



**Kavilu v CFC – Stanbic Bank Kenya Limited (Cause 2003 of 2015)
[2024] KEELRC 512 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 512 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2003 OF 2015
B ONGAYA, J
MARCH 7, 2024**

BETWEEN

JIMMY R KAVILU CLAIMANT

AND

CFC – STANBIC BANK KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated 19.11.2021 through Oloo & Oloo Advocates LLP. The claimant prayed for judgment against the respondent for:
 - a. Payment of Kshs. 32, 595, 452.00 as particularised in paragraphs 6 and 7.
 - b. Damages for breach of contract.
 - c. Costs of the suit.
 - d. Interest on (a) and (b) at commercial rate of 20% per annum until payment in full.
 - e. Certificate of urgency.
 - f. Any other and further relief the Honourable Court deem fit to grant.

2. The claimant has pleaded that he worked as employed by the respondent for 25 years and eight months until retirement under an early retirement scheme on 31.03.2000. The claimant states that he gave a six months’ notice for his early retirement and which was accepted by the respondent. The claimant’s case is that in total breach of the contract of service, the respondent treated the retirement notice as a pre-retirement leave and in breach of the contract of service dated 03.06.1974. the particulars of breach are pleaded as follows:
 - a. Terming the six months’ notice period upon request for early retirement as a pre-retirement leave.



- b. Failing to pay the claimant the leave allowance.
 - c. Failing to pay the terminal benefits and dues in accordance with the claimant's contract and prevailing terms and conditions of service applicable to the claimant as a Senior Manager
3. The claimant alleged that by reason of the breach of contract there was an underpayment and he suffered and continues to suffer substantial financial loss and he claimed special damages as follows:
 - a. Loss of unpaid salary from 01.04.2000 to 12.01.2003 Kshs. 13, 940, 084.00.
 - b. Loss of use of bank maintained motor vehicle from 01.04.2000 to 12.01.2003 Kshs.4, 340, and 990.00.
 - c. Loss of medical allowance for period 01.01.2000 to 12.01.2003 Kshs. 1, 313, 150.00.
 - d. Loss of club membership 01.01.2000 to 31.12.2002 Kshs. 270,000.00.
 - e. Loss of 116 leave days not purchased from 1999 to 2003 at Kshs.13, 232.70 per day Kshs. 1, 534, and 999.00.
 - f. Total special damages Kshs. 21, 399, 223.00.
4. The claimant pleaded that because of failure to pay per the contract of employment dated 03.06.1975 he was forced to sale his house on L.R No. 69/280, Ngei Estate Phase 1 to redeem his loan with the Bank. He alleges that he thereby suffered special loss being loss of expected income on L.R No. 60/ 289 Ngei Estate Phase 1 being difference between expected rental income between 01.07.2002 to 31.12.2026 and proceeds from sale of the house Kshs. 11, 196, 229.00 plus costs incurred in the sale of the house Kshs. 40, 000.00 making a total of Kshs. 11, 236, 229.00.
5. The respondent's memorandum of response was dated 27.06.2023 filed through M/S Oraro & Company Advocates and learned counsel Ms. Sandra Kavachi appeared in that behalf. The respondent denied the claimant's claims and contended that even if the claimant was sent on pre-retirement leave the same did not in any way contravene the claimant's contract of employment neither was there any negligence on the respondent's part nor breach of the contract of service. The respondent pleaded that upon termination the claimant was paid all benefits and the claim in the sum of Kshs. 21, 399, 223.00 or any part thereof as claimed is not owed at all. The amount claimed is as well statute barred under section 90 of the Employment Act, 2007 and not actionable in law. The respondent denied knowledge of the rest of the special damages claimed for the claimant, as the claims relating sale of the house were remote, not part of the contract of employment, and not recoverable in the circumstances.
6. The respondent prayed that the claim dated 19.11.2021 and the reliefs sought therein be dismissed with costs.
7. The claimant testified to support his case and the respondent's witness was Winfred Kyalo, the Employee Relations and Culture Manager (RW). Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
8. To answer the 1st issue for determination, the Court returns that per mutual evidence and pleadings the respondent employed the claimant as a Management Trainee effective 03.06.1974 and subsequently the claimant was confirmed on permanent and pensionable service in the executive grade effective 10.02.1975. The contract of employment dated 03.06.1974 provided for salary, grade as well as termination.



9. To answer the 2nd issue for determination, the court finds that parties separated by agreement. On 08.09.99, the claimant wrote a letter addressed to the respondent's Managing Director and titled "Early Retirement" stating, "I refer to our discussion and hereby request the Bank to agree that I proceed on early retirement effective 1st February 2000." The respondent replied by letter dated 09.09.1999 stating that the Bank was agreeable to the request with effect from 01.04.2000. Further, in view of the claimant's long service the Bank had exceptionally agreed to the following:
- a. Between 09.09.1999 to 30.09.1999, the claimant was to ensure a smooth handover to the staff nominated by the Bank for that purpose.
 - b. The claimant to avail himself of six months' pre-retirement leave effective 01.10.1999 to 30.03.2000 with full entitlements under existing terms and conditions of service including specifically the medical allowance for yourself and family and the use of the allocated Bank vehicle.
 - c. On 01.04.2000 the claimant to receive a gratuity of one year's gross emoluments and after 01.04.2000 the claimant to be eligible to apply to the Trustees of Stanbic Bank Kenya Limited Staff Pension and Life Assurance Scheme for payment of the pension with immediate effect.
 - d. Subject to acceptable independent valuation, the claimant to purchase from the Bank the allocated vehicle registration No. KAG 162G.
 - e. The Bank agreed to continue until 31.03.2001 the existing concessionary staff terms on the claimant's loans then outstanding at Kshs. 3, 009, 621.63 and, " On or before that date, alternative arrangements acceptable to the Bank should be made, failing which commercial terms will apply."
 - f. During the six months' pre-retirement leave, the claimant to maintain usual commitment to the Bank and thereafter, the Bank was at liberty to introduce to the claimant business consultancy opportunities, which may arise.
 - g. The letter concluded as follows, "Please sign and return to us a copy of this letter indicating your acknowledgement of these terms. Your signature will also indicate that you will have no further claims of any sort against the Bank, save as detailed above. Finally, we also take this opportunity to thank you for your support and commitment to the Bank over the last 25 years of dedicated service."
10. The claimant signed on a crossed 09.09.1999 or 13.09.1999 as endorsed thus, "Agreed and thanks."
11. By circular No. 14/99 signed by P.J.W Lewis –Jones, Managing Director and dated 09.09.1999, all staff were notified about the claimant's request to retire early and the Bank's agreement to the request and that the claimant starts a pre-retirement leave on 30.09.1999.
12. The Court returns that the contract of service ended by the mutual termination agreement contained in the respondent's letter dated 09.09.1999 and which both parties mutually agreed to sign as constituting the terms and conditions of the separation.
13. The 3rd issue is whether the claimant is entitled to any of the remedies as claimed or prayed for. The Court returns as follows. As submitted for the respondent the parties negotiated and concluded a separation agreement. The claimant has not shown that the alleged breach of contract related to the terms and conditions of that mutually agreed separation agreement on terms and conditions of the claimant's early retirement. The Court finds that the parties are bound by the early retirement agreement with exceptional terms and conditions in that regard. The claim of Kshs. 21, 399, 223.00 in



paragraph 7 of the memorandum of claim is found unjustified and the claim of Kshs. 21, 399, 223.00 in that regard declined. The claim of Kshs. 11, 236, 229.00 in paragraph 8 of the memorandum of claim is equally found strange and remote to the contract of service or the early retirement agreement. The submission for the respondent in that regard is upheld. The claimant testified that he had his own expectations on terms of early retirement including payment for gratuity for each year served. He also confirmed that he signed the Bank's letter dated 09.09.1999 enumerating the terms of the early retirement. He testified in cross-examination that he realised he had been short changed and further, "After letter of 09.09.1999 I did not write to object. Bank wrote 01.09.1999. I replied 03.09.1999. 5 days lapsed. 08.09.1999 there was Board meeting. Board asked I confirm my early retirement. Without permission, I could not retire. Bank's letter 09.09.1999 was the permission. I see page C-1062. I WROTE "Agreed and Thanks" and signed on 09.09.1999 crossed then 13.09.1999. I accepted on 09.09.1999. It is not 13.09.1999. Board met 08.09.1999. It was too late to protest." The claimant confirmed that he was Deputy CEO and at that level, all staff had to be informed of his leaving. The Court has considered the claimant's testimony and nothing makes him absolved from the mutual agreement on early retirement and the agreed terms and conditions of the early retirement. The claimant's case is that he should not be so bound, but that, the Court should implement his unilateral and desired more favourable terms and conditions of the early retirement outside those that were mutually agreed upon by the parties, in the separation agreement. It should be obvious that the claimant's case is a mere afterthought as he has established nothing that stopped him from negotiating those terms and nothing compelling him to accept the terms and conditions in the letter of 09.09.1999 which he voluntarily signed.

14. The Court has considered the confirmation letter of February 1975 that either party could terminate the contract of service by giving six months' notice or six months' salary in lieu of notice. The Court has found that the parties, despite that provision, agreed to the terms and conditions of early retirement per letter of 09.09.1999. In any event, it is misconceived for the claimant to claim the six months' salaries whereas, the early retirement was at his instance so that if the six month's requirement of notice or pay in lieu was impaired by the the early retirement agreement, then it was to the Bank's detriment and not the claimant. The Court finds accordingly.
15. On leave, RW testified and demonstrated that Kshs. 8, 100 was paid on 14.10.1999 for leave. The claimant offered no evidence and basis of the 116 leave days claimed for 1999 to 2003, long after he had retired. The Court finds it inconceivable that leave would be due long after the early retirement took effect.
16. The Court has considered the submission for the claimant thus, " 18. Rather than take the written and established path in the employment contract, the respondent on its own motion, decided to give the claimant, pre-retirement leave. The effect of this offer was to alter the existing terms of employment. It meant that the claimant, besides enjoying the given pre-retirement leave, was entitled to the benefits that accrued on his availing himself the six months of leave as per the terms and conditions of service which were in effect." However, the Court has found that the early retirement was at the claimant's instant. If the claimant left immediately per the contractual termination clause, he would have paid the respondent six months' salaries in lieu of notice. In alternative, he would have worked for the six months. How then was he prejudiced for six months' leave fully paid and with attendant benefits? The Court has also found that the six months' pre-retirement leave was not imposed unilaterally at the respondent's sole instance but that the parties signed the mutual early retirement agreement of 09.09.1999. While erroneously invoking section 10(5) of *Employment Act*, 2007 which was not in force as at the time of early retirement and which section requires consent of an employee in variation of terms and conditions of service, the Court has found that the parties signed the early retirement



agreement which in effect modified the earlier contractual provisions on termination or such early retirement.

17. To answer the 4th issue, the Court considers that the suit and claims were not time barred. First. The respondent's submissions appear not to disturb the submissions for the claimant that the suit was instituted initially as HCCC No. 983 of 2004 and the jurisdictional issue ruled upon by Nambuye J and Maureen Onyango J per rulings on record. Second and in that view, the suit was initially filed in 2004 upon a cause of action accruing prior to coming into force of the Employment Act, 2007 so that it was misconceived for the respondent to invoke section 90 of the Employment Act, 2007 to urge the time barring.
18. The Court has considered the parties margins of success and the long winding history of the suit and each party to bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent Bank against the claimant for the dismissal of the claimant's memorandum of claim with orders each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH MARCH 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

