



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 700 OF 2016**

*(Formerly HCC 128 of 2007)*

**Before Hon. Lady Justice Maureen Onyango**

**JOHN KENNEDY OMANGA.....CLAIMANT**

**VERSUS**

**BOARD OF DIRECTORS, POSTAL CORPORATIONS OF KENYA.....1<sup>ST</sup> RESPONDENT**

**POSTAL CORPORATIONS OF KENYA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

John F. Kennedy Omanga instituted this suit vide a Plaint dated 14<sup>th</sup> July 2006 against the Board of Directors, Postal Corporation of Kenya and Postal Corporation of Kenya seeking payment of his retirement benefits. He avers that he was employed as Assistant Corporation Secretary on 13<sup>th</sup> April 1995 by the former Kenya Posts and Telecommunications Corporation (KP&TC) which was replaced on 1<sup>st</sup> July 1999 when the 2<sup>nd</sup> Defendant was established. That by a Vesting Order of October 1999 in the Kenya Gazette under the Communications Act 1998, the employees of the former (KP&TC) were then vested to the Postal Corporation and Telkom Kenya Limited on similar or better terms of employment. Further, that the contracts of employment of employees of the former KP&TC were governed by the Posta Code of Regulations which was adopted by the 1<sup>st</sup> Defendant to apply to employees of the 2<sup>nd</sup> Defendant.

The Plaintiff avers that while in the employment of the 2<sup>nd</sup> Defendant, he was appointed to the positions of Chief Legal Officer, Corporation Secretary, Assistant General Manager EMS and that on 4<sup>th</sup> August 2003, he was transferred to the position of Assistant General Manager/Strategy and Business Development. That in February and March 2005 the Postmaster General who is also the Chief Executive of the 2<sup>nd</sup> Defendant communicated to staff that the 1<sup>st</sup> Defendant had in November 2004 approved a new organisational structure for the 2<sup>nd</sup> Defendant. That the said structure did not however include the Plaintiff's position of Assistant General Manager/Strategy and Business Development which meant that the 1<sup>st</sup> Defendant had abolished the said position. That the 2<sup>nd</sup> Defendant's Chief Executive's communication was also to the effect that the 1<sup>st</sup> Defendant had further communicated an exit package to cater for all employees left out in the new structure.

He avers that the Posta Code of Regulations recognized the power of the 1<sup>st</sup> Defendant to reorganise the 2<sup>nd</sup> Defendant's organizational structure and also provided for the formula for compensation in the event of such restructuring. That he therefore wrote to the 1<sup>st</sup> Defendant in June 2005 requesting it to invoke the rules in the Posta code of regulations i.e. to approve the exit package and retire him from employment of the 2<sup>nd</sup> Defendant on abolition of office or '*compulsory retirement as a result of re-organisation intended to bring about greater efficiency or economy*'. That the Chief Executive of the 2<sup>nd</sup> Defendant communicated to him on 18<sup>th</sup> July 2005 that the 1<sup>st</sup> Defendant had approved his request, and he consequently retired from employment of the 2<sup>nd</sup> Defendant. He avers that he was thus entitled to the exit package and retirement benefits which he tabulates at *paragraph 19 of the Plaint*. He avers that despite giving Notice, the Defendants have refused, ignored and/or neglected to make good his claim.

The Plaintiff prays for judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally for:

- a) The sum of Kshs.2,813,905.75 as golden handshake and gratuity benefits.
- b) The sum of Kshs.22,796.90 per month as monthly pension.
- c) Costs of this suit.

d) Interest on (a), (b) and (c) above at court rates.

e) Any other relief that this Court may deem just and fit to grant.

The Court in a Ruling dated 26<sup>th</sup> March 2009, allowed the Defendants' application in terms of separating the claim for pension from the rest of the claims in the suit and for the same to be referred to arbitration as provided the Trust Deed and Rules of the Postal Corporation of Kenya Pension Scheme. The Defendants were also required to file their Defence so as to fast track the hearing of the rest of the Plaintiff's claim.

The Defendants filed a Statement of Defence and Counterclaim dated 20<sup>th</sup> July 2009 admitting the employment of the Plaintiff but denied that the new organizational structure declared the Plaintiff redundant or that his terms of employment was governed by the Posta Code. They aver that the Plaintiff would have been absorbed elsewhere in the Corporation if he had so willed and intimated the same to them and that the Plaintiff stood a chance of being deployed to any other portfolio where his skills and experience proved relevant. The Defendants further aver that the Plaintiff chose to leave employment on his own volition and that his application letter for retirement was approved on the basis of normal retirement and not abolition of office or compulsory retirement. That the Plaintiff is therefore not entitled to retirement benefits and exit package as claimed.

In the Counterclaim, the Defendants state that the 2<sup>nd</sup> Defendant advanced a car loan to the Plaintiff while in its employment which as at that date was outstanding at Kshs.408,317/-. The Defendants thus prayed that the Plaintiff's suit be dismissed with costs and judgment be entered against him in favour of the Defendants for Kshs.408,317/- with interest at court rates until payment in full and for costs of the Counterclaim.

The Plaintiff then filed a Reply to Defence and Defence to Counterclaim dated 31<sup>st</sup> August 2009 denying the Defendants' counterclaim and averring that the car loan advanced to him by the Defendants was fully serviced. He further stated that the said Counterclaim lacked merit, was bad in law, malicious, an abuse of the court process and meant to embarrass him and deny him his rights and should be struck out with costs and the Statement of Defence dismissed. He prayed for judgment as prayed in the Plaintiff.

The suit was by the consent of parties disposed of by way of written submissions. The Plaintiff filed submissions on 2<sup>nd</sup> July 2020 and served a copy upon the Respondent's Counsel on 15<sup>th</sup> July 2020 as per date stamp. No defence was filed for the Respondents.

#### **Claimant's Submissions**

The Claimant submits that on 15<sup>th</sup> July 2009, parties recorded consent as condition for setting aside Judgement as entered against the Defendants partly to the effect that the sum of Kshs.1,251,335.00/- be deposited in a joint interest earning account in the names of Muthoga, Gaturu and Company Advocates and M/s Momanyi and Associates within 30 days from the 15<sup>th</sup> July, 2009. That there has been no appeal or review preferred against the Ruling of the Court as delivered on 26<sup>th</sup> March 2009 as well as the Arbitral Award delivered on 12<sup>th</sup> April 2012 which declared that the Plaintiff was entitled to Special Additional Pension of Kshs.286,958.03/- as at 14<sup>th</sup> April 2012. That therefore the only issue pending before this court for determination is the prayer for Golden handshake and Benefits in respect of which he addresses this Court as hereunder.

It is submitted by the Claimant that he was retired pursuant to the **Posta Code D12.1.2.4** and the regulations that govern the contract of employment between Postal Corporation of Kenya and its employees. That the Circular issued by the Respondents on 14<sup>th</sup> February 2005 provided the benefits as exit package for staff who opt for early retirement and those unsuccessful in their bid for new positions as follows:

*The Board has approved an exit package for staff who may wish to retire voluntarily and those who will not be successful in their bid for new positions. Staff in super scale (6 and above) will get a handshake of Kshs.300,000 while those in scale 7 will carry home Kshs.200,000/-.*

*Other exit terms equally available to all management staff include three (3) months' salary in lieu of notice and 15 days' salary for every year worked. These are outside the pension scheme benefits.*

Further, that the 1<sup>st</sup> Respondent's Circular on Voluntary Early retirement scheme for management staff as issued by the Postmaster General in March 2005 also provided for Golden Handshake of Kshs 500,000/- and other benefits for workers in scale 2-7 in the early retirement package (**at paragraph 4**).

The Claimant relies on the case of **Aineah Likumba Asienya & 11 others v Postal Corporation of Kenya & another [2019] eKLR** (involving the 2<sup>nd</sup> Respondent herein) where the Court held that the claimants were entitled to the Golden Handshake and that the voluntary early retirement was not tied to pension. The court further held that to discriminate on grounds of age is untenable and awarded the claimants the remedy in the sum of Kshs.200,000/- together with the sums for notice and the payment for their service. He further relies on the case of **John O. Ochanda v Telkom Kenya Limited [2011] eKLR** which analysed the issue of golden handshake and which decision was further upheld by the Court of Appeal in 2013 as follows:

“ ...

*"Much about this item has been noted above when dealing with severance. Golden handshake is a rather new word in the lexicon of industrial relations. It does not appear to be old in use or application. But when it found its place in Kenya, it connoted something akin to a "thank you" token from the employer when one leaves employment. Perhaps a gift about which one cannot lay on a verbal demand on or commence court litigation. But here it looks like its payment was decreed by the Government and bodies engaged in*

*retrenching staff were directed to pay it. It became an item to be demanded. It was in the circulars, guidelines and parties negotiated it in the CBA. Therefore, it became payable and could not be dispensed with at a whim or caprice."*

*What the appellant did was that it paid those retrenched in phase 2 golden handshake but did not pay any golden handshake to the employees retrenched in phase 1. The appellant gave no reason for this discriminatory treatment. Since the appellant chose to give no reason, the only inference we can make is that it had no reason for doing so.*

*(35) Golden handshake is defined in The Concise Oxford Dictionary (9<sup>th</sup> Edition) as a payment given on redundancy or early retirement. Once the appellant decided to pay golden handshake, it could not arbitrarily decide who to pay and who not to pay. It had to be paid across the board. The age of an employee for the purposes of eligibility did not arise. Once it had decided to pay phase 2, Kshs.150,000/- as golden handshake, the appellant had no reason to refuse to pay employees in phase 1. In these circumstances, we cannot detect any misdirection in the way the learned Judge dealt with the issue of golden handshake."*

That the 1<sup>st</sup> Respondent having approved Golden handshake for the former employees was obliged to pay the said sum of Kshs.500,000/- to the Claimant. Further, that it approved his request to retire and did not make any counter offer in respect of his request. The Claimant further submits that he has established through his evidence that he retired from the 2<sup>nd</sup> Respondent on grounds of "Abolition of Office /Compulsory retirement arising from re-organization to bring about greater efficiency or economy". That he is thus also entitled to one month's salary for each of the 10 years worked; and to three months' salary in lieu of notice as prayed in the Plea.

On the issue of interests and costs, the Claimant submits that the rationale for awarding interest was well canvassed in the case of **Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2015] eKLR** where Odunga J. cited several case law and held that an award of interest is a form of reimbursement or compensation to a person who has been deprived of the use of goods or money by reason of a wrongful act on the part of the other party, paid by the party who has wrongfully deprived him of the use of the goods or money. That in **Joseph Kibera Omote v Kenya Airports Authority [2019] eKLR** the Court awarded interest on severance pay and found that there was no legal basis for the respondent to withhold the claimant's terminal dues on account of pendency of criminal proceedings. The Court further directed the respondent to pay the claimant half the costs of the suit as he had succeeded in part.

That similarly, in this case the 2<sup>nd</sup> Respondent did not have any justifiable reasons to withhold his terminal dues upon early retirement. Further, that the 2<sup>nd</sup> Respondent has already made terminal dues, including Golden Handshake to other former employees who were retired on similar grounds as the Claimant. That the Claimant is therefore entitled to interest as well as costs since it is the 2<sup>nd</sup> Respondent's refusal to pay him terminal dues that forced him to seek legal redress engaging at least two law firms. That as was held in the case of **Philip Peter Kerecha v Space Sellers Limited & Another [2018] eKLR** in economics, the basic rule on debts is that the cost of waiting is interest. That it is the sought costs that the claimant shall secure reimbursement from.

The Claimant submits that he does not dispute the loan amount as counterclaimed by the Respondents. That however the reason for the same is the abrupt retirement from employment and the Respondents' failure to pay him the claimed dues. That this Court should thus not reward the Respondents for their wrong doing with an award of interest and costs. He further prays that this Court do enter judgement in favour of the Respondents for the Counterclaimed amount of Kshs 408,335/- but with no order as to interest and costs, and that the counterclaim amount be off-set from the Plaintiff's decretal sum on the award that would be entered in this suit.

### **Analysis and Determination**

The first issue for determination is whether the Claimant is entitled to payment of Golden Handshake and Benefits as prayed in paragraph 19(1) of the Plea. The second issue for determination is whether the Respondents are entitled to their Counterclaim as prayed. The third issue for determination is who should pay the costs and interests of the suit.

In the Court's Ruling of 26<sup>th</sup> March 2009, the court made a finding at **paragraph 24 (b)**;

*(b) That the Plaintiff voluntarily elected to retire from the service of the second defendant on the basis that the substantive office he was then holding, namely General Manager, Strategy and Business Development had since been abolished.*

Further, vide the Arbitral Award made on 30<sup>th</sup> April 2012, the Arbitrator Martin Munyu made a finding at **paragraph 76(4)** that the Claimant retired on the ground of abolition of office. These findings have not been set aside or reviewed.

At **Paragraph 4** of the Voluntary Early Retirement Scheme for Management Staff Circular issued by the Postmaster General in March 2004, the Voluntary Early Retirement Package was stated as follows: -

#### **4.1 Staff on Scale 2 – 7**

- (a) Golden Handshake Kshs.500,000/-*
- (b) Three months' salary in lieu of Notice.*
- (c) Housing privilege for Three Months.*
- (d) One Month Salary for every complete year of service.*

(e) Pension Benefits as per the current retirement benefits Regulations.

In the case of **Aineah Likumba Asienya & 11 Others v Postal Corporation of Kenya & Another (supra)** and **John O. Ochanda (supra)** as upheld by the Court of Appeal the court found all employees of the Respondents who left employment in circumstances similar to the claimants were entitled to Golden Handshake. I therefore find that the claimant is entitled to the same and award him **Kshs.500,000/-** on account of Golden Handshake. The claimant is further entitled to 3 months' salary in lieu of notice in terms of the circular dated March 2004. I award him **Kshs.173,385/-** based on his monthly salary of Kshs.57,795. I further award the claimant **Kshs.577,950/-** being one month's salary for every completed year of service for the 10 years worked.

**The total award is Kshs.1,251,335.00/-**

**Pension:**

In the ruling delivered on 26<sup>th</sup> March 2009, Sitati J. directed that the issue on pension be referred to arbitration in accordance with Clause 35 of the Trust Deed and Regulations for the Postal Corporation Kenyan Scheme. The arbitrator has since made an award in respect of the issue which is dated 30<sup>th</sup> April, 2012. The issue is thus not for determination herein.

**Counter Claim:**

In his submissions, the claimant has admitted owing the 2<sup>nd</sup> Respondent the sum of Kshs.468,317/- as prayed in the counterclaim. He prays that the same be offset from the decretal sum.

**I therefore award the Respondents the sum of Kshs.468,317/-** as admitted by the Claimant to be offset from the decretal sum due to the Claimant.

With respect to costs in view of the fact that the claimant has been successful, I will award him costs. The Respondents will however not have costs in view of the fact that they failed to file their submissions and also because the claimant admitted the counter claim so that there was no necessity to prove the same. On interest, I will award the claimant interest at court rates from the date of consent order being 15<sup>th</sup> July 2009. Any interest earned in the deposit account will be netted off the interest awarded.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS**

**6<sup>TH</sup> DAY OF NOVEMBER 2020**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**