



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 239 OF 2014

WILFRED NZIOKA MUTUA.....PLAINTIFF

- V E R S U S -

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

BARCLAYS BANK OF KENYA STAFF PENSION FUND..... 2ND DEFENDANT

JUDGMENT

1) By the plaint dated 28th August 2012, Wilfred Nzioka Mutua, the plaintiff herein, sought for judgment against Barclays Bank (K) Ltd and Barclays Bank of Kenya Staff Pension Fund, the 1st and 2nd defendants respectively, as follows:

a) Ksh. 58,000,000/=

b) Interest on(a) above at court rates from its due date until payment in full.

c) General and punitive damages be awarded to the plaintiff as against the defendants for breach of its fiduciary duty to the plaintiff by the defendant.

d) Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant.

e) Any such other or further relief as this honourable court may deem appropriate.

2) The defendant filed a common statement of defence to oppose the plaintiff's claim.

3) The plaintiff's case is supported by the evidence of the plaintiff (PW1). It is the evidence of PW1 that the plaintiff was an employee of Barclays Bank (K) Ltd, the 1st defendant and was also a member of the Barclays Bank of Kenya Staff Pension Fund, the 2nd defendant until retirement from the bank vide the letter dated 3rd December 2003. PW1 stated that upon his retirement the defendants represented to the plaintiff that he will be paid a lump sum of kshs.2,796,338/= and a monthly pension of ksh.45,799/60, an amount which the plaintiff believed to have been erroneously calculated. PW1 stated that the amount was deliberately and erroneously understated by the defendants. The plaintiff told this court that upon discovering the above anomaly he informed the defendants in writing that his pension benefits were underpaid. PW1 averred that he even requested the 1st defendant to furnish him with the method of

calculation and the reasons behind the amounts he was paid. The plaintiff produced in evidence as an exhibit the letter dated 21st October 2005 in which the defendant informed the plaintiff that the amount he had been paid was correct. This response, the plaintiff said, prompted him to file a claim against the defendants before the Retirement Benefits Authority (RBA) for his underpaid pension dues on or around 11th December 2009. While the claim was pending determination, PW1 said, the defendants paid to the plaintiff the correct monthly pension of kshs.95,379/=. PW1 also claimed that he was again informed that he would be paid the withheld pension in lumpsum of kshs.6,493,397/=. The plaintiff alleged that the defendants in essence admitted that they underpaid him his pension dues.

4) The defence case was buttressed by the evidence of Mercy Ngura (DW1) who told this court that the payments the defendants made to the plaintiff were merely gratuitous and not monies due to the plaintiff. DW1 stated that the question as to whether or not the plaintiff's pension dues were incorrectly computed by the defendants is not original to these proceedings. She stated that the issue was referred to the Retirement Benefits Authority (RBA) and dismissed with the resultant appeal being dismissed by the Retirement Benefits Appeal tribunal (R.B.A.T). DW1 stated that these proceedings are not an appeal or a challenge against the dismissal orders. The defendants averred that the plaintiff failed to disclose the adverse findings made by RBA and RBAT on the very issue that he now litigates before this court. The plaintiff in response to the defendant's assertion stated that the Trust Deed and Rules of the Defendant scheme did not provide for any ex-gratia payments and was specific that the payments that were due to the plaintiff could not be reduced under any circumstances. The plaintiff testified claiming that he owned a company known as Wileum Enterprises Ltd dealing with printing in large volumes and the supply of promotional items. PW1 claimed that the defendants' illegal and unjustified underpayment completely disabled the plaintiff's business because the plaintiff was unable to upgrade the equipment to match the demand from the jobs he was contracted for. He claimed that had the money been paid he could have invested it to expand his business. The plaintiff claimed that between December 2003 and 2nd April 2012, his business performed poorly for lack of financial input and capital he attributed to the defendants' wrongful withholding of his benefits under the scheme. PW1 argued that he is entitled to damages for loss of use and opportunity when the sum of kshs.6,493,397/= was held for 9 years. PW1 claimed he sought the services of a qualified auditor to calculate the total damage for lost opportunity as a result of the defendants' actions. The plaintiff stated that upon his calculation, damages amounted to kshs.58,000,000/= which he claims from the defendants jointly and severally. The plaintiff avers that under the Retirement Benefits Act, 2007, the Authority has no power to award damages for loss of use and opportunity as claimed herein arising out of non payment of the pension benefits and the same can only be instituted in a civil suit and this is what prompted him to file this suit.

5) I have considered the evidence presented and the rival submissions plus the authorities cited. The first issue which the parties ably addressed this court about is whether or not the pension dues to the plaintiff were wrongly assessed. The defendant tendered evidence showing that the plaintiff filed a complaint before the Retirement Benefits Authority complaining that his pension dues were not properly calculated and that he was underpaid. The complaint was heard and determined against the plaintiff on 20th November 2012 where RBA ruled that the plaintiff's benefits were computed as per the terms that were applicable when he exited employment. It is also apparent from documentary evidence presented that RBA acknowledged that the defendants' decision to increase the plaintiff's pension dues was due to the reversal of the actuarial reduction of their benefits which was better than the Trust Deed and Rules allowed for. The defendant further tendered evidence showing that the plaintiff challenged RBA's decision before the Retirement Benefits Appeals Tribunal (RBAT). RBAT heard the appeal and had the same dismissed. The aforesaid decisions were never disclosed to this court by the plaintiff nor by his legal advisers.

6) DW1 clearly stated that the defendants' good intentions in upwardly reviewing the pension benefits played a serious role. The plaintiff did not however disclose the adverse findings of RBA and RBAT. The defendant' 'witness tendered evidence showing that RBA was seized of the fact that the defendants had reviewed the pension benefits of their members including that of the plaintiff as per the applicable terms. RBA also found that the higher pensions following the review resulted in the members being in a better position than the Trust Deed and Rules allowed for. The plaintiff purported to distinguish the dispute before the RBA/RBAT and that before this court. He claimed that the dispute before RBA/RBAT

related to pension benefits while that before this court is in respect of damages suffered for loss of use and opportunity when the defendants allegedly wrongly withheld his money for 9 years. The distinction in my view does not make sense because the claim before this court is predicated on the allegation that the defendants miscalculated and underpaid the plaintiffs pension benefits. The two issues cannot be logically separable. I am satisfied by the evidence tendered by the defence that the plaintiff's pension dues were correctly calculated hence the claims before this court cannot be maintained.

7) The second issue which was highly contested was whether the plaintiff can personally make a claim for loss of business opportunity allegedly suffered by Weleun Enterprises Ltd. There is no dispute that Wileun Enterprises Ltd is a separate corporate personality from the plaintiff. It has been argued that Wileun Enterprises Ltd suffered loss and damage amounting to ksh.58 million due to the defendants' miscalculation of the plaintiff's pension benefits. In my humble view this claim is unsustainable on the basis that the company has its own corporate personality which is separate from the plaintiff. Such a claim can only be pursued in the name of the company and not in the plaintiff's name. It should be noted that Wileun Enterprises Ltd is not a party to this suit and no evidence has been presented to establish whether the company actually exists and whether or not it belongs to the plaintiff. The matter is further complicated by the fact that no evidence was tendered showing that Wileun Enterprises Ltd was a member of the defendants' pension scheme. It is clear in my mind that any cause of action arising from the plaintiff's membership of the pension scheme accrues to him personally. The damages claimed by the plaintiff are therefore too remote to the relationship between the duo.

8) The third issue is whether the plaintiff proved his claim for payment of ksh.58 million. The plaintiff testified and wholly relied on the report from a firm of certified public accountants known as Ngumumu & Associates. It is unfortunate that no witness was called from the aforesaid firm of auditors to tender evidence of Wileun Enterprises Ltd's financial records to support the entries in the report. It was alleged by the plaintiff that with more money he would have bought two colour printing machines instead of a single machine. It is clear to me that this was purely speculative since there was no tangible evidence to prove that. For this reason, I find the plaintiff's claim for ksh.58 million not proved to the required standards in civil cases.

9) In the end, the plaintiff's suit lacks merit. The same is dismissed with costs to the defendants.

Dated, Signed and Delivered in open court this 1st day of April, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant