



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 1364 OF 1996

SOLOMON M. ANAMPIU PLAINTIFF

VERSUS

MTCHEL COTTS KENYA LIMITED DEFENDANT

JUDGMENT

This is a dispute between the Plaintiff and the Defendant largely over settlement of his severance pay.

The former was employed by the latter in 1966 as a trainee staff manager who moved through the ranks to become a Managing Director in 1987

He was 57 years old when the defendant decided to reorganize and decentralize its operations to result in the dismantling of the head office which the plaintiff headed.

Major shareholders of the defendant met on 27th April 1995 to consider a report, which had been made by 3 members of a Committee set up by the Board of Directors to work out modalities on the plan of action and the reorganization of the defendant.

The report, which recommended the dismantling of the head office and relocating or laying off some staff, was considered and accepted by the Board of Directors in a meeting held on 11th May 1995.

This meant, the staff not relocated from the head office to other sections would consider their services terminated.

The plaintiff was, unfortunately, one of those who found themselves unemployed by virtue of this reorganization. Others included G.M Wanjohi, the finance manager, (PW2), Geoffrey Gicheru Gathuku, credit controller (PW1), Mrs. S.W. Muhuri and Mrs. A. Thuo, amongst others.

From the evidence adduced in this case, it would appear the plaintiff had gotten wind of the intended dismantling of the head office of the defendant and more specifically that his position of Managing Director would be abolished.

He wrote to the Chairman of the defendant (DW1) to set out terms of his exit from the defendant company including a 6 months' notice effective 1st July 1995. This letter is dated 24th May 1995.

This letter intimated that the plaintiff had written a letter to the same effect on 18th May 1995 to which no reply had been received.

In the letter of 24th May 1995 the plaintiff specifically requested that he be paid terminal redundancy

dues. However, no reply was received to this letter either.

Though the plaintiff wrote a number of letters to have his dues settled before he left office there was no letter from the defendant to spell out his terms for what the defendant termed early retirement save one letter from the administration manager, on K.M. Kibbe, dated 26th May 1995 which forwarded the plaintiff's Retirement Benefits Scheme Claim Forms to Insurance Company of East Africa. In this letter it was clearly stated that the plaintiff was leaving the defendant's services on 30th June 1995 (see exh.9).

The plaintiff appears to have been discussing the termination of his services with the defendant with the latter's Chairman (DW1) and was set to leave by 30th June 1995. However, this was not to be. Instead, by its letter dated 8th June 1995, the defendant-though DW1 – granting the plaintiff 38 day's leave with effect from 12th June 1995 pending early retirement.

The plaintiff proceeded on leave and in his letter dated 9th June 1995, he stressed that payment of terminal dues should not be delayed (see Exh.14).

While on leave his name was removed from the payroll at the end of June 1995 and that for the extra 19 days he was deemed to be on duty while on leave, he was paid a sum of Kshs.133,775/50 by voucher (see Exh. 16).

While still on leave again, he received a letter dated 26th July 1995 in which a number of serious allegations of wrongdoing were made against him when he was in office and over which he was called upon to explain by 31st July 1995. Thus he was given only 5 days to explain but he did not do so.

Then on 18th August 1995 the defendant Chairman wrote another letter to the plaintiff referring to their earlier letter to which the said plaintiff had not replied.

In this letter the defendant purported to dismiss the plaintiff for the alleged misappropriation of its funds but sent the plaintiff a cheque for Kshs.2,376,027/40 being settlement of his dues on exgratia basis.

Though the plaintiff replied to this letter in an apparent attempt to put the record straight, the defendant stuck to its allegations and did not take any further step in the matter and this is why this suit was filed in this court on 4th June 1996 and amended on 23rd February 1997. The amended plaint was filed in court on 6th March 1998.

The amendment was actually intended to increase the number of severance pay days from 15 to 20 – hence increase the amount of severance pay from Kshs.5,321,500/= to Kshs.7,095,333.35. Otherwise the only other claim in the plaint was the 6 months notice period.

A defence to this suit filed in court on 31st July 1996 denied that the plaintiff's services were declared redundant due to the reorganization of the defendant and/or that the plaintiff was entitled to severance pay as prayed in the plaint.

Parties to the case appeared before this court on various dates from 1st February 1999 to testify therein. Apart from the plaintiff, two (2) other witnesses were called. They were Geoffrey Gicheru Gathuku (PW1) and Geoffrey Mwangi Wanjohi (PW2), part of the head office staff who were laid off due to the reorganization of the defendant.

The defendant was represented by its Chairman, Dr. C.W. Obura. The plaintiff's evidence was intended to show he was entitled to severance pay while that of the defendant was to show that the plaintiff was not entitled to this and that he was adequately compensated when his services with the defendant were terminated.

The whole evidence as adduced was bent on showing on one hand that the plaintiff was declared redundant by the reorganization of the defendant and dismantling of the head office hence entitled to severance pay as per the amended plaint while the defence contented that the plaintiff was not declared

redundant and was therefore not entitled to redundancy benefits whether under the original or the amended plaint. That in fact the plaintiff took early retirement and was thus fully paid his retirement dues under this arrangement.

Three issues arose in this case, namely,

- (a) Whether the plaintiff was declared redundant or he took early retirement?
- (b) In case of the former, whether he was entitled to severance benefits?
- (c) In case of the latter, whether he was paid his full benefits.

The plaintiff's letter to the Chairman of the defendant dated 24th May 1995 indicated that since the report on the reorganization of the defendant and the dismantling of the headquarters presented to the major shareholders by a Committee made up of the Chairman, A.R. Jibril and A.S.M Ndegwa and accepted on 11th May 1995 several discussions had been held between the defendant's Chairman and the plaintiff where tentative agreements had been reached.

These included notice period, payment for 3 years period before his legal retirement age, redundancy dues, writing off the outstanding loan on the plaintiff's motor vehicle, and payment of retirement benefits scheme dues; (exh. 7).

Apart from these matters being raised in this letter, the plaintiff hinted he had expressed similar views in a similar letter to the said Chairman on 18th May 1995. Unfortunately copy of this letter was not produced to the court.

In that letter too, the plaintiff was apprehensive that he was being rendered redundant by the dismantling of the head office.

The Chairman did not reply to this letter but in a letter by the Administration Manager one K.M. Kibbe, to the Insurance Company of East Africa and dated on 26th May 1995 enclosing the plaintiff's retirement benefits scheme claim form, it was disclosed that the said plaintiff was leaving the services of the defendant on 30th June 1995. (see exh. 9 and 10).

This was reinforced by the plaintiff letter dated 31st May 1995 and an internal memo from the said administration manager to the plaintiff dated 2nd June 1995 stating that as at 30th June 1995 the latter would be due 38 days leave which the plaintiff wanted paid to him in cash but which he was ordered by the defendant Chairman to take instead of a cash payment through his letter dated 8th June 1995.

Though not happy at this development, the plaintiff confirmed that he would proceed on leave but hoped that this would not delay the processing of his terminal dues – see his letter dated 9th June 1995 (exh. 4).

The plaintiff in the same letter disclosed that the defendant chairman was going to arrange a meeting between him, the plaintiff and one Ndegwa for 12th or 13th June 1995 where they would “**discuss and hopefully agree on my terminal redundancy dues and early retirement**”.

From the evidence adduced on both sides, no such meeting was arranged or held and the defendant Chairman did not say anything about this letter.

While on leave, the plaintiff had a telephone discussion on the issue of payment of his terminal dues with the defendant Chairman on 10th July 1995 which he followed up with the letter of the same date in which he mentioned payment of his retirement benefits scheme dues as well as redundancy dues.

By this time, the plaintiff had already been removed from the pay roll as at 30th June 1995 and that for the 19 days he was on leave during July 1995, he was paid Kshs.133,775/50 by voucher (see exh. 16). By

this time too, the plaintiff was already out of the defendant's office. From the plaintiff's own mouth, the defendant's Chairman had asked him to vacate the office by 12th June 1995. DW1 did not deny this.

Technically the plaintiff's services with the defendant were supposed to have been terminated on 30th June 1995 but because of the 38 days leave he was forced to take from 12th June 1995, the termination date was prolonged to 19th July 1995 when the leave ended. This is why he received pay for those 19 days through a voucher and I would consider it the ideal date when the plaintiff's services with the defendant were terminated.

If the defendant intended the plaintiff to stay in-service beyond 19.7.95, it should not have paid him for only 19 days in the month of July 1995.

In light of this, a letter written to the plaintiff by the defendant Chairman and dated 26th July 1995 purporting to accuse him of various malpractices and another dated 18th August 1995 purporting to dismiss him from employment were ineffective because by this time, the plaintiff was no longer the defendant's employee.

From April 1995 the defendant Chairman held many discussions with the plaintiff about the impending retirement of the latter due to the reorganization of the defendant and the dismantling of the head office.

The said Chairman had perused the report prepared by Jibril and Ndegwa about the said reorganization and had even allowed the plaintiff to take 38 day's leave pending retirement and even asked him to vacate office from 12th June 1995.

In those circumstances, I would not say the plaintiff's dismissal from employment was lawful or otherwise because in the circumstances explained hereinbefore this issue did not arise.

There was no reason for the Chairman of the defendant to hold lots of discussions with the plaintiff and to encourage him to retire by 30th June 1995, then prolong this retirement into July 1995 by 19 days only to come out of the blue after the plaintiff has long left employment to accuse him of a number of malpractices.

This was misleading and improper or that the said Chairman was trying to block the plaintiff from receiving from the defendant what were his lawful entitlements. Otherwise, if he was genuine, he should have replied to the many letters addressed to him by the plaintiff, even if to tell the latter he was not entitled to this or that claim for this or that reason. He did not do so.

This then leaves the issues of the six months notice period and whether the plaintiff was entitled to payment of redundancy benefits for a decision.

As to the former, the plaintiff did not produce his letter of appointment to stipulate his terms. But he testified that he was one of the locally engaged executives and according to the standard terms of that cadre of staff (exh. 24), clause 11(ii) thereof provides that:-

“Except in the case of employees serving on probati on, contracts of employment shall be terminated by the giving by either party three months notice effective from any day of any month, failing which there shall be paid by the party terminating such contract without notice, three months salary in lieu of such notice”.

There being no evidence of a contrary view, the plaintiff was entitled to 3 months notice or three months salary in lieu thereof, which was paid to him, (see para 5(a) of exhibit (18).

Such salary is of course basic not gross as the plaintiff expected. Going by evidence adduced herein, therefore, the plaintiff has no valid claim against the defendant as regards notice period.

I have already found elsewhere in this judgment that once the plaintiff had exhausted his pending leave

of 38 days on 19th July 1995 the defendant could not terminate his services or dismiss him from employment as he was no longer under its employment.

Moreover, in these circumstances, a letter dated 26th July 1995 purporting to accuse the plaintiff of a number of malpractices while in employment and the other dated 18th August 1995 purporting to dismiss him were in effective, since he had long ceased to be its servant.

The defence witness agreed the plaintiff did not ask to retire from employment, neither did the defendant itself ask him to retire.

The defendant set in motion some mechanism in which it intended to phase out the head office and relocate some of the staff located there to the other sections. Those who could not be relocated, naturally lost their jobs.

The plaintiff was amongst the senior staff who were not relocated, hence he lost his position as the managing director of the defendant.

Throughout the evidence adduced by the defence witness no suggestion for an alternative position was made to the plaintiff.

What this meant was that the plaintiff's services were no longer needed by the defendant. He never volunteered to leave the job. He was rendered unemployable and by this involuntary act of loss of ones job, instigated by the defendant for whatever reason, he was rendered redundant, hence entitled to severance/redundancy dues.

He has been subjected to this otherwise unnecessary torture by the uncooperative attitude of DW1 and/or the defendant, otherwise after some other executive staff, including G.M Wanjohi (PW2), G.G. Gicheru (PW1), Mrs. S.W. Muchuri and Mrs. A. Thuo, had their services terminated at the same time as the plaintiff and in similar manner, their terminal dues package included the element of severance pay based on 20 days for each completed year of service.

There was absolutely no reason why the plaintiff was treated differently and denied the element of severance pay in his terminal dues.

In my considered view the plaintiff was entitled to this head of payment more so given that he had worked for the defendant for a period of 29 years without any adverse comments about his services.

That he was aged 57 years old or that he was the managing director was not relevant factors and did not mean he could not be declared redundant. According to the evidence he was.

I am also convinced this kind of worker was entitled to a certificate of service from the defendant though this is not one of the prayers made in the plaint.

One other issue which has featured in this case is whether to go by the original or amended plaint.

Counsel for the defendant raised a preliminary objection on a point of law as to the validity of the amended plaintiff because he thought it offends the mandatory provisions of Rule 7(1) of Order VIA of the Civil Procedure Rules and also Rule 7(2) of the same order. Order VI(a) Rule 7(1) aforesaid provides as follows:-

“Every pleading and other documents amended under this order shall be endorsed with the date of amendment and either with the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made”.

And order VIA Rule 7(2) provides that:-

“All amendments shall be shown by striking out in red ink all deleted words, but in such manner as to leave them legible and by underlining in red ink all added words”.

Referring to the draft copy of the amendment plaint in their possession counsel for the defendant submitted that none of the amendment sought to be introduced had been effected as by law required, hence the amended plaint had violated the provisions of the Civil Procedure Rules stated above.

Counsel for the plaintiff replied that though the amended plaint was properly signed, dated and filed in court as required by law, there could have been some omission in the original figure claimed are not shown on the amended plaint.

However, he submitted that the omission was an irregularity which was curable since the new figures being claimed are clearly shown.

Let me say this on this objection. Though the main objective of the rules quoted, particularly order VIA Rules 7(2) cannot be easily discerned therefrom, the compliance with this provision is mandatory because of the use of the word “shall”.

In that event, this rule was not complied with and the best way out is to fall back on the original plaint where figures claimed are clearly spelled out inform of severance pay.

Otherwise I am satisfied the copy of the amended plaint on the file complied with Order VIA Rule 7(1) of the Civil Procedure Rules and that what is important is the copy filed in court and not draft copy served upon the defendant.

In the ultimate result and since the plaintiff was paid all other claims for him in the original plaint, I enter judgment for him in the sum of Kshs.5,321,500/= in form of redundancy dues plus costs thereof and interest from the date of filing suit.

Delivered and dated this 29th of July 2003.

D.K.S AGANYANYA

PRINCIPAL JUDGE