



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 616 OF 2015**

**(Formerly HCCC No. 164 of 2005 at Mombasa)**

**FRANCOIS MAKORANI DDAIDDO.....CLAIMANT**

**- VERSUS -**

**BANK OF INDIA.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> July, 2021)**

**JUDGMENT**

The claimant filed the further amended memorandum of claim on 19.02.2016 through Marende, Birir Shimaka & Company Advocates. The claimant alleges as follows:

- a) He was employed by the respondent for 11 years and 8 months and was offered a loan under the respondent's Staff Loan Scheme of Kshs. 1, 371, 600.00 to be paid within 25 years from the claimant's monthly salary earned until the full loan amount was recovered.
- b) On 27.07.1998 the claimant requested and the respondent accepted that the claimant takes an early retirement under the respondent's prevailing Voluntary Early Retirement Scheme (VERS). The respondent agreed to deduct pending loan owed by the claimant from the VERS benefits payable to the claimant. The respondent was to pay Kshs. 140, 832.60 being claimant's Provident Fund dues but not yet paid as due from Kenya National Assurance Company Limited and now already received by the claimant per the letter dated 23.07.2003.
- c) The claimant has not been paid his benefits being Kshs. 2, 097, 270.00 exclusive the Provident Fund dues already received by the claimant. The claimant has not received an official letter on his separation with the respondent.
- d) The VERS terms provided that the claimant was free to seek employment from other organisation on condition that the respondent was to be notified. The claimant got a job with the Co-operative Bank of Kenya who notified the respondent of the intention to hire the claimant but the respondent notified Co-operative Bank that the respondent had fired the claimant thereby prejudicing the claimant's new employment. The respondent has continued to give bad recommendation to claimant's prospective new employers.
- e) The claimant's final dues when properly computed are enough to settle his indebtedness to the respondent.

The claimant prays and claims for:

- a) A declaration he does not owe the respondent any money.
- b) A declaration that the action of the respondent in deceiving or lying to Co-operative Bank was malicious and scandalous.
- c) Reinstatement to employment with all benefits for the lost years.
- d) In alternative:
  - i. Compensation under VERS 3 salaries for every year foregone up to a maximum of 40 salaries Kshs. 1, 777, 520.00.
  - ii. Medical cover up to ten years from date of retirement Kshs. 319, 750.00.

- iii. Provident Fund for Kenya National Assurance Kshs. 140, 832.60.
  - iv. Leave Kshs.52, 595.00.
  - v. Leave accrued from 01.12.1997 to 31.07.98 Kshs. 1, 644.00.
  - vi. Gratuity for 11 years worked Kshs. 406, 318.00.
  - vii. Exemplary damages Kshs. 150, 000, 000.00.
  - viii. Letter of termination or retirement.
  - ix. Costs and interest.
  - x. Any other or further relief the Honourable Court may deem fit to grant.
- e) Exemplary damages.
  - f) Letter of termination or retirement.
  - g) Costs and interest.
  - h) Any other or further relief the Honourable Court may deem fit to grant.

The respondent filed the further amended defence and counterclaim on 14.09.2016 through K.A. Kasmani & Company Advocates. The respondent's case is as follows:

- a) The suit is *res judicata* as was fully canvassed and has been determined in Industrial Court of Kenya Cause No.77 of 1999, Kenya Union of Commercial, Food and Allied Workers & Kenya Bankers (Employers) Association representing 19 Kenyan Banks.
- b) The respondent lent the claimant a sum of Kshs. 1, 371, 600.00 whose security was plot No. MN/1921/II and subject to three respective charges dated 25.11.1994 for Kshs. 585, 000.00; 03.05.1996 for Kshs. 497, 700.00; and 27.05.1997 for Kshs. 288, 900.00.
- c) The claimant wrongly participated in an illegal strike on 03.08.1998 and his employment was terminated by the respondent and final dues settled per the decision in in Industrial Court of Kenya Cause No.77 of 1999, Kenya Union of Commercial, Food and Allied Workers & Kenya Bankers (Employers) Association representing 19 Kenyan Banks. The respondent gave the claimant a credit of Kshs. 509, 860.00 and the claimant was found liable to the respondent in the sum of Kshs. 866, 140.15 subject to interest per the terms of the three charges particulars of which were supplied to the claimant. Despite demands, the claimant failed to repay the amount of Kshs. 2, 134, 124.00 as at 30.06.2002 with further interest, The respondent was entitled to exercise its statutory power of sale under section 69A (b) or 69A (b) or 69A(c) of the Indian Transfer of Property Amendment Act No.9 of 1959 as applied in Kenya. As per Auctioneer's Act the property was valued by J.Osodo Registered Valuer at open market Kshs. 1, 300, 000.00; mortgage value Kshs. 1, 100, 000.00 and forced sale value at Kshs. 940, 000.00.
- d) The respondent employed the claimant from 01.12.1986 and terminated the employment on 05.08.1998 on the ground the claimant participated in an illegal strike.
- e) The respondent denies accepting the claimant's application for VERS. The amounts due after termination were credited to the claimant's account and as per award in Industrial Court of Kenya Cause No.77 of 1999, Kenya Union of Commercial, Food and Allied Workers & Kenya Bankers (Employers) Association representing 19 Kenyan Banks. Upon dismissal the claimant's benefits were computed as Kshs. 509, 860.00 and as at 04.09.2002 the total loan amount owing was Kshs. 1, 376, 000.15 and less credit of claimant's benefits the loan outstanding was Kshs. 866, 140.15 which continued to accrue interest and as August 2016 the amount owing was Kshs. 14, 427, 266.20 and continues to accrue interest at bank rates.
- f) The award in Industrial Court of Kenya Cause No.77 of 1999, Kenya Union of Commercial, Food and Allied Workers & Kenya Bankers (Employers) Association representing 19 Kenyan Banks ruled that the employees were not entitled to any further notice of dismissal. The issue of reinstatement is *res judicata*.
- g) Correspondence between the respondent and Co-operative Bank were confidential and in any event were not malicious because the respondent merely conveyed the truth.
- h) The award in Industrial Court of Kenya Cause No.77 of 1999, Kenya Union of Commercial, Food and Allied Workers & Kenya Bankers (Employers) Association representing 19 Kenyan Banks ruled out reinstatement and provided for redundancy payments to dismissed employees and the same was credited to claimant's loan account to reduce his indebtedness to the respondent.
- i) The Court lacks jurisdiction to decide upon interest rates applicable by the respondent and the claimant signed the three charges accepting the interest rates. The Court lacks jurisdiction to write off the loan or to decide that the claimant is not owing.

j) The respondent served notification of sale and advertisement on 29.07.2005 and a reserve price set on the recommendation of J.Osodo, Registered Valuer.

k) The defendant's advocates have been given full particulars of payment credited to the claimant's loan account.

The respondent counterclaimed and prayed for:

a) The claimant to pay KShs. 14, 427, 266.20 being unpaid loan together with interest at bank rates until payment in full.

b) The claimant's suit be dismissed with costs and the respondent's counterclaim be allowed with costs.

The claimant testified to support his claims. The respondent's witness (RW) was Jacob Sidialo, the respondent's General Officer. Final submissions were filed for the parties. The Court has considered all the material on record and makes findings as follows.

To answer the **1<sup>st</sup> issue** for determination, there is no dispute that the respondent employed the claimant on 01.12.1986 and parties separated following the events of the strike sometimes in 1998.

To answer the **2<sup>nd</sup> issue** for determination the Court returns that the parties' contract of service came to an end following the countrywide strike of bank workers of 1998. The strike was subject of Industrial Court of Kenya Cause No.77 of 1999, Kenya Union of Commercial, Food and Allied Workers & Kenya Bankers (Employers) Association representing 19 Kenyan Banks. The evidence is that the claimant prior to the strike had by the letter dated 27.07.1998 applied for retirement under VERS. Prior to receiving the reply, the strike was called and on 02.09.1998 the claimant wrote to the respondent thus, **"I regret to have participated in the National Strike which terminated my service from Branch. 2. I hereby request you to reverse your decision to consider me under the Existing Early (Voluntary) Retirement Scheme. 3. Thank you in advance."** During his testimony in Court the claimant stated that there was a strike on 03.08.1998 which was a nationwide strike. Further, he asked to be pardoned by the respondent for participating in the strike. The claimant further testified thus, **"I was never told I was not eligible for VER. CEO did not write to approve my application for VER.... Had the bank released my dues, I would have paid what is claimed in counter-claim"**. During the cross-examination, the claimant stated that he had not attained 35 years of Age and served for at least 15 years and further, he did not meet the pre-conditions for VERS as set by the respondent on 16.10.1996. RW testified that he was not aware that the claimant was given a termination or dismissal letter. The Court has considered the evidence and returns that the claimant has failed to establish a case that he was entitled to separate on account of terms under VERS and the evidence is that the contract of employment ended as a consequence of the nationwide strike of 1998. The claimant was aware of that fact because of his own evidence he wrote to be pardoned but the respondent refused to exercise the discretion in his favour. The Court finds that as urged for the respondent the contract of service ended on 03.08.1998, the date the nationwide strike started (and called off by COTU on 17.08.1998 – thus 14 days of illegal strike per the award by the then Industrial Court) – and the claimant wrote confirming his participation in that strike. The details surrounding that strike are better elaborated in the award in Industrial Court of Kenya Cause No.77 of 1999, Kenya Union of Commercial, Food and Allied Workers & Kenya Bankers (Employers) Association representing 19 Kenyan Banks and delivered on 17.03.2001 by Cockar J. While the Court finds that the termination was on 03.08.1998 by reason that the claimant had participated in the strike, there is no evidence that a letter on termination of the contract on that date had been issued but the termination appears to have been in the claimant's knowledge. The Court finds that the claimant has not established a basis for the claim for a termination letter as a precondition to validate that termination and the prayer for a letter in that regard will collapse.

To answer the **3<sup>rd</sup> issue** for determination, the Court finds that as submitted for the respondent, the suit was time barred. In particular, the suit was initially filed in the High Court on 16.08.2015 objecting to the respondent's exercise of the statutory power of sale and no employment dispute was raised as such. On 10.10.2012 the claimant was granted leave to include a claim for a declaration that the plaintiff does not owe the defendant any monies, but, the claimant, without leave included in the amendment a prayer for compensation for years forgone, medical cover and other prayers. The respondent filed an amended defence on 03.11.2012 and pleaded the suit was time barred. On 08.09.2015 the suit was transferred to this Court from the High Court. On 22.10.2015 the Court allowed parties to amend pleadings. The claimant filed the further amended memorandum of claim with claims and prayers based on the contract of employment. The respondent filed the further amended defence based on the contract of service and the charge documents executed between the parties. It is submitted for the respondent that the cause of action is time barred because it is filed outside the three years of limitation stipulated under section 90 of the Employment Act. The respondent relies on **G4S Security Services (K) Limited –Versus- Joseph Kamau & 468 Others [2018]eKLR** and **Attorney General –Versus-Andrew Maina Githinji & Another[2016] eKLR** where the Court of Appeal ruled that the time of limitation in section 90 of the Employment Act was mandatory.

For the claimant it was submitted that it was true that the benefits accrued in 1998 but it was in 2005 that the notice to sale was issued by the respondent and the subsequent amendments were made as ordered by the Court.

The Court has considered the submissions and pleadings on record. It is clear that the suit was filed in 2005 in the High Court and the claimant only objected to the respondent's exercise of the power of sale in view of the charges concluded by the parties. The amendments to urge the claims as based on the contract of service and as claimed and prayed for were introduced in 2012 and 2015 amendments as submitted for the respondent. The Court finds that as based on section 90 of the Employment Act, 2007 and section 4 of the Limitation of Actions Act, the three and six years of limitation as respectively prescribed had lapsed whether the cause of action was triggered in 2005 when the notice of sale was issued as urged for the claimant or in 1998 when the benefits were due as urged for the respondent. Needless to state, by the same finding the counterclaim as filed for the respondent on 14.09.2016 was equally time barred. Accordingly, the claimant's suit and the counterclaim are both liable to dismissal as time barred and with orders each party to bear own costs of the proceedings herein.

To answer the **4<sup>th</sup> issue** for determination and for avoidance of doubt, the Court finds that the preliminary objection by the respondent that the suit was *res judicata* or the Court lacked jurisdiction to determine issues related loan obligations arising out of the charges and loan agreements between the parties was conclusively determined by the Court's ruling (Rika J) delivered on 24.03.2017.

In conclusion, the claimant's suit and the respondent's counterclaim are respectively dismissed with orders each party to bear own costs of the entire proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 16<sup>TH</sup> JULY, 2021.**

**BYRAM ONGAYA**

**JUDGE**