REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 4549 OF 1987

BACHITTER SINGH CHASE ……..……..PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD…..…….. DEFENDANT

JUDGMENT

This is a suit for damages, special and general, costs and interest. The plaintiff is Bachitter Singh Chase. The defendant is Barclays Bank Limited, his former employers. It is a bank with limited liability and has a registered office in Nairobi.

The plaintiff's claim has been spelled out in a lengthy plaint with a staggering 47 paragraphs. The plaint sets out the backdrop of the plaintiff's claim more or less in detailed form. I propose to set out, only in resume form, the essential background facts to the claim.

By a letter dated 5th October, 1962, the defendant offered the plaintiff employment as a bank clerk on specified terms which were set out in full. On 12th October, 1962, the plaintiff accepted the terms and was taken up by the defendant. According to clause one of the terms the plaintiff was to serve on probationary terms for six months, and would thereafter be confirmed in his appointment. The plaintiff served for the whole of the six months probationary period, was confirmed, and thereafter rose up the ladder getting a series of promotions. It is not essential to set out all the various cadres the plaintiff worked, suffice it to say that by December, 1985, he had risen to become a sub-manager with a gross annual salary of Kshs 338,784, exclusive of ancilliary benefits. He was in the management cadre. He had authority to pay cheques of amounts up to Kshs 500,000. It should be noted on the outset that although the plaintiff was severally promoted through the ranks, he never received any written communication varying the terms of employment in his letter of appointment dated 5th October, 1962, except with regard to personal emoluments.

Throughout his service with the defendant bank the plaintiff was posted to work in various branches of the bank and in various capacities. The last branch he worked in was Market Street branch where he worked as a sub-manager. He was serving under one Raphael Gitau who was the Branch Manager. The plaintiff was posted to that branch in or about December, 1958. By July 1986, the plaintiff was still attached to that branch.

The plaintiff has avered in his plaint that his rapid promotions were due to his excellent work, his able and diligent performance as a manager and his clean record. He neither received warning letters nor parol reprimands throughout his service with the defendant before July 1986. Nor was he at any time called upon to explain his conduct at work.

The plaintiff has also avered in his plaint, and it was also his evidence, that the several letters he received promoting him to various positions in the defendant bank, varied and or revised the original terms of employment as contained in his appointment letter of 5th October, 1962, thereby creating a new contract each time he received a promotion. I will defer discussion of this aspect of the plaintiff's case until later in this judgment.

By a letter dated 8th October, 1986, (Exht 1(31)) the plaintiff's service with the defendant was terminated without notice. He was however paid one month's salary in lieu of notice. The defendant in granting the plaintiff one month's salary in lieu of notice acted under the terms of the plaintiff's letter of appointment dated 5th October, 1962. The letter of termination read, in pertinent part, as follows:

"TERMINATION OF SERVICE

Reference is made to the investigations which have recently been carried out by Bank inspectors into (i) Kshs. 10.5 million fraud at the Market Branch and (ii) the diversion of Kshs. 750,000 due to Pump Maintenance of East Africa Limited, ostensibly to avoid the company's liability to our Moi Avenue Branch. Both subjects have been extensively and intensively discussed with you.

From all available information, it seems clear that:

(i) With regard to the said fraud, your conduct was at best demonstrably careless in the way you handled the matter, having regard to your long experience and past conduct, and you improperly performed your duties in that respect in direct contravention of laid down procedures which you knew and/or ought to have known; and

(ii) With regard to the diversion of funds, you willfully acted in a manner which created a conflict between your official duties and your personal interests and thus derived a personal benefit in the course of your official duties. Alternatively, you wilfully neglected to perform your official duty in the interest of the Bank in that respect.

In light of the foregoing, the Bank is entitled to dismiss you summarily for gross misconduct. However, having in view your long service with the Bank, it has been decided to terminate your service forthwith pursuant to clause 13 of your letter of appointment dated 12th October, 1962. In addition to your one month's salary in lieu of notice, you will be paid all your other accrued emoluments when the same have been calculated."

For a clear appreciation of the letter partly reproduced above it is essential to give a short account as to the two matters which provoked the Bank to write the letter.

With regard to the alleged fraud of Kshs 10.5 million, an account was opened at the Market Street branch on 10th March, 1986 in the name of Abumba Exporters. It was a firm name with one Mary Waimatha Wright as sole proprietor and probably the only signatory to the account. The account was opened with a deposit of Kshs 1000/=. Thereafter, and within a space of about 5 months large deposits at short intervals were made. The total deposited within that period was in excess of Kshs 20 million. All the credits except the last one of Kshs 9.9 million were seen by the plaintiff who raised no querry on them. Deposits were made by cheques payable to Income Tax Department. Within the same period large withdrawals were made from the account to the tune of Kshs 10,539,000/=. The total number of withdrawals were 33, out of which 20 were handled by the plaintiff.

Bank Inspectors who investigated the matter made a report on the matter and blamed the plaintiff as having been careless in his routine supervisory role. They cast aspersions as to his conduct in the matter. With regard to diversion of Kshs. 750,000 from Moi Avenue branch of the defendant bank, the plaintiff with his father and brother were directors of a limited liability company known as Pump Maintenance East Africa Limited. The company operated an account with the Moi Avenue branch of the defendant. It enjoyed overdraft facilities. By July, 1986, the company was allegedly neither servicing its debts with the defendant, nor was it operating the account. It is in evidence that the defendant knew the plaintiff was a

director of the company, and had sometimes in 1984 called upon him to use his position in the company to influence repayments to the defendant of money the company owed it.

In July 1986,the company was paid by Caltex Oil, (Kenya) Ltd, a sum of Kshs 750,000, by cheque. The cheque was crossed and could only be paid through the payee's bank account. Pump Maintenance East Africa (under Pump Maintenance) had by then one other bank account. It was with Bank of Oman. The cheque from Caltex Oil (K) Ltd, was not banked in any of the bank accounts Pump Maintenance had. Instead it was on 25th July 1986 deposited in a saving account in the names of Singh Baljeet; Singh Narinder and Babhitter Singh at the Market Street Branch of the defendant. The account No of that account was 4034345. For some reason the cheque was treated as cash or rather, it was shown as cash. (Exht A (16) refers). The savings credit slip was prepared by the plaintiff. He affixed his signature in the place provided for the person paying the cashier to sign.

No cash was deposited to open that account. That much the plaintiff admitted. His explanation was that the cheque was in actual fact cashed, Caltex Oil (K) Ltd, having had its account against which the cheque was drawn, at that branch; and the proceeds thereof were deposited in the bank account No 4034345. That is hardly believable regard being had of the fact that the cheque could not normally be cashed otherwise than through the payee's bank account. The bank account No 4034345 was not that of Pump Maintenance but that of its directors. The plaintiff admitted under cross-examination that it was improper to deposit that cheque in an account other than that of the payee named on it. He said:

"The cheque was made out to Pump Maintenance EA Ltd. It was paid into a joint account of my father, my brother and myself. It is that cheque which opened that account. It is true that it is improper to pay a cheque made in another person's name into a given account .... True I caused it to be paid into a different account."

The matter did not end by the opening of the savings joint account. The plaintiff on the same day completed documents for the opening of a second savings account, but this time in the name of Pump Maintence. The account was not opened immediately but that was done two or so days later. Its number was 399285. The plaintiff testified in cross-examination that the cheque from Caltex Oil (K) Ltd, was to be cashed through this account and then the proceeds be immediately transferred to account No 4034345. He was clearly not telling the truth. The Pump Maintenance account was opened after the joint account in the names of directors. On the same day that account was opened using the Caltex Oil (K) Ltd, cheque, a sum of Kshs 80,000 was withdrawn from the account (Exht A(13) refers).

The withdrawal was not posted on the bank statement until 28th July 1986. (Exht A(12) refers).

The plaintiff testified that in opening the both savings accounts he was not in any way motivated by personal interests. He said his brother had approached him on 25th July, 1986, told him the Moi Avenue branch of the defendant where their company had an account had been uncooperative as they refused to allow a withdrawal against the Caltex Oil (K) Ltd, cheque, and so he decided to seek his advice. He further stated that it was his idea that two separate saving accounts be opened at the Market Street Branch to facilitate the encashment of the cheque. He however denied that he directed any of his subordinate officers to treat the Caltex Oil (K) Ltd, cheque as cash. James Njoroge Githuka (DW2) and Julius Kikuvi Malia (DW3) testified otherwise. They were the plaintiff's subordinate officers at the Market Street branch. It was their testimony that the plaintiff never deposited any cash during the opening of the both savings accounts.

So much for the background facts. The plaintiff's case is simple. It is that upon his confirmation after serving the defendant for six months he became a permanent and pensionable employee of the defendant. He could not be removed until he attained the retirement age. The letter of appointment he was given governed his employment only until he got his first promotion. The series of promotions he got created between him and the defendant a new contract for each promotion he got. He avered and testified in that regard that the original letter of employment had no effect at the time of his dismissal, and could not validly be relied upon as a basis for terminating his services with the defendant. Consequently, he argued, his dismissal was wrongful as entitles him to damages. He does not think the allegations which the

defendant relied upon to dismiss him had any basis. It was his evidence that the allegation of fraud lacked supporting evidence; while the allegations of violation of banking regulations and practice with regard to the accounts he opened lacked substance. It was his evidence that the procedures which were operational at that branch permitted the lodgement of third party cheques in some accounts. He testified that since Caltex Oil (K) Ltd, held an account at the Market Street Branch, and against which the cheque in question was drawn, the lodgment of the cheque in an account in the same branch was deemed as cash. Consequently the plaintiff violated none of the defendant's regulations when he treated it as cash and caused withdrawals to be made against it as soon as it was lodged. He denied he compromised his position in the Bank or having derived any personal benefit as a result of the lodgment and encashment of the cheque.

The plaintiff now contends that his dismissal has caused him loss and damage. He cannot get any alternative job, he has suffered in his reputation, he has lost the income he would have got had he worked untitled he attained the age of retirement and he has hitherto and since the date of his dismissal suffered mental agony for which he is entitled to damages. The defendant's case is different. It was conceded that the plaintiff was a good, efficient and diligent worker for sometime. Consequently he received rapid promotions. However, because of his violation of bank regulations, the defendant contends that it was entitled to terminate his services either summarily or after due notice pursuant to the terms contained in letter of appointment dated 5th October, 1962, or on payment of salary in lieu of notice. It is the defendant's case that the plaintiff perpetrated a diversion of funds, which should have been paid to its Moi Avenue Branch, to the Market Street branch. Further that he was negligent in the performance of his work, particularly with regard to the operation of the Abumba Exporters account. It is its contention that it was entitled to dismiss the plaintiff summarily, but upon consideration of his long service and previous good record it decided to terminate his employment. Issues were agreed. They are eight in all. I propose to reorganize them and re-paraphrase them for ease of consideration. They are:

1) Was the plaintiff's employment with the defendant permanent and pensionable. If so,

2) Whether his membership to the pension scheme insulated his employment from termination prior to the age of retirement.

3) Did the plaintiff's original contract of employment lapse or was it varied each time he was promoted as to be of no effect:

4) Whether the plaintiff was dismissed from his employment. If so,

5) Whether on termination his employment was subject to the contract entered on 12th October, 1962.

6) Was the termination, if termination there was, proper. If not

7) What damages, if any, is the plaintiff entitled to.

I propose to deal with the issues seriatim. With regard to the first issue the plaintiff's employment was initially on probationary terms. It was subject to confirmation at the expiry of six months. The plaintiff successfully completed the probationary period and was appointed on permanent terms. By such appointment he qualified for membership in the Staff Pension Fund. Evidence was adduced to the effect that the plaintiff was a member of the Staff Pension Fund. I will therefore answer the first issue in the affirmative.

As for the second issue the plaintiff's employment on permanent and pensionable terms did not mean he attained the status of irremovability. An issue like this one arose for consideration in the case of *East African Airways –v- Knight* (1975) EA 165, Mustapha Ag VP, stated at P. 173, as follows:

"It is clear that Mr Knight was on permanent as opposed to temporary appointment. However, permanent employment does not mean that it is necessarily

employment for life or until retirement, it merely means that the employment is to continue for an indefinite period with an element of permanency and a degree of security of tenure. It is not necessarily a life appointment with the status of irremovability."

I adopt those remarks. They are authoritative and binding on this court. Moreover the original contract had a provision as to termination of the contract after due notice. I will therefore answer the second issue in the negative.

The third issue is the crux of this suit. The issue is whether the plaintiff's original contract of employment lapsed or was varied or deemed to have been varied each time he was promoted as to be of no effect. It was common ground that the contract which was entered into on 12th October, 1962, governed the relationship between the parties. At the time of its execution the plaintiff was a mere bank clerk. He was after his confirmation promoted severally. The letters he received announcing his promotions merely made mention of his new duties and remuneration. They were silent on other matters.

In his written submissions, Mr KM Maini, who was led by Mr. Mutula Kilonzo in the conduct of the plaintiff's case, did not think it would be rational to apply the original contract to the plaintiff at the time of his discharge from the defendant's employment. It was his view that that would be preposterous. The original contract applied to him when he was a clerk, he said, and cannot be said to apply to him in an elevated position.

Mr Fred Ojiambo, Counsel on record for the defendant, was of a contrary view. He urged that except for personal emoluments the original contract was intact and, therefore, governed the relationship between the parties at the time the plaintiff was discharged from the defendant's employment. G. H. Treitel in his book, *The Law of Contract*, 3rd Ed. At P. 86, has given a distinction between variation and rescission of contract. He says:

"A contract may be rescinded or varied by subsequent agreement. The object of rescission is to release the parties from the contract. The object of variation is to alter some term of the contract."

The substance of both counsels' submissions is on whether the promotions amounted to a rescission or variation of the original contract. The letters the plaintiff received from time to time advising him of his promotions and the duties he had been assigned were silent on the other terms which were stipulated in the original agreement.

MR Freedland in his Book "*The Contract of Employment*," says at P. 67 as follows:

"If a contract containing a term (express or implied) dealing with a certain particular matter is varied by an agreement which replaces many of the old terms but says nothing about that particular matter, then the question whether that term continues to form part of the contract between the parties depends upon whether there has been a rescission and replacement of eh old contract; for if so, that particular term in the original contract may be treated as having gone by the board."

The author talks of a rescission of the old contract by the variation of several terms of it. In the instant matter only two of the several terms were varied specifically. There is no evidence before me as to the position with regard to the remaining terms. The plaintiff was obliged to but failed to call evidence to show the treatment he was receiving from the defendant in the various elevated positions he enjoyed during his employment with the defendant. He did not call evidence to show that he enjoyed better terms, except personal emoluments, than under the original contract. Nor did he call evidence to show that officers in the defendant's employment who are higher than clerks enjoy better terms, except for personal emoluments and other benefits than are stipulated in the original agreement.

The Court of Appeal in England dealt with a situation more or less similar to that in the instant case, in the case of *Meek –v- Port of London Authority* (1918) Ch D 96 Swinfen. Eady MR said at Pp.99 – 100:

"In my judgment it is clear that if an employee by the terms of his contract to receive remuneration at a

progressive rate, on each occasion when his salary is thus increased there is not a new contract entered into. The increase is by virtue of his old pre-existing contract. But when, as here, the increase is not an increase automatically under an existing contract, but is an increase owing to the position of the employee being changed by employers voluntarily promoting him to a higher grade, or, in one case, voluntarily making him an increase of salary, then the position is altogether different. In such case the employee having no right to promotion at any particular time but only a reasonable expectation that faithful service under the same employer will be duly rewarded, when he is promoted to a higher grade at a higher salary with different duties in law a new contract is entered into between himself and his employers. The employers offer him a better position and he accepts it, and under those circumstances, except so far as his duties are altered and his salary is increased, the old terms and conditions remain the same."

I respectively adopt the passage above in this judgment. As I stated earlier the plaintiff did not adduce evidence to show he enjoyed better terms, except personal emoluments. In absence of such evidence we have to fall back on the original agreement respecting those terms on which evidence is lacking as to their alteration. Consequently, it is my judgment that the original contract lapsed and was replaced by one embodying the varied duties and remuneration and re-enacting the un-altered terms. Akin to the foregoing issue is issue number five. The issue is whether or not the termination of the plaintiff's employment was subject to the contract executed on 12th October, 1962. I have more or less dealt with that issue in the preceding paragraph. Provisions as to termination were not varied. So although that contract was replaced the provisions as to termination were each time a new contract was created carried forward or re-enacted in each of the new contracts. It can, therefore, be safely concluded that the provisions as to termination were as embodied in the contract of 12th October, 1962.

Issues 4 and 6 may be dealt with together. Paragraph 13 of the original contract (exht 1(1)) stipulates:

"If, after you have served your probationary period, your appointment is confirmed it will be that of a monthly servant, provided that should you at any time either during your probationary period or afterwards, commit any breach of the conditions herein contained or be guilty of unsatisfactory conduct inside or outside the bank, the bank reserves the right to dismiss you without notice."

The contract document does not stipulate the period of the notice. Having described the plaintiff as a monthly servant, then we must fall back on the Employment Act, Cap 226, Laws of Kenya for the period of the notice. Section 14(5) (iii) thereof provides for a termination notice of 28 days for monthly servants, except where the contract provides for a longer period. Section 16 provides for the payment of wages in lieu of notice. The wages must be such as would have been paid or earned during the period of the notice required to be given.

The plaintiff was paid one months' salary in lieu of notice. He was served with the letter of termination sometimes in October 1986. he was advised he would be paid all personal emoluments in lieu of one month's notice. Those were to be used to offset part of his then indebtedness to the defendant bank. In effect upon payment of one month's personal emoluments the plaintiff ceased to be a servant of the defendant. He was not dismissed. His contract of employment with the defendant was terminated. I say so because although termination and dismissal have the same effect, namely, ending the contractual relationship between an employer and his employee, the legal consequences are different. A dismissal, as a general rule, comes about due to breach of a term of the contract of employment. A termination on the other hand is where a party to a contract exercises a right under the contract to lawfully bring it to an end by notice. There need not, necessarily, be a breach of the contract before a contract can be lawfully terminated by notice.

The plaintiff contends and it was urged on his behalf that his contract of employment was not terminated. Rather, that he was wrongfully dismissed. His argument is that it was unconscionable to apply the terms applicable to clerks to dismiss him, an officer who had risen to the level of sub-manager. I have already found as fact and held that the terms with regard to termination of employment which were in force at the time of the plaintiff's discharge were as embodied, in the contract of 12th October, 1962.

The defendant applied those in terminating the plaintiff's employment. With due respect they were

entitled to invoke those stipulations. Long service and promotions *per se* would not entitle the plaintiff to terms other than those in his contract document in absence of a clear agreement to the contrary, and in absence of conduct which would show that the intention of the parties was that different terms would apply. In any case a party cannot raise the plea of "unconscionable" act or conduct as a ground for seeking relief or adjusting any contract which shows, as Lord Radcliffe put it is the case, *Bridge –v- Campbell Discount Co. Ltd*; [1962] AllER; 385 at P. 397, a rought edge to him. That is what the plaintiff prays that this court do – smoothen the rough edges to his advantage.

I was referred to the decision of my sister at Law, Lady Justice Aluoch, in the case of *R. M. Sifuna –v- Commercial Bank of Africa*, NAI HCCC No. 1069 of 1985, as authority that a court may depart from a term in a contract of employment which appears to be unconscionable. The Judge said, in pertinent part, as follows:

"This letter (of appointment which provided, *inter alia*, for one month's notice of termination) governed the terms of appointment of the plaintiff when he was a junior officer way back in 1971 and there is no way it can be made to apply to the plaintiff's situation as a member of the Managerial Staff in 1984. The defendant cannot pray in aid the provision of section 14(5)(iii) of the Employment Act Cap 226 Laws of Kenya, either. In the absence of express stipulation as to notice, the Court has to decide what would be a reasonable notice in the circumstances of each case."

I accept the passage as stating the correct position in law where the contract document has no express provision as to the period of the notice. Not so however where, as in this case, the contract document describes the plaintiff as a monthly servant. Section 14(5)(iii) would be superfluous if not applied to give guidance where the contract document is generally worded. When a court decides what is reasonable notice in any given case it is in effect invoking an equitable principle of fairness. However, it is a well known principle that equity must follow the law. In our case here there is clear stipulation that the plaintiff was a monthly servant which then means s 14(5)(iii), above, applies. Consequently, I find and hold that the defendant was obliged to give one month's notice before it would lawfully terminate the plaintiff's employment.

The plaintiff was paid salary in lieu of notice. The defendant in lieu of dismissal decided to terminate the plaintiff's employment. That is what they said in their letter of determination of that employment. In the same letter they gave reasons for that action. I earlier set out the background facts respecting those reasons. The plaintiff conceded that to some extent he acted contrary to banking regulations. I have considered those ground and come to the conclusions that, viewed on a balance of probabilities, they amounted to misconduct. It was such misconduct as entitled the defendant to dismiss the plaintiff. The defendant addressed its mind to this fact. It waived its right to dismiss the plaintiff and opted to terminate his employment. The manner in which they went about it accorded with the subsisting contract of employment. It is my judgment that the termination was proper. It was neither a breach of that contract nor a violation of the law. The defendant relied on the only contract that was subsisting to terminate the plaintiff's employment with it.

What was the effect of the termination? As I said earlier, the defendant having opted to terminate the plaintiff's employment by notice instead of dismissing him, waived their right to dismiss him. It meant that the plaintiff was entitled to terminal benefits. He was paid personal emoluments in lieu of notice. He was not, however, paid any pension benefits.

In deciding to terminate the plaintiff's employment instead of dismissing him the defendant considered his previous conduct and performance, which was very good, and his long service. Having on their own volition decided to take into account those aspects, it is my view that the defendant should not have denied the plaintiff the pension benefits which he had, under the Pension Fund rules for the defendant's staff, qualified to get but for the fact that he had not attained the retirement age. The plaintiff had served the defendant bank for at least 24 years, 14 more than the minimum qualifying service period. It was too harsh on the part of the defendant that having decided more or less to excuse the misconduct went ahead to deprive the plaintiff of pension benefits.

Pension as I understand it is payment to reward long service. The plaintiff worked for the defendant for quite a long time and as a gesture of appreciation the defendant should have paid him pension. It was unconscionable and inequitable to deny him the pension, considering what I have stated above. In light of that I declare that the plaintiff is entitled to be paid his pension. Except in that regard the plaintiff's suit fails.

As far costs of the suit the plaintiff's claim did not fail in its entirety. That being so, it is my judgment that the most appropriate order to make on costs in that each party bear own costs.

Dated and Delivered at Nairobi this 3rd Day of October, 1990

S.E.O. BOSIRE

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JUDGE