REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL 198 OF 2004

WILLIAM BARASA OBUTITI …………………………......…. APPELLANT

AND

MUMIAS SUGAR COMPANY LIMITED…..........…………… RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Bungoma (Sergon, J) dated 18th June, 2004

in

H.C.C.C. NO. 169 of 2001)

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JUDGMENT OF THE COURT

The dispute the genesis of the appeal before us arises in this way. ***Mumias Sugar Company Limited***, the respondent in the appeal and the defendant in the suit before the superior court, is a sugar processing and manufacturing concern based in Mumias within the Western Province of Kenya. In or about early, ***1997*** it mooted a scheme the purport of which was to reduce staff through what it called a Voluntary Early Retirement Scheme – **VERS**. By a notice dated *17th February, 1997* the respondent informed its employees of the **VERS** package which offered any one of them who wished to retire under the scheme a lump sum calculated as follows:

*"**A.***

(i) ***3 months basic salary for each year of service***

(ii) ***3 months basic salary in lieu of notice***

(iii) ***6 months housing allowance paid at relevant grade***

(iv) ***Golden handshake of 75,000/- for unionisable employees and Kshs.150,000/- for non unionisable employees***

(v) ***Leave balance upto the date of release***

(vi) ***24 days pay for each year worked for unionisable staff as provided for under C.B.A.***

(vii) Pension dues as per the pension scheme

(viii) N.S.S.F. dues

B.

Any one who was of 53 years and above would be paid according to the provisions of (i) and (iii) above as outlined in clause A."

As the scheme appeared very attractive, over ***2000 employees*** opted for it and expressed desire to retire on the scheme. After a thorough vetting a total of ***1041 employees*** were eventually selected and seminars and workshops were organised in order to prepare them for retirement. It is also apparent from the evidence on record that emanating from the sensitization programme possible risks and disadvantages of the scheme were highlighted for the benefit of those employees who had expressed interest in the scheme. Consequently, a good number of employees opted out of the scheme and were re-engaged by the respondent. However, the appellant who had earlier been captivated by the scheme soldiered on and fully fell for it.

The appellant, ***William Barasa Obutiti***, was employed as a tractor driver on *3rd November, 1979*. His starting salary at Grade 5 was Kshs.3,000/= per month. He had served for about 20 years when the scheme was floated. He studied the scheme and he found the package good. He opted for early retirement on *19th November, 1999* at Grade UG 9 with a salary of Kshs.9,776/= per month. The appellant testified that he was under the impression that his dues would be pegged on the salary scale obtaining as in November, 1999 which would have entitled him to a total retirement package of Kshs.881,987/=. To his surprise and disappointment he received only Khs.644,442/= which was based on the 1997 salary scale. He contended that the computation and the calculation of his entitlements under the scheme were wrong; and indeed, contrary to the spirit and terms of the whole retirement scheme. He averred that he had been underpaid and had suffered great loss and damage.

It was in these circumstances that the appellant brought a suit at the High Court of Kenya at Bungoma for a declaration that **VERS** package be premised on the basic salary scales and grades obtaining as at *19th November, 1999* and in terms of the Collective Bargaining Agreement for the period *1st April, 1999* up to *30th April, 2001*.

In a terse statement of defence the respondent averred that the **VERS** package was to be calculated from the salary and wages obtaining as at *30th April, 1999* and that this information was expressly communicated to all employees of the respondent, including the appellant, who had intimated his desire to submit to **VERS.** The respondent further denied that it had negated the spirit and terms of the retirement package by applying the previous basic salary as opposed to the prevailing salary as in *1999*. It also denied that **VERS** was premised on the payment formula tendered in the trial court by the appellant as *Exhibit No. 1.*

Before trial each of the parties filed separate issues. However, the learned trial Judge (Sergon, J) identified three issues for his decision.

These were:-

(i) Whether VERS was based on the Collective Bargaining Agreement for the period between 1st May, 1999 and 30th April, 2001 or the appellant's production incentive allowance.

(ii) Whether VERS was voluntary or not.

(iii) Whether the scheme was unfair, prejudicial and irregular for the respondent to calculate the appellant's entitlements based on the salary scales obtaining on 30th April, 1999, the last operative date of the previous collective Bargaining Agreement instead of the then Collective Bargaining Agreement

of 1st May, 1999 upto 30th April, 2001.

The learned Judge answered the issues thus:-

(i) VERS was a separate scheme which covered both unionisable and non-unionisable employees. It was not envisaged to fall under the Collective Bargaining Agreement terms nor was it negotiated under it. It was based on the respondent's production incentive allowance.

(ii) VERS was widely publicized. The terms were explicit and clear to the parties. It was on the basis of "take it or leave it." It was not negotiable nor was it compulsory. The terms were purely on a voluntary basis

(iii) VERS was not prejudicial. The volunteers were given a warning, trained and advised on the pros and cons of the scheme. The appellant took up the package voluntarily fully aware of its conditions. He was not tricked.

The learned Judge then dismissed the suit and the appellant being aggrieved by the decision has preferred this appeal.

It is trite that an appeal to this Court from a trial by the High Court is by way of retrial. 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 witnesses and should make due allowance in this respect. See **SELLE AND ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD. & OTHERS [1968] EA 123**. Also, 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 demeanour of a witness is inconsistent with the evidence in the case generally (**ABDUL HAMEED SAIF VS. ALI MOHAMED SHOLAN (1955), 22 E.A.C.A. 270**). Again, in **PETERS VS. SUNDAY POST LTD [1958] EA 424**, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p 429:-

"***It is a strong thing for an appellate Court to differ from the finding, on question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.***

But the jurisdiction "(to review the evidence) should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

It must follow therefore that only when the finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did, will this Court interfere with it – see **EPHANTUS MWANGI & ANOTHER VS. WAMBUGU (1983\84) 2 KCA 100** at page 118.

Mr. Menezes for the appellant submitted that the learned trial Judge erred in failing to find that it was unlawful and against established principles of law for the respondent to pay the retirement benefits of the respondent based on the previous and not current salary of the appellant at the time of retirement i.e. *19th November, 1999* and that the respondent was under an obligation to pay the appellant in accordance with the terms floated on *31st May, 1999* and published to the appellant through a general announcement. The main thrust of Mr. Menezes' submissions was that the learned Judge misinterpreted the terms of **VERS.**

With great respect to Mr. Menezes and despite his forceful and persuasive submissions, we think that he has been unable to show "*the established principles of law*" which the respondent allegedly blatantly breached in paying the appellant's retirement benefits. It is manifestly clear from the general announcements issued by the respondent on *31st January, 1997 and 20th February, 1997* that **VERS** originated solely from the respondent and that its purpose was to reduce the number of its employees.

It is apparent that having established the decision to reduce the number of employees, the respondent had then to determine the effective salary. We have been unable to find evidence that the **VERS** package was to be calculated on the salary appertaining as on *19th November, 1999*.

We find, also, that there is no evidence at all that **VERS** was a negotiated scheme by the respondent with the Kenya Union of Sugar Plantation Workers or with Sugar Employers Group of the Federation of Kenya Employers or with COTU (K) or indeed with any other body or persons. Further, the appellant has failed to show that **VERS** was underpinned on the collective Bargaining Agreement (CBA). A detailed examination of the **VERS** and the CBA reveals three glaring differences. First, there is no uniformity between the two schemes on the severance and redundancy pay package, especially on the years of service; secondly, the **VERS** package was better and far above the CBA redundancy terms; and thirdly, the production incentive allowance was not part of the **VERS** but of the CBA. In our view, therefore, we are unable to find that the learned Judge had wrongly interpreted the pertinent terms of the **VERS** and the CBA and we dismiss the submissions thereto.

It is also contended by Mr. Menezes that it was wrong for the learned Judge not to find that it was wrong for the appellant to have used the salary of Shs.7,167/= being the 1997 salary instead of Shs.9,776/= the salary as at the time of retirement as the rate of calculation for the **VERS** package. By a document dated 31st March, 2000, the respondent appears to have made it clear on what terms **VERS** package would carry. The document stated:-

"***VERS PARAMETERS - 31st March 2000***

1. Age: VERS shall calculate age of applicants from date of birth closing date of applications which was 19.10.1999

2. Years of Service: VERS shall use 24 days per year of service.

3. Leave pay: VERS shall use current salary to calculate leave pay due to eligible applicants.

4. Basic salary: VERS shall use basic salary as at 30.04.1999

5. Notice: VERS shall use current salary to calculate pay in lieu of notice."

As to the above document, William Njibwakale (DW1), the respondent's Recruitment Officer, testified that the information contained in the document was communicated to all employees through Memos and Heads of Departments. Further, seminars and sensitization workshops were organized on **VERS** and the document was the basis for the calculation of the final package. It would appear that it was only after this vigorous sensitisation that workers were required to indicate their acceptance of the scheme. In our view, the appellant made an absolute and unqualified acceptance of all the terms of the **VERS** and he cannot now renege on them. There is no justification therefore to fault the learned Judge for having adopted the date for the material salary to be *30th April, 1999*. In the circumstances, the appellant having opted for the **VERS** he cannot resist its terms and it was incumbent upon the respondent to affirm the contract and compel all the employees who chose to retire under the package to submit to it as agreed.

Mr. Menezes also submits that the appellant was under a genuine mistake as to the details of the **VERS** package. With respect this submission is misconceived. The appellant has not shown that he belaboured under any mistake in accepting the scheme. Moreover, it has not been shown that the mistake, if any, was of both the parties, i.e. mutual and not unilateral; and secondly, that the mistake was about a fact essential to the **VERS** package and not about one which is subsidiary to it. Could the alleged mistake, if it existed be a basis to rescind the scheme? We do not think so.

In **BELL VS. LEVER BROTHERS (1932) A.C. 161, Lever Brothers** sought to set aside an agreement under which they had paid large sums of money to the defendants to induce them to retire from the Board of Directors of a certain company. The plaintiffs subsequently discovered that the defendants had been

guilty of several breaches of duty for which they could have been similarly dismissed from the Board, without need of paying any compensation. No concealment by the defendants was proved. The House of Lords held that there was no mistake as to any essential term of the agreement and the agreement could not, therefore, be set aside. Similarly, we too, do not discern any mistake as to any essential term of the scheme and therefore there are no grounds for ditching the **VERS.**

It was submitted before the superior court and repeated before us that the entire scheme was prejudicial, unfair and irregular. We would agree with Mr. Menezes that where such a scheme like the **VERS** is designed to benefit employees who opt for an early retirement it should be strictly enforced to achieve its objective. The difficulty here, however, is that there is no statutory provision to enforce it and non – observance of all formalities could not render the package illegal. We find that we are unable to say that the scheme was in any way prejudicial, unfair or irregular.

It has also been suggested in the submission of counsel for the appellant that the respondent was in a position to dominate the will of the appellant in the **VERS** by the reason of the fact that it was his employer and could force the scheme on the appellant and other employees. This assertion is unfounded and we reject it. Firstly, a defence of undue influence was not raised in the superior court; and secondly, undue influence only arises in contracts where one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage. No evidence has been tendered to show that the respondent coerced the appellant to accept the scheme or that the respondent had obtained any benefit or unfair advantage over the appellant.

We would also disagree with Mr. Menezes in his submission that **VERS** was irregular in any manner. It is open to an employer and employee at any time during the currency of a contract of employment to terminate the contract by agreement. The agreement of mutual release may be subject to terms as in the **VERS.** In such circumstances, the agreement will be effective to override formal or substantial restrictions placed on the termination of the contract by the original contract itself. See **LATCHFORD PREMIER CINEMA LTD VS. ENNION & PATERSON [1931] 2 Ch.409**.

We think that there is nothing irregular or contrary to public policy in the **VERS** mooted by the respondent. We take judicial notice of the fact that it is in the best interest of the entire country, including the appellant and all others, past and present employees, to sustain the respondent company for the sake of the country's economy rather than smothering it with constant demands of unsubstantiated claims and payments. The **VERS** package, we would think, was for the benefit of those employees who opted for it and the success of the scheme was also meant to sustain the respondent. There is nothing wrong with the scheme, it is legal and certainly not irregular.

From the grounds of appeal we have considered, we are satisfied that the entire appeal is without merit.

We need not consider the other grounds of appeal enumerated by the appellant since they are immaterial to the eventual decision which we have reached. In our view, the learned Judge came to the correct decision in all the issues laid before him and there are no grounds to fault him.

In the result, this appeal is hereby dismissed in its entirety. The respondent shall have the costs of the appeal.

Dated and delivered at Kisumu this 1st day of December, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR