



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & MURGOR, J.J.A.)

CIVIL APPEAL NO. 275 OF 2014

BETWEEN

POSTAL CORPORATION OF KENYA.....1ST APPELLANT

THE POSTMASTER GENERAL

POSTAL CORPORATION OF KENYA.....2ND APPELLANT

AND

AINEAH LIKUMBA ASIENYA & 11 OTHERS.....RESPONDENTS

(Appeal from the Ruling and Decree of the High Court of Kenya

at Nairobi (Khaminwa, J.) dated 28th June, 2012

in

HCCCC No. 688 of 2007)

JUDGMENT OF THE COURT

1. The respondents were former employees of the Postal Corporation of Kenya, the 1st appellant, whose services were terminated on 9th October, 2006. According to an amended plaint filed before the High Court on 25th June, 2008, their services were unlawfully terminated before they attained the mandatory retirement age of 55 years. The respondents therefore claimed salary and benefits for the respective periods which each one of them would otherwise have remained in employment.

2. In paragraphs 40 and 41 of the amended plaint, the respondents’ pleaded as follows:

“40. The compensation in damages based on the revised terms of service are is as in the Third Schedule to this Plaintiff.

41. The Plaintiffs’ claim is and has been one based on retrenchment package if their services are terminated and pursuant to the Defendants’ statement in the Certificates of Service sent to the Plaintiffs’ advocates in March 2008 that the Plaintiffs’ services were terminated on retrenchment due to restructuring. The Plaintiffs claim losses based on a fair and reasonable retrenchment package such as the one given to Rachel Nduta Kamunyu Employee Personnel Reference Number 20424. Based on that package the claims for compensation would be:

PCK RETRENCHMENT

COMPENSATION PACKAGE CLAIMED

Names	PF NO.	Rank	Service	SALARY	3 months Notice	Severance Pay 12 months	Golden	Unpaid salary &	Terminal leave	House allowance	Transport	Total compensation
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			Period (Yrs)	P.M. (Kshs.)		salary For each complete year of service)	handsh ake (Kshs.)	house allowance (Kshs.) 1-9-06	salary (Kshs.)	during terminal leave (Kshs.)	allowance	claimed (Kshs.)
P.O. OKELO	21139	M	33	51,590.00	154,770.00	3,404,940.00	200,000.00	27,477.00	77,385.00	60,000.00	.....	.....
..... OKETCH	21700	M	21	51,590.00	154,770.00	2,1.....	200,000.00	27,477.00	52,544.00	54,000.00	38,592.00	.....
.....	.....	M	21	51,590.00	154,770.00	.....	200,000.00	27,477.00	.....	26,641.00	....	.....
..... WANZALA	.....	M	24	51,590.00	154,770.00	2,475,.....	200,000.00	27,477.00	60,188.00	46,567.00	----	.....
F.N. MUNGAI	21703	M	21	505,815.00	151,545.00	2,121,630.00	200,000.00	27,155.00	68,037.00	54,667.00	38,636.00	2,662,670.00
E.S. OCHILLO	21065	SAM	24	45,250.00	135,750.00	2,172,000.00	200,000.00	21,975.00	=	=	33,937.00	2,563,662.00
A.L. ASIENYA	20206	SAM	32	45,250.00	135,750.00	2,896,000.00	200,000.00	21,975.00	19,608.00	12,133.00	33,937.00	3,319,403.50
J.M. MWIRICHIA	20647	SAM	27	45,250.00	135,750.00	2,443,500.00	200,000.00	21,975.00	37,708.00	23,333.00	33,937.00	3,047,424.50
M.K. MWANJALA	20244	AM	32	41,270.00	123,810.00	2,641,280.00	200,000.00	20,781.00	247,620.00	168,000.00	30,952.00	3,374,134.50
N.P. ODUOR	20270	AM	31	41,270.00	123,810.00	2,558,740.00	200,000.00	20,781.00	67,408.00	45,733.00	30,952.00	2,708,028.50
F.M. MUTUNE	20153	AM	33	41,270.00	123,810.00	2,723,820.00	200,000.00	20,781.00	163,704.00	111,067.00	30,952.00	3,374,134.50
N.M. ETALE	20707	AM	27	41,270.00	123,810.00	2,228,580.00	200,000.00	20,781.00	61,905.00	42,000.00	30,952.00	2,708,028.50
TOTALS	=	=	=	=	1.673.115.00	30.206,730.00	2,400,000.00	286,112.00	921,500.00	654,267.00	419,028.00	36,560,752.75

KEY

M	-	Manager
SAM	Senior	Assistant
AM – Assistant Manager		Manager

This package is in line with the equitable package recommended for and given to civil servants serving in the public service of Kenya as per the civil service circular on “Targeted Voluntary Early Retirement (TVERS) Ref. No. OP. CAB 39/4A/(20) of 27th May, 2004 which offered retrenchment benefits to employees aged over 50 years. Those civil servants aged 53 and above were excluded from the scheme but allowed to serve the full term up to retirement age of 55 years.

The plaintiffs’ claims in this package is also in line with the Kenya Commercial Bank Limited retrenchment programme due to re-organisation of the Bank conducted in 2007 vide circular Ref. No. DDHRI. No. 26/2007 of 3rd April 2007 under which employees up to the age of 54 were compensated and those over 54 years were allowed to retire at the normal retirement age of 55 years.

The plaintiffs shall refer to the two circulars for their full meaning and effect.”

3. The respondents prayed for judgment as follows:

“(a) The termination of the Plaintiffs’ employment was wrongful and unlawful;

(b) The Defendants deliberately and unwarrantedly inflicted economic loss on the Plaintiffs.

(c) The Defendants severally and jointly pay damages to the Plaintiffs for fraudulent misrepresentation that the Plaintiffs’ services were terminated due to implementation of the new Management and Regional Structure, in line with the Corporation’s Strategic Business Plan 2003-2007 when there was no implementation scheme for the Plan in place;

(d) The Plaintiffs were each one of them unjustifiably defamed in their person, name character and office;

(e) Compensation for loss of earnings as pleaded in paragraphs 35, 36 and 37, 38, 39 and 40 of the Plaint and as to the court shall be just and equitable;

(f) Compensation for termination of services under the retrenchment scheme of the Postal Corporation of Kenya for the Plaintiffs severally as pleaded in paragraph 41 of this amended Plaint;

(g) Without prejudice to the claim for compensation for loss of earnings, damages for wrongful and unlawful termination of their employment;

(h) Damages for defamation;

(i) Injunction to restrain the First Defendant by itself its officers, agents or servants from selling or otherwise disposing of the affected Plaintiffs’ property held by the First Defendant as security for loans advanced to the Plaintiffs affected, the Defendant Postal Corporation of Kenya, having enough funds of the Plaintiffs to cover any attendant liabilities on termination of the any of the Plaintiffs’ services.

(j) Interest on (e), (f) and (g) at court rates or as the court the court may deem appropriate from the date of termination of the Plaintiffs’ services or as the court may determine.-(k) Costs of the suit be awarded to the Plaintiffs.”

4. On 21st October, 2008 the respondents filed an application under **Order XXXV rules 1(a), 2 and 3 and Order XXXIX rules 1 and 2** of the repealed **Civil Procedure Rules** seeking the following orders:

“1. THAT Summary Judgment be entered for the Plaintiffs against the 1st Defendant the Postal Corporation of Kenya in aggregate sum of Kshs.36,560,752.75 with interest as pleaded in paragraph 40 and particularized in paragraph 41 of the Amended Plaint filed and served on 25th July 2008 and prayed for in prayers (e), (f) and (j) of the Amended Plaint.

2. THAT pending the final determination of the suit an interlocutory injunction is issued to restrain the First Defendant by itself, its officers, agents or servants from selling or otherwise disposing of the affected plaintiffs’ property held by the First Defendant as security for loans advanced to the Plaintiffs affected, the Defendant Postal Corporation of Kenya having enough funds of the Plaintiffs to cover any attendant liabilities on termination of any of the Plaintiffs’ services.

3. THAT the remainder of Plaintiffs’ claim in the Amended Plaint proceeds to hearing, determination and assessment of damages.

4. THAT the costs of this application be provided for.”

5. One of the grounds upon which the above application was premised was that the appellants had not filed an amended defence denying the compensation claims as set out in the amended plaint and therefore they had no defence to the claimed sum of **Kshs.36,560,752.75**, which they contended was a liquidated claim.

6. In their respective statements of defence prior to the filing of the amended plaint, the appellants denied the respondents’ claims and stated, *inter alia*, that each of the respondents were given notice on 9th October, 2006 that their services would be terminated upon attaining 50 years and above, to facilitate restructuring of the 1st appellant; that each of the respondents communicated a preference to stay in service up to the age of 55 years; that the 1st appellant had lawful authority to terminate the respondents’ services and it did so legitimately .

7. The appellants further denied all the claims for monetary compensation, arguing that the claims had been improperly and mischievously set out in schedules instead of being in the plaint; and that at the time of termination of their services, some of the respondents owed money to the 1st appellant by way of loans, which they had severally admitted.

8. The appellants’ replying affidavit was sworn by **Hellen Ambasa**, then Acting Corporation Secretary of the 1st appellant. She stated, *inter alia*, that the parties had been pursuing an amicable resolution of the matter; that it was in bad faith for the respondents to seek summary judgment during the pendency of the negotiations; that the respondents were not entitled to summary judgment as the appellants had already

filed a statement of defence on 8th November, 2007 which raised a number of triable issues. A proposed amended defence was also annexed to the replying affidavit.

9. Ms. Ambasa further stated that the sum of Kshs.36,560,752.75 described as an aggregate sum in the respondents' application is neither a debt nor a liquidated demand and therefore the remedy of summary judgment was not available to them. And in addition, the respondents had conceded that they owe the 1st appellant various sums of money.

10. In her ruling, Khaminwa, J. held that:

“The amount [claimed] is ascertained under paragraph 11 of the supporting affidavit and in paragraphs 40 and 41 of the amended plaint as Kshs.36,560,752.75 payable to the 12 plaintiffs/applicants. It is also clear that there is no denial of the said sum by the defendant, in fact the defendant is eager to settle the matter but there is long delay which is causing anxiety to the plaintiffs. In the present case the defendants did not file defence to the amended plaint but they have proceed to file only draft defence. This cannot be considered as it is not filed in court. It cannot therefore be said the defendant has discharged its burden of proof.”

11. The learned judge went on to state:

“In this case the applicants have specified the claim and it does not need investigations beyond mere calculation, a mere matter of arithmetic. It is sworn that the applicants owe money to their employer as a result of the loans advanced to some of them..... On these grounds I allow the application. I order that the Kshs.36,560,752.75 be paid to the applicants forthwith and temporary injunction as prayed is hereby issued against the defendant.”

12. Being aggrieved by the said decision, the appellants preferred an appeal to this Court. In their memorandum of appeal, the appellants argued, *inter alia*, that the Kshs.36,560,752.75 was neither a liquidated/ascertained claim nor a debt and therefore the learned trial judge erred in fact and law in granting summary judgment; that the learned judge misapprehended the principles of amendment of pleadings in holding that there was no denial of, or defences to the respondents' claim; and in holding that the appellants' defence and proposed amended defence and counterclaim did not disclose any triable issues.

13. In his brief submissions before this Court, **Mr. Maweu**, learned counsel for the appellants, argued that in an application for summary judgment, a respondent is required to show by way of a defence, affidavit or otherwise that there is an arguable case; that as long as a respondent can demonstrate existence of *bona fide* triable issues summary judgment cannot issue. He cited this Court's decision in **OSODO v BARCLAYS BANK INTERNATIONAL LIMITED [1981] KLR 30** where it was held that:

“Where there are triable issues in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionally.”

14. Counsel argued that even in the absence of an amended defence, the trial court should have looked at the original statement of defence which raised serious triable issues. The appellants' replying affidavit to which the proposed amended defence and counterclaim was annexed also raised serious triable issues, including the respondents' admission of their indebtedness to the 1st appellant.

