**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: GITHINJI, KIAGE & M'INOTI, JJ.A.**

**CIVIL APPEAL NO. 245 OF 2005**

**BETWEEN**

**JORAM ACHUKU OYOOO ……..……...……..... APPELLANT**

**AND**

**THE KENYA FISHERIES & RESEARCH INSTITUTE BOARD**

**OF TRUSTEES, KENYA MARINE FISHERIES RESEARCH INSTITUTE …RESPONDENTS**

**(Appeal from the ruling & judgment of the High Court of Kenya at Kisumu (Tanui, J) dated 6th April, 2005**

**in**

**HCCC NO. 252 OF 2002)**

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**JUDGMENT OF THE COURT**

Shorn of all flourish and embellishment, at the heart of this appeal is a simple question: should the appellant's pension have been calculated and paid under the ***Pensions Act, Cap 189 Laws of Kenya*** and the Directorate of Personnel Management (DPM) Circular No. 5 of 11th November, 1992 or should it have been **under the Kenya Marine and Fisheries Research Institute Staff Pension Scheme?**

Upon retirement from the first respondent's employment on 1st August, 1999, the appellant was paid a pension of KShs.294,920/= based on the first respondent's staff pension scheme. The appellant however contends that he was short-changed because his pension should have been based on the provisions of the Pensions Act and the DPM circular, which would have entitled him to a more handsome amount.

On 29th June, 2002, the appellant filed a plaint against the two respondents in the High Court of Kenya,

Kisumu, which was subsequently amended with leave on 11th April, 2003. In the plaint, the appellant averred that on 28th August, 1975, he had entered into a contract of employment with the **East African Marine and Fisheries Research Organization**, one of the institutions of the defunct East Africa Community. His monthly salary was KShs.642.00/= and he was eligible for pension under the Pensions Act, Cap 189 Laws of Kenya.

Upon the break-up of the Community on 1st July, 1977, the plaintiff avers that he was absorbed by the first respondent as a laboratory technician III on his previous terms of service and diligently rendered service until his retirement as a senior laboratory technician on 1st August, 1999. The plaintiff contends that his retirement occurred pursuant to DPM circular No. 5 of 11th November, 1992, which allowed employees in specified job groups to apply for voluntary retirement upon attaining the age of forty years. One of the provisions of the said circular was that an officer who opted for voluntary retirement was entitled to retirement benefits under the Pensions Act.

The plaintiff was paid a pension of KShs.294,920.00/= but he contends that in calculating his retirement benefits, the respondents erred by ignoring the fact that he had worked for 288 months (from 1975 to 1999) and by failing to use the formula provided in the ***Pensions Act***, which would have entitled him to more. He therefore prayed, for among other orders, declarations that he was entitled to retirement benefits from 1975 to 1999, and that his retirement benefits were payable under the Pensions Act and the DPM circular costs, and interest.

By a defence dated 11th September, 2002, and subsequently amended pursuant to leave granted on 8th April, 2003, the defendants denied most of the plaintiff's averments. Regarding the DPM circular, the defendants denied its existence and pleaded in the alternative that if it existed, the plaintiff had been advised by a letter dated 29th March, 1994, that the circular did not apply to employees of State corporations. It was further averred that the appellant was properly paid his benefits in accordance with the first respondent's staff pension scheme.

The dispute was heard by Tanui J who on 6th April, 2005, found that the appellant had not proved his case on a balance of probabilities and dismissed the suit with costs. Dissatisfied with the judgment and decree of the High Court, the appellant now appeals to this court citing the following seven [7] grounds:

1. *The learned trial judge erred in law and in fact in failing to consider that the appellant's pension had been worked out by the respondents' officer, Mr. Nyandoro and the respondents were bound by the same.*

2. *The learned trial judge erred in law and in fact in finding that the appellant was a member of the respondents' pension scheme with Insurance Company of East Africa which pension scheme was effected when the appellant retired.*

3. *The learned trial judge failed to consider that the respondent was under obligation to pay the appellant pension from 1975 to 1980.*

4. *The learned trial judge erred in law and in fact in failing to consider that the appellant retired vide DPM circular of 11th November, 1992 which enjoined the respondent to pay him all his dues.*

5. *The learned trial judge was totally biased against the appellant.*

6. *The learned trial judge did not consider the principle of estoppel or at all.*

7. *The learned trial judge only considered the defence evidence and did not give much weight to the plaintiff's case.*

We remind ourselves of our duty as a first appellate Court which was stated in ***SELLE VS. ASSOCIATED MOTOR BOAT COMPANY LTD, (1968) EA 123, 126 paras H-I*** as follows:

> *"An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."*

The evidence recorded by the learned judge as well as the documentary exhibits produced at trial show that by a letter dated 28th August 1975 (Exh. P-1), the defunct East African Community offered and the appellant accepted employment as a Laboratory Assistant Grade II in the East African Marine Fisheries Research Organization. This was to be in the permanent and pensionable establishment of the Community. The basic monthly salary was KShs.642/-. The letter further provided that the appointment was to pensionable office under the Pensions Act and that the appellant would be eligible for a free pension in accordance with that Act.

Unfortunately this was not to be because after the East Africa Community broke up on 1st July 1977, the Department of Marine Fisheries Research was absorbed into the Ministry of Tourism and Wildlife. By a letter dated 31st October, 1977, the Ministry offered the appellant appointment as a laboratory technician III to the Kenya Government. The letter informed the appellant that he would be absorbed into Kenya Government service with effect from 1st July, 1977 *"subject to the terms and conditions of service detailed below"*.

Clause 5 provided as follows:

> *"Your appointment is to a pensionable office and if you have already been confirmed and admitted to the permanent and pensionable establishment, you will, on absorption into the Kenya Government Service retain your eligibility for a pension or other retiring benefits in accordance with the provisions of the Kenya Pensions Act, (Cap 189)."*

Up to that point, there was no doubt that had the appellant continued as an employee of the Ministry of Tourism and Wildlife, his employment would have continued as before and he would have been entitled to pension and other retirement benefits under the Pensions Act.

However, the appellant did not work and retire under those terms and as an employee of the Ministry of Tourism and Wildlife, for upon the establishment of the Kenya Marine & Fisheries Research Institute as a distinct statutory body from the Ministry, on 10th October, 1980, the Institute in writing offered him appointment with ***effect from 1st July 1980*** as a laboratory technical III "***subject to the terms and conditions of service detailed below".*** Clause 5 of the said letter of offer provided as follows:

> *"Your appointment is to a permanent / temporary office and if you have already been confirmed and admitted to the permanent and pensionable establishment, you will, on absorption into the Institute's service retain your eligibility for a pensionable or agreed retiring benefits in accordance with the regulation and provision as stipulated by the Board of Management."*

The salient features of this letter include the fact that, unlike the offer from the Ministry, the offer from the Institute did not make any reference to pension and retirement benefits under the Pensions Act. Instead, the appellant's pension and retirement benefits, if he accepted the offer, were to be in accordance with regulations and provision as stipulated by the Board of Management. Moreover, the offer to the appellant was not backdated to August 1975 when he joined the Community, but was effective from 1st July, 1980.

Clause 8 of the letter further provided:

> *"If you wish to accept the offer of appointment at the terms and conditions set out above, you are required to signify your acceptance by not later than 1st November, 1980, failing which it will be assumed that you do not wish to be appointed to the Institute's Service, in which case you are to inform the parent Ministry accordingly".*

By a letter dated 1st November, 1980 the appellant accepted the appointment and pledged to *"abide with the regulations and conditions of the Institute's service".*

As of that date therefore, it was clear that the appellant had taken up employment with the first respondent with effect from 1st July, 1980, and that his pension and retirement benefits would be determined in accordance with the first respondent's regulation and provision as determined by its Board of Management.

It is common ground that part of the regulation and provision that was referred to in the letter of offer of employment to the appellant was the Kenya Marine and Fisheries Research Institute Terms and Conditions of Service for Employees and the Rules of the Kenya Marine and Fisheries Research Institute Staff Retirement Benefits Scheme made thereunder. This clear and straightforward agreement between the appellant and the first respondent was subsequently obfuscated and confused by the parties themselves for reasons that are not obvious.

On 7th January, 1993, the first respondent wrote a notice (Exh. P-4(A) and (B)) to all its members of staff in the following terms:

> *"RE: NEW CONDITIONS OF SERVICE RETIREMENT OF OFFICERS ON JOB GROUP "H" OR R1. 10 AND ABOVE ON ATTAINMENT OF FORTY (40) YEARS OF AGE.*
>
> *This is to hereby bring to your attention and general information the contents of a Circular letter from Permanent Secretary/Director, Directorate of Personnel Management ref. No. 5 of 11th November, 1992, which is self explanatory. The same is applicable to the Staff of this Institute."*

The relevant part of Circular No. 5 of 1992 provided:

> *"An officer on attaining the age forty (40) years may apply to retire voluntarily any time thereafter. The retirement of officers under this rule is optional and subject to approval by the Government, which reserves the right to accept or reject such applications…*
>
> *All officers who retire under this arrangement will be eligible to receive retirement benefits in accordance with the provisions of the Pensions Act (Cap 189)."*

On 25th January, 1994, the appellant wrote to the fist respondent stating that he had attained the age of 40 and wished to opt for the voluntary early retirement scheme. He requested to be furnished with detailed information on the early retirement scheme.

On 7th February, 1994, the first respondent wrote to the appellant and advised him that the scheme of voluntary early retirement **was only applicable to civil servants and not to employees of parastatals.** It was also the evidence of DW2 Emmy Chemngeno Koskei, an administrative secretary with the first respondent, that after Circular No 5, the first respondent inquired whether its staff was eligible but was advised that the circular applied only to mainstream civil servants and a circular to that effect was issued to all the staff of the first respondent at the various stations.

On 30th June, 1997, the appellant made another written inquiry about the early retirement scheme based

on the DPM Circular (Exh. P-5) and on 1st August, 1997, the first respondent replied to the said letter and stated:

> *"You are hereby informed that retirement based on DPM Circular No. 5 of 11th November, 1992 is applicable to the Institute staff as communicated vide institute circular Ref. No. KMF/AD/9 Vol. II/147 of 7th January, 1993. Note that as per the circular you do not meet the minimum requirements to retire under forty year rule specifically because you were serving below JG "H" prior to your appointment by the Institute though presently you are above JG 'H' as per current scheme of service"*.

Thus, whilst the first respondent had previously taken the position that DPM Circular No. 5 did not apply to its employees, in this letter the appellant was advised otherwise, but was still informed that he did not qualify for early retirement under the Circular because he was serving below job group "H" prior to his appointment by the appellant.

Barely one year later, on 1st July 1998, the appellant wrote once again to the first respondent and informed it that he was opting for voluntary retirement. He gave several grounds to justify the voluntary retirement, one of which was that he had attained over 40 years and that he now met the requirements of the DPM Circular. He concluded by indicating that he wished to retire from public service within the next one year.

If what was stated in the first respondent's letter of 1st August, 1997, still held good, that is, that the appellant did not qualify for early retirement under the Circular because he was serving below job group "H" prior to his appointment by the appellant, there was no way the appellant could have suddenly met the requirements of the circular as stated in his letter of 1st July, 1998. In any event, according to the evidence of DW 2 , by the time the appellant wrote his letter of 1st July, 1998, DPM Circular No 5 of 1992 was no longer in operation.

Be that as it may, the first respondent replied on 22nd July 1998 and advised that the appellant's request for voluntary retirement had been accepted with effect from 1st July, 1998 and that his service would cease on 31st July, 1999. Regarding his benefits, the first respondent stated that:

> *"Meanwhile the office is working out your benefits according to KMFRI pension scheme which is in effect."*

Although the appellant contends that the effect of this letter and subsequent correspondence from the first respondent was to accept his retirement and pension under the DPM Circular and the Pensions Act, the letter of 22nd July, 1998, was very clear that the appellant's benefits were to be calculated in accordance with the first respondent's pension scheme.

On 16th August, 1999 the first respondent issued a *'To whom it may Concern"* letter whose reference was *"Retirement of Mr. Joram Achuku"* which stated:

> *"This is to confirm that Mr. Joram Achuku who has been an employee of Kenya Marine and Fisheries Research Institute stationed at Kisumu Research Centre on the basis of voluntary 40 years retirement rule, has opted to retire w.e.f. 1st August, 1999.*
>
> *The institute is in the process of preparing his final benefits and will be released as soon as they are disbursed from the fund manager. Any assistance accorded to him will be highly appreciated."*

This was soon followed on 26th August, 1999 by a Certificate of Service which stated:

> *"The above referenced officer (the appellant) was absorbed in the Institute service as a*

*laboratory technician III from the 1st July, 1977 at the break-up of the East African Community.*

*The officer has served the Institute honestly and diligently in various capacities and has opted to retire voluntarily on the basis of 40 years retirement rule w.e.f. 1/8/99. He retires as a senior laboratory technician.*

*We take this opportunity to wish Mr. Achuku an enjoyable time in his future endeavours."*

The question to ask regarding these two documents which were produced as exhibits is whether the voluntary retirement referred to therein could have been under the DPM circular. Neither of the letters referred to the DPM circular directly, which in any event had ceased to apply by the date of the appellant's application for retirement. This left the possibility that there was a glaring error or mistake in the letters and the learned judge found as such. The evidence of DW2 was that the letters were misleading.

Certainly the letter of 26th August, 1999, was incorrect in one major respect: the appellant was not absorbed in the Institute's service since 1st July, 1977 because the Institute did not exist as of that date. In any event, the appellant's letter of offer of employment with the Institute stated in no uncertain terms that his employment was with effect from 1st July, 1980.

The other piece of evidence on which the appellant hinged his claim that he had been underpaid was because an officer of the first respondent, a Mr. Nicodemus S. Nyandoro had worked out the plaintiff's benefits and had indicated the same to be KShs.727,268.70/=. The evidence of DW2 again was that the benefits of retiring members of staff were calculated by the Insurance Company of East Africa who were the administrators and underwriters of the first respondent's retirement scheme and that Mr. Nyandoro's calculations could not be accurate. This evidence was confirmed by DW4, Anne Sitima, an insurance officer with the Insurance Company of East Africa.

Having reconsidered and re-evaluated the evidence we now turn to consider the appellant's grounds of appeal.

The first ground complains that the trial judge erred in law and in fact in failing to consider that the appellant's pension had been worked out by the respondents' officer, Mr. Nyandoro and the respondents were bound by the same. We have noted that the evidence of DW2 and DW4 showed that it was the Insurance Company of East Africa, as the firm responsible for the administration and underwriting of the first respondent's retirement scheme which was supposed to calculate the appellant's benefits and not Mr. Nyandoro. It is therefore not surprising that the first respondent did not consider itself bound by Mr. Nyandoro's calculations, which even the first appellant does not entirely agree with in view of his claim for KShs.1,814,679.80/= as opposed to Mr. Nyandoro's figure of KShs.727,268.70/=. From the evidence, we do not see any merit in this ground of appeal.

The second ground of appeal faults the learned trial judge for holding that the appellant was a member of the respondents' pension scheme. The short answer to this ground is that the learned judge correctly found as such on the basis of the evidence adduced. The first respondent's offer of employment dated 10th October, 1980, which the appellant accepted in writing on 1st November, 1980, provided that the appellant would retain his eligibility for pensionable or agreed retiring benefits in accordance with the regulation and provision as stipulated by the Board of Management. The retirement scheme was provided for under the first respondent's terms and conditions of service and its ***Staff Retirement Benefits Scheme Rules***. We do not find any merit in this ground either.

The third ground of appeal faults the learned judge for failing to consider that the first respondent was under obligation to pay the appellant pension from 1975 to 1980. Again, in light of the evidence adduced, the learned judge could not have come to such a finding. The letter of offer of employment was unequivocal that the appellant's employment with the first respondent was *"with effect from 1st July,*

*1980"*. The appellant's attempt to backdate his employment with the first appellant to a date when the first respondent did not exist in law and contrary to the express terms of the letter of his appointment is, to say the least, a novel proposition. This ground too has no merit.

The fourth ground of appeal is a complaint that the learned trial judge erred in law and in fact in failing to consider that the appellant retired vide DPM circular of 11th November, 1992, which enjoined the respondent to pay him all his dues. Again, the learned trial judge was entitled to find as he did that the appellant did not prove his claim on a balance of probabilities. There were at least two letters addressed to the appellant advising him that the circular did not apply to him or that he did not qualify under it. There was also a circular to all employees of the first respondent advising that the DPM circular did not apply to employees of parastatals but only to mainstream civil servants. The evidence of DW2 was that in any event, by the time the appellant was applying for retirement that DPM circular had become inoperative. The appellant hinges his claim on correspondence that the respondent's witnesses testified was erroneous and mistaken, two of which were written after the appellant's retirement, and which therefore could not have served to induce his pre-retirement decision. The letter dated 22nd July, 1998, accepting the appellant's retirement did not refer to the DPM circular at all, and any lingering doubts the appellant may have had about the terms under which he was retiring should have been set to rest by the statement in that letter that:

> *"Meanwhile the office is working out your benefits according to KMFRI pension scheme which is in effect".*

We find that from the evidence, the learned trial judge did not err in finding that the appellant did not retire under the DPM circular and that this ground of appeal too has no merit.

The fifth and seventh grounds can conveniently be addressed together. Ground five charges that the learned trial judge was totally biased against the appellant and ground seven that he only considered the defence evidence and did not give much weight to the plaintiff's case. Upon re-evaluating the evidence on record, we find the charge of bias to be unfair and without basis. The learned judge carefully weighed the appellant's evidence against that of the respondents. Of course the learned judge devoted longer space in the judgement analyzing the respondents' case as compared to that of the appellant. But rather than establishing bias, this fact could be easily explained by the fact that the appellant was the only witness for his case while the respondents called four witnesses whose evidence the learned judge carefully evaluated in turn. There was considerable documentary evidence which was produced and which we have re-evaluated above. We do not see how the leaned judge could be accused of bias or how he could possibly have come to a different conclusion in light of that evidence. If, in addition, we bear in mind the fact that the learned judge saw and heard the witnesses, we cannot reach the conclusion we are being invited to reach by the appellant. Accordingly, we do not find any merit in these two grounds either.

The last ground of appeal, ground 6 faults the learned judge for not considering the principle of estoppel. The appellant contended that under ***S. 120 of the Evidence Act, cap 80 Laws of Kenya***, the respondents were estopped from contending that the appellant did not retire under the DPM circular. ***S. 120 of the Evidence Act*** provides as follows:

> *"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".*

It has been stated that estoppel is not a cause of action but a rule of evidence. The authors of ***Odgers on Pleadings and Practice, 20th Edn, (1971)*** state as follows on estoppel:

> *"An estoppel must always be specially pleaded, unless it appears on the face of the adverse pleading, when it is ground for an objection in point of law; or unless there was no opportunity to plead it, as there was not in Coppinger V. Norton (1920) 2 Ir. R. 241…A plea of estoppel must always be drafted with great care and particularity. It must state in*

*full detail the facts on which the party pleading relies as constituting the estoppel, and should also specify the allegations which it is contended the other party is precluded from proving."*

The appellant did not specially plead the facts alleged to constitute the estoppel. But even if we considered ***S. 120 of the Evidence Act***, we are not able to stay, on the evidence, that the respondents intentionally caused the appellant to believe he was entitled to retire under the DPM circular and on the basis of that representation the appellant acted to his prejudice. We have already noted that the appellant was expressly advised that the circular did not apply to him. The letter that accepted his retirement expressly told him that ***"meanwhile the office is working out your benefits according to KMFRI pension scheme which is in effect".*** The letter did not tell him that his benefits were as per the circular. The other two letters which the appellant relies upon came after his retirement and cannot, by any stretch of imagination be said to have induced his decision to retire. In any event, we have noted that the statements in those letters pertaining to the appellant's retirement were written by mistake, rather than intentionally.

We are satisfied that the parties never had any illusions about their respective legal relations and obligations. In the run up to the appellant's retirement, the respondents did commit a lapse or two in its communication with the appellant. The appellant was nevertheless aware of the true position and we find that he is belatedly trying to capitalize and take advantage of those lapses. There is nothing on record to indicate an intention on the part of the parties to alter the terms and conditions of the appellant's employment.

The upshot is that we find no merit in this appeal and the same is dismissed with costs to the respondents.

**Dated and delivered at Kisumu this 24th day of May, 2013.**

E. M. GITHINJI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR