



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 264 OF 2015

BETWEEN

ADELLAH KAVISA KALUME & 66 OTHERS.....APPELLANTS

AND

KENYA POST OFFICE SAVINGS BANK.....RESPONDENT

(Appeal from the Judgment and Decree of the Industrial Court at Nairobi (Onyango, J) dated 4th September, 2015

in

INDUSTRIAL CAUSE NO. 2436 OF 2012)

JUDGMENT OF THE COURT

1. The appellants herein instituted suit by way of a memorandum of claim in the Industrial Court(now Employment and Labour Relations Court(ELRC)) at Nairobi against the respondent Kenya Post Office Savings Bank (**Post Bank**) seeking special damages of Ksh.45,688,117 being refund to them of all the amounts they claim were unlawfully deducted from their salaries for the period 1st May, 1999 to 31st July, 2007 together with interest thereon from the date of filing suit at court rates of 14% and costs of the suit.
2. The appellants averred that they were at all material times employees of the respondent, having been employed at different times in different capacities, with their employment status being governed by the Employment Act and other employment Laws. Their pension was administered under the “**Kenya Post Office Savings Bank Staff Retirement Benefits Scheme Trust Deed**” which was established on 20th December, 1997 but with a commencement date of 1st July, 1993.
3. This was a non contributory scheme where only the employer used to contribute certain sums of money as authorized by the applicable Rules. Like in every other pension scheme, the contributions are released to the employee upon retirement or paid to his/her beneficiaries if a member died before retirement.
4. Sometime in year 2005, the employer decided to introduce changes to the said scheme to an employee contributory scheme. In the said scheme the employer contributes a specific amount and the employee also contributes a specific percentage of his/her salary. In this scheme upon retirement a member ends up

with higher savings than in the non contributory scheme. It is however not for us for purposes of this judgment to discuss the merits and demerits of the two schemes. In this case, the employer was supposed to deduct 7% of the appellants' salary each month as their contribution to the scheme. This new requirement was anchored on **Rule 6 (a)** of the new scheme Rules which provided as follows;-

“Member’s contributions

Each member shall contribute to the scheme in each contribution year an amount equal to seven per cent (7%) of his Pensionable Emoluments, such contributions being deducted by the Founder each month from his pensionable emoluments and paid to the Trustees in accordance with their directions.”

5. The employer sent out invitation letters to the employees inviting them to join the new scheme which was referred to as the “New Defined Contribution Scheme”. Membership of the new scheme was therefore wholly voluntary. According to the letters sent out to the employees, the respondent and the Trustees of the Pension Fund were going to carry out a sensitization exercise to explain to the employees how the new scheme was going to benefit them. Ultimately, on 18th January, 2008, other Trust Deed and Scheme Rules were signed by the respondent and the Trustees. Under these Rules, members contribution was set at 7% of the pensionable salary while the contribution from the employer was retained at 11%.

6. All appeared well until the appellants took early retirement effective from 31st January, 2010 and their pension was computed. They then realized that the respondent had been deducting contributions from their salaries between 1st May, 1999 and 31st July, 2007, a period before the contributory defined pension scheme came into force. The amount each appellant claims is tabulated in their joint statement of claim. They claim that the said deductions were done through fraudulent misrepresentation, concealment and/or non-disclosure of material facts and contrary to the law, the Trust Deed and the rules governing the Pension Scheme.

7. The respondent denied the claim and maintained that if any amounts were deducted from the appellants' emoluments such deductions were made with the full knowledge of each of the appellants. After hearing the case **Onyango, J** dismissed the appellants' claim by a judgment dated 4th September, 2015 now impugned, in which the appellants have lodged a Memorandum of Appeal raising 15 grounds which can be summarized and compacted into three broad grounds to the effect that the learned Judge erred in:-

- **Misinterpreting and misapplying the facts of the case.**
- **Analyzing the evidence adduced by the appellants and made determination that is unsupported by evidence.**
- **Finding that the appellants claim was statute barred.**

8. At the plenary hearing before us, **Ms. Savini** learned counsel for the appellant adopted her written submissions and made brief highlights. She assailed the learned Judge for misinterpreting and misapplying the facts and the law as pleaded in the memorandum of claim dated 15th December, 2012. She explained that the learned Judge was wrong in finding that the unlawful deductions ended in 2004 and the claim should have been filed in 2010 before the expiry of 6 years. She explained that the unlawful deductions ended in 2007 and the claim was filed in 2012, which was within the 6 year limitation period. Counsel maintained that the learned Judge was not settled as to the exact period when the unlawful deductions were made. Moreover, the learned Judge was wrong, in relying on a wrong date, 31st December, 2004 to compute the limitation period from when the deductions stopped. She posited that the learned Judge erred in failing to enter judgment in the appellant's favor despite finding that the respondent's pension scheme was non-contributory and that the purported deductions from the appellant's pay slips were unlawful. Ms Savini continued to argue that the learned Judge was wrong in misapplying the provisions of the Trust Deed and Rules by relying on the respondent's actuarial report and not the appellants' submitted evidence regarding computations of pension benefits in a defined benefits and defined contribution scheme.

9. Learned counsel also assailed the learned Judge for solely relying on the evidence adduced by the respondent and ignoring evidence adduced by the appellants, thereby arriving at an unfair determination of the case against the appellants. Moreover, she contended that the learned Judge made findings that were un-supported by evidence, which according to counsel offended rules of fairness and justice. Thus, for instance, despite the evidence adduced in court that sufficiently showed that the unlawful deductions on the appellants' salaries were not voluntary, and that the appellants consented to the unlawful deductions based on the circular dated 2nd March, 1999 which stated that the employees had requested the contributory pension scheme. According to counsel, the circular could not supersede the Trust Deed and the Rules governing its operation and the scheme could only be amended through a supplementary Trust Deed and not a circular.

10. As regards the computation of pension comprising the unlawful deductions, counsel submitted that there was no evidence adduced to show that the appellants received the money that was deducted from their salaries without their consent. Instead, the learned Judge ought to have found that the respondent failed to comply with the substantive and procedural requirements needed to effectuate deductions from an employee's salary as proven by the evidence adduced by the appellants.

11. Counsel took issue with the learned Judge's finding that the claim was statute barred. She contended that the claim was within time as the consents to deduct the contributions were signed in 2007 and not 2004 as concluded by the learned Judge. Moreover, according to counsel the fraud was only discovered after the appellants retired in 2010, and so pursuant to **section 27 of the Limitations of Actions Act**, time could only start running from the date of discovery of the alleged fraud and the claim was therefore well within the limitation of six years. The Judge was faulted for failing to find that the contested deductions involved fraud, misrepresentation, concealment and/or non-disclosure of material facts. She called in aid the decision in **DT DOBIE & CO. (KENYA) LTD -vs- MUCHINA** for the proposition that the act of dismissing the appellants claim without carefully considering all the facts of the case was contrary to the rule of law.

12. Mr. Mwangi learned counsel for the respondent, in opposing the appeal adopted his written submissions and list of authorities but also made some oral highlights in regard to the salient issues raised in the written submissions. He maintained that the judgment now impugned, was sound and properly founded on the law and the learned Judge correctly captured the facts and the evidence. He proceeded to argue that the deductions made from the appellants salaries were refunded on 26th January, 2010 upon their early retirement. Citing the decision of **CHASE INTERNATIONAL INVESTMENT CORPORATION & ANOTHER -vs- LAXMAN KESHRA & 3 OTHERS [1978] eKLR**, he posited that in light of the said refund of the pension to the appellants the Judge correctly found that ordering the respondent to make fresh set of payments of the same amounts it remitted to the Pension Scheme Fund would amount to unjust enrichment. According to the respondent, the appellants allowed their salary to be deducted from May, 1999 to 31st July, 2007 knowing that the deductions were building up their pension, and they should therefore be estopped from lodging the claims well after they have left the respondent's employment and commuted their pension.

13. In conclusion, Mr. Mwangi submitted that the claim was time barred by statute for any money deducted prior to 2006 as the claim was filed in 2012 i.e after six years. Similarly, any claim arising from deductions done after the coming into force of the Employment Act 2007 would also be caught up with by the three year limitation period under that Act. He therefore supported the learned Judge's finding that the entire claim was statutorily time barred. He relied on this Court's decision of **AG & ANOTHER -vs- ANDREW MAINA GITHINJI & ANOTHER [2016] eKLR**

14. As a first appellate Court we have considered the entire record and the submissions as summarized above. Our role now as mandated by **Rule 29 (1) of the Court of Appeal Rules**, is to subject the entire evidence to a fresh and exhaustive analysis and appraisal so as to make our own independent inferences and conclusions while mindful that we have not, unlike the learned Judge, had the advantage of hearing and observing the witnesses as they testified. See **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER (1968) EA 123**. We therefore pay some deference to the learned Judge's findings unless they be based on no evidence, a misapprehension of the evidence or are plainly wrong

leading to injustice.

15. Having the above in mind, we have crystallised three broad issues for determination that will dispose of this appeal. We start with the issue on whether the deductions in question were done without consent from the appellants. The 1997 Trust Deed and Scheme Rules had a retrospective effect and it commenced on 1st July, 1993. **Clause 9** of the same provided for contributions by the employer to be such contributions as may be authorized by the Rules. **Rule 8 (a)** on the other hand stipulated that members were not required to pay for the time being. As observed earlier, the issue of members' contribution was introduced by the Trust Deed of 2005. Under the new Deed and Rules, each member would contribute 7% of his/her pensionable emoluments while the employer would contribute 11% This is not in dispute and we need not belabor the point. Deductions continued under that Trust Deed and Scheme Rules until 18th January, 2007 when another Trust Deed was introduced, this time increasing the employer's contribution to 14%. That too is not in dispute.

16. The problem arose when the appellants opted to take early retirement and when their dues were being computed, they realized that they had been deducted members' contributions since 1999. As far as they were concerned, having not given their consent, those deductions were unlawful, hence the claim for refund of the same. The respondent does not deny making the deductions but explains that the appellants did not lose anything as the amounts deducted were taken care of by the employer by way of salary increment by an equal amount. Our view of the matter is that the deductions prior to 2007, were not sanctioned by the Scheme Rules as there was no consent by the appellants for their salaries to be deducted. We note however that there was communication to all the pensionable members vide the internal memos dated 2nd March, 1999 and 6th May 1999 notifying them of the 7% contribution from their salary to the scheme. According to the respondent however, the appellants did not suffer any loss or monetary disadvantage as the money in question was loaded to their pay slips as salary increment and then deducted to cover their contribution. There was no evidence that any of the appellants complained or objected to the said contributions. This must in our view be because the deductions did not reduce their net take home salary.

17. In our view, what the respondent needed to do was amend the Scheme Rules to accommodate that change in order to comply with Rule 12 of the 1999 Trust Deed and Rules. Did that make the deductions unlawful? We don't think so particularly because it did not reduce the salary or accrued benefits of any of the members. On the contrary, it was to their advantage. The procedure was not strictly followed but evidently there was no substantive breach of the terms of the Trust Deed. We do not find any evidence of fraud, concealment or misrepresentation on the part of the employer. After all, this money was going to benefit the appellants upon retirement. There was evidence before the trial court also to the effect that the said deductions were paid to the pension Scheme Fund and eventually paid out to the appellants in form of commuted pension. We find consonance with the learned Judge in her following finding:-

“The claimants do not deny that the deductions made from their salaries were paid to the pension scheme Fund. They also do not deny that they have already received their commuted pension which was partly constituted by the funds deducted from their salaries which they are seeking to be refunded under this suit. Having not sought refund of the money unlawfully deducted from them until after the money had been paid back to them in the form of commuted pension, the money is no longer available to be refunded to them. Any payment to them would amount to unjust enrichment and would be inequitable as the money is already in their pockets”

18. Our conclusion in respect of this issue is that although the deductions in question were done without the written consent of the appellants, they were notified of the same and raised no objections. They therefore acquiesced to the deductions being made. Moreover, the appellants were not subjected to any financial disadvantage because the deductions were cushioned by the employer. The said amounts formed part of the appellants' computed pension and they cannot therefore claim refund of the same money they have already received. The doctrine of estoppel comes into play. Finally on this issue, even if money is owed to the appellants, as there is no dispute that the money was paid to the Kenya Post Bank Pension Scheme Fund, it is the Fund and not the employer who should be called upon to account for the money,

yet the said entity is not a party in this suit.

19. Having expressed ourselves as above, it becomes clear that the issue of the claim being statutorily barred becomes moot. However, as the learned Judge made a finding that the claim was time barred, it is imperative that we discuss that issue, more so because it formed a major ground of appeal. According to the appellants, the New Defined Contributory Scheme became effective on 1st August, 2007 and that would explain why a sample of the signed consents in the record of appeal were signed between 30th July, 2007 and 17th August, 2007. That also explains why their claim is based on the period between 1st May, 1999 and 31st July, 2007.

20. In that respect our finding is that the learned Judge erred on the last date the cause of action is said to have accrued. We find that the contested deductions were between 1st May, 1999 and 31st July, 2007 and not 2004 as stated by the learned Judge. That being so, time started running in 2007. Since the deductions were continuous, the claim cannot be separated for purposes of determining statutory limitation. The governing statute in force then was the Employment Act 2007 under which the period of limitation is 3 years. The appellants' suit was filed in December 2012, which is 5 years after the date of the last deduction. This would therefore clearly mean that the claim was time barred and the learned Judge cannot be faulted for so finding.

21. Having found that there was no fraud or misrepresentation in the manner the deductions in question were made, even a claim under **Section 26** of the **Limitation of Actions Act** would not have succeeded. We think we have said enough to demonstrate that this appeal is for dismissal. The same is hereby dismissed with costs

Dated and delivered at Nairobi this 16th day of February 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR