paragraph is that one cannot qualify for Pension if he retired before attaining 50 years. The plaintiff was 47 years this explains why he was pleading for consideration for payment of his pension and benefits. He is further advised to revive the issue on attaining 50 years. It does not say, he would be paid on attaining 50 years as in the sentence before that he was informed only those retiring at age 50 qualified for Pension.

Unfortunately the plaintiff found he could still not get his pension at attaining 50 years after the Defendant wrote to him vide letter dated 10.4.96. The letter states:

"After checking on records, we have noted that the information communicated to you as per the

letter dated 24 th September, 1992 is in correct.

The Bank's Kenya Pension Scheme regulations stipulates that the normal qualifying age for pension is 55 years

The only exception was for those who retired under V.E.R. terms and those stipulated under personal circular 11/1991 ---- -----“

In my understanding the Bank is conceding that they should not have advised the plaintiff to revive his application for pension at 50 years but at 55 years. The plaintiff therefore waited to receive his benefits at 50 only to be turned back. The Bank however having admitted it was an error on their part I find that though the plaintiff did retire at the age of 47 years which was below the age set by the pension scheme, they did lead him to belief he would be paid on attaining 50 years. In the circumstances is the plaintiff entitled to any Damages?

Having found that the plaintiff retired on his own application following a Fraud at the Bank in which he had been implicated and had two options open to him, that is either to retire or be dismissed, he is the circumstances not entitled to ay Damages for early retirement. However on the issue of payment of his Pension at the age of 50 years, as I said, the Bank did conceded they errored in advising him so. However can that error be said to have in any way contributed to his early retirement? The answer is No as he had submitted is retirement letter long before.

On issue of Damages for failure to access his pension at the age of 50 years, there is no doubt the Bank admits the representation. The plaintiff testified that he did not look for a job after his retirement as he intended to start a business using his Pension at 50 years. It was only after attaining the said age and being told he couldn't access it that he had to start looking around. The plaintiff's claim is for loss of earnings between 47 years and 50 years. I have already held that the plaintiff retired on his own and the only representation made to him was that he could not access his pension at 50 years. I do not find his employer in the circumstances liable for his early retirement but I do find them liable for misrepresenting to him that he would access his Pension at 50 years. Taking into consideration that he was earning a salary of Kshs.15,602/= and that there was no guarantee that he would have secured a job within the 3 years while waiting for his pension had been informed at the time of retiring that he would access at 55 years, and further taking into account the mental anguish he must have suffered as he had a family to care for, I will award a sum of Kshs.200,000/=.

There is one issue that I need to address before conclusion and that is whether the claim herein is statute barred? The gist of the claim is on misrepresentation. I have herein analyzed the two letters which give vise to this issue. The Defendant says the time started to run in 1992 after the plaintiff received the latter dated 24.9.92. My understanding of the said letter is that the plaintiff's request to be paid his pension and benefits before the retirement age had been turned down. However he was to revive the issue on attaining 50 years which is one of the set point for early retirement and payment of benefits. It was not until he attained the age of 50 years that he got a rude shock that he could only access it at age 55 years. The Bank then informed him vide letters dated 10.4.96 and 8.11.96 that the information was incorrect. In the circumstances, there is no doubt that the said misrepresentation only became clear to the plaintiff in 1996. The limitation period would in the circumstances run from then. The plaintiff had at the start of the hearing abandoned the claim for payment of his pension as the same had been paid. The alternative claim for payment of a sum of 608,478 being loss of earnings from date of retirement to age of 50 years fails.

The plaintiff shall therefore have judgement the sum of Kshs.200,000/= being Damages for suffering occasioned by the misrepresentation for a period of 3½ years. He will also be entitled to interest at prevailing Bank rate at the time as well as costs of the suit.

Dated and Delivered at Mombasa this 26th day of March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE