



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Civil Appeal 160 of 1999**

**(From Original Civil Suit No. 100 of 1997 of the Principal Magistrate's Court at Kitui: N. Ithiga Esq. on 8.10.99)**

**STANDARD CHARTERED BANK (K) LTD ..... APPELLANT**

**VERSUS**

**JOSEPH NGALA MWENGEA..... RESPONDENT**

**Coram: J. W. Mwera J.**

**Obura Advocate for Appellant Kibanga Advocate for Respondent C.C. Muli**

**JUDGEMENT**

This appeal arises from Kitui S.R.M.CC No. 100/97 filed by Joseph Ngala Mwengea. The court heard that it was decided as a test case for two or so others which were pending before the same court by former co-employees of Mwengea, the respondent, with the appellant M/s Standard Chartered Bank (K) Limited. Those other cases seek similar reliefs as the respondent sought and the facts underlying all that are basically the same.

Mr. Obura for the appellant put the background to this litigation in such a manner that Mr. Kibanga did not much differ with, save of course, on the outcome pronounced by the Learned Trial Magistrate at Kitui.

In paraphrase and probably not in as much detail as the parties know, the respondent with others were once employees of the appellant. In 1995 the appellant bank started to do what has taken on various phrases and words like retrenching, rightsizing, rationalizing etc. of staff, facilities, resources, operations etc. in the organization.

This court was told that the bank embarked on shedding off some of its branches and along with that, staff. That the bank acquainted the affected staff with its intention to the effect that it was closing (and selling) its Kitui office down. That the staff there including the respondent and his mates would either choose to retire early whereupon their benefits would be paid to them or relocate to other bank branches. That the bank in the alternative worked out a scheme by which those not keen to retire would be employed by the National Bank of Kenya Limited (buyers of the Kitui branch) and accordingly such staff would be under new terms and conditions of service including the transfer of each staff pension benefits to another entity all together. That the respondent and his mates opted for the latter scheme and that although they had not reached the age or retirement or worked for the appellant for a minimum often (10)

years, what so far had been accruing towards their pension benefits would be worked out. That the same were worked out and everything was done to invest those benefits with a suitable pension fund (run by M/S ALICO K. LTD) which the respondent and his lot would collect on reaching retirement age of 50 years for female and 55 years for male staff. But that before that was done and after the group of the respondent got jobs with the National Bank of Kenya Limited (NBK) they sued the bank desiring to be paid their terminal benefits as at the time they stopped working with the bank. The bank did not see it that way and when the Learned Trial Magistrate found so among other orders and reliefs, this appeal arose. All the time from the lower court Mr. Kibanga maintained that his clients are entitled to what was quantified after they stopped working for the appellant and the same was due for payment right away - and not until his clients attained retirement age. If the foregoing generally captures the context of the case and proceedings, it may be pertinent simply to gloss over the respondent's plaint dated 18.4.99, the defence and the lower court record.

In paragraph 8 of the plaint it was averred:

"8. The plaintiff successfully applied for voluntary early retirement and going by the terms of the scheme, those employment contract (sic) between the plaintiff and the defendant, the plaintiff is entitled to terminal benefits."

It was further pleaded that when the respondent approached the appellant for such payment the latter seemed reluctant to pay out whereupon the respondent suffered much loss and damage. So the respondent prayed that his benefits be paid to him plus damages, costs and interest. An amended plaint of 17.3.98 specifically put the claimed terminal benefits at Sh. 292,323/10.

In a defence of 18.6.97 it was averred that the respondent with his mates at Kitui were given three options during the restructuring exercise: to transfer their services to National Bank of Kenya Limited, or to proceed on voluntary early retirement or to continue services with the appellant bank.

That the respondent chose the first option and with effect from 1.11.95 he ceased to be an employee of the appellant - by mutual agreement. So the respondent was not entitled to the benefits which the staff who chose to retire early took.

The Learned Trial Magistrate heard the respondent along with one Titus Kilonzo Masya (P.W.2) and also one Fred Simiyu Waswa (D.W.I) in defence. He then rose and penned a judgement in favour of the respondent. The oral testimony plus the exhibits produced by both sides formed the basis of that judgement. The same formed the basis of this appeal and both counsel again submitted on them.

The memorandum of appeal with 8 grounds was argued by Mr. Obura globally. That the Learned Trial Magistrate erred when he found that the respondent and his mates had taken the voluntary early retirement option and he ceased to be a member of the Standard Chartered Kenya Pension Fund. That the same Learned Trial Magistrate ought to have found that the point of contention was the pension fund and not any other form of terminal benefits. Further that the amount claimed was subject to the Respondent's Pension Fund Rules as well as the Income Tax Act with the Rules thereunder. That the Learned Trial Magistrate was in error to find that the appellant was properly sued and not the trustees of the pension fund. Stopping here for a moment the pleadings on record contained nothing of the joinder of parties or who was to be sued or not sued. Mr. Obura posited that since that aspect featured in evidence, submissions and the lower court judgement it became an issue to be determined. That since it was determined, it rightly formed a tenable ground of appeal. No case law was produced to support such a proposition. Nonetheless this court is disinclined to be so persuaded. May that ground be disposed of here and so it is. Essentially an issue is determined as pleaded and supported by evidence and/or law.

Parties come to court with their pleadings and they tender evidence in support thereof. Side issues unless incorporated by amendment in the pleadings should not be entertained. But a court may deliver an obiter dictum if one is called for. For the present appeal the issue of whether the appellant was properly sued or its Pension Fund was the proper party should not detract any attention from the focus of the appeal. That part was not in the pleadings and this court is prepared to hold that it did not fall to be canvassed, testified

and submitted upon or determined.

Back to the grounds of appeal, the memorandum of appeal, stated that the sum quantified as Sh.292,323/= did not fall to be paid before the respondent attained the retirement age (nor was it payable in SRMCC 101, 102 of 1997 on same grounds). And that the respondent did not prove his case on a balance of probabilities and so it was decided against the weight of the evidence. As said earlier Mr. Kibanga did not agree with Mr. Obura and he did so in an equally learned and eloquent manner. In determining this case submissions from both counsel are incorporated as hereunder, and on the following not so many questions:

- 1) Did the respondent take voluntary early retirement with, its benefits as he pleaded or what option did he take in the appellant's restructuring process?
- 2) What was the course as regard benefits to be followed in the case of the respondent?
- 3) The end result in this appeal. Beginning with the first question:

(1). The option that Respondent took: On 3.2.95 the appellant addressed a circular letter to all its staff conveying its intention to off-load sixteen of its 42 branches. The letter said inter alia:

"Staff working at the affected branches will be given opportunity to relocate to other branches or, if they wish take Voluntary Early Retirement (VER)..... "

On 4.7.96 the respondent with others wrote to the appellant on the subject

#### OUR FINAL BENEFITS

The letter read in pertinent parts:

"We the undersigned are former employees of Standard Chartered (K) Limited at your Ex-Kitui branch who opted to join the National Bank of Kenya Limited after your Mr. Tony Groag, and the Executive Chairman, National Bank of Kenya Limited Mr. John P. N. Simba addressed members of staff of Standard Chartered Bank (K) Limited on 4.8.95. In your speech it was clear that your staff had the option to remain in service or join National Bank of Kenya Limited, who were to acquire the branch on 1.11.95. Those who opted to join National Bank were promised that their final benefits would be invested with ALICO until they attain retirement age, and get their money plus interest or they be paid by Standard Bank in which case the Government would slash a good 50% of our benefits. You gave us up to 13.8.95 to make a decision and communicate with your human resources division. This we did and in response the Head of Human Resources acknowledged our letters and said that he would communicate in due course regarding our final benefits, otherwise our decisions were accepted by the management.

..... We now write to enquire the position whether our final benefits have been invested with ALICO and if so we would like to know the details..... If not invested yet is it possible for us to be treated as VER candidates and be paid our money without further delay?"

From this letter quoted in extenso the clear position is that by 4.7.96 the respondent with others had opted to join National Bank of Kenya Limited by which their final benefits would be invested with ALICO. But they did not know the terms of such investment. The letter then added that if such investment was yet to take place perhaps the appellant would consider to change the option in the restructuring and give that that it gave those who chose to retire early. So far it is clear that the respondent had opted to continue in service and he had had a slot with National Bank of Kenya Limited. He had opted to have his benefits invested with ALICO save that the appellant was taking too long to acquaint him with the details of the scheme. Respondent had not opted for early retirement option at all.

So on 1.8.96 the appellant advised the respondent with others.

"All arrangements to transfer your past service liability from the Standard Chartered Bank Pension Fund to ALICO are now complete."

This was a reply to the Respondent inquiry of 4.7.96. It is pertinent from the proceedings before the Learned Trial Magistrate that the respondent at no time took the Early Retirement Scheme where-upon his benefits would have been slashed by as much as 50% by the government. This is gleaned from the evidence of his witness Titus Kilonzo (P.W.2) in cross examination.

"I can remember. Some people opted to take V.E.R. I did not take up V.E.R. in February 1995.....  
The plaintiffs are not asking for payments under V.E.R..... "

This testimony contrasts sharply with that of respondent who (see plaint para 8 above) boldly pleaded that he successfully applied for voluntary early retirement. Evidence has shown that, with others, they opted to remain in employment. Their former employer helped him secure a job with National Bank of Kenya Limited. The respondent denied this in his cross examination but then added:

"I am claiming as a voluntary employment retirement (sic). Employees could get lumpsum. I was not paid anything. I am not aware about what these people who went on V.E.R. got."

With this kind of evidence, the clear position is that the respondent did not opt for early retirement benefits. He remained in employment and desired his benefits invested with ALICO and payable on attaining the retirement age.

On 31.7.96 the appellant informed the respondent that his past service liability had been quantified. It came to Sh.292,323/=. That it was being passed on to M/S ALICO for investment, if the respondent signed the letter of 31.7.96 to confirm the arrangement.

Two weeks later the respondent with others responded:

"However we do not wish to invest our money with ALICO but instead we want to be paid our final dues irrespective of whatever percentage the Government will slash away in form of tax.

We therefore ask you to process our final dues in the manner you processed for V.E.R. candidates and remit to us only that which is all (?) to us."

Now this is not a letter from one who from the beginning and all the time was a candidate of voluntary early retirement. He has changed his mind now that he has secured a job with National Bank of Kenya Limited. He also wants to get the lumpsum. Talk of greed or indecision.

In this court's view the respondent chose to continue in the job and have his benefits invested with ALICO until he gets them after age 55. He was never an early retiree. His benefits are subject to pension rules (it is still lying with the Standard Chartered Pension Fund) and if paid now it will be contrary to the spirit and purpose of the legal regime and policy governing pensions.

(2) What Course to be Followed: Unless the appellant has a way to concede to the request by the respondent of 16.8.96, and rework benefits under voluntary early retirement, the respondent will bide his time until he attains age 55. Either he signs for his benefits to go into the more lucrative ALICO investment or let them remain where they are.

(3) The End Result: This court is satisfied that the Learned Trial Magistrate was in error to arrive at the conclusion he did and to issue the orders he issued.

The lower court judgement is thus set aside and the appeal allowed with costs. Judgement accordingly delivered on 2<sup>nd</sup> May 2001.

J.W MWERA

JUDGE