



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE No 502 OF 2012

PAPIUS KIROGOTHI MUHINDI 1st PLAINTIFF

BEN GAKERE NYUTHO 2nd PLAINTIFF

Versus

EQUITY BANK LIMITED 1ST DEFENDANT

JAMES NJUGUNA MWANGI 2ND DEFENDANT

MARY WANGARI WAMAE 3RD DEFENDANT

KENNETH MBAABU MCUHIRI 4TH DEFENDANT

GERALD GACHOKA WARUI 5TH DEFENDANT

J U D G M E N T

1. The suit now before this Court was commenced by a plaint dated 7th August 2012 and filed on 8th August 2012. The Plaintiffs are former employees of the First Defendant. When these proceedings were first commenced they were started against the First Defendant only. However, pursuant to the Order of Hon. Mr Justice Havelock there was an amendment filed on 28th October 2013 whereby the Second to Fifth Defendants were joined to the Suit. On 3rd December 2013 the Defendants were given corresponding leave to amend their Defences. The First Defendant was the former employer (until their retirement) of both of the Plaintiffs. It is a Bank and is described in the pleadings as “*a public limited liability company incorporated under the Companies Act Cap 486 of the Laws of Kenya and licensed to carry on banking business under the Banking Act Cap 488 of the Laws of Kenya*”. The Second to Fifth Defendants are sued in their capacity as Trustees of the Employees’ Shareholder Scheme of the First Defendant Bank (“the ESOP”). From the oral evidence of the witnesses from both sides, it seems that the First Defendant was not, as pleaded, throughout the events the subject of this suit a publically listed company. That came later. The dispute requiring resolution concerns the Plaintiffs’ entitlements under the ESOP upon retirement from the First Defendant’s employ.

2. The First Plaintiff filed a witness statement and gave oral evidence. In his evidence he said that the First and Second Plaintiffs were recruited by the Second Defendant to join the First Defendant (“the Bank”) and they joined at the management level. It is common ground that the ESOP was established around August 2005 pursuant to a Settlement Deed dated 29th August 2005, a copy of which appears in

the Plaintiff's Bundle. A more legible copy was also produced by the Defendants during the course of the trial, and that assisted considerably.

3. During his evidence, the First Plaintiff explained how he and the Second Plaintiff came to join the ESOP. He explained that certain officers of the Bank and the Trustees were very keen to ensure the maximum investment in the Scheme. There were meetings and presentations and employees were encouraged to join the Scheme. The two Plaintiffs did join the Scheme. Mr Muhindi said he was encouraged to do so by Mr James Njuguna Mwangi (the Second Defendant). The First Plaintiff, Mr Muhindi, said that they (the Plaintiffs) did receive a copy of the Settlement Deed at the relevant time but did not receive a copy of the Deed of Variation until much later. However, he was conversant with the terms of the Settlement Deed and in the main they were consistent with the presentations made to the Employees when the ESOP was initiated. He said they were aware of the Regulations that accompanied the Deed of Settlement and that they were governed by the **Capital Markets Authority (Collective Investments Scheme) Regulations 2001**. Further, that there was an undeniable connection between the ESOP and the floatation of the shares, in other words the company going public and the success of that venture. Sadly, the Second Plaintiff passed away before the trial. Evidence on his behalf was given by his widow.

4. The Defendant's evidence comprised the oral evidence of only one witness, The Third Defendant. It is said on behalf of the Defendants that in 2009 or thereabouts the existing ESOP Scheme was replaced by a new scheme with new rules by virtue of the Deed of Variation dated 11th November 2009. The Deed of Variation did not receive the same publicity as the Settlement Deed. According to the Trustees it "*amended and/or varied the Settlement Deed*". When asked how the information was disseminated to the Employees who were members of the Scheme, it was said, by the witness, that the document was available on the Bank's intranet. There was no specific distribution to individuals. The evidence on behalf of the Plaintiffs is that they were not aware of the Deed of Variation until after the dispute arose and litigation commenced, nor were they aware of its dissemination by intranet.

5. On 12th May 2010 the First Plaintiff was due to retire. He wrote a letter dated 11th May 2010 to the Chief Executive Officer and Managing Director of the Bank (who is the Second Defendant) explaining that fact and asking to redeem his shares held in the ESOP. The Second Plaintiff was also due to retire on the earlier date of 15th April 2010. He wrote a similar letter, however he was categorical in that he did not wish to redeem his shares but wanted them to be transferred into his sole name as the scheme allowed. Having heard nothing from the Bank or the Trustees of the ESOP by that date, the First Plaintiff on 22nd May 2010 withdrew his Instructions of 11th May 2010. He too opted to keep his shares rather than receive the cash redemption value. His evidence was that the decision was based on the market movements/value. The Third Defendant said in her evidence that the Trustees held a meeting on 17th May 2010 and accepted the instructions of the First Plaintiff. There was no admission of this meeting made before her oral evidence was heard. In fact, the First Plaintiff's evidence on the matter was challenged in Cross-Examination. No Minutes were disclosed by the Defendants on the various earlier opportunities. In fact, the Plaintiff was cross-examined on the basis that there had been no meeting. The First Plaintiff said he was informed of the meeting only after he raised a complaint in relation to the conduct of the Bank and Trustees with the CMA and not at the time it was supposedly held. He says he was not informed of the existence of any meeting nor the decision that was taken before changing his election on 22 May 2010. In relation to the Second Plaintiff, 30 days would have passed by then.

10. The Plaintiffs received no contemporaneous notification of the said meeting nor were they informed of its outcome. Thereafter on 4th June 2010 their accounts were credited with the following amounts:

The First Plaintiff Kshs. 31,457,000 on 4th June 2010; and

The Second Plaintiff with Kshs.34,747,500/- on 4th June 2010.

11. The Plaintiff's respective cases are that upon retirement the First Plaintiff had accrued 1,660,000 shares and the Second Plaintiff had accrued 2,050,000. The value of the shares on the NSE on 4th June

2010 was Kshs.23.50/24.00. The value used by the Defendants to calculate redemption was Kshs.18.95 in accordance with the formula. The Plaintiffs challenged the First Defendant's computations and payments. First in a meeting on 16th August 2010 (see Letter of Complaint to CEO) and also the the CMA. The Third Defendant replied to that by a letter dated 7th September 2010. In that letter she said that the Trustees of the ESOP were not under any obligation to the Plaintiffs . The letter was addressed to the CEO of the Bank who was also a Trustee of the ESOP and the Second Defendant herein. The author/signatory of the letter in Reply (7th September 2010) was the Third Defendant. From its content, it was clear the response came from the Trustees. The CEO and/or the Bank did not respond to the Letter by saying as would be expected. They could have said that all communications should be directed to the ESOP because it was managed as that was a separate entity. If indeed that was the case.

12. Following that Letter, the Plaintiffs wrote a further letter of complaint dated 14th September 2010 this time to the regulatory authority namely the Central Bank of Kenya and the Chairman of the Commodities Marketing Authority (CMA). It seems that there followed some communication between the CMA and the Bank/ESOP. Unfortunately and surprisingly the Defendant's did not consider it necessary to disclose that evidence until half way through the oral evidence of the Third Defendant, in other words after the Plaintiffs had closed their case. The Defendants rely on those exchanges for their Defence. The non-disclosure of documents has been dealt with in an earlier Ruling. However, one of the letters disclosed at the last moment suggests that after the complaint to the CMA an additional payment was made to the 1st Plaintiff. (**Exhibit MWW-1 p. 7**).

13. Having not progressed their complaint, the Plaintiff's through their lawyers sent a Letter of Demand and Threat of Litigation to the Defendants dated 6th December 2010. In it they said they were relying on the Deed of Settlement dated 29th August 2010 for their claim and a share value of Kshs26.50.

14. The Deed of Variation was disclosed during the period that followed. The exact date is not clear. The Deed of Variation was dated on the front page but not on the signature page so there is no conclusive contemporaneous evidence of the date on which it was signed nor the date on which it became applicable. The date on the front page is 11th November 2009.

15. The Plaintiffs then instituted these proceedings by filing a suit on 8th 2012. At that stage there was only one Defendant – the First Defendant Bank. The Bank's Advocates entered an Appearance but did not file a Defence within the requisite period. Judgment in Default was entered for the full sum claimed of Kshs.43,240,500/=. On or about 27th September 2012, Judgment in default was set aside (Order of Havelock J) on the basis that a Defence showing a triable issue had been filed albeit late. The Defendant did not file List or Bundle of Documents at the time and, in particular, there was no indication of the documents it now seeks to rely upon. There followed Amended Defences.

16. The Plaintiff's case is set out in para 6 *et seq* of the Amended Plaintiff. It states:

6. The Plaintiffs aver that at the time of retirement they issued the requisite notices verbally and in writing to the Defendant and expressly instructed. The ESOP to transfer the shares to their accounts in the Defendant's Custodial Department which instructions the Defendant refused/neglected to effect and instead credited the Plaintiff's account with Kshs.31,457,000/- on 4th June 2010 (1st Plaintiff's) and Kshs.34,747,500/- on 4th June 2010 (2nd Plaintiff's) respectively without their knowledge or consent and to their prejudice.

6A. The Plaintiffs state that upon leaving service with 1st Defendant at their respective dates, they found out that the amounts of monies that the Defendants transferred to their respective accounts were greatly concealed as a result of fraudulent misrepresentation, concealment and/or non-disclosure of material facts thereby resulting to the Plaintiffs being unpaid contrary to the provisions of the Trust Deed and Rules which action was illegal, null and void. The act of crediting the plaintiffs' accounts with the amounts of monies was in total breach of their rights of election which they had exercised as per the Rules of the Scheme and the Law."

18. The Plaintiffs base their claim on the following:

- (1) The Deed of Settlement dated 29th August 2005
- (2) The Rules
- (3) The Capital Markets Act and
- (4) The Regulations.

19. The salient parts of the Deed of Settlement dealing with redemption of units are contained in Clause 5.1 which provides:

“Unless otherwise agreed by the Trustees with the consent of the Company of Unitholder who in accordance with the ESOP Rules ceases to be employed by the Group shall upon such cessation be deemed to have applied for redemption of the Units registered in his name on the Register whereupon the Trustee shall, within 30 days, pay the balance standing to the credit of the Unitholder’s account to the Unitholder. Alternatively, in order to implement redemption the Trustees may at the request of the Unitholder transfer the share corresponding to the Units redeemed to the Unitholder.”.(emphasis added). That suggests a degree of flexibility.

20. It is also worth setting out Clause 5.3 which provides;

“The Trustees shall only allow redemption of Units by Unitholders in accordance with the ESOP Rules and may, without limiting the foregoing allow partial redemption.”

The Rules of the ESOP

21. Further, Rules 7.1 and 7.3 of the Rules made under the Trust Deed explicitly state that on cessation of employment of the 1st Defendant by Unitholders,

7.1 “Unless the Trustees with the consent of the Company otherwise agree, where a Unit holder ceases to be an Eligible Employee, he shall be deemed to have given notice of redemption of his Units to the Trustees and the Trustees shall pay the Redemption proceeds to the Unit holder within 30 days.

7.3 In order to implement redemption upon cessation of employment, the Trustees may, upon request by the Unit holder and with the consent of the Company, transfer to the Unit holder the shares corresponding to the number of fully paid up Units being redeemed by the Unit holder.”

For the 1st Plaintiff the 30 days would have expired on or about 10th June 2010 and for the 2nd Plaintiff it would have been on 15th May 2010.

The Regulations

22. The relevant parts of the Regulations relied upon provide:

109.A listed company may set up an employee share ownership plan (hereinafter referred to as ESOP) to enable its employees own shares of the listed company subject to approval of the Authority.

(2) EVERY ESOP shall be registered with the Authority.

110. An Employee Share Ownership Plan shall be structured as a unit trust (the ESOP Unit Trust).

117. *The rules of the ESOP shall prescribe the price at which an ESOP Unit Trust shall allot the units to the employee, the price at which the trustees shall re-purchase units and the liability for incidental expenses but such re-purchase shall reflect the latest traded price of the company's share at the securities exchange.*

119. *At the option of the employee, the trustees shall upon receipt of the surrendered certificates, either-*

(a) transfer in a private transaction in accordance with the prescribed procedure for private transactions, to the name of the employee, the number of shares of the represented in the surrendered share certificate and cause the employee's name to be registered as the owner of such shares in the register of the listed company, or

(b) re-purchase the surrendered units.

22. The Defendants rely on the Deed of Variation as being the applicable Document regulating the ESOP at the time of the Plaintiff's retirement. In particular they rely on paragraphs 2.2 and 2.6 which provide;

"2.2 The Board may determine the periods during which dealings in the Company's Shares and in Units shall be prohibited and it shall notify the Trustees, the Capital Markets Authority and the NSE of such 'close periods'."

And "6.5 Before any payment is made to the Unitholder upon redemption of his Units the Board shall be entitled to require the Trustees to (and the Trustees shall if so required, but subject to their fiduciary duties to Unitholders) apply the Redemption Proceeds first in or towards payment to the Company or a member of the Group of any sums properly owing to the Company or member of the Group by reason of his participation as a Unitholder."

Also relied upon are the following:

"11. Tax, Duties and other Dues

If the Trustees or the company or any of them are accountable for tax, duties or other dues on any income benefit payable under these Rules, an appropriate deduction to meet the same may be made and the amount of distribution of income and Redemption Proceeds will be reduced accordingly.

Issues of Certificate, Inspections

1.1 The Trustees shall issue each unitholder with a certificate for his or her Units in the form set out in Appendix C within 30 days of the Vesting Date.

1.2. Upon written notice to the Trustees a Unitholder and any person authorised by the Unitholder and approved by the Trustees shall at any reasonable time be permitted to inspect a copy of the Settlement and these rules. An Employee may also make written request for a copy of the Unitholder's Account applicable to him or her.

It is clear from the above that the ESOP envisaged redemption as a process rather than a single event.

23. The Parties have filed their respective Lists of Issues. Over the long life of these proceedings the Parties have changed their legal representation but their respective cases have remained largely unchanged. They are set out below as they appear.

The Plaintiff

24. The Plaintiff sets out the background to the dispute. It states the Plaintiffs were employees of the Bank at management level. They were enlisted as shareholders in ESOP. Both retired, on 12th May 2010 and 15th April 2010 respectively. When they retired they had accumulated shares totally Kshs.1,660,000 (1st Plaintiff) and 2,050,000/- (2nd Plaintiff). They anticipated receiving the shares but instead payments of Kshs.31,457,000 (1st Plaintiff) on 4th June 2010 and Kshs.34,747,500/- (2nd Plaintiff) were on 4th October 2010 were paid into accounts without their knowledge and consent.

25. The Plaintiff allege Breach of :

- (1) Express Provisions of the ESOP
- (2) the Capital Markets Regulations (Collective Investment Schemes Regulations 2001)
- (3) The Plaintiffs express instructions – oral and written.

26. The Plaintiffs also allege that sole intention was to fraudulently prevent the Plaintiffs from trading with the shares. It is said as a consequence the Plaintiffs:

- a. Suffered loss and Damage: Particulars of Damage;
- b. Such particulars of fraud as a provided state that the conduct complaint of was done deliberately and in bad faith.

27. The Plaintiff's claim is for Kshs.43,240,500/- Both claims without interest at Bank rates and that is the amount for which the preliminary decree was entered together with mesne profits and costs at the higher rate.

28. The 1st Plaintiff gave oral evidence. He adopted his witness statement and was asked supplementary questions in chief and cross examined over a period of 3 days. He also said that the scheme was introduced to the Employees and several meetings in 2005. He said there was an expectation that they would all join and there was no mention of a five year timescale for eligibility. The Employees would be buying shares in the Bank. His complaint was that they did what was expected but when they asked to withdraw their shares, the Bank/ESOP refused.

29. The 1st Plaintiff was examined and cross-examined at length. He impressed me as a credible witness. He was a professional who took his duties seriously and he was careful to provide the Court with the correct picture even where he accepted it could count against him.

The Defences

19. The Defendant's filed separate Defences and an Amendment. The First Defendant's main line of Defence is that it had no involvement in the facts and matters complained of and that the ESOP is a separate entity. The Defence of the Trustees is that they complied with the rules and requirements of the ESOP as well as the Regulations prevailing at the time.

The Issues

20. The Parties filed their respective Lists of Issues for determination as set out below.

The Plaintiff's List of Issues filed on 2nd May 2012.

1. *Whether the redemption and or vesting of the Equity Bank Employees Share Ownership Plan (ESOP) units upon the Plaintiff's leaving the employment of the 1st Defendant and withdrawal from the ESOP were governed only by the Trust Deed and Rules or by both the Trust Deed and Rules and the Capital Markets Authority (collective Investments Schemes) Regulations 2001.*

2. *Whether the 1st Defendant is in any way involved in the operations of the ESOP.*
3. *Whether the Plaintiffs were entitled to benefits accruing under the ESOP computed in terms and to the extent of the provisions of the Trust Deed and Rules and in accordance with the law upon their retirement.*
4. *Whether at the time of retirement the Plaintiffs had each accumulated shares totaling to 1,666,000 (1st Plaintiff) and 2,050,000 (2nd Plaintiff) respectively.*
5. *Whether the Trust Deed and rules provided for either redemption of the units to be repurchased by the Defendant Trustees or to transfer the shares corresponding to the units to the Plaintiffs.*
6. *Whether upon retirement under the regulations of the scheme, the Plaintiffs had an option to transfer their shares, corresponding to the value of the units in their names, in a private transaction in accordance with the prescribed procedure for private transactions.*
7. *Whether the plaintiffs issued the Defendants with the requisite notices verbally and in writing expressly instructing it to transfer the shares to their accounts with the Defendant's custodial department.*
8. *Whether the Defendants were guilty of fraudulent misrepresentation, concealment and or non-disclosure of material facts in crediting the sums stated in paragraph 6 of the Amended Plaint to the Plaintiff's respective accounts.*
9. *Whether the act of the Defendants in crediting the sums stated in paragraph 6 of the Amended Plaint to the Plaintiff's respective accounts was a breach of their right of election exercisable under the rules of the ESOP scheme and the law.*
10. *Whether the unit value upon redemption was clearly defined under the Trust Deed and Rules dated 29th August 2005 and Section 117 and 119 of the Capital Markets Authority (collective Investments Schemes) Regulations 2001.*
11. *Whether the Deed of Amendment dated 11th November 2009 could derogate from the Plaintiff's accrued rights under the original Trust Deed and Rules and could also override a statutory provision.*
12. *Whether the Defendants failed to effectuate the Plaintiffs' redemption rights under the ESOP as defined by the law.*
13. *Whether the Defendants discharged their duties of good faith and disclosure to the plaintiffs regarding their unit holdings in the Equity ESOP.*
14. *Whether the Plaintiffs are entitled to the prayers made in the plaint.*
15. *What orders should be made as to costs.*

The Defendant's List of Issues filed on 8th May 2014.

1. *Whether the 1st Defendant operated or was in any way involved in the running of the Equity Bank Share Ownership Plan ('the Equity Bank ESOP')*
2. *Whether the Equity Bank ESOP constituted a strict arrangement between the Employees of the 1st Defendant and the Trustees.*
3. *Whether the rights and obligations under the Equity Bank ESOP vested solely in the Trustees in*

exclusion of the 1st Defendant.

4. Whether the Settlement Deed and Rules provided for either redemption of the Units to be repurchased by the Trustees or transfer the shares corresponding to the Units of the Plaintiffs' and be registered as the owner of such shares in the register of the listed Company.

5. Whether the Plaintiffs' upon retirement opted to redeem their Units rather than transfer the shares to their accounts with the Defendants' custodial department pursuant to the Settlement Deed and the Rules as amended from time to time.

6. Whether the Plaintiffs' would be deemed to have applied for redemption of their Units retirement from the employee of the 1st Defendant.

7. Whether the retirement dates would be deemed as the dates for issuance of the respective redemption notices by the Plaintiffs' for the redemption of the Units.

8. Was the Settlement Deed, the Rules as amended from time to time as well as the provisions of the Capital Markets (Collective Investment Schemes) Regulations, 2001 applicable in the redemption of the Units held by the Plaintiffs'.

9. Whether the redemption price of Kshs.16.95 & Kshs.18.95 used by the Defendants in repurchasing the Plaintiffs' Units was in accordance with the Settlement Deed and the Rules as amended from time.

10. Whether the Defendants' were guilty of fraudulent misrepresentation, concealment and or non-disclosure of the material facts in crediting the sums of Kshs.31,457,000 & 34,747,500 to the Plaintiffs' respective accounts.

11. Whether redemption of the Units was only permitted upon an employee after lapse of a period of 5 years from the date of acquiring the Units, otherwise known as the Vesting Date.

12. Who will bear the costs of this suit."

21. The Parties filed detailed Written Submissions.

22. These proceedings have been characterised by delay. This matter went through the pre-trial process on several occasions it was the Defendant who had not complied with disclosure. That is the subject of a separate Ruling and I will not repeat it here.

23. The matter eventually came before the Court for Hearing on 18th November 2014, 19th November 2014, 21st November 2014, 9th December 2014 and 19th January 2015 for hearing oral evidence. The court heard oral evidence from the First Plaintiff and he was cross-examined at length.

24. Sadly, during the intervening period the second had passed away and he is substituted within the plaint by his widow persuaded to the Order of Haveock J. His widow, in her oral evidence adopted his Witness Statement. The Defendants called only one witness, third Defendant her evidence was interrupted to permit disclosure of documents the existence of which was hitherto denied. That adjournment was further lengthened due to more "new" documents appearing. She never returned to the witness box on the dates thereafter listed for her evidence and for her convenience.

25. Both Counsel attended consistently and presented their respective cases well and clearly both orally and in writing and for that the Court is grateful.

The Facts and Evidence

26. It is common ground between the parties that the two plaintiffs were employees of the First Defendant Bank. It is also uncontroverted that they were invited to join the ESOP and they did so. It is important to note that fact because there is some mention in the Defendants' documents of absence of eligibility. The fact is that the Defendants and each of them treated the Plaintiff as if they were eligible members and the ESOP and the Bank received benefit from their membership. Therefore the Bank it is estopped from denying eligibility . **Section 120 of the Evidence Act** provides "120. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

27. It is common ground that the Plaintiffs did retire on 12th May 2010 and 15th April 2010 respectively.

28. The Plaintiffs are categoric in that they say :

1. They were entitled to make an election between receiving the Shares or receiving their Redemption value, calculated on market value on the relevant date. In the case of the Second Plaintiff it is clear and uncontroverted that he made only one election for the shares to be transferred to him personally. That was not done and monies were transferred to his account on or around 4th June 2010. Following complaints to the CMA subsequent additional payments were made to both Plaintiffs in October/November 2010.

2. In the case of the 1st Plaintiff he changed his election from the cover redemption value to the Shares. The Plaintiffs' case is that they were entitled to do so under The complaint is that, again his option was ignored and some funds were transferred to his account as stated above on 4th June 2010.

29. The Defendant Trustees rely on clauses 5.1 and 5.3 of the Trust Deed which states that when a "Unitholder" ceases to be employed by the Bank, shall be deemed to have applied for redemption. However, that Clause also contains a "Saving provision" which says "Alternatively, in order to implement redemption, the Trustees may at the request of the Unitholder transfer the shares.....to the Unitholder".

30. It is clear from a reading of that Clause that "redemption" could mean payment of the value of the units held, alternatively the transfer of the Shares. It is clear from that Clause and Clause 5.3 that the Trustees had some discretion in the matter. The Plaintiffs argue for absolute discretion. The Defendants take the position that there was no possibility of redemption otherwise payment of the cash value.

31. However, if the Defendants argument was given Credence it would mean that the first half of Clause 5.1 should be applied strictly and the Second half ignored completely. Besides, it is the Trustee Defendant's argument that the Trust Deed in its entirety was replaced by the Deed of Variation.

32. The Defendant's also rely on Rules 7.1 and 7.3 and again there is a reference to the retiring employee being deemed to have given notice and also that "redemption" in that sense included transfer of the Shares corresponding to the number of fully paid up units being redeemed.

33. The Defendants at paragraph 28 of their written submissions argue that the Trustees had an obligation to pay "the redemption proceeds" to the retiring employees within 30 days of the date of deemed redemption.

34. Again that argument it is important to note that the 2nd to 5th Defendants were Trustees of the ESOP. They held the funds and value of the ESOP on trust for the Unitholders. That was to be independent of the Bank. The Trustees owed those Unit holders a Fiduciary duty. That means they should have acted in the best interests of the Unitholders. In this case of the Trustees seem to have applied the interpretation to the Trust Deed and Rules that was least favourable to the retiring employees (the Plaintiffs).

35. Secondly, the Trustees, in particular the second Defendant and Third Defendant are officers of the Bank, namely CEO & MD and Company Secretary. That raises more than a suspicion of sets out a mechanism of consultation with the Bank on the issue of nowhere in their case have any of the Defendants referred to or even the two roles from “cross-contamination” . it is fair therefore to find that name existed. The Trustees therefore cannot demonstrate to the court that they acted in the best interests of the Unitholders rather than the Bank. It is clear the Bank had an interest on it would not have been necessary to consult with the Bank.

36. The Defendant’s place great reliance on Rules 7.1 and 7.3 however, the version of the Rules exhibited to the Defendants list and Bundle filed on 8th May 2014 differs from the version relied upon on the written submissions. That demonstrates that the Defendants themselves hold little store by the retrospective effect of those Rules argued previously.

Deed of Variation

37. Therefore it is clear that the Plaintiffs were entitled to and in fact did, ask for redemption, in their cases to be done by transfer of Shares. They received no response to that request. Had the Trustees addressed their minds to the issue properly, they would have reminded the retiring employees of the process before such transfer could be sanctioned. They did not.

38. By all accounts, up until half was through the second Defendants evidence it appears they did nothing. Subsequently they claim to have had a meeting on 17th May 2010. In cross-examination the Defendants Counsel challenged the evidence of the meeting as given by p1 However, the Defendants case then adopted the position that it did take place and made the necessary decision.

39. The Defendants also rely on the 30 day time period to demonstrate that they acted in accordance with the Trust Deed and Rules. They say payments had to be done within 30 days and they were. Infact the Second Plaintiff (Ben Nyotho) was “deemed” to have retirement on 15th April 2010. That means that on 17th May 2010 when the purported meeting took place 30 days had already lapsed.

40. The Trust Deed repeatedly uses the word “deemed” in different senses within the Trust Deed. In such an instance it is only fair and just that the sense and meaning is construed in the subjective context of each reference of use of the word “*deemed*”.

41. The Defendants also argue that notwithstanding direct instructions or requests, the Plaintiffs are deemed to have asked for a contrary less beneficial position. In the context of a Trust and Fiduciary duties, such construction is arbitrary and in breach of Trust and I find the Defendants conduct to be so.

42. As to the first Defendant being a separate entity from the ESOP, I note with a little surprise that there are several officers in common and that communications with the regulatory bodies and the plaintiffs are interchangeable between the two. In the circumstances I find that there is no conclusive evidence before the court that suggests, never mind demonstrates that the two were separate and independent bodies.

43. In the circumstances and for the reasons set out above I allow the Plaintiffs claim in part and dismiss the Defences of all the Defendants. I find the value attributed was much lower market value.

44. I find the Defendant Bank and the Defendant ESOP jointly and severally liable for the loss occasioned to the plaintiffs by the failure of the Defendants to transfer the appropriate shares to them.

45. However, I dismiss that part of the plaint that alleges and relies upon fraud. Fraud is a specific complaint. It has to be appropriately pleaded and fully particularized. That has not been done. There is no direct evidence put forward by the Plaintiffs that establishes fraud. Mis-Management is not always fraud although it could be in the right circumstances.

46. I therefore find the Defendants and each of them was in breach of their fiduciary duties and in breach

of contract with the plaintiffs. I find the terms of the contract to be as alleged by the Plaintiffs and in particular find that the Deed of Variation does not have retrospective effect. Further the document produced is not appropriately signed and stamped and therefore does not provide good evidence.

47. As to quantum, I allow the Plaintiff claim as pleaded in the Amended Plaint dated 4th December 2012 and set out in the Written Submissions.

48. As to the claim for consequential loss, whether called mesne profit, loss of income or loss of profit. That has been insufficiently quantified and particularized. I therefore order the Parties to file their evidence on those issues within 21 days if they are unable to agree the quantum.

49. Defendants to pay the Plaintiffs costs. In making this order, I take into account the Defendant conduct and delay caused as a consequence.

Order accordingly

FARAH S. AMIN

JUDGE

Signed and Delivered on the 8th day of February 2016.

In the Presence of:

Joseph Kabugi

– Court Clerk

Mr Thiga for the Plaintiffs

Mr Kiche holding Brief for Mr Ohaga for the Defendants.