



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT NO. 101 OF 2003

BETWEEN

MARGARET A. OJUANDO

suing as the administrator ad litem of the

estate of GAD DAVID OJUANDO (deceased) PLAINTIFF

AND

PROF. NIMROD BWIBO 1ST DEFENDANT

PROF. F.N. ONYANGO 2ND DEFENDANT

MASENO UNIVERSITY 3RD DEFENDANT

JUDGMENT

1. The deceased was employed as a librarian by Maseno University (“the University”) on 17th September 1990 as a Senior Librarian. Following the changes in the terms of employment, the deceased was notified on 15th April 2002 that he would attain the compulsory retirement age on 30th June 2003. Since he had retained the compulsory retirement age, he was required to vacate office, a fact which he contested by filing suit claiming that he was a permanent and pensionable employee and that he was required to retire at the age of 65 years and that he did not wish to retire early. In a judgment dated 23rd May 2005, Warsame J., found that the deceased’s retirement was backdated and held that his rights were violated by denying him his accrued benefits and pension.

2. Both parties appealed to the Court of Appeal against the judgment in *Civil Appeal No. 336 of 2005* and in its judgment, the Court of Appeal stated that;

For avoidance of doubt we declare that the compulsory retirement age of the appellant is 65 years of age. Further that appellant shall be paid all arrears of salaries and all other benefits as specified under the Regulations and the Act and as shall be assessed and determined by the superior court.

3. The issue then is what are the benefits the deceased was entitled to from the period his employment was terminated to the time of his expected retirement. As the parties could not agree on the amount due to the deceased, I directed the University to file its proposal which it set out in a letter dated 3rd August 2016 annexed to the affidavit of Beryl A. Olang’o, Advocate, sworn on 5th August 2016. In response, the

Kshs. 7,960,148.00

Less paid

Kshs 3,091,604.00

Total

Kshs. 4,868,544.00

7. I agree that leave allowance is paid only when it is earned and in this case since the deceased was not earning, he cannot claim it for the time he was not at work. However, the plaintiff claimed that leave earned prior to 2003 for 136 days amounting to **Kshs. 471,900.00**. Since this amount was already earned and it is not controverted, I award the same.

8. Since the deceased was entitled to benefit from the University medical scheme by attending University facilities for treatment, I hold that he is entitled to reimbursement of any medical claims made during the subject period. This is a form of special damages that must be proved with particularity. In the *Affidavit of Proof of Damages*, the deceased stated that he was suffering from various ailments and had to undergo treatment at Aga Khan Hospital. He attached a bundle of documents as evidence of the fact that he spent the substantial sums of money for treatment and management of his condition. As evidence, he attached a discharge summary from Aga Khan Hospital Kisumu dated 2nd February 2005 and two interim inpatient invoice dated 1st February 2009 and 28th October 2009 for the sum of Kshs. 169,314 and Kshs. 1,806 respectively. In the absence of proof that the invoice had been settled, the claim for special damages must fail (see *Total Kenya Limited v Janevams Ltd CA Civil Appeal No. 178 of 2005[2015]eKLR*).

9. I reject the claim for terminal leave for the simple reason that the deceased's claim is calculated up to the date of retirement. There is no basis to claim payment in lieu of terminal leave which is leave intended to transition the employee to leave.

10. The University shall therefore pay for the sum of **Kshs 5,340,444.00 (Kshs. 5,340,444.00 + Kshs. 471,900.00)** less the applicable income tax for which the University shall provide an income tax certificate.

11. Finally, the parties agree that any claim for pension payments should be directed to the **Maseno University Retirement Benefits Scheme** for settlement. I direct the University to expeditiously facilitate payment of the deceased's pension benefits to his estate.

12. I have anxiously considered the issue of interest. Although the issue was not addressed by the parties, I will address it so as to deal with the matter with finality. **Section 26 (1) of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** empowers the Courts with the discretionary power to award interest on pecuniary judgments and it reads: -

26(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit. [Emphasis mine]

13. Such discretion must be exercised judiciously having regard to the facts, circumstances and applicable principles as was explained in *Prem Lata v Peter Musa Mbiyu [1965] EA 392* where the Court held:

The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by section 26 of the Civil Procedure Act but such discretion must, of course, be judicially exercised, and where no reasons are given for the exercise of a judicial discretion in a particular manner, it will be assumed that the discretion has been correctly exercised, unless the contrary be shown...It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or

money to which he is entitled should be compensated for such deprivation by the award of interest.

14. The exercise of such discretion is now governed by principles that have emerged from several cases. In **Prem Lata v Peter Musa Mbiyu (Supra)** the court stated that:

[I]nterest should normally be awarded on special damages, if the amount claimed has been actually expended or incurred at the date of filing suit

The same principle was reiterated in **Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd. [1970] E.A 469**, where the court observed that;

The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment.

15. The principle applicable to this case is that the plaintiff is entitled to interest from the date of filing suit since the claim is one for special damages. But a look at the claim shows that the totality of the claim was not set out in the original plaint with the requisite particularity and the extent of the claim only came to fore once the Court of Appeal rendered its decision and directed the trial court to assess the deceased's terminal dues and the plaintiff filed the affidavit of proof of damages on 5th June 2009. Thereafter the matter did not move in court until 30th March 2012 when the court issued a notice to dismiss the suit for want of prosecution. It became apparent that the plaintiff had passed away in the month of March 2012. The grant *ad litem* enabling the matter to proceed was issued in October 2012 and the application for substitution filed and allowed by consent on 13th March 2013 and 23rd October 2013 respectively.

16. Taking these facts into account, I find that the deceased is entitled to interest as it is clear that he was kept away from his money by the University. However, the extent of the claim only became apparent after the Court of Appeal had made its decision and even thereafter the suit was not prosecuted with alacrity as the plaintiff died and had to be substituted. In other words, while the plaintiff is entitled to interest, the University should not be penalized for the failure or delay by the plaintiff to prosecute the claim. I therefore find that that the reasonable time for the award of interest at court rates is from 1st December 2013 until payment in full.

17. I now turn to the issue of costs. The plaintiff, having succeeded in the claim, is entitled to costs. Having regard to the provisions of **section 27** of the **Civil Procedure Act**, the court has power to award costs including power to determine the extent of such costs. Given the nature of the matter and having regard to the delay and the need for finality, I assess cost due to the plaintiff as Kshs. 150,000/-exclusive of disbursements and further court fees in accordance with **Schedule VI** of the **Advocates Remuneration Order, 1997**.

18. The final orders then are as follows;

(a) Judgment be and is hereby entered for the plaintiff against the 3rd defendant in the sum of **Kshs 5,340,444.00**.

(b) The 3rd defendant shall provide plaintiff with an income tax certificate upon payment of the sum set out in (a) above.

(c) The said sum in (a) above shall accrue interest at 12% per annum from 1st December 2013 until payment in full.

(d) The claim for pension payments should be directed to the **Maseno University Retirement Benefits Scheme** for settlement and the 3rd defendant is directed to facilitate the payment of the

same to the estate of the deceased expeditiously.

(e) The costs of this suit are assessed at **Kshs. 150,000.00** together with disbursements and further court fees shall be paid by the 3rd defendant.

DATED and **DELIVERED** at **KISUMU** this **14th** day of **November** 2016.

D.S. MAJANJA

JUDGE

Mr Adala instructed by J. Miruka Owuor, Advocate for the plaintiff.

Mr Que instructed by Wasunna & Company Advocates for the defendants.