



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 281 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 10th July, 2019)

BANKING, INSURANCE AND FINANCE UNION (KENYA).....CLAIMANT

-VERSUS-

BANK OF BARODA (K) LIMITED.....RESPONDENT

RULING

1. Before this Court is the Claimant's Application dated 29th April 2019, wherein, they seek the following orders:-

a. Spent.

b. THAT this Honourable Court do issue interim ex parte orders restraining the Respondent herein from prematurely and unlawfully retiring Mr. Thomas Orina Mokinu and or any other bank employees before attaining the normal retirement age of 60 years until the hearing and determination of this application inter partes.

c. THAT the Honourable Court do issue orders compelling the Respondent, its principals or agents to abide by the court orders issued on 4th October 2018 which declared the Respondent's action as discriminatory and further ordered the Respondent to review the retirement age of all employees from the current 55 years to 60 years.

d. THAT Honourable Court do award costs of this Application to the Claimant.

2. The Application is based on the grounds that the Respondent has ignored the decision of this Court issued on 4th October 2018 where the Court found the Respondent's action of subjecting certain employees to a retirement age of 55 years and others 60 years as discriminatory.

3. On 12th April 2019, the Respondent issued the grievant a retirement notice indicating that his retirement date would be 30th April 2019 when he would turn 55 years. The Respondent has failed to review its retirement age policy and guidelines despite receiving a letter to review the same.

4. It is their case that the grievant's birth certificate, national identification card and employment records only indicate the year of birth and do not specify the exact date that the Claimant was born.

5. The Application is supported by the Affidavit of Joseph Ole Tipape and is based on the grounds on the face of the motion. Additionally, the Applicant avers that the Respondent prematurely retired one of its employees, Mary Kungu, in August 2018 during the subsistence of Cause 234 of 2018.

6. It is the Claimant's position that the Respondent's actions amount to disobedience of the Court orders.

7. The Respondent opposed the Application vide the Replying Affidavit filed on 13th May 2019 and the Further Replying Affidavit filed on 15th May 2019 of James Kirtela Kimintah. The Respondent avers that the matter is *res judicata* as the same issues had already been heard and determined by this Honourable Court and which matter was pending appeal.

8. Further, the orders for stay granted to the Kenya Bankers Association suspended the operationalization of the judgment pending the hearing and determination of the appeal. As such, the retirement of employees is 55 years as envisioned in the Staff Handbook hence the Respondent in not disobeying any orders.

9. The Respondent avers that by suspending the grievant's retirement, they have acted in good faith and in obedience to the Court orders. As such, it is their position that the filing of this Application is an abuse of the process of this Court as it is based on misrepresentations.

10. The Respondent also avers that retirement age is one of the non-negotiable terms of the CBA as it is linked to pension schemes. Further, there is no provision under the Employment Act of the KBA guidelines that requires it to have a uniform retirement age of 60. Nevertheless, the decision to enhance the retirement age is not a collective industry decision and only 12 of the 40 industry members have enhanced the retirement age of their employees.

11. As regards the grievant's age, the Respondent avers that Mr. Mokinu has made several applications to it where he indicated that his date of birth was 30th April 1964 and not 30th December 1964 as sworn in his Affidavit of 11th April 2019. The Respondent maintains that there is no evidence to corroborate the grievant's averments and that his Affidavit was only sworn once he was served with a retirement notice.

12. It is the Respondent's case that it stands to suffer financial loss if the orders sought are granted as it will be forced to keep employees who have attained the age of 55 years in its payroll.

13. The Applicant filed a rejoinder arguing that vide this Court's judgment issued on 4th October 2018, retirement age was concluded to be a negotiable term and that the decision of subjecting employees to different retirement ages was discriminatory and should be reviewed accordingly.

14. It is their position that the KBA and the Respondent's Applications for stay were seeking to stay certain parts of the judgment and not the entire judgment and that this Court's decision to dismiss the Respondent's Application has not been challenged to date.

15. They further aver that the only legal documents admissible to authenticate age are the birth certificate and national identification card and not the documents produced by the Respondent. Further, in the absence of a specific birth date, the Respondent is bound by the averments in the grievant's affidavit.

16. It is their position that Mr. Mokinu was not issued with a month's retirement notice nor was there an indication that there would be payment in lieu of notice.

Submissions by the Parties

17. In their submissions filed on 10th June 2019, the Claimant submits that once the Respondent's Application for stay was dismissed, they ceased being a party to the suit and only KBA can enjoy the fruits of the orders of the stay granted. They rely on the case of **Wangui Kathlyn vs. Disciplinary Tribunal of the Law Society of Kenya & Another HC Misc. Application 113 of 2016.**

18. Further, that the grievant's age is as indicated in his Affidavit and not as indicated in the documents adduced by the Respondent. They submit that the common best practices in employment law dictate that where an employer is in doubt of an employment benefit accruing to an employee, they adopt what is most favourable to the employee, which in this case is attainment of retirement age on 31st December 2019.

19. The Respondent in their written submissions filed on 21st May 2019 submit that the instant application is frivolous, vexatious and an abuse of the Court process and ought to be struck out as it is based on false and misrepresented facts. Given the stay ruling, the retirement age of employees stood at 55. They rely on the case **Kivanga Estates Limited vs. National Bank of Kenya Limited [2017], Kiama Wangai vs. John Mugambi & Another [2012] eKLR, Graham Rioba Sagwe & 2 Others vs. Fina Bank Limited & 5 Others [2017] eKLR, Republic vs. Commissioner General, Kenya Revenue Authority ex parte Mount Kenya Bottlers Limited & Another [2017] eKLR, Intercountries Importers and Exporters Limited vs. Teleposta Pension Scheme Registered Trustees & 5 Others [2019] eKLR and Okiya Omtatah Okoiti vs. Joseph Kinyua & 2 Others [2018] eKLR.**

20. They also submit that the matter is *res judicata* as it had already been determined and the decision has a pending appeal. They rely on the cases of **Joseph Tama Ndua & 10 Others vs. Jacaranda Hotels (Mombasa) Limited t/a Jacaranda Indian Ocean Beach Resort [2019] eKLR, George Kihara Mbiyu vs. Margaret Njeri Mbiyu & 15 Others [2018] eKLR, Kenya Commercial Bank vs. Benjoh Amalgamated Limited [2017] eKLR and Stephen Wang'ang'a Njoroge vs. Stanley Ngugi Njoroge & Another [2017] eKLR.**

21. They further submit that Mr. Mokinu is estopped from alleging that his date of birth is 30th December 1964 and they relied on his assertions since 1991, that he was born on 19th April 1964. They rely on the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR and Seascapes Limited vs. Development Finance Company of Kenya Limited [2009] eKLR.**

22. Lastly, the Respondent submits that its retirement age policy is not discriminatory. Its parent company in India with a retirement age of 60 years is a different entity from the Respondent.

23. They further submit that different countries have different retirement policies. They rely on the cases of **Salomon vs. Salomon [1897] AC 78 and Victor Mabachi & Another vs. Nurtorn Bates Limited [2013] eKLR.**

24. I have examined the averments of both Parties. On the 29/4/2019 this Court issued orders restraining the Respondent from prematurely retiring the Applicant herein before attaining the age of 60 years.

25. The application emanates from this Court's judgement in Cause No. 234/2018 dated 4/10/2018 where the Court directed that the issue of retirement age be negotiated as per the Parties CBA and that the fact of having some employees retire at 55 and others at 60 years was discriminatory. This Court therefore became functus officio in relation to the said pronouncement.

26. In relation to the current application, the Claim is different from that in Cause No. 234/2018 and the issue of this Court being functus officio cannot lie. This Claim relates to a particular grievant who is due to be retired and is not about the issue of the entire Membership of the Claimants as in the Cause No. 234/2018 and also not about negotiation on retirement age.

27. Considering the averments of the Applicant herein, the grievant has averred that he is due to be retired earlier.

28. The Claimant has shown by documents and submissions that indeed the grievant is due to retire him before attaining 60 years whereas the other employees are set to retire at 60 years which is prima facie discriminatory. In the circumstances, I find the Applicant has established a prima facie case to warrant issuance of the orders sought.

29. I therefore allow the application and issue orders restraining the Respondents herein from retiring Mr. Thomas Orina Mokinu before the age of 60 years pending the hearing and determination of this claim.

30. Costs in the cause.

Dated and delivered in open Court this 10th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ondati for Respondent – Present

Applicant – Absent