15. Secondly, Mr. Maweu submitted that the amount sought by the respondents in their application was not a liquidated claim; it was a claim for loss and damages. Initially the claim was based on unlawful retrenchment but was amended to one for compensation as a result of voluntary early retirement, equating it to benefits that had allegedly been paid to some employees of KCB who had been retired in similar circumstances as the respondents.

16. Counsel submitted that BLACK'S LAW DICTIONARY, ninth edition, defines a liquidated claim as follows:

“1. A claim for an amount previously agreed on by the parties or that can be precisely determined by operation of law or by the terms of the parties? agreement.

2. A claim that has been determined in a judicial proceeding.”

17. Further, counsel cited **CIMBRIA EAST AFRICA LIMITED v KENYA**

POWER & LIGHTING CO. LIMITED [2017] eKLR where Ochieng, J. held:

“A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic. I adopt the following definition of a debt or liquidated demand from THE SUPREME COURT PRACTICE (1985) VOLUME 1, at page 33;

A liquidated demand is in the nature of debt, i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a „debt or liquidated demand? but constitutes „damages?.”

18. Lastly, Mr. Maweu argued that although the respondents' application was filed on 21st October, 2008 before the **Civil Procedure Rules, 2010** came into operation, it was nevertheless argued sometimes in 2012 after commencement of the Civil Procedure Rules, 2010. **Order 54 rule 2** of the 2010 Rules provides that all proceedings that were pending in court at the time of coming into force of the 2010 Rules, the new Rules were to be applied, but without prejudice to the validity of anything previously done; counsel submitted.

19. In that regard, under the 2010 Rules, an application for summary judgment could only be filed where there was no defence at all to a claim; and the trial court erred in applying the repealed Rules by entertaining the application for summary judgment, counsel added. For all the above reasons, we were urged to allow the appeal.

20. **Mr. Mungla**, learned counsel for the respondents, opposed the appeal. He argued that on 24th June, 2008 the appellants were granted fourteen (14) days to file an amended defence to the respondents' amended plaint but they did not do so; that under **Order 2 rule 11** of the **Civil Procedure Rules, 2010**, any allegation of fact made by a party in his pleadings is deemed to be admitted by the opposing party unless it is traversed by that party in his pleadings; and that a general denial is not a sufficient traverse of the allegation.

21. He added that in their filed statements of defence as well as the proposed amended statements of defence, the appellants' denial of the respondents' claim was in general terms and not specific. The learned judge therefore was right in entering summary judgment in favour of the respondents.

22. As regards reliance on the repealed Civil Procedure Rules, counsel submitted that the transitional provisions under **Order 54 rule 2** of the **Civil Procedure Rules, 2010**, as long as there was no prejudice to anything previously done, the trial court was perfectly entitled to rely on the repealed Rules.

23. Mr. Mungla contended that the respondents' claim was a liquidated one; that the 1st appellant had expressly admitted owing the respondents some money but had not stated the exact amount; that in the circumstances the trial court had to accept the figure given by the respondents. Counsel urged the Court to dismiss the appeal.

24. We have carefully considered the record of appeal as well as the arguments advanced by counsel. The determination of this appeal primarily turns on the consideration whether the respondents' claim was a liquidated one or not. Under **order XXXV** of the **repealed Civil Procedure Rules** and **order 36** of the **Civil Procedure Rules, 2010**, a plaintiff can pray for summary judgment if the claim is for a liquidated demand, with or without interest. In the original plaint, the respondents prayed for damages for fraudulent misrepresentation that their services were terminated due to implementation of the 1st appellant's new Management and Regional Structure. They also prayed for "compensation for loss of earnings as pleaded in paragraphs 35, 36 and 37 of the plaint and as to the court shall be just and equitable."

25. In paragraphs 35, 36 and 37 of the plaint, the respondents stated as follows:

"35. The 1st Defendant has revised terms of service to which the Plaintiffs were entitled as of 1st October 2006 and they claim compensation based on the revised terms. The claims details are as in the First Schedule to this Plaint.

36. If the losses are calculated without reference to the revised terms of service the claims details will be as in the Second Schedule to this Plaint.

