



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 367 OF 2011

YUNIS MORAA GICHANA.....APPELLANT

VERSUS

WAKENYA PAMOJA SACCO SOCIETY LIMITED....1ST RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED.....2ND RESPONDENT

JUDGMENT

1. The suit is based on an amended Statement of Claim dated 12th July, 2018 in which the claimant prays for the following reliefs:-
 - (a) Damages.
 - (b) Full, accurate and true accounts of the retirement benefits in accordance with the Collective Bargaining Agreement.
 - (c) Gratuity, severance pay and compensation pension, with payment of Kshs. 210,762.95 plus interest from the date of default until payment.
 - (d) Costs of the suit and interest.
2. The Claimant testified under Oath as C.W.1 and testified that she worked for Gusii Farmers Rural SACCO now the 1st Respondent from 1979 until the year 2002.
3. That upon leaving employment she was not paid her terminal benefits. That the 1st respondent acknowledged the debt in 2009, upon her following up the matter. That C.W.1 recorded a witness statement dated 14/12/2018 which she adopted as her evidence in chief. C.W.1 also produced documents filed in two lists dated 12/7/2008 and marked "1" to "6") and a further list dated 13/12/2008 marked '7' to '10'.
4. C.W.1 testified that in the beginning of the year 2000, the 1st defendant's General Manager, one Celestine Nyamumbo asked C.W.1 to apply for early retirement due to ill health, which C.W.1 did.
5. That on 30th January, 2002, C.W.1 received a letter informing her that the letter for early retirement had been approved with effect from 31/3/2002. That C.W.1 followed payment of her retirement benefits for a long time in vain.
6. Whilst following up the matter with the Retirement Benefits Authority, C.W.1 received a letter dated 4th November, 2009 from the authority informing her that her retirement benefits were received by the 2nd defendant from Wakenya Pamoja Staff Provident Fund in the sum of Khs. 201,762.95 vide cheques nos. 000098 and 000223 of Kshs. 190,680.35 and Kshs. 19,902.60 payable to C.W.1 dated 6/3/2002 and 3/5/2002 respectively. That to-date C.W.1 does not know who encashed her cheques.
7. That C.W.1 has not been informed by the 1st respondent how her money was removed from the 2nd respondent's account and by who, the money was withdrawn.
8. C.W.1 testified that Wakenya Pamoja Provident Fund informed her that the Sacco employed the son of C.W.1 and so C.W.1 was not entitled to payment of any benefits. C.W.1 prays that the respondents be directed to pay her full benefits upon rendering full and proper accounts to C.W.1 with interest and costs as per the collective Bargaining Agreement.
9. C.W.1 was cross-examined by Advocate Shiwetso for 1st respondent and Mrs Mulila for 2nd respondent.

10. The respondents called R.W.1 Fred Miruka, the Human Resource Manager for the 1st respondent. R.W.1 testified that C.W.1 worked for the 1st respondent from 1979 to 2002. That during the period C.W.1 was granted salary advances and Loans and as at the time C.W.1 took early retirement she owed money to the 1st respondent.

11. That the terminal benefits of C.W.1 were paid in two cheques as testified by C.W.1 in the sum of Kshs. 190,860 and 19,919 respectfully.

12. In the witness statement dated 7/12/2018, R.W.1 stated that cheques number 00098 and 0000223 drawn in favour of C.W.1 by Co-operative Bank through the SACCO were credited in her account. That on 31/3/2002 Kshs. 190,860.35 was credited in her account and on 31/5/2002 Kshs. 19,919 was directly debited from the cheque payment as the claimant had outstanding balance with the SACCO. R.W.1 produced ledger card from the account of C.W.1 marked '4' in the 1st respondent's bundle of documents to illustrate aforesaid evidence.

13. R.W.1 concluded therefore, the 1st respondent fully discharged its mandate of remitting payment to the claimant of the retirement benefits and that the 1st respondent does not owe the claimant any further funds.

14. R.W.1 stated further that interest on the terminal benefits was also computed before the aforesaid sums were remitted to her account.

15. R.W.1 stated that the Claimant erroneously seeks to claim further benefits in terms of a Collective Bargaining Agreement which was concluded way after she had left employment. That the Collective Bargaining Agreement signed between the SACCO and the employees after the claimant had left does not apply to her at all. R.W.1 produced the Collective Bargaining Agreement executed on 18/6/2008 marked '6' in support of this point.

16. That C.W.1 was registered under a gratuity Trust Account and Retirement Benefits Authority to which the SACCO is a contributor, and therefore C.W.1 does not have any claim of benefits from the SACCO, the 1st respondent and 2nd respondent bank at Kisii branch. R.W.2 stated that the claimant was a stranger to them since she had no account in the 2nd respondent (Co-operative Bank). That the 2nd respondent is therefore a stranger to all the allegations made by the claimant. That the dispute if at all is between the claimant and the 1st respondent and the 2nd respondent be struck out of the suit and/or the suit be dismissed as against the 2nd respondent.

17. R.W.2 Elkana Esikuri, business banker Kisii branch of the 2nd respondent testified that he worked for the 2nd respondent since the year 2013. That the 2nd respondent wrote two cheques to the 1st respondent Wakenya Pamoja being No. 98 for Kshs.190,860 and No. 223 for Kshs.19,902.60. R.W.2 stated that the cheques were drawn in favour of the Claimant but were sent to the Trustee Account of Wakenya Pamoja SACCO whose account was held at the respondent itself. That C.W.1 was entitled to the payment that was made through the remittance stated earlier.

18. That the suit lacks merit and it be dismissed with costs

Determination

19. The issues for determinations are:-

- (i) Whether the Claimant has proved that she is owed terminal benefits by the 1st and 2nd defendant, jointly and severally.
- (ii) Whether the claimant is entitled to the reliefs sought.

20. The claimant in the suit bears the primary burden of proving on a balance of probability that she was entitled to payment of terminal benefits from either the 1st or 2nd respondents or both in terms of Section 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya. Section 107 provides:-

“107. Burden of proof

(1) Whoever desires any Court to give Judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists.”

21. Whereas Section 108 provides:-

“108. Incidence of burden

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

22. In the present case, the claimant through her testimony which is not contradicted by the 1st respondent vide R.W.1 stated that she was employed by the 1st respondent between the years 1979 and 2002.

23. That the claimant took early retirement on medical grounds.

24. That the Claimant was registered under a Gratuity Trust Account and Retirement Benefits Authority to which the 1st respondent SACCO was a contributor on behalf of its employees including the claimant.
25. It is not in dispute that upon taking her retirement, the claimant was entitled to payment of terminal benefits and that the said terminal benefits were computed by the provident fund aforesaid which proceeded to generate two cheques Nos. 000098 for Kshs. 190,860.35 on 6th March, 2002 and No. 000223 for Kshs. 19,902.60 dated 3/5/2002 in favour of the claimant totaling Kshs. 210,762.95 now demanded by the claimant.
26. It is also evident that the said cheques were remitted to the 1st respondent's account held in the 2nd respondent bank.
27. It is not in dispute that the cheques were in the name of the claimant.
28. The query raised by C.W.1 is how the two cheques were then encashed without any endorsement by the claimant in whose favour the cheques were drawn if at all that happened.
29. The 1st respondent has intimated through R.W.1 that the claimant owed 1st respondent money and so part of the benefits in the sum of Kshs. 19,919 was directly debited from the cheque payment as the claimant had outstanding balances to the SACCO.
30. R.W.1 did not tell the Court how much outstanding debt was owed by the claimant to the SACCO, the 1st respondent.
31. R.W.1 further told the Court that the cheque of Kshs. 190,860.35 was credited to the account of the claimant in the SACCO and that fact is reflected in the statement of account of the claimant produced before Court and listed "No. 4" in the 1st respondent's bundle of documents.
32. The Court is satisfied from the documentary evidence that Kshs. 210,762.95 comprising retirement benefits of the Claimant were credited in the claimant's SACCO Account and the Claimant was the only person with authority to withdraw money credited into her SACCO Account aforesaid.
33. The Court is also satisfied that Kshs. 19,902.60 was deducted by the SACCO from the credited amount towards payment of the Claimant's outstanding loan.
34. It is therefore beyond doubt that the claimant received a credit of Kshs. 190,860.35 in her SACCO account being retirement benefits from the provident fund.
35. The 2nd respondent only hosted the account of the 1st respondent and there is no evidence at all to associate the 2nd respondent bank with the transaction for payment of terminal benefits between the 1st respondent SACCO and its employee, the claimant.
36. The Court therefore absolves the 2nd respondent from any liability in this matter.
37. The Court also finds that there is no evidence that anybody else other than the claimant received terminal benefits in the sum of Kshs. 210,762.95 in her SACCO account and Kshs. 19,902.60 was applied to defray outstanding loan to the SACCO.
38. The Court also finds that the Collective Bargaining Agreement concluded between the SACCO and its employees on 18th June, 2008 did not apply to the Claimant since she had already left the employment of the 1st respondent in the year 2002.
39. The negotiated benefits in the Collective Bargaining Agreement are therefore not payable to the Claimant retrospectively. That Claim lacks merit and is dismissed.
40. The claimant has not proved that she has been wronged by the 1st and 2nd respondents and is therefore not entitled to any damages from the respondents.
41. Furthermore, the retirement benefits due and owing to the claimant were payable and were duly paid by a third party, a provident fund for the employees of the SACCO to the account of the claimant in the SACCO which account was held at the Co-operative Bank. This evidence was clearly brought out by the testimony of R.W.1, Elkana Sikuri who testified for the 2nd respondent.
42. The claimant has failed to prove on a balance of probability that she did not receive the paid terminal benefits neither has the claimant proved that she was entitled to more benefits than that she was paid.
43. Accordingly, the entire suit lacks merit and is dismissed.
44. We consider this case appropriate for each party to bear their costs of the suit in recognition that that claimant took early retirement on medical grounds upon serving the 1st respondent for many years.

Dated and delivered at Nairobi this 17th day of December, 2020.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Bosire for Claimant

Mr. Bude for 1st respondent

M/s Mutiria for 2nd respondent.

Chrispo – Court clerk