



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 375 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JOHN KIMANI MWEGA.....CLAIMANT

VERSUS

CENTRAL BANK OF KENYA.....1ST RESPONDENT

BOARD OF TRUSTEES OF CENTRAL BANK OF KENYA

PENSION FUND.....2ND RESPONDENT

JUDGMENT

Vide his Statement of Claim filed on 12th March 2014, the Claimant avers that the Respondents had purported to resist his Notice for Early Retirement dated 11th November 2013 by imposing extraneous, onerous and oppressive conditions to forestalling the effect of the notice. He further avers that on expiry of the notice the Respondents have refused to pay him his terminal benefits which include accrued salary, leave and his pension. He therefore seeks the following orders against the Respondents:

a. An award of withheld salary made up as follows:

i. January 2014 salary.....Kshs.570,157.20

ii. February 10 days salary.....Kshs.203,627.00

iii. 21 days outstanding leave..... Kshs.399,110.00

iv. Lost pay at KSMS being

39 lecture hours x 2,000.....Kshs.78,000

b. Lump sum Pension under Rules 10 and 13.. Kshs.14,205,565.60

c. Loss of earning for

35 months x Kshs.570,157..... Kshs.19,955,945.00

d. Leave allowance for 3 years at Kshs.123,000... Kshs.369,000.00

Sub total..... Kshs.35,780,954.00

e. Monthly pension from 11th February 2014 (pensionable date) at the rate of Kshs.256,928.30 per month during the Claimant's lifetime (Rule 20)..... Kshs.256,928.30

f. Exemplified and punitive damages for the violation of the Claimant's rights under the Constitution and Employment Act for the

aforesaid malicious acts of intimidation, threats, embarrassment and discrimination and as expression of the Court's displeasure on the Respondent's conduct as aforesaid;

- g. An Order directed to the 1st Respondent to issue the Claimant with a Certificate of Service (Testimonial)
- h. Such further and/or other reliefs and/or Orders/Awards as the Court may be pleased to grant;
- i. Interest on the above awards from date of filing this cause until payment in full;
- j. Costs of this suit and interest thereon.

The Respondent filed its Replying Memorandum on 23rd April 2014 denying the Claimant's averments. It contends that the Claimant purported to give the 1st Respondent his Notice of Early Retirement whilst there was a pending disciplinary issue in respect of the Claimant's conflict of interest in the purchase of Property known as L.R. No. 10821/76. It avers that the entire claim aims at circumventing the 1st Respondent's internal disciplinary mechanism and that the claim is premature as the Claimant is still its employee.

At the hearing the Claimant elected to rely on his Statement of Claim and not adduce any evidence. Nduma J. declined the Respondents' application seeking to compel the Claimant to be cross-examined by the Respondents. The Respondent called two witnesses Rose Ndetso, the 1st Respondent's Director of Statutory Management Department who testified as RW1, and Elizabeth Njogu the 1st Respondent's Legal Officer in the Human Resource Department who testified as RW2.

Respondent's Case

ROSE NDETISO, RW1, testified that Deposit Protection Fund Board (DPFB) was transformed to Kenya Deposit Insurance Corporation (KDIC). That the DPFB was under the management of Central Bank of Kenya (CBK), the 1st Respondent and all its employees were employees of CBK.

She testified that Eurobank Ltd was in liquidation and that they (DPFB) aimed at recovering debts in Eurobank by auctioning one of the security properties.

In cross-examination, she testified that the Claimant was a senior officer and that the Governor of the CBK must have known him as a senior officer. She testified that she could read the name on the transfer documents and the photographs attached to the document but she could not recall seeing the Governor signing the documents. She further testified that the transfer was handled by the Legal Department and she did not personally handle it.

She testified that this claim is all about a personnel conflict of interest as staff should not participate in the sale of debtors property. She testified that the 1st Respondent referred the matter to the Anti-Corruption Court. She testified that she did not know if there were any rules that barred the Respondent from making payments to the Claimant or stop the Claimant from retiring.

In re-examination, she testified that she is familiar with the sale process and that the transfer was first signed by the Governor of the CBK hence at the time the Governor signed the transfer the purchaser had not signed the same. She testified that the Claimant was to respond to some of these issues when he was invited to a disciplinary process which he declined and that the sale was now completed.

ELIZABETH NJOGU, RW2, adopted her Witness Statement as her evidence in chief. She testified that it is not correct that the Claimant was discriminated and that in instances where the Bank offers its staff opportunity to buy its own assets the process is transparent and above suspicion. She testified that the Claimant had offered to reverse the transaction but later on rescinded the decision to reverse the impugned transaction. She further testified that the Bank is entitled to subject the Claimant to disciplinary process which was yet to be conducted.

In cross-examination she testified that there is no rule that bars an employee from early retirement and that his Pension was based on his half salary. She testified that the reason for the early retirement not being effected was that the matter had to be approved by the management and he was not allowed to go on early retirement since there was a pending case. She testified that the Claimant was not paid his full pension. That the recommendations by the Human Resource Director in her Memo dated 15th November 2013 were never compiled with. She testified that the bank had not filed a suit for recovery of land but she was aware of criminal charges against the claimant. It was her testimony that the rules on termination apply to pension and that the rules provide for what determines pension.

In re-examination she testified that Rule 6.22 of the Staff Rules is not couched in mandatory terms.

She testified that she was not aware if the transaction was reversed as requested in the letter from Kimwe Property Management Limited.

Claimant's submissions

The Claimant submitted that Rule 6.22 of the Central Bank of Kenya Rules and Regulations provides that an employee on permanent and pensionable terms may at any time terminate his services with the Bank by giving three months' notice in writing of the intention to terminate his services. Thus, an employee cannot impose or set conditions for his dismissal. That the Respondent, under this provision, is expected to accept the tender of Early Retirement Notice. He therefore submitted that it was an exercise in futility for the 1st Respondent to frustrate the Notice by unilaterally imposing extraneous matters to arrogantly and oppressively dismiss the efficacy of the said notice.

He submitted that should there have been a conflict of interest the Respondent's remedy lay elsewhere but not in withholding the Claimant's terminal emoluments and pension. He submitted that the equitable remedy of specific performance is not available to the 1st Respondent as to compel him to continue in its service against his will. He relied on the decision in **Communication Workers Union of Kenya v Telkom (K) Ltd & 2 Others [2006] eKLR** where the Court held:

“I agreed with the submission made by Mr Wekesa, learned counsel for the defendants when he stated that an employment agreement is essentially an agreement for personal service. Parties to an employment agreement cannot be forced to continue in an employment relationship when one party obviously does not desire to continue in such a relationship.”

He submitted that assuming he is to be held accountable for the action of Kimwe Properties Management Limited the purchaser of actioned premises the allegations of conflict of interest as spelt out in rules 3.36 and 3.37 cannot stand as the Company bought the premises at a public auction that was widely advertised in the daily Nation on 8th April and 4th May 2013 and the transfer document was executed by the 1st Respondent's Governor by endorsing his signature on the transfer on behalf of the chargee, who personally knew the Claimant and was put on actual notice that the Claimant was a director of the company.

He further submitted that the Chargor of the premises, Joshua Mithika, the 1st Defendant in ELC Case No. 537 of 2013 has not preferred any claim resting on any irregularity or impropriety to the sale.

He submitted that he is entitled to all the reliefs sought. He further submitted that he is entitled to an award of exemplary and punitive damages for the reason that the Respondents purported to detain him for his personal service and refused to release his earned pension and other dues. He submitted that there was no justification for the Respondent to withhold his pension dues and Certificate of Service. In support of this, he relied on the case of **Miche Gitau v NSSF Board of Trustees Civil Suit No. 3264 of 1993** (unreported). In conclusion he submitted that he is entitled to the reliefs sought.

Respondents' Submissions

The Respondents submitted that the Claimant was an employee of the 1st Respondent deployed in the Finance and Administration Division of the DPFB. That he had expertise in the conduct of activities by the DPFB thus he was specifically aware of Rule 3.36 and 3.37 of the Central Bank of Kenya Staff Rules and Regulations which provided that an employee ought not to put himself in a position where his duty and private interest conflict without disclosure of his interest. They further submitted that the Claimant was aware of the requirement of section 8.51 of the Operations Manual, Section 41 and 42 of the Anti-Corruption and Economic Crimes Act.

They submitted that there were valid reasons to commence disciplinary action against the Claimant. That the process was derailed by the Claimant filing this claim in which an order of interim stay of the disciplinary proceedings was issued. It is therefore their submission that the court ought not to interfere with disciplinary process between employers and employees. They relied on the decisions in **Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR** where the Court held:

“Where there are legitimate reasons for an employer to commence the process of suspension or interdiction, this court will not interfere with the same but this process must conform to both procedural and substantive fairness. This is a right due to any employer to employ disciplinary measures at the workplace and to ensure industrial or workplace peace.”

They submitted that the Claimant issued the Notice of Early Retirement with the sole intention of interfering and seeking to avoid the disciplinary action and that the issue of conflict of interest would still subsist as the Claimant failed to rescind the sale transaction that gave rise to the conflict of interest. They submitted that the use of the term 'may' under Rule 6.22 of the Staff Rules signifies that once the Claimant issued his notice of early retirement, the notice was to be considered for approval by the management. In submitting that the early retirement notice was in bad faith and aimed at curtailing the 1st Respondent's right to employ disciplinary measures, they relied on the decision in **Kenya Union of Commercial Food and Allied Workers BS Mohindra & Company (K) Ltd [2015] eKLR**.

They submitted that the Claimant was paid 50% of his salary while on suspension and the payment was made until he attained retirement age on 27th January 2017. They further submitted that there is no entitlement for the balance of the 50% salary unless the Court determines that there was no justification to subject the Claimant to disciplinary process.

They submitted that the Claimant has already been paid his pension based on the half salary which he was being paid at the time of his retirement. It argued that the pension dispute ought to be addressed by the Retirement Benefits Authority Tribunal and not before this Court. It submitted that since the Claimant continued his employment up to his retirement, no claim for loss of earnings arises as alleged.

It submitted that leave allowance does not arise in the circumstances as the Claimant was not reporting to work on a day to day basis and was paid half salary. They further submitted that the Claimant is not entitled to damages for the reason that he breached his obligations by acting in bad faith against the disciplinary process that was commenced. In conclusion, they submitted that the claims are without merit and ought to be dismissed with costs.

Determination

The undisputed facts of this suit are that the Claimant was employed by the 1st Respondent on 6th August 1984 and rose through the ranks from a Graduate Trainee to an Assistant Director, Administration and Finance deployed at the Deposit Protection Fund Board (DPFB) now Kenya Deposit Insurance Corporation (KDIC). The DPFB being the liquidator of the Euro Bank Limited [in liquidation] advertised, through public action, the sale of property L.R. 10821/76- Thika. Kimwe Property Managers Limited was the successful bidder at the auction and purchased the property. The Claimant was a director and a shareholder of the Kimwe Property Managers Limited.

Regarding section 42 of the Act, I reiterate that it was not possible to know who the chargee was until after the Company participated in the public auction and was issued with a confirmation of purchase. Personally I was informed much later after the public auction, making it impossible to comply with section 42. As far as the principal/chargee for the property is concerned, I never “knowingly” acquired the property in breach of the section.

Conflict of interest: I believe there was no conflict of interest. The

Bank has in the past invited staff to participate in public auctions where Bank property is being disposed, through administrative circulars. Secondly, I understand conflict of interest in this context to mean that one party influences the auction process to their advantage. As the Director is aware, my duties do not in any way involve liquidation matters, and I have no information as to the liquidation activities except what is reported at senior management meetings or in the weekly clip file. To my recollection, these reports include only what has happened and not what will happen. I would therefore have no information on what transactions are in progress and at what stage. As described above, I had no prior knowledge of the principal/chargee at the time the Company Board resolved to proceed with the auction.

As regards rule 3.36 of the staff rules and regulations, the Bank in my opinion had no interest in the sale which I subordinated and I cannot therefore be accused of putting my interest first.

DPFB staff from purchasing property for institutions under liquidations: From my understanding, the manual talks of ‘DPFB’ staff and members of their families or agents involved in liquidations. This does not include staff in other areas of DPFB including myself currently deployed in Finance and Administration Division. It also does not exclude companies. In any event, however, there was no way of knowing before the public auction that the property was under DPFB.

Concealing my identity: I have consulted the Company management team that handled the transaction and none of them recollects having been asked to provide information of the Company directors which they failed to provide or gave misleading information. I was also never approached on the matter by anybody as an individual and failed to provide correct information.

Compromising the liquidation team in the transaction: I personally have not asked any of the liquidation team or induced them in any way regarding the said auction as I was not aware of DPFB’s involvement in the matter until after the sale.

Conclusion:

As stated, I was not aware that the property was under DPFB. If I had known, before the Company made a decision, I would have consulted with the relevant internal organs and persons to enable a decision to be made on whether the Company would participate in the public auction, or not. I therefore find no reason or cause for any disciplinary action against me.

Kimani Mwegu

9th October 2013

CC: The Deputy Governor”

The Respondent referred to Section 8.5.1 of the DPFB Operations Manual, which bars/prohibits DPFB staff and immediate family members from purchasing property for institutions under liquidations. However, the Operational Manual, the claimant produced in Court omitted several sections of the manual including section 8.5.1.

Clause 3.36 of the CBK Staff Rules and Regulations provide that –

“No employee shall subordinate his duty to his private interest, neither shall an employee put himself in a position where his duty and private interest conflict. No employee shall use his official position to further his private interest.

Clause 3.36 and 3.3.7

If, as a part of his duties, an employee is called upon to deal with any matter or issue in which he has a personal interest, such an employee shall immediately disclose his interest to the Director of Human Resources.”

From the foregoing Clauses the Claimant cannot plead in his defence that the CBK Governor knew him and would have noticed his name on the transfer form. The Claimant having been an employee of the 1st Respondent was bound to disclose his interest in the company that purchase the property. Further, the Claimant was aware of the implication of the purchase as he had already sought advice from his lawyers but did not see the need to disclose such interest as provided under the above clauses of the Staff Rules and Regulations.

The Claimant being a majority shareholder in Kimwe Property Managers Limited by virtue of his shareholding, he had a financial interest in the purchase of the property and was expected to disclose such interest to the 1st Respondent.

The 1st Respondent in response to the conflict of interest commenced disciplinary proceedings against the Claimant by issuing him with two notices to show cause why he should not be subjected to disciplinary proceeding. Instead of facing disciplinary proceedings, the Claimant chose to apply to retire under Clause 6.22 of the Staff Rules and Regulations. Clause 6.22 provides that an employee may terminate his

services at any time by giving the bank 3 months termination notice.

In the claimant's letter dated 11th November 2013 giving notice, he referred to a notice of Early Retirement and not termination. Early retirement is provided for in the Rules and Regulations governing the Pension and Trustee Deed where it is defined as –

“Early Retirement” shall mean a date earlier than the Normal Retirement Date but not earlier than the fiftieth birthday in respect to any member.

Rule 9 – Limitations on Part of Member/Employer provides at Clause (d) provides that –

(d) By decision of the Governor a member may be retired compulsorily before his normal retirement date. A member who is retired under this Rule shall be entitled to a deferred pension commencing on his Normal Pension Date subject to 10 hereunder.

Under Rule 9(d) an employee can only be retired by the decision of the Governor. This therefore means that the Governor had the option to accept or refuse a request for early retirement.

In *Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR* the Court held:

“In a recent decision of this Court, *Edwin Beiti Kipchumba v. National Bank of Kenya Limited [2018] eKLR*, it was held that resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The Employment Act does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect. The Employment Act does not bar, or in any way limit an Employee, from terminating his/her contract of employment before, during or after, a disciplinary hearing.”

Had the claimant given notice of termination under Clause 6.22 of the Staff Rules and Regulations, the position would have been different. He however gave notice of Early Retirement, which is not provided for under Clause 6.22 of the Staff Rules and Regulations, but under Rule 0(d) of the Pension Rules under which he could only retire with the approval of the Governor. He cannot therefore fault the respondent from declining his notice of early retirement.

b. Whether the Claimant is entitled to the reliefs sought

In the Notice of Suspension dated 17th January 2014 the Claimant was informed that no salary was payable to him during his suspension. This is as provided at Clause 6.37 of the Staff Rules and Regulations as follows –

6.37 When to suspend an Employee

The Bank may suspend an employee:

- a. ...;
- b. ...;
- c. ...;
- d. If and when the Bank's interest requires that an employee should forthwith cease to exercise the functions and powers of his office and the question of his dismissal is being contemplated.
- e. Where an employee is charged with misconduct and the question of his dismissal is being contemplated.
- f.

An employee who is suspended shall vacate his office and continue to be away from his office until such a time as his suspension is determined by the Bank. The Bank may also impose other conditions which the persons suspended shall observe during suspension. No salary and/or allowances shall be payable to an employee, who is under an order of suspension.”

Pursuant to this Court's Order, the Claimant received 50% of his salary while on suspension and it is on the basis of the 50% salary that he received his pension upon retirement after he attained mandatory retirement age during the pendency of this case.

Clause 6.39 of the CBK Staff Rules and Regulations provides that:

“Any salary or other benefits withheld during any period of interdiction or suspension will become payable to the employee upon his reinstatement but where he is dismissed following a period of interdiction or suspension no salary withheld or any other benefit accruing during the period of interdiction or suspension as the case may be will be paid to him.”

At the time of his suspension, the Claimant was still an employee of the 1st respondent as it is during this time that he was serving his 3 months “*retirement*” notice which was to end on 11th February 2014. The Claimant’s suspension was never lifted and he was never reinstated back to work. He is thus not entitled to claim his full salary for the months of January and February 2014 as prayed.

In respect of his leave, Clause 6.15 of the CBK Staff Rules and Regulations provides that:

Retiring employees should exhaust all their leave up to and including their last day of service unless an employee has been exempted by the Bank to do so.

Should an employee fail to exhaust his accumulated leave before the last day of service, such leave will be forfeited and the balance of the days will not count for purposes of pension benefit calculations”

It is not clear from the record and the claimant did not give evidence to clarify when the leave he claim accrued as he was on suspension from 17th January 2014 until he retired. I therefore find that the Claim for leave allowance and 21 days outstanding leave is not merited and is accordingly dismissed.

The claim for pension has been overtaken by events as the parties are in agreement that upon reaching retirement age the claimant was retired and paid his pension based on the 50% salary that he was earning following the court’s orders.

The claim for damages is dismissed as the Claimant did not sufficiently prove the violation of his rights under the Constitution or that that he was unfairly determined.

Based on the foregoing, the claim herein fails in its entirety and is accordingly dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019

MAUREEN ONYANGO

JUDGE