



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 151(N) OF 2008

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th January, 2017)

COMMUNICATION WORKERS OF KENYA.....CLAIMANT

VERSUS

TELCOM KENYA LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant filed an application on 12.11.2008 under Certificate of Urgency seeking orders to restrain the Respondent from closing their Voluntary Early Retirement (VER) offer on 14th November 2008 and that the reviews packages under the Voluntary Early Retirement (VER) ought to be determined after consultation between Claimant and Respondent as provided for in the Recognition and Collective Bargaining Agreements between the Parties.
2. After the hearing of this application, the Court allowed the application and gave inter alia a temporary injunction restraining the Respondent from closing the Voluntary Early Retirement (VER) on 14th November 2008 or any other day until the employees intended retirement pay package is determined.
3. On 27th April 2009 the Claimant obtained further orders barring the Respondent from receiving and implementing the Voluntary Early Retirement (VER) for about 597 employees pending full hearing of the application of the Applicants.
- 4 The Respondent was aggrieved by the 2 Rulings of the Industrial Court and filed High Court Petition No. 269/2009 under Section 84(1) of the Old Constitution alleging contravention of its fundamental rights.
5. After hearing the Petitioner in the Petition, the Hon. J. Mumbi Ngugi gave her rulings noting that the Rulings of 12th November 2008, 5th December 2008 and 28th April 2009 violated the Respondent's constitutional right of fair trial and against entry into its premises and directed that *“should any issue still be outstanding between the Parties in Industrial Court Cause No. 151(N)/2008 the same be addressed appropriately by the Industrial Court (constituted under the new Constitution”*.
6. This Court in addressing the judgment of High Court Petition No. 269/2009 made a Ruling that this Court would proceed and hear this dispute on its own merit on outstanding issues for which the Applicant was to set out and move the Court for hearing within 90 days.

7. The Claimant has now moved this Court and sets out the issues in dispute as being the proper salary for calculating severance pay.

Claimant's case

8. The Claimants have stated that there were two Voluntary Early Retirement (VER) Schemes. The 1st Scheme applied to all its employees both management and unionisable staff (Appendix 5) and many employees found the offer fair and non-discriminatory.

9. The terms of the Scheme were signed by the representatives of Telkom Kenya Limited and the Communication Workers Union of Kenya. This Scheme started in October/November 2007.

10. However, on 15th February 2008, after about 4 months, the 1st Voluntary Early Retirement (VER) was put to a stop abruptly and employees were informed that the desired target on the Scheme had been reached and the offer had come to an end and the whole exercise of rationalization had been completed. Many employees who wished to exit under the terms of the Scheme were unable to do so.

11. Staff who existed under this programme left on 8th February 2008 and were paid in three waves starting 31st March 2008 and their benefits sent to the bank. These employees' benefits were paid based on their last salary off their exit.

12. On 17th October 2008, 8 months later, the Respondent decided to roll out another Voluntary Early Retirement (VER) Scheme (Appendix 5). This offer stated that it was open to all employees and would run between 21st October and 14th November 2008 only for 3 weeks and this was done without the consultation with the Union.

13. The provision of this Scheme which the Claimants contested was that the severance pay component of the pay package would be calculated using a formula based on a basic salary of March 2008. Though some employees showed interest in this new Voluntary Early Retirement (VER) Scheme they felt that the time given for the application was too short and that the terms of the Scheme needed to improve.

14. The Claimants wrote to the Respondent to have a discussion on the terms of this Voluntary Early Retirement (VER) Scheme and sought an extension of the deadline for application for it.

15. The Respondent entered into dialogue with Claimant and agreed on some issues but disagreed on two.

16. In the discussion between the two Parties, the Claimant requested the Respondent for extension of the Voluntary Early Retirement (VER) Scheme to give ample time to employees for adequate consultation and secondly to base the severance pay on the employees' salaries at the time of exit and not as at 31st March 2008. This was according to the Parties Recognition Agreement (Appendix 8 & 9).

17. It is this issue that is still a thorn in the flesh for the Parties i.e. the proper salary for calculating severance pay.

18. The Claimants want the salary to be used for calculating severance pay to be the last salary each employee was earning (appendix 12) and this is as stated in J. Rika's Ruling at page 4 & 5 (Appendix 10).

19. The Claimants want these amounts re-calculated and released to them within 30 days plus an interest of 20% per month. They also seek costs of this suit.

20. The Respondents on the other hand state that it is now over 6 years since Cause No. 151 (N)/2008 was filed and over 2 ½ years since the Judgment in Petition No. 269/2009 was delivered.

21. They aver that pursuant to the Judgment in Petition No. 269 of 2009 effectively lifting the Injunction that stopped the Voluntary Early Retirement (VER) Scheme, the Respondent has separated with and paid

out all outstanding dues to all ex-employees that agreed to take up Voluntary Early Retirement (VER) package.

22. They submit that this Court should determine whether the Claimants demands for variation of the terms of Voluntary Early Retirement (VER) Scheme has basis in Kenyan law and whether the Claimant is entitled to plead any issue that was unpleaded in the previous claim.

23. I will start by addressing the later issue on whether the Claimant is entitled to plead any issue that was unpleaded in original claim. The Ruling of Mumbi J in Petition No. 269/09, was in relation to outstanding issues. The original claim set out issues in relation to payments to be made under the Voluntary Early Retirement (VER) Scheme.

24. Infact this matter was contested and that is why the Court (Rika J) in this Cause on 5.12.2008 determined that the dispute on salary base to be applied under the Scheme be referred back to the Parties' Central Joint Council for further consideration. The closer of the Voluntary Early Retirement (VER) on 14.11.2008 was also stayed until hearing of the employees intended retirement pay package is determined.

25. The Respondents were dissatisfied with decision and filed Petition No. 269/2009 whereby J. Mumbi determined on 25.7.2012 that Rulings of Rika J of 12.11.2008, 5th December 2008 and 28th April 2009 violated the Petitioners fundamental constitutional rights of fair trial, protection against servitude and against entry into its premises and were therefore null and void.

26. Mumbi J however indicated that should there still be any outstanding issues between the parties in this Cause, the same be determined by this Court which had by then been constituted in July 2012.

27. The Ruling of Mumbi J in effect determined that the stay order given by Rika J was no longer available and so the Voluntary Early Retirement (VER) Scheme was to proceed as formally scheduled.

28. The Ruling also stated that the Petitioner had prayed for other orders and declarations but which in light of the developments within the Industrial Court (Read establishment of the Court) she thought were overtaken by events. It is in respect of such matter that she ordered would be decided by the newly created Industrial Court.

29. I have looked at the orders of J. Rika (as he then was) which was given after hearing the parties interpartes. The Petitioner on the other hand, sought various prayers as evidenced from the Petition as item (a) to (o).

30. The Hon Court delivered 3 of them and left any other issues undetermined to this Court. It is worth noting that the Hon. J. Rika determined an application filed under Certificate of Urgency but issues raised in the Memorandum of Claim dated 12th November 2008 were never concluded.

31. The main claim remained unprosecuted and when the matter now came before this Court, the Claimants sought to amend their claim which application was granted and they filed an Amended Claim dated 6.1.2016 on 7.1.2016.

32. The Respondents submission is that the Claimant should not be allowed to bring up any new issues save what was in the original claim.

33. My view is that an Amended Claim is an amendment to correct an error in the original pleading. Black law dictionary – 9th Edition at page 1270 defines an amended pleading (read claim) as:

“a pleading that replaces an earlier pleading and that contains matters omitted from or not known at the time of the earlier pleading----- An amendment is the correction of an error or the supplying of an omission in the process or pleadings”.

34. This Court allowed the Claimants to amend their claim and it has already been declared that:

“the allowance of amendments is incidental to the exercise of all judicial power and is indispensable to the ends of justice”—(see Eugene A. Jones – Manual of Equity Pleading and Practice 68 (1916).

35. The Respondent had submitted that whereas the Claimants can proceed with this case, they should not bring out any new issues not pleaded in original pleading. They contend that the Ruling of J Mumbi only allowed issues not determined.

36. That is true and I have already indicated that what had been determined was the application but the claim remained unprosecuted until after the judgment in the Petition hence the order of this Court allowing an amendment.

37. The Respondent referred Court to the Court of Appeal Ruling in **North Kisii Farmers Limited vs. Jeremiah Mayake Ombui & 4 others (2014) eKLR.**

38. This Ruling dealt with the fact that Courts should only determine suits based on pleading before it but did not address the issue of amended pleading.

39. It is my view that this Court has a new amended claim before it and that is the pleading it will address and therefore the contention of the Respondent that the Court should overlook it is to ask the Court to depart from what it is expected to do ---- to address the pleading of the Parties.

40. On the 2nd issue, the Claimants have asked this Court to determine the salary for calculating severance pay.

41. The Claimants submitted that this Court should consider the last salary of each employee to be the basis for calculating the severance pay.

42. The Respondents on the other hand want the exit salary to be the basic pay as at 31st March 2008.

43. The Claimants insist that the terms of Voluntary Early Retirement (VER) envisaged in this dispute were in the process of being negotiated and the parties had not finalized them. They aver that the Voluntary Early Retirement (VER) was initiated by the Respondent but when the matter was subjected to negotiations under the Parties Joint Negotiating Council as per the Recognition Agreement, it ceased to be an item of take it or leave it.

44. The parties were then required to negotiate within the Kenyan Legal framework. The Claimants had distinguished authorities cited by the Respondent – see **William Barasa Obutiti vs. Mumias Sugar company Limited CA 198/2004 (2006) eKLR** and that this was not subject to negotiations.

45. The Claimants and Respondent had a Collective Bargaining Agreement – Appendix 8 which has an Annexure A- being a Memorandum of Agreement, Telkom Kenya Company Limited Central Joint Council. As per the appendix 8, the Council had upto 12 members – 6 drawn from each side but each side could co-opt other members where there was need. The functions of the Council included maintain the procedure for dealing with disputes and determination of the general principles governing conditions of service e.g recruitment, hours, tenure and remuneration in so far as they affect unionisable employees.

46. On 7.11.2008 – (Appendix 9) this Central Joint Council reached an agreement on Voluntary Early Retirement (VER) where various issues were decided. The issue of the salary the basis of which the benefits were to be calculated was not resolved and the meeting was adjourned to 10th November 2008. The parties agreed to submit to the jurisdiction of this Central Joint Council.

47. The Council had its own duties as set out above. The Council however never concluded its work

because on 12th November 2008, the Claimant filed their application and the claim which in effect halted the ongoing proceedings of the Central Joint Council.

48. In view of the above, the Claimants have submitted that the Voluntary Early Retirement (VER) herein was of a special nature which was subjected to negotiations and was not on a take or leave basis.

49. They also submit that it is standard practice that severance pay is calculated based on the last pay slips and so the Respondent should recalculate the outstanding amounts corresponding to the last payslips and release it to the Claimants.

50. They also seek interest on the amounts in question. They aver that this award will only apply to 89 persons named in their Appendix 14 due to time lapse.

51. The Respondents in their submissions state that a contract of employment can be terminated in a number of ways as set out in the law. Among them is termination by mutual agreement of an employer and employee under a Voluntary Early Retirement (VER) Scheme.

52. They submit that Voluntary Early Retirement (VER) overrides formal or substantial restrictions placed on the termination of the contract by the Employment Act or Collective Bargaining Agreement.

53. They contend that a Voluntary Early Retirement (VER) being a mutual agreement should therefore be strictly enforced to achieve its objective unless vitiating factors of a contract are proven e.g fraud, mistake, duress or undue influence.

54. They cited **Kenya Union of Commercial Food & Allied Workers Union vs. National Social Security Fund, case (984 of 2012 (2013) eKLR** where the Court held that in case of Voluntary Early Retirement (VER), remedies formal or substantial restrictions placed on the termination of the contracts by the original contract itself.

55. In the same case, Hon. Judge Ndolo had this to say:

“Voluntary Early Retirement (VER) Schemes are by nature and design specific and time bound. The terms of any specific Voluntary Early Retirement (VER) Scheme are determined by several factors, the major one being affordability. The fortunes and circumstances of employers are a moving target and it is therefore not always possible to guarantee standard Voluntary Early Retirement (VER) terms for all staff for all time. It is not possible to establish an immutable precedent in Voluntary Early Retirement (VER). Applicable terms may vary depending on the circumstances which the employer finds itself”.

56. Having considered the submissions of both parties, I will now delve into the document detailing the Voluntary Early Retirement (VER) Scheme.

57. The Voluntary Early Retirement (VER) Scheme offer was released by the Respondent on 7th October 2008 (see Appendix 5). As per the wording of the Voluntary Early Retirement (VER) -----it was not compulsive. It set out the what the offer was and stated:

“Those interested should send their signed formal application (with their PF Number) to Head of Human Resources (not an email) through their Head of Department to reach her by 14th Novmeber 2008.

58. My reading of this document shows that the entire process was on a voluntary basis of offer and acceptance. The envisaged exit package was set out categorically and only those who applied were to be considered. It is true that some negotiations did occur under the Central Joint Council with a view of altering the pay package but this never succeeded. What remains is the offer made which offer applies only to those who responded to it.

59. By virtue of this Voluntary Early Retirement (VER) being a voluntary scheme, the issue of a forced negotiation could not arise. The insistence by the Claimant that the scheme be altered by this Court so that the exit amount is pegged on the last payslip is tantamount to asking this Court to rewrite the contract for the parties which is like meddling in the parties free will.

60. I do not find this Court having jurisdiction to do so and I therefore find the claim by the Claimants not tenable and I accordingly dismiss it.

61. Given the lengthy discussion involved in this case and the nature of the claim having gone through lengthy and tedious Court process, I will order that each party bear its own costs.

Read in open Court this 19th day of January, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Namasake for Claimant – Present

Awele for Respondent – Present