



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CASE NO. 992 OF 2014

(Formerly HCCC 502 of 2011)

BERNARD MAINA KIAMA & 42 OTHERS.....CLAIMANTS

VERSUS

RIFT VALLEY RAILWAYS (KENYA) LIMITED....RESPONDENT

JUDGMENT

1. The Claimants filed their suit at the High Court of Kenya and the suit was transferred to this court some 3 years later. The Claimants were declared redundant and averred that the redundancy package was communicated to them by the then managing director Roy Puffet who wrote the letter dated 20th February 2008 Ref: RVR/HRM/SP/4 informing them of the redundancy effective 1st April 2008. The Claimants averred that the Respondent was in breach of the concession agreement dated 23rd January 2006 which had specified their contracts and terms (remuneration) were to be adjusted upwards which the Respondent apparently failed to do. The Claimants assert that the redundancy dues were not paid as expected and they continued working till May 2008 without being paid any salaries. The Claimants averred that the clearance certificates are illegal and unenforceable as they were signed under duress and that the Claimants were apprehensive after the adverse publicity the Respondent had undergone especially in the electronic and print media regarding the survival of the Respondent's business in Kenya. The Claimants assert that the redundancy was illegal and made in bad faith and a ploy as the jobs they held were advertised in the print media. They averred that they were forced to pay for house rent at market rates after they were declared redundant. The Claimants sought payment of 8 month's salary for work between September 2007 and May 2008, full monthly salary for the Claimants up to the age they would reach the retirement age of 60 years, general damages, costs of the suit and interest thereon at court rates.

2. The Respondent asserts that the court lacks jurisdiction to entertain the suit as the Claimants moved the High Court which did not have capacity to hear labour matters under the Trade Disputes Act (now repealed) and that the suit was therefore incompetent as the High Court could not transfer to this court a matter that it had no jurisdiction over. The Respondent asserts that the provisions of Section 14 of the Trade Disputes Act are mandatory and therefore the non-compliance with the provisions of the law made the suit untenable since it was a nullity.

3. The Claimants testified through Bernard Kiama who stated on behalf of his colleagues that they were dismissed unfairly by the Respondent. He testified that they were divided into two groups with one group from No. 1-35 claiming 2 months salary for April and May 2008, 1½ salary for each year of service as balance of their service pay and payment till 60 years, and the second group being No. 36-43 who sought 8 months salary from October 2007 till May 2008, 1½ salary for each year of service as balance of their service pay and payment till 60 years. He stated that they sought the 1½ as they were only paid for one month when they were at the Respondent as opposed to the 2½ months they were entitled to. He stated that they were forced to sign the discharge forms and they thus sought payment of the balance. As the Respondent was absent, no testimony was adduced on their behalf. That marked the close of oral testimony.

4. The parties were to file submissions and the Claimants filed submissions on 19th December 2018 and the Respondent filed on 18th December 2018. I will not concern myself much with the objection taken on jurisdiction as my brother Nduma J. dealt with the preliminary objection raised by the Respondent and dismissed it. The Respondent neither sought review nor appeal. As the matter of jurisdiction is *res judicata* the Court will not deal with it.

5. The Claimants submissions were that they were seeking special damages, general damages, costs of the suit and interest on the sums at court rates plus any other further relief the court deemed fit and just to grant. The Claimants submitted that the redundancy meted out by the Respondent was in gross violation of the law, the Concession Agreement and the employment contract because their terminal dues were not paid immediately and that they continued working without pay until May 2008. They assert that they were not paid the sums due per the Concession Agreement under Clause D.4 on pension which set the pensionable staff were entitled to 2½ months for each year worked if less than 10 years but the Respondent only paid them one month salary under this clause. The Claimants submitted that they were disadvantaged as in handling the retrenchment exercise the Respondent ignored that there was only one player in the railways industry and that they deserved to be paid their full dues to assist them settle in their new lives as getting an alternative employment was difficult. They cited the

case of **Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others [2014] eKLR** which held that there was little chance of the workers getting employment elsewhere given the air transport industry in Kenya was fairly limited. The Claimants submitted that the declaration of redundancy was justified if there is substantive justification for declaring the redundancy and there is procedural fairness in the consequent retrenchment. The Claimant submitted that the Respondent failed to meet the statutory threshold for fairness and that it failed to hold meaningful deliberations with the affected employees or their union and its selection of the affected employees was not based on an objective and open criteria. They cited the case of **Gerrishom Mukhutsi Obayo v DSV Air and Sea Limited [2018] eKLR** where the court held that for a redundancy to be fair, the employer must prove that both the labour officer and the employee's union where there is one have been notified at least one month before the redundancy takes place. They urged the grant of their prayers before the court.

6. The Respondent in its submissions regurgitated the issues on jurisdiction which I hold were *res judicata*. Regarding the suit, the Respondent submitted that the claim by the Claimants was vague. The Respondent submitted that they requested for various sums of money without any tabulation of the specific claims. The Respondent submitted that in the absence of particulars, the claims made could not be granted. The Respondent submitted that the retrenchment was undertaken with certain criteria being followed for payment and that the employees who were not pensionable were to be paid for 2½ months for each year worked and those who had worked for 10 years would be paid 1 month for each year worked. The Respondent submitted that the Claimants did not prove their claims and that the claims by the 36th, 37th, 38th, 39th and 42nd Claimants were *res judicata* as they were claimants in other suits that had been determined. The Respondent also submitted that the Claimants each admitted to signing clearance forms which expressly stated that they had received all their dues and that they had no further claims against the Respondent. The Respondent submitted that the suit should be dismissed with costs.

7. The Claimants herein filed a sketchy suit. The claims they had were not well articulated and particulars were lacking. Be that as it may, in their documents annexed to the claim the Claimants exhibited the clearance certificate which was in both English and Kiswahili. The Claimants absolved the Respondent of any claims they may have in the following words *I do confirm that all payments due to me arising out of my employment contract and retrenchment thereof with RVR have been fully and finally settled and that I have no further claims against the company*. The Claimants signed the documents in April 2008 and they cannot now be heard to say they were coerced. From then, they waited for 3 years before filing suit and never indicated on these documents their reservations. They have not indicated how they were coerced into signing these waivers.

8. 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 **Damondar 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.

9. The Claimants were bound by their waivers and they absolved the Respondent of any future claims. The bargain they took may have been less than what they could have been or were entitled to. The suit therefore is fit only for dismissal. I dismiss the suit and each party to bear their own costs.

It is so ordered.

Dated at Meru this 7th day of February 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 13th day of February 2019

Radido Stephen

JUDGE