37. The compensation in damages based on the revised terms of service are as in the Third Schedule to this Plaint."

26. The first, second and third schedules comprised of amounts that had been computed by the respondents as being due and payable to them by the 1st appellant, which were shown in the three schedules as Kshs.3,735,160, 2,523,390 and 41,936,980 respectively.

27. In its statement of defence, the 1st appellant, apart from denying the respondents' claim in its entirety, stated in paragraph 17 as follows:

"17. In answer to paragraphs 22, 34, 35, 36 and 37 of the Plaint, the 1st Defendant pleads as follows:-

(a) The parameters for compensation set out therein are denied and the Plaintiffs are put to strict proof thereof.

(b) The Plaintiffs are not entitled to be paid salaries and other benefits that accrue from active service after they ceased being in service.

(c) The claims for special damages have been improperly and mischievously set out in Schedules instead of being pleaded in the Plaint. The 1st Defendant is unable to plead to claims made in Schedule and is therefore grossly prejudiced by this manner of pleadings.

(d) The pleading of substantial special damages in Schedule rather than in the Plaint was done for the further purpose of avoiding the payment of full Court fees on the claims. The Plaintiffs achieved that aim when the Court fees required of them was assessed at Kshs.11,500/- despite their claims for special damages being set out in the Schedules as Kshs.41,936,980.00 or thereabouts.

(e) The pleading of special damages in Schedules rather than in the Plaint is otherwise an abuse of the process of the Court and

the said Schedules ought to be struck out and/or expunged from the record.”

28. We have already reproduced the contents of paragraphs 40 and 41 of the amended plaint, which show how the respondents, in their own computation, which the appellants did not agree with, arrived at the sum of Kshs.36,560,752.75. The respondents argued that the amount they were suing for was in line with the equitable package recommended for or given to civil servants who had similarly taken voluntary early retirement in 2004, which they also alleged was in line with the package given by the Kenya Commercial Bank (KCB) under its retrenchment programme in 2007.

29. Bearing in mind the true meaning of a liquidated demand as defined in BLACK’S LAW DICTIONARY and the Supreme Court Practice (1985) Volume 1, the respondents’ claim was not for a liquidated sum. The fact that the respondents had, in their own ways, quantified what they believed they were entitled to did not, *ipso facto*, render it a liquidated demand. The claim was speculative in nature and the exact amount payable, if at all, required to be strictly proved. The amount claimed had not been ascertained or agreed upon.

30. The respondents’ contention that the specific amounts claimed under each heading was equivalent to the sums awarded to former civil servants and former employees of KCB who had voluntarily retired was in itself a triable issue since the respondents had to adduce evidence to so prove. In paragraph 41 of the amended plaint the respondents stated that the amount they were claiming was what they deemed as “fair and reasonable retrenchment package such as the one given to Rachel Nduta Kamunyu...” These are issues that required proof.

31. The appellants had filed statements of defence to the original plaint which contained more or less the same amounts of money as claimed in the amended plaint, albeit in schedules that were attached to the plaint. The statements of defence cannot, in our view, be described as sham. It matters not that the appellants had not filed amended defences. The defences on record contained triable issues. In terms of **order 2 rule 12(2)**, there was a joinder of issue on the defences that were on record.

32. In **KENINDIA ASSURANCE CO. LTD. v COMMERCIAL BANK OF AFRICA LIMITED eKLR**, this Court held that summary judgment can only be resorted to in the clearest of the cases. If a respondent shows a *bona fide* triable issue, he must be allowed to defend the suit without conditions. A defence that raises triable issues does not mean a defence that must succeed, it is one that discloses issues that ought to go for trial.

33. In our view, therefore, the learned trial judge erred in holding that the respondents’ claim was a liquidated one and there was no defence to it.

34. Having arrived at that firm finding, we need not consider other issues that were raised by counsel. It would be superfluous to do so, more so and considering that this is a matter that will have to be heard and determined on its merits by the appropriate trial court, unless the parties reach an amicable settlement.

35. In view of the foregoing, we allow the appeal and set aside the ruling and the subsequent decree by the High Court. The appellants are awarded costs of the appeal.

Dated and delivered at Nairobi this 21st Day of September, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR