



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 55 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

PETER CYRUS KARINGA.....CLAIMANT

VERSUS

NAIROBI CITY WATER AND SEWERAGE

COMPANY LIMITED.....RESPONDENT

JUDGMENT

The claim herein was instituted by the Memorandum of Claim dated 19th January 2018 as amended on 9th April 2018 and further amended on 28th October 2018.

In the further amended claim, the Claimant prays for judgment against the Respondent as follows –

a. That this Court be pleased to issue a permanent injunctions restraining the Respondents from breaching the Contract of Employment dated 3rd March 2015 and terminating/retiring the Claimant from his Employment or affecting his monthly dues benefits and rights in employment until the hearing of this suit the year 2027 when the contract expires pursuant to

Section 4.3.2 page 20 of Human Resource Manual, 2013.

b. In the Alternative the Claimant prays for judgment against the Respondent for Kshs.218,763,400.04/= being employment dues and benefits as shown below:-

- i. Basic pay 353,905 x 25..... Kshs.8,847,625.00
- ii. House Allowance 33,000 x 25..... Kshs.825,000.00
- iii. Fuel Allowance 45,000 x 25..... Kshs.1,125,000.00
- iv. Non practicing allowance
10,000 x 25..... Kshs.250,000.00
- v. Gratuity 31% basic..... Kshs.2,742,763.75
- vi. Leave days allowances (2018, 2019, 2020)
(30+30+5) x 353,905.00 x . Kshs.1,099,784.46
- vii. Leave allowances 2018, 2019, 2020... Kshs.737,302.08

Kshs.15,637,474.54

NOTICE IN LIEU

- viii. Basic pay 353,905 x 6..... Kshs.1,061,715.00
- ix. House Allowance 33,000 x 6..... Kshs.99,000.00
- x. Fuel Allowance 45,000 x 6..... Kshs.135,000.00
- xi. Non practicing allowance 1,000 x 6..... Kshs.30,000.00
- xii. Gratuity 31% basic..... Kshs.329,131.65
- xiii. Leave days allowances 3 months
- xiv. $x 3 \times 353,905 \times 12/251$ Kshs.126,898.20

Kshs.1,781,744.85

Kshs.17,419,219.39

OUTSTANDING PAYMENTS /IMPROVED QUALIFICATION

1. Bachelor Degree July 2008 to February 2009..... Kshs.274,283.00

Employers Pension..... Kshs.47,237.62

Kshs.321,520.62

Claimants Pension contribution Kshs.33,013. Kshs.37,790.10

Kshs.41,267.00 and Kshs.33,013.00 be paid to Laptrust Pension including interest, penalties and actuarial values to date.

2. MBA

Arrears of 2010 to March 2012..... Kshs.140,766.00

Employers Pension..... Kshs.21,114.90

Kshs.161,880.90

Claimants contribution Kshs.17,718.72/= Kshs 22,148.40/= and Kshs.17,718.72/= be paid to Laptrust Pension including interest, actuarial values to date.

3. CPA Section 5 & 6 Qualification

Kshs.2,164,599 and

Employer Pension Contribution..... Kshs.282,339.00

Pension contribution of..... Kshs.225,871.20

All contributions sent to Laptrust including interest. Penalties and actuarial values to date.

4. Upgrading Upgrading payroll officer to payroll coordinator..... Kshs.913,904.50

5. Yearly Annual Increments

Total..... Kshs.3,946,802.60

Employers pension 15%..... Kshs.592,020.39

Kshs.4,538,822.99

15% Employer..... Kshs.592,020.90
12% self..... Kshs.473,616.31
Total..... Kshs.1,065,636.70
Send to CPF

6. Actuarial calculation Pension deducted CBA 2005, 2012, 2015 all contributions send to Laptrust including Interest, Penalties, and actuarial values to date.

Actuarial calculation Pension deducted but data not remitted to CPF TO DATE

CBA 2005,

235,367 x x 49 months..... Kshs.3,113,905.40

CBA 2012,

235,367 x 9 months..... Kshs.571,941.81

CBA 2015

235,367 x x 9 months..... Kshs.571,941.81

7. Additional Pension Responsibilities *payment of extraneous allowance*..... Kshs.702,988.03

8. PAYMENT OF PENSIONS DEDUCTIONS OMITTED FROM SEPTEMBER 2005 TO JANUARY 2011

The claimant claims Kshs.2,953,243.42 all contributions sent to Laptrust including Interest, Penalties and Actuarial Values to date

9. Additional Pension Responsibilities *payment of extraneous allowance as per item No. 6.275 page 150 of Human Resource Manual*

10. Improved qualifications CHRP from January 2018..... Kshs258,979.14

Refund of 50% of tuition CHRP sponsored. Kshs.124,300.00

2019 practicing certificate, CHRP and

ICPAK..... Kshs.23,900.00

11. Medical Allowance..... Kshs.600,000.00

12. Award saved the company NH1F penalty..... Kshs.4,253,360.00

13. Medical Reimbursement..... Kshs.4,715.00

14. Payment of Gap Pension Sept 2005 - Jan 2011 as per court order of Cause No: 520/2006 and Agency Agreement on transfer..... Kshs.2,953,243.20

15. Payment of unexpired contract per Human Resource Manual 2013 item 4.3.2 page 20..... Kshs.20,119,060.00

16. Gratuity 31% of basic..... Kshs.5,704,948.60

17. Compensation for loss of employment.... Kshs.4,642,860.00

18. Damages for discrimination, inhuman treatment and harsh work environment..... Kshs.50,000,000.00

19. New Medallion..... Kshs.110,000.00

20. Baggage allowance..... Kshs.70,000.00

21. Severance pay from 1979 to 2018 [353,905 (basic Maximum Salary structure) x 4 months x 39 years]..... Kshs.55,209,180.00

22. Non practicing allowance and annual subscriptions to Professional Body IHRM Member 2013, 2014, 2015, 2016 (4 years x 10,000 x 12 months)..... Kshs.480,000.00

IHRM practicing certificate 2017, 2018, 2019, 2020

(2 months) 3 x 12 x 10,000 +20000..... Kshs.360,000.00

TOTAL..... KSHS.218,763,400.04

23. Compensation for loss of employment

24. Damages for discrimination, inhuman treatment and harsh work environment..... Kshs.50,000,000.00

25. Compensation for the remainder period of the contract term renewable to the end of contract 4th March 2020.

26. Interest on at Commercial rates of 20% from the date of filing the suit till payment in full.

27. Gratuity Arrears..... Kshs.35,226.19

28. Leave days..... Kshs.61,043.90

29. A certificate of service to the Claimant in terms of Employment Act.

30. Reinstatement of the Claimant.

31. Cost of Suit

32. Any other and/or further relief that this court may deem fit and just to grant in the circumstances.

The Respondent filed defences to the claim, the amended claim and the further amended claim.

In the response to the further amended claim, the Respondent denies the averments in the further amended claim and avers that the Claimant was retired after attaining the mandatory retirement age of 60 years. That the retirement was in compliance with the Respondent's Human Resource Policy and Procedures Manual and the Government circular on review of the mandatory retirement age for public servants dated 20th March 2009.

The Respondent denies that the Claimant is entitled to any of prayers sought in the further amended claim and prays that the claim be dismissed with costs.

Facts

The main facts of this suit are not contested. The Claimant was originally employed by the defunct City Council of Nairobi by letter dated 8th May 1979 as a Meter Reader II. When the water department was hived off from the City Council of Nairobi, the Claimant and all staff working in the Water and Sewerage Department of the Nairobi City Council were seconded to the newly established Nairobi City Water and Sewerage Company Limited, the Respondent herein.

The Claimant's letter of secondment dated 22nd April 2004 stated that his terms of service were subject to change once a report from a Human Resource Consultant commissioned by the Board of the newly established Respondent developed the company's organisational structure and remuneration is finalised and adopted. The Claimant was eventually issued with a letter of appointment by the Respondent dated 26th August 2005 which states that he was engaged as Payroll Officer, Grade 5.

While in the employment of the Respondent, the Claimant continually improved his qualifications which saw him rise through the ranks. At the time relevant to this suit the Claimant held the position of Finance Budget Coordinator, a position he was appointed to by letter dated 4th March 2009.

By letter dated 9th January 2017 the Respondent informed the Claimant that he was due to retire and ought to vacate office on 2nd February 2018.

It is the Claimant's averment that on 14th March 2013, the Respondent revised its Human Resource Policy manual as approved in the board meeting of 18th December 2012 in which section 4.3.2 was introduced providing that

“Managing Director, Functional Director, Managers, Coordinators and officers shall be employed on contract basis with each

contract term running for a period of five years. The Contracts may be renewed based on performance and for a period not exceeding two terms for the Managing Director, and Functional/ Directors, three terms for managers and for a period not exceeding four terms for Coordinators and Officers.”

The Claimant further avers that pursuant to Section 4.3.2 of the Respondent’s Human Resource Policy and Procedure Manual of 14th March 2013, the Claimant’s Contract was subject to automatic renewal until he had served four terms of five years. That automatic renewal was subject only to non-performance.

The Claimant avers that he had a running contract from 5th February 2015 to 4th March 2020 which was disrupted. He urges the court to renew the contract for another 5 years period from 4th March 2020 as per provisions of section 4.3.2 of the Respondents Human Resource Policy and Procedure Manual of 14th March 2013.

The Claimant further avers that his retirement was unfair and unjust, malicious and intended to hound him out of office. He states that he has a clean record and served the Respondent diligently and honestly as attested by his promotions. It is further the Claimant’s averment that his inhuman treatment by the Respondent has subjected him to immense mental anguish.

Respondent’s Case

The Respondent’s case is however that the Claimant was retired after attaining the mandatory retirement age of sixty (60) years. That although the Claimant was issued with a contract agreement which was to lapse on 4th March 2020 and an appointment letter dated 5th February 2015, the Claimant was later furnished with a letter amending the contract period dated 13th March 2015, informing him that his last day at work would be 2nd February 2018. It is further the Respondent’s case that the Claimant was issued with and acknowledged receipt of a notice of retirement dated 9th January 2017, which informed him that he would attain the compulsory retirement age of 60 years on 2nd February 2018.

It is the Respondent’s case that Clause 8.27.4 of the Human Resource Policy and Procedure Manual, which defines the rules, regulations and conditions of employment for the Respondent Company, provides that the mandatory retirement age for the company staff is sixty (60) years. The Policy also provides that an employee who is due to retire on attainment of the mandatory retirement age shall be given one (1) year’s notice before the retirement age.

The Respondent denies that the Claimant is entitled to any of the remedies sought and prays that the claim be dismissed with costs.

Evidence

The parties agreed to dispose of the claim by way of written submissions and witness statements on record.

Determination

I have considered the pleadings and evidence on record. I have further considered the submission filed by the parties and the authorities that the parties cited. The issues for determination are the following –

1. The nature and terms of the Claimant’s engagement with the Respondent.
2. Whether the separation of the Claimant from the Respondent was within the terms of his contract.
3. Whether the Claimant is entitled to the remedies sought.

Claimant’s Contract

From the evidence on record, the Claimant was first engaged by the Respondent on secondment from the Nairobi City Council by letter dated 22nd April 2004. By letter dated 26th August 2005 he was engaged by the Respondent as Payroll Officer, Grade 5 on a 3 year fixed term contract. The contract was thereafter renewed severally until 5th February 2015 when the contract was renewed for a period of 5 years. The letter of renewal is reproduced below –

“NCWSC/HRM/VOL.III/04717/nng 5 February 2015

Peter Cyrus Karinga – 04717

Finance Budget Coordinator

P. O. Box 30656 – 00100,

NAIROBI

Dear Peter,

RE: RENEWAL OF CONTRACT EMPLOYMENT

This is to inform you that the Nairobi City Water and Sewerage

Company Limited Management have approved renewal of your employment contract for a period of five (5) years, commencing 3rd March 2015.

Your terms and conditions of service will be pegged on the performance contract document that you have duly signed with your supervisor in which you will be appraised bi - annually. You are expected to achieve the set targets which are renewed annually to the highest standards that the job requires.

Please note that your performance achievement over the appraisal period as stipulated in the HR procedures manual 4.8.2 is not expected to be worse than 3.6. This will be computed as stipulated in the Public Service Performance contracting guideline, presently being issued by the Performance Contracting Secretariat of the Nairobi City County.

On behalf of Management and on my own behalf, I take this opportunity to congratulate you on your contract renewal.

Yours Sincerely

SIGNED

Eng. Philip Gichuki

Managing Director”

However, just over one month later, by letter dated 13th March 2015, the Claimant’s contract period was amended to end on 2nd February 2018, when he would be attaining mandatory retirement age. The letter is reproduced below –

“NCWSC/HRM/VOL.I/04717/RKM/nng 13 March 2015

Peter Cyrus Karinga – 04717

P. O. Box 30656 – 00100, NAIROBI

Dear Peter,

RE: AMENDMENT OF CONTRACT PERIOD

Reference-is made to our letter ref. NCWSC/HRM/VOL.I/04717/RKM/nng dated 5th February, 2015 renewing your employment contract for a period of five (5) years effective 3rd March, 2015.

We wish to inform you that the contract period has been amended to commence 3rd March, 2015 to 2nd February, 2018 for the reason that you will be attaining the mandatory retirement age of 60 years.

Please take note that your last working day could be on 2nd February, 2018.

Yours Sincerely

SIGNED

Eng. Philip Gichuki, Managing Director”

Under the Respondent’s Human Resources Policy and Procedures Manual, there is provision for both contract employment and retirement as follows –

4.3 Types of Appointment

All staff of NCWSC shall either be on permanent or contract employment. However, a need may arise where it will be necessary for the Company to engage staff on casual basis or on secondment.

4.3.2 Contract employment

Managing Director, Functional Directors, Managers, Coordinators and Officers shall be employed on contract basis with each contract term running for a period of five years. The contracts may be renewed based on performance and for a period not exceeding two terms for the Managing director and functional directors, three terms for managers and for a period not exceeding four terms for

coordinators and officers.

All employees on contract will be paid gratuity, at the rate of 31% of the total basic salary received for each completed month of service or any other rate that may be determined by the Board of Directors. This shall be payable at the end of each completed *year of service or on prorata basis at the time of exit. Employees who are members of pension fund will be paid from the employment gratuity.*

NCWSC may engage any other cadre of staff on a specific contract period on terms and conditions of engagement to be determined by the Board of Directors in line with the Employment Act, 2007.

8.27.4 Retirement

The mandatory Retirement age for the company staff is sixty (60) years. However, one may be retired early due to poor health or disability rendering one unfit to work in which case the opinion of an independent doctor would be sought. An employee who is due to retire on attainment of the mandatory retirement age shall be given one (1) year's notice before the retirement age.

An employee may also opt to retire on or after attaining the age of 50 years by giving a year's notice. All officers on retirement notice should utilise all their pending leave days before the actual retirement date. Employees with no pending leave may be granted thirty (30) days terminal leave.

From the foregoing, it is clear that the Claimant's employment with the Respondent was on contract terms and the last contract was clearly expressed to expire on 2nd February 2018.

Claimant's Separation

It is not in contention that by letter dated 9th January 2017 the Claimant was given notice of retirement in accordance with both the retirement clause in the Respondent's Human Resources Manual and his last contract. The notice of retirement letter is reproduced below –

“NCWSC/HRD/VOL.I/4717/LG/eg 9th January 2017

Peter Cyrus Karinga – 4717

P.O. Box 30656 – 00100

Nairobi

Dear Peter,

RE: NOTICE OF RETIREMENT

I write to inform you that according to records held in this office, you will attain the compulsory retirement age of 60 years by 2nd February, 2018.

You are hereby informed that your last day of service will be 2nd February, 2018. You will also be expected to have taken all your leave days and off duty days before 2nd February, 2018. Please note that under no circumstances will payment be made for accumulated administrative leave and off days.

I take this opportunity to thank you for the loyal service you have rendered to this Company during the course of your appointment.

Please contact the Payments Office before the date of retirement regarding your terminal benefits, which will be paid to you after clearing yourself of any liabilities you owe the Company.

Yours sincerely,

SIGNED

Lucas Gor

Ag. Human Resource Manager”

It is not contested by the Claimant that he attained compulsory retirement age of 60 years on 2nd February 2018. It is further not contested that the Claimant received the letter dated 13th March 2015 revising the expiry date of his contract which had originally been expressed to last for 5 years to 2nd February 2018 to coincide with his attainment of compulsory retirement age of 60 years.

The Claimant submits that the reliance by the Respondent on Clause 8.27.4 has previously come into question in **ELRC Cause No. 1409 of**

2015 Henry Muema Kimanathi v Nairobi City Water and Sewerage Company Limited in which the Respondent herein attempted to retire an employee whose terms were the same as the terms of contract of the claimant. In this case the Court stated:

“In this case, the Respondents reply is that despite the contract of employment issued to the Claimant on 4th June 2014, they are bound by the civil service regulations requiring employees to retire at age 60. That the Public Service Regulations are binding upon the Respondent and there is a human resource policy that regulate the retirement age at 60 years. However, the Contract issued to the Claimant was at the instance of the respondent, it is binding upon the parties and with it, it confers rights and benefits upon the Claimant that cannot be negated by a Public Service Regulation of human resource policy that are contrary to written law that allow contracts of employment pursuant to Section 7 and 10 of the Employment Act. Also, once the contract of employment was issued to the claimant, it became binding and can only be terminated in pursuant to the law as under Section 35 read together with Sections 43 and 44. Otherwise to terminate the contract at the instance of a regulation or policy outside the law, the same would amount to an unfair labour practice.”

The Claimant further relies on Section 120 of the Evidence Act which provides that –

120. General estoppel.

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.

The Claimant submits that the Respondent is estopped from denying the import of the contract of employed dated 3rd March 2015 and the application of Clause 4.3.2 of the Respondent’s Human Resource Manual.

The Claimant further submits that Clause 1.3 of the Human Resource Manual is binding upon the Respondent. Clause 1.3 of the Human Resource Manual provides as follows:

1.3 Applicability

Unless expressly provided either in these regulations or stated in individual letters of appointment or where exceptions is authorised by the Board, these regulations shall apply to all employees of NCWSC.

The Principle of estoppel has been defined in **Halsbury’s Laws of England 4th Edition; Re-issue Vol. 9(1)** paragraph 602 at page 339, which defines a contract as follows:-

“ . . .the most commonly accepted definition is a promise or set of promises which the law will enforce. The expression ‘contract’ may, however be used to describe any or all of the following: (i) that series of promises or acts themselves constituting the contract; (ii) the document or documents constituting or evidencing that a series of promises or acts, or their performance; (iii) the legal relations resulting from that series.”

In the case of **Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR**, the Court held

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

For the Respondent it is submitted that Section 10(5) of the Employment Act allows an employer to make changes to a contract and inform the employee about the changes in writing. Section 10(5) of the Employment Act provides –

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

I have considered the decision in **Cause No. 1490 of 2015 Henry Muema Kimathi v Nairobi City Water and Sewerage Company**. In that case there is no mention of the amendment of the contract as in the instant case. Further, there is no mention of retirement notice. I also do not find the facts of **Cause No. 1726 of 2017 Eng. Stephen Mbugua Chege** relevant to the present case.

In the instant case, the contract dated 5th February 2015 was amended on 13th March 2015, just over 5 weeks from the date of the contract. The letter amending the contract gave reasons for so doing. The Claimant raised no objection. The Claimant was again issued with more than a year’s notice of retirement, on 9th January 2017, advising him of his retirement on 2nd February 2018. Again he did nothing until 19th January 2018, more than one year later, when he filed the instant suit. He had notice of the date of retirement from 13th March 2015, with a reminder on 9th January 2017. He cannot hide behind legitimate expectation because the facts of this case do not fit within the principle of legitimate expectation.

The Claimant further relied on the principle of estoppel. The principal of estoppel was well set out in **Combe v Combe 195 1 (1) All England Law Reports 766** at 770 by Denning LJ as follows;

“The principle as I understand it is that where one party has by his words or conduct made to the other a promise or assurance which

was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word.”

It is paramount to note that the Respondent herein neither made a promise nor gave the Claimant an assurance that his Contract will be renewed. In fact, the letter dated 13th March 2015 clearly indicated that by 2nd February 2018, he will attain the mandatory retirement age of 60 years. Hence the Doctrine of Estoppel is not applicable in this particular case.

From the facts herein, I can only make a finding that the Claimant retired after attaining mandatory retirement age as provided for in the Respondent’s Human Resource Manual and as provided in his contract as amended on 13th March 2015. I thus find that the separation of the Claimant from the Responded was in accordance with his terms of service.

Remedies

Having found that the Claimant’s separation from the Respondent was in accordance with his contract and the Respondent’s Human Resource Manual, he is not entitled to pay in lieu of notice as notice was given to him one year before the date of retirement and also in the contract date 13th March 2015.

He is further not entitled to an injunction restraining the Respondent from breaching his terms of contract as the contract already expired and could not be breached. For the same reason the prayer for reinstatement fails.

The Claimant is further not entitled to basic pay, house allowance, fuel allowance, non-practicing allowance, gratuity or leave allowance for the period 2018, 2019 and 2020 as prayed in paragraph 22 of the further amended claim. These are future claims for a period he did not work and after the expiry of his contract. The Claimant has not proved the prayers under paragraph 23 of the further amended claim being payments for improved qualifications.

As submitted by the Respondent which submissions were not controverted by the Claimant, the Claimant did not attach preapproval letters from Human Resource Office for the training he underwent. Further, that the request made by the Claimant by letter dated 11th July 2017 was rejected by the Respondent by letter dated 28th July 2017. On the prayer for Kshs.140,766 for MBA, the Respondent submits that the Claimant was given a salary increment from Kshs.114,178 to Kshs.119,887 as reflected in pay slips at annexure G(i) and G(ii) of the Respondent’s bundle.

The prayers for Kshs.913,904.50 and yearly increments of Kshs.3,946,802.60 having been for the period 2012 to July 2017, the Claimant did not prove that he was not paid when he was upgraded or that he did not receive increments.

All the prayers in respect of pensions fail as the same should be addressed to the Managers of the Claimant’s Pension Scheme or to the Retirement Benefits Authority as provided under the Retirement Benefits Act.

The prayers for maximum period of contract, gratuity and compensation for loss of employment and damages for discrimination fail as the Claimant was not unfairly terminated.

The prayers for New Medallion and Baggage Allowance were paid to the Claimant as reflected in his pay slip for January 2018. The prayer for practicing certificate was not proved.

Conclusion

In conclusion, the entire claim fails and is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE