



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2130 OF 2012**

**HARON OKETCH RAPEMO.....CLAIMANT**

**VERSUS**

**HON. ATTORNEY GENERAL**

**THE DIRECTOR OF PENSIONS**

**KENYA INDUSTRIAL RESEARCH &**

**DEVELOPMENT INSTITUTE.....RESPONDENTS**

**JUDGMENT**

1. The Claimant sued the Respondents in a suit that commenced at the High Court of Kenya in 2002. The suit was not determined before the High Court and was transferred to this Court 10 years later. He was retired from the 3<sup>rd</sup> Respondent on grounds of age on 31<sup>st</sup> October 2000. The Claimant averred that he was employed from 18<sup>th</sup> April 1969 with the Chambers for the Counsel for East African Community in Arusha, Tanzania on permanent and pensionable terms before his transfer to the East African Trypanosomiasis Research Organisation before joining the East African Commission and Research Secretariat in Arusha acting as a senior librarian before he joined the 3<sup>rd</sup> Respondent (hereafter, KIRDI) when the collapse of the East African Community brought him back to Kenya. He was retired and after retirement was not able to relocate to his rural home. He thus sought his full pension being Kshs. 1,998,988/-, reduced pension of Kshs. 352,763/-, accommodation expenses for 151 days at the rate of 24,000/- Kshs. 3,624,000/-, transport expenses – Kshs. 75,000/-, storage charges Kshs. 85,050/- pro rata leave days – Kshs. 27,349/-, unpaid salary increment of 14,964/-. The Claimant also sought accommodation expenses calculated on the basis of the KIRDI's night out rates. He averred that he had received some payment which was to be deducted from the sum due. He also sought costs of the suit and interest.

2. The Respondents filed their defences, initially through the Attorney General before the 3<sup>rd</sup> Respondent engaged another advocate. In their defence, 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that the suit was defective and that the Claimant was not their employee. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents asserted that it was impossible to serve two masters at a time and that the Claimant was not terminated from service but retired on grounds of age. The defence of the 3<sup>rd</sup> Respondent was to the effect that the Claimant had been paid all his lawful benefits and that he had not suffered any loss, embarrassment nor damage. The Respondents witnesses stated in their statements that the Claimant's terminal dues were settled and because the Claimant had opted to remain in Central Government, his service at KIRDI was unlike for those staff members who opted to join the KIRDI optional retirement scheme which had better terms than the Central Government. The Claimant was accordingly entitled to pension for the period before opting for the second option in which only gratuity was payable for his service at KIRDI. The Respondents witnesses stated that the Claimant was duly paid his dues and was not entitled to per diem while he waited for his pension.

3. The matter was finally heard in 2018 after a few failed attempts at hearing in 2014, and early 2015. The case was partly heard by me in December 2015 and the following year the case never took off. It remained unheard till November 2018 when I heard the balance of the claim. The Claimant confirmed that he received some payment in February 2001 and he signed in acknowledgement. He stated that he signed the acknowledgment under duress though he confirmed that he did not endorse anywhere on the document his reservations against the receipt. He said that he sought the full pension as the Director KIRDI opted to retire him and not the Permanent Secretary. He testified that upon retirement he had to hire a vehicle to Kisumu to ferry his personal belongings and that the 3<sup>rd</sup> Respondent did not facilitate the same through provision of a vehicle or money for the hire of transport. He stated that the landlord locked up his goods when he was unable to pay his rent after his retirement when he was pursuing his pension.

4. The Respondent called Jairus Ombui the assistant director HR and Admin at KIRDI. He testified that the Claimant had retired and was not a member of the contributory pension scheme KIRDI had. He testified that the Claimant was entitled to transport to his rural home per the HR manual. He stated that he knew for a fact that the sum was paid though he could not tell exactly when and that the Claimant signed off that he had no claim against KIRDI. That marked the close of oral testimony.

5. The Claimant filed his submissions on 10<sup>th</sup> January and a list of authorities on 11<sup>th</sup> January 2019 while the Respondents filed their submissions on 17<sup>th</sup> January 2019 before the file was transmitted to me in Nyeri to pen the judgment. The Claimant reiterated how he was employed by the East African Community in various capacities before the collapse of the Community in 1977 and his last point of public service was the 3<sup>rd</sup> Respondent. He submitted that he was entitled to the pension calculated for KIRDI staff as his election to the 2<sup>nd</sup> option which was Central Government pension was not acted upon. He applied the formulae applicable in that regard and submitted that he was entitled to the full pension as well as the commuted pension, cumulated pension and the reduced pension all totaling the grand figure of Kshs. 2,373,131.20. The Claimant also sought accommodation expenses calculated on the basis of the KIRDI's night out rates for the 151 days he and his family spent in Nairobi when he was chasing his pension dues.

6. The 3<sup>rd</sup> Respondent in its submissions stated that upon the Claimant having attained retirement age was retired from KIRDI and his accrued benefits calculated and paid including his accrued leave days and the transport expenses for transporting his personal belongings to his rural home. The 3<sup>rd</sup> Respondent submitted that the Claimant is not entitled to any of the claims in his plaint as there was a discharge he signed on 21<sup>st</sup> February 2001. The 3<sup>rd</sup> Respondent relied on the cases of **Ephraim Gaiho Gathongori v Timafloor Limited [2018] eKLR** and **Gilbert Mugambi v Michimikuru Tea Factory Limited [2018] eKLR** where the court held that the execution of a discharge voucher constituted a complete contract.

7. The Claimant when seeking the dues he believes are due to him was handicapped by one thing. In the case of **Coastal Bottlers v Kimathi Muthika [2018] eKLR**, the Court of Appeal held as follows:-

*21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. In **Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR** this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:*

***"The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged."***

*22. All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Our position is fortified by the sentiments of Sir Charles Newbold P. in **Damodar Jhabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd [1967] EA 153** that:-*

***"The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - **Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others (supra)** – Lord Justice Beatson stated as follows:-***

*'Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.'*

*23. Giving effect to the parties' intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant.*

8. The Claimant therefore in signing the discharge on 21<sup>st</sup> February 2001 intended, as far as the contract he executed goes, to be bound by it and absolve the 3<sup>rd</sup> Respondent of any claims he could conceivably have. It is unfortunate that the bargain he took may have been less than what he could have been or was entitled to. That is neither here nor there. He cannot recover in this claim as he waived the right to pursue any remedies through the waiver he signed. His suit is therefore only fit for dismissal as I cannot discern any intent by the Claimant not to be bound by his discharge. If he had reservations he could have signed 'without prejudice' or 'received in part payment'. The suit is thus dismissed but each party will bear their own costs.

It is so ordered.

**Dated at Nyeri this 24<sup>th</sup> day of January 2019**

**Nzioki wa Makau**

**JUDGE**

**Delivered at Nairobi this 29<sup>th</sup> day of January 2019**

**Radido Stephen**

**JUDGE**