



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 70 OF 2017

BETWEEN

WILLIS OGOLA OKENDO.....APPELLANT

AND

COLLINS OYUU.....1ST RESPONDENT

GILBERT NDOLO OWOUR.....2ND RESPONDENT

CLEMENT OMOLO.....3RD RESPONDENT

KENYA NATIONAL UNION OF

TEACHERS (KNUT).....4TH RESPONDENT

(An Appeal from the Judgment of the Employment and Labour

Relations Court (M. Onyango, J) dated 24th November, 2016

in

INDUSTRIAL CAUSE NO. 32 OF 2014)

JUDGMENT OF THE COURT

BACKGROUND

[1] This is an appeal by **WILLIS OGOLA OKENDO**, (the appellant) against the judgment of the Employment and Labour Relations Court (ELRC) (M. Onyango, J) where the learned Judge dismissed the appellant's claim for death allowances for his two sons and mother against **COLLINS OYUU** (the 1st respondent), **GILBERT NDOLO OWUOR** (the 2nd respondent), **CLEMENT OMOLO** (the 3rd respondent), and **Kenya National Union of Teachers** (KNUT) (the 4th respondent).

[2] The 1st respondent was the Executive Secretary of 4th respondent, the 2nd Respondent was the Executive Secretary of the 4th respondent's Bondo Branch, while the 3rd respondent was the Executive Secretary of the 4th respondent's Siaya Branch.

[3] A brief background of this appeal can be gleaned from the undated Complaint, supported by an affidavit sworn by the appellant dated 10th September, 2014. The appellant claimed that he was employed by the Teachers Service Commission (TSC) on 1st May, 1974; that he became a member of the 4th Respondent as it was mandatory for all TSC registered teachers to become members of the 4th respondent and be deducted monthly subscription fees through the check off system; that at an Annual Delegates Conference (ADC) meeting held on 7th and 8th December, 1995 which the appellant attended, the ADC passed a resolution for payment of allowances to members and their dependants on account of death, old age, sickness, accidents or unemployment; that the appellant made a request to the 4th respondent on 30th August, 2004 for payment of old age allowance pursuant to Article 12 of the KNUT Constitution and an order for payment of death allowance for his two

(2) sons who died in 2007 and 2008 respectively and his mother as provided in the KNUT Constitution. The appellant retired on 31st August, 2004.

[4] In the said plaint, the appellant sought the following orders against the respondents:-

(i) An order directing the defendants to pay old age and death allowances for my two sons and my mother and act according to its (KNUT) Constitution. Honourable court to determine.

(ii) Cost of this suit to be borne by defendant jointly and severally.

(iii) The honourable court to determine the interest as from the year I retired 30th August, 2004 to date.

(iv) Any other or further remedy/relief this honourable court may deem fit to grant.

[5] The respondents filed a defence on 3rd October, 2014 in which they denied that the appellant was entitled to the orders sought.

[6] At the hearing of the claim, the appellant testified on his own behalf. Under cross examination, the appellant stated that he was aware that upon retirement his membership to the 4th respondent ceased. The 2nd respondent testified on behalf of the respondents. He stated that the appellant ceased to be a member of the Burial and Benevolent Fund when he retired; that the objective of the Burial and Benevolent Fund is to give members a decent burial but if they retired their contributions were refunded as was the case in respect of the appellant; that after payment of the refund the member is not entitled to any further benefits; that death allowance is paid to members at the time of bereavement and that the appellant was therefore not owed any amount by the respondents as his dependents died after his retirement and he had ceased to be a member of the scheme.

[7] In her judgment the learned judge dismissed the appellant's claim for death allowances for his two sons and mother, and ordered the 4th Respondent to include the appellant's request for old age allowances in its agenda for the next National Executive Committee Meeting as promised in its letter to the appellant dated 9th August, 2012 and communicate its decision to the appellant.

[8] Aggrieved by that decision, the appellant applied for a review by way of an application dated 6th December, 2016 *inter alia* on the grounds that he filed suit in the High Court at Kisumu on 23rd September, 2014 against the four respondents herein; that the 1st 2nd and 3rd respondents failed to enter appearance and judgment was entered against them on 25th November, 2014; that formal proof proceeded on 30th May, 2016; that the 4th respondent failed to serve him with its papers in default of Order 10 of the Civil Procedure Act.

[9] In her ruling dated 4th May, 2017, the learned judge found as follows:-

“It is the court's opinion that the application as filed is so ambiguous as to render it incapable of being dealt with as an application for review. None of the prescribed grounds for review are cited in the application. The application contains elements of complaints against this court and the High Court where the suit was initially lodge a before being transferred to this court. The application also contains issues that should be subject of appeal and not review.

Due to the ambiguity of the application this court is left with no alternative but to dismiss the application on grounds that it is not a suitable case for review.”

[10] Aggrieved by that decision, the appellant filed this appeal raising, *inter alia*, the following grounds of appeal; that the impugned judgment did not conform to **orders 21 Rules (4) and (5)** of the **Civil Procedure Act**; that the court erred in failing to use its powers to make an award of compensation in circumstances contemplated in this case; and that the learned judge erred in ordering the 4th respondent to include the appellant's request for old age allowance in its agenda for the next NEC meeting without indicating a time limit.

[11] The appellant sought the following orders:-

“a) This appeal be allowed with costs.

b) The Judgment in the High Court Case No. 32 and the judgment in the Employment and Labour Court be joined together as one case.

c) Cost of this suit be done by Defendants jointly and severally.

d) The defendant to pay Death allowance for my two sons and my mother who were my dependants and were all covered in the scheme amounting to a total of 780,000/= and my old age allowance as stated in the KNUT constitution.

e) Any other further remedy/relief this honourable court may deem fit to grant.”

SUBMISSIONS

[12] When this appeal was heard before us, both parties had filed written submissions and relied on the same. The appellant was in person

while **Ms. Akol** held brief for **Mr. Sing'oei**, learned counsel for the respondents. The firm of **Sing'oei Murkomen and Sigei Advocates** had filed written submissions on behalf of the respondents.

[13] In his submissions the appellant urged as to allow the appeal with costs noting that the learned judge had made a finding in her judgment that the appellant had a legitimate expectation to benefit from old age allowance and death allowances; and that Article 4 of the KNUT Constitution (revised on 9th December, 2013) provided that:

“The funds of the Union may be expended only for the following objectives: – ... (f) such allowances to members and their dependants on account of death, old age sickness, accidents or unemployment as the National Executive Council may from time to time prescribe.”

[14] In the written submissions filed on 23rd April, 2013, counsel for the respondents submitted that the impugned judgment of the trial court, meets the threshold of the essentials expected of it under **Order 21 Rule 4 and 5** of the **Civil Procedure Rules** as the judgment contains a concise statement of the case, the points of determination, the decision thereon and the reasons for the decision and that it was therefore a valid judgment.

[15] Counsel for the respondent argued that the appellant's rights under the old age and death allowances schemes which were managed at branch levels, ceased upon his retirement; that legitimate expectation is a doctrine that is well recognized and established in administrative law; that for an expectation to be legitimate, it must be founded upon a promise or practice by a public authority that is expected to fulfil the expectation; that such expectation were fulfilled in regard to the appellant as the collected funds/allowances were paid to his benefit upon his retirement; that the learned judge considered evidence adduced by the appellant and the respondents and noted the fact that the appellant had misapprehended the KNUT Constitution regarding **Article XII (3)(f)** which stipulates that a member of the Burial and Benevolent Fund who dies while in service is given a decent burial while one who retires is refunded his contributions; that the appellant was refunded his contributions upon retirement; and that his claim in regard to the death allowances for his mother and two sons is a misapprehension of the objective of the scheme. Counsel urged us to dismiss the appeal with costs.

DETERMINATION

[16] We have considered the record of appeal and the rival submissions. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See ***Selle -v- Associated Motor Boat Co. [1968] EA 123***)

As stated in the case of Kenya Ports Authority Vs Kuston (Kenya) Limited [2009] 2 EA 212:

“On a first appeal from the High Court, the Court of Appeal shall consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in evidence.”

[17] The issues for determination in this appeal are:

- a) Whether the trial court complied with the provisions of **Order 21 Rule 4 and 5** of the **Civil Procedure Rules**;
- b) Whether the appellant is entitled to benefit from the old age and death allowances and whether the appellant's legitimate expectation to benefit from the old age and death allowances was infringed.

[18] On the issue of whether the trial court complied with the provisions of **Order 21 Rule 4 and 5** of the **Civil Procedure Rules**, **the Rules** provides as follows:

“4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons thereof, upon each separate issue.”

[19] Counsel for the respondents submitted that the trial court's judgment met the requirements of **Order 21 Rule 4 and 5** of the **Civil Procedure Rules** and relied on the persuasive authority of the High Court in the case of ***Royal Star Ltd and Another V Kimeu Wambua Civil Appeal No 156 of 2011*** where the court cited the case of ***South Nyanza Sugar Co. Ltd V Omwando (2011) eKLR*** in which Makhandia, J. (as he then was) stated as follows:

“...Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of Order 21 rule 4 of the Civil Procedure Rules which provides that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision...The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and apportionment thereof...Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it.”

[20] We have examined the impugned judgment and do note that it contains a statement of the facts, the points for determination, the decision thereon and the reasons for the decision. We therefore find that the impugned judgment complies with the requirements of the provisions of **Order 21 Rule 4** and 5, and this ground of appeal therefore fails.

[21] On the issue whether the appellant was entitled to benefit from the old age and death allowances and whether his legitimate expectation on the same was infringed, the learned Judge found as follows:

“I find that the plaintiff has a legitimate expectation to benefit from old age allowance as provided under Article XII(3)(f) and as promised in the letter dated 9th August, 2012. I however find that his demand for payment of death benefits in respect of his deceased mother and sons is borne of a misunderstanding of the said clause as it does not provide for payment of death or burial allowances for dependants of members who are alive but for payments to dependants in the event of the death of a member.

For the foregoing reasons, I order that the 4th Respondent includes in its agenda for the next National Executive Committee meeting the request by the Plaintiff for payment of old age allowance as promised in the letter dated 9th August, 2012 and that the decision of the National Executive Committee be communicated to the Plaintiff.”

[22] Article XII(4)(f) of the KNUT Constitution provides as follows:

“The funds of the Union may be expended only for the following objectives:-

(f) Such allowances to members or their dependents on account of death, old age sickness, accidents or unemployment as the National Executive Council may from time to time prescribe.”

[23] The letter from the respondent’s then Secretary General to the appellant dated 9th August, 2012 stated in part as follows regarding old age allowance payment:

“We wish to inform you that your request for old age allowance payment can only be decided upon by the National Executive Council (NEC). For that reasons (sic) we shall put forward your request during the next NEC meeting and then communicate to you their decision on the matter.”

[24] The doctrine of legitimate expectation is well recognized in administrative law. In Communication Commission of Kenya & 5 Others v. Royal Media Services and 5 Others, SC Petition Nos. 14, 14A, 14B & 14C of 2014 the Supreme Court stated that:-

“...the emerging principles on legitimate expectation may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;*
- b. the expectation itself must be reasonable;*
- c. the representation must be one which was competent and lawful for the decision-maker to make; and*
- d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”*

In re Westminster City Council, [1986] A.C. 668 at 692 (Lord Bridge) stated as follows:

“...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation. Legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil a promise.”

[25] This Court in the case of Oindi Zaippeline & 39 Others v Karatina University & another [2015] eKLR stated as follows:

“Legitimate expectation is founded upon a basic principle of fairness – that legitimate expectation ought not to be thwarted – that in judging a case a Judge should achieve justice and weigh the relative strength of expectation. In South African Veterinary Council v. Szymanski 2003 (4) S.A. 42 (SCA) at [paragraph 28]: the Court held that “the law does not protect every expectation but only those which are ‘legitimate’”. The requirements for legitimate expectation include the following:

- i. The representation underlying the expectation must be ‘clear, unambiguous and devoid of relevant qualification’: De Smith, Woolf and Jowell (op cit -98- Petition No. 14 of 2014 [Judicial Review of Administrative Action 5th ed] at 425 para 8-055).*
- ii. The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements*

may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

iii. The expectation must be reasonable: Administrator, Transvaal v. Traub (1989 (4) SA 731 (A)] at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8- 037).

iv. The representation must have been induced by the decision- maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); Attorney- General of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h - j.

v. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: Hauptfleisch v. Caledon Divisional Council 1963 (4) SA 53 (C) at 59E - G. This was also referred to with approval in Walele v. City of Cape Town and Others; 2008 (6) S.A 129 (C.C.) paragraph 41. -99- Petition No. 14 of 2014.”

[26] In the instant case, we have examined the record to ascertain if there was any express, clear and unambiguous promise or representation made to the appellant by the respondents as a public authority or representatives of a public authority. If any such promise or representation was made, it falls upon this Court to consider whether such promise or representations were predicated upon the relevant law. We find, as did the learned trial Judge, that the appellant had a legitimate expectation to benefit from old age allowance as provided under *Article XII (3) (f)* of the KNUT Constitution and as promised in the letter dated 9th August, 2012. The said clause does not however provide for payment of death or burial allowances for dependants of members who are alive but are payable to the dependants in the event of the death of a member. The appellant is therefore not entitled to payment of death allowances in respect of his two sons and mother.

[27] Accordingly, this appeal has no merit and is dismissed. Each party shall bear its costs in this appeal.

Dated and delivered at Kisumu this 16th day of August, 2018

E.M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR