



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 616 OF 2015

BETWEEN

FRANCOIS MAKORANI DDAIDDO.....
CLAIMANT

VERSUS

BANK OF INDIA [K] LTD.....
RESPONDENT

RULING

1. This Claim originated in the High Court at Mombasa having been registered as Civil Suit Number 164 of 2005.
 2. It was transferred by an order of the High Court on 8th September 2015. The High Court stated the dispute falls within the jurisdiction of the Employment and Labour Relations Court.
 3. It was registered at the current Court as Cause Number 616 of 2015. Parties were directed to amend their Pleadings to conform with the Industrial Court (Procedure) Rules 2010.
 4. Through his Amended Claim, the Claimant states he was employed by the Respondent Bank for 11 years and 8 months. On 27th July 1998, he accepted early retirement, under an existing Voluntary Early Retirement Scheme (VERS).
 5. He was to be paid all terminal dues and pension. These were not paid. He was free to secure employment elsewhere. He was invited for an interview by Co-operative Bank of Kenya. The Respondent gave adverse personal reference on the Claimant ensuring he did not secure employment.
 6. He prays for the following orders against the Respondent:-
 - a) Reinstatement to employment with all benefits for the lost years
- d) Alternatively:-**
- i. Compensation under VERS 3 salaries (?) for every year foregone, up to a maximum of 40 salaries (?) at Kshs. 1,777,520.

- ii. Medical Cover for upto 10 years for (?) date of retirement at Kshs. 319,750.
 - iii. Providence Fund for Kenya Assurance at Kshs. 140,832.
 - iv. Leave accrued at Kshs. 1,644.
 - v. Gratuity for 11 years at Kshs. 406,318.
- c) Exemplary damages at Kshs. 150,000,000.
 - d) Letter of termination and/or retirement.
 - e) Declaration that the Claimant does not owe the Respondent any money.
 - f) Declaration that the Respondent's communication to Co-operative Bank on the Claimant was malicious and scandalous.

The prayers are not clearly worded.

7. The Respondent filed further Amended Defence on 14th September 2016. Paragraph 3 states that the Claim is *res judicata*, having been canvassed and determined in ***Industrial Court of Kenya Cause Number 77 of 1999 between Kenya Union of Commercial Food and Allied Workers v. Kenya Bankers Association (Representing 19 Kenyan Banks)***.

8. The Respondent simultaneously filed a Notice of Preliminary Objection, based on the ground given above, and on the ground that the Court does not have jurisdiction to declare that the Claimant does not owe his former Employer money.

9. The Preliminary Objection was argued on 16th February 2017.

10. The Respondent submits there was an industry-wide strike, in the banking industry in 1999. The Claimant participated in the strike.

11. The Union presented a Claim before the Industrial Court (Cause No. 77 of 1999), seeking reinstatement of its Members who had been dismissed after striking.

12. The Industrial Court, having found there were redundancy processes going on in various banks around the time of the strike, declined reinstatement, awarding the Grievants redundancy benefits, in accordance with the governing CBA.

13. The Bank of India, Respondent herein, was among the Banks represented by the Kenya Bankers Association.

14. The Claimant seeks reinstatement or terminal dues and gratuity. He was paid terminal dues and gratuity. He was paid terminal dues, in accordance with the Award of the Court under reference.

15. At page 152 of the Award, the Industrial Court stated it does not have jurisdiction to adjudicate or make orders regarding loan contracts.

16. The Claimant submits the mere fact that the Union sued the Bank, does not mean the Claimant was Party to the previous litigation. It has not been shown the Claimant was a Member of the Union, involved in the Industrial Court Cause. The Union does not represent one, simply because he is a Member.

17. Further Amended Claim shows the Claimant was not dismissed. He was asked to retire under VERS. He has not been issued letter of termination to-date. The issues are different.

18. The issue of debt was raised between the Parties at the High Court. The High Court directed the matter be transferred to the Employment and Labour Relations Court. The Claimant cannot be punished for including the prayer on debt, in the transferred Claim.

The Court Finds:-

19. ***In Industrial Court at Nairobi Cause Number 405 of 2012, between Paul Seki Nzau & 27 Others v. Laico Regency Limited***, the Court stated the principle of *res judicata* is based on 3 elements:-

- i) There must have been prior litigation in which the claims raised in the second litigation, were raised or could have been raised.
- ii) Parties to the second litigation must be identical in some manner, to the Parties in the first litigation, or be in privity with the Parties in the first litigation.
- iii) There must be in place a final decision made on merits in the original Claim.

20. In Cause No. 405 of 2012, the Court found the Claim to be *res judicata*. The Employees had presented the Claim in person, while their Union had previously presented another Claim based on same operative facts, against the same Employer.

21. The Award in Cause Number 77 of 1999, raises doubt whether the Claimant was a Party to that Cause, or one of the Employees on whose behalf the Cause was presented.

22. At page 32 of the Award, the Court stated Form 'A' mentioned 600 Bank Employees. Only 534 had signed up in Mr. Orowe's office, Advocate acting on behalf of the Claimant.

23. It was further observed there were Grievants who had signed disclaimers with the various Banks in final and full settlement of their respective Claims.

24. There is no evidence that the Claimant was among 534 Employees who instructed Mr. Orowe to pursue the previous Claim. It is not sufficient that he participated in the strike, and wrote acknowledging his involvement. It is not sufficient that he was a Member of the Trade Union. For the principle of *res judicata* to be successfully invoked, it would have to be shown he was one of the 534 Grievants, whom the Industrial Court's Award states, had active interest in the dispute.

25. Even assuming the Claimant was a Party to the previous litigation, the Award of the Court was not final. At page 41 of the Award, it is stated:-

"The Court is aware that detailed investigations will be necessary to ascertain which Grievants are entitled to benefit from the Court Award."

26. The Court went on to set a Panel made up of its Registrar and Senior Economist CPU in the Ministry of Labour, to scrutinize all records in conjunction with the Parties' Representatives.

27. The decision of this Court's Founding Father, Justice Saeed R. Cockar (Peace be upon him), was not final. There was an order for further investigation. It cannot be *res judicata* as it was not final.

28. Lastly, the Claimant was loaned a sum of Kshs. 1.3 million by the Respondent, while still in employment. The loan was secured through Claimant's plot. The Respondent alleges Claimant has failed to pay interest on the principal, and owes the Respondent Kshs. 2.1 million. The Claimant denies owing the Respondent this money, and seeks the Court to declare he does not owe any money.

29. The issue of Employees owing money to their employing Banks, was raised in Cause No. 77 of 1999. The Court stated, as submitted by the Respondent, that it did not have jurisdiction to deal with loan obligations.

30. That was the Industrial Court of 1999. The jurisdiction of the Employment and Labour Relations Court in the year 2017, is not the same jurisdiction held by the Industrial Court in 1999. Jurisdiction has progressively been expanded beginning with the Labour Reforms of 2007/2008, going through to the Constitution of Kenya 2010.

31. In event of mixed-grill Claims, the Court with the closest connecting factors to the dispute, assumes jurisdiction. The High Court correctly held the core issue in this dispute is an employment issue. The debt dispute arises out of an employment relation. It is the position of Respondent that the Claimant owed money to the Respondent. Some of the money was recovered from the Claimant's benefits. The debt dispute is a component of the employment dispute and not severable.

IT IS ORDERED:-

- a) The Preliminary Objection is rejected.***
- b) Parties to set down the Main Claim for hearing.***
- c) Costs in the Cause.***

Dated and delivered at Mombasa this 24th day of March 2017.

James Rika

Judge