



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 1921 OF 2014
(formerly HCC 1117 of 2000)

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th June, 2017)

SOLOMON KIIGE NGECHA.....CLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. This claim was initially filed on 18/7/2000 as High Court Civil Case No. 1117/2000 through a Plaint filed by the firm of Waruhiu K'Owade and Nganga Advocates.
2. An Amended Plaint filed was filed on 26th January 2005. An attempt to proceed with the hearing of this case failed and on 30th April 2014 this claim was transferred to this Court by Hon. J. Ougo for hearing and determination.
3. The parties appeared before Hon J. Nzioki Wa Makau on 13/10/2015 for hearing but the Respondent sought for adjournment indicating that they had been unable to retrieve their original file from the archives. The Hon Judge allowed the adjournment but ordered the Respondents to pay the Claimant expenses amounting to 25,000/= within 21 days.
4. The Claimant took a fresh hearing date and served the Respondent for hearing on 25.1.2017. On this day, the Respondents were still not ready to proceed and they had not paid the costs ordered on 13th October 2015.
5. The Court rejected the request for adjournment and ordered the case to proceed at 12 noon that same day.
6. At the time fixed for hearing at 12 noon, the Respondents failed to turn up. The case therefore proceeded undefended.
7. The Claimant testified before Court stating that he was 1st employed by Kenya Savings and Mortgages (KSML) vide a letter dated 8/11/1983 as per his appointment letter at page 1 of his documents.
8. In 1991 Kenya Savings Mortgages (KSML) was merging with other institutions to make consolidated

bank. This was done through Legal Notice No.5 of 1991 dated 27th September 1995. After this he continued working with Respondent in Mortgage Department. Vide an Act of Parliament (Consolidated Bank Act) the bank took over 9 institutions including the Kenya Savings Mortgages (KSML).

9. Under Section 11(1) of the said Act, the Claimant avers that there was provision that employees of the 9 institutions would now be taken over by Consolidated Bank of Kenya (CBK) and so he became an employee of Consolidated Bank of Kenya (CBK) after this.

10. It is the Claimant's case that he continued working for Respondent and was placed on its payroll as can be discerned from the pay slips at page 19-22 of the Claimant's documents. The Claimant also in his evidence drew the Court's attention to documents on page 24, 25, 28 and 29 which further demonstrate that he was an employee of the Respondents.

11. The Claimant told Court that on 22nd February 1999 while on duty he was advised by the Respondent's Managing Director to resign from his former employment and apply for a job with the Respondent.

12. The Claimant did as advised vide a letter at page 16 and 17 of his documents. He however received a regret from the Respondents which is at page 18 of his documents.

13. It is the Claimants contention on his evidence that the resignation was a sham and invalid since as at 2nd February 1999 Kenya Savings Mortgages (KSML) was non-existent since it had been collapsed and its assets and liabilities taken over the Respondent by virtue of the coming into force of the Consolidated Bank Act, 1991 whose commencement date is 14th June 1991.

14. Despite the regret letter, the Claimant avers that he continued working for Consolidated Bank of Kenya (CBK) and continued earning his salary until May 1999 when he was dismissed from work having worked for Respondent and its predecessor since 8th November 1982.

15. It is his case that the dismissal was unfair and that by that time Kenya Savings Mortgages (KSML) was non-existent yet the person who signed his letter of dismissal was one Mr. Mbatia who was Consolidated Bank of Kenya (CBK) Branch Manager of the Branch he was working in.

16. On 12-10-1999, he received a letter from Consolidated Bank of Kenya (CBK) stating that his staff Account had been closed.

17. It is his contention that he was unfairly terminated and seeks to be paid up by the Respondent as per his Memorandum of Claim. He told Court that he was not given any notice of intention to terminate his employment nor paid for his service.

18. The Respondent did not attend Court during the hearing. They had however filed their Amended Defence in this case filed on 5.9.2006 through the firm of M/S Kiogora Mutai & Company Advocates. I will consider their defence as filed wherein they deny the Claimant's averments. It is their case that Consolidated Bank of Kenya Act of 1991 never merged together the nine institutions listed under paragraph 3(i) (a) to (i) all inclusive as alleged by the Claimant.

19. They contend that the said Legal Notice No.332 of 27/9/1985 related to limited vesting Order in respect of undertakings of the Union Bank of Kenya Limited's subsidiary M/s Sunbeam Supermarket Limited.

20. The Defendant also denied verbally requesting all the employees of the alleged institution to write letters of resignation to their old employer and reapply for jobs with the Defendant.

21. They contend that the Claimant rendered his resignation to Kenya Savings Mortgages (KSML) as alleged in paragraph 7 of the Plaintiff out of his own freewill and applied to the Defendant for employment

as any other job seeker would do and his application had to be considered alongside others.

22. They deny including the Plaintiff to their payroll with effect from February 1999 or at all as he was never employed by them.

23. The Defendant denies ever employing the Claimant and want the claim dismissed with costs.

24. I have considered the above evidence as adduced by both parties plus submissions filed by the Claimant. The issues for determination are as follows:

1) Whether there was any employment relationship between the Claimant and the Respondent.

2) If yes, what were the terms of this employment relationship?

3) If yes, how this relationship was terminated.

4) What remedies if any can be granted in the circumstances.

25. In considering issue No.1 above this Court is alive to the fact that the Claimant was initially employed by Kenya Savings Mortgages (KSML) on 8/11/1983 and confirmed in employment on 28th September 1984. The employment with the Kenya Savings Mortgages (KSML) is said to have subsisted through to Consolidated Bank of Kenya (CBK).

26. On 29.9.1995, Legal Notice No.332 was gazetted by the then Finance Minister Musalia Mudavadi as follows:

“Consolidated Bank of Kenya Act (No. 5 of 1991)

In exercise of the powers conferred by Section 3(1) of the Consolidated Bank of Kenya (CBK), the Minister for Finance makes the following Order:

THE CONSOLIDATED BANK OF KENYA (VESTING) ORDERS, 1995

1. This order may be cited as the Consolidated Bank of Kenya (Vesting) Order, 1995 and shall be deemed to have come into operation on the 14th June, 1991.

2. Subject to Section 3 of the Act all undertakings of the Union Bank of Kenya Limited shall, by virtue of the Act and without further assurance, vest in the Consolidated Bank of Kenya Limited made on the 27th September, 1995”.

27. The above vesting order of course deals with Union Bank of Kenya and the Consolidated Bank of Kenya (CBK).

28. The Respondents have stated that this vesting order never related to the Kenya Savings Mortgages (KSML). It is however not contested that Kenya Savings Mortgages (KSML) was one of the institutions taken over as Subsidiary of Consolidated Bank of Kenya (CBK).

29. This is evidenced from the judgment and findings in Industrial Court of Kenya Case No. 28/1996 by then J. Chemmutut when he considered issues of recognition dealing with Consolidated Bank of Kenya (CBK) the Respondent herein. He made his finding then after submissions and stated as follows:

“The Banks were established by the Consolidated Bank of Kenya Act No. 5 of 1991 with effect from 14th June 1991 for the purposes of acquiring the assets and liabilities of the following financial institutions:-

- i) Nationwide Finance Company Limited.**
- ii) Business Finance Company of Kenya Limited.**
- iii) Citizens Building Society.**
- iv) Estate Finance Company Limited.**
- v) Home Savings & Mortgages Limited.**
- vi) Kenya Savings & Mortgages Limited.**
- vii) Jimba Credit Corporation Limited.**
- viii) Estate Building Society.**
- ix) Union Bank of Kenya Limited.**

30. He further observed that the acquisition of the Bank assets and liabilities were to come in force after the Minister of Finance made a vesting order. The Court considered the issue of whether the vesting order had been made and stated as follows:

“I shall first of all dispose of the argument raised by the Bank that the Vesting Order has not todate been made by the Minister for Finance and that the subsidiaries or institutions being managed by the Bank. Operate independently. In my view the Minister for Finance, in exercise of the powers conferred upon him by Section 3(1) of the Consolidated Bank of Kenya Act, No. 5 of 199, retrospectively brought into operation the entire Act under Legal Notice No.332 of 27th September 1995 with effect from 14th June 1991. In the same notice the Minister also vested in the bank all undertakings of the Union Bank of Kenya Limited in relation to Sunbeam Supermarket Limited and the bank has since been fully in operation and their financial report shows that there are three (3) main segments, namely banking, finance and mortgages-----,

The above institutions or subsidiaries are therefore wholly owned by the Bank (Exhibit C 4).

The documentary evidence on the record show that the assets and liabilities of the aforementioned nine (9) institutions or subsidiaries were assumed or acquired by the bank with effect from 2nd March 1992 (Exhibit C.5). Therefore, the import of the argument advanced by the bank that the vesting order has not been made by the Minister for Finance has no force and I reject it as futile.”

31. This was in 1998 and this was before the Claimant hence was dismissed by the Respondent.

32. Section 11(1) of the Collective Bargaining Agreement (CBA) states as follows:

“Employees and Pension Schemes

1) Any person who is employed by a subsidiary immediately before the vesting day shall on that day become an employee of Consolidated Bank on the same terms and conditions of service as his existing terms and conditions and subject to any subsisting notice of termination, resignation or variation and such employment with the subsidiary and Consolidated Bank shall be deemed to be a single continuing employment”.

33. It would be assumed that the vesting order occurred on 14th June 1991 when the Consolidated Bank of Kenya Act came in force.

34. The above notwithstanding I will also consider how the Respondent has dealt with the Claimant since then.

35. The Claimant has exhibited his pay slips for February 1999, March 1999, April 1999 and May 1999 showing that he was an employee of Consolidated Bank of Kenya.

36. On 27/10/1999 he was paid a cheque for Kshs.89,374 by Consolidated Bank. They had also written to him on 12th October 1999 stating as follows:

“Mr. Solomon K. Ngecha

P.O. Box 73636

NAIROBI.

Dear Sir,

RE: STAFF ACCOUNT CLOSURE

We enclose herein bank cheque No. 101691 for Kshs.1066 being the final balance in your account No. 01-5-0158 as at 8/9/99.

Yours faithfully

CONSOLIDATED BANK OF KENYA LIMITED

Signed

H. M. NTONGAI

ASSISTANT MANAGER OPS “

37. On 12th August 1993, the Respondent also wrote to the Claimant – Mr. S. K. Ngecha, C/O Consolidated Bank Mortgage Limited- Nairobi concerning the bereavement of his father.

38. On 6th April 1002, they also wrote to him concerning recovering from his terminal benefits from a loan he had guaranteed one Joel Ngecha Kiige.

39. It is apparent that they were treating the Claimant as an employee despite their insistence that there was no vesting order.

40. Another question would be whether the claimant resigned from the employment of Kenya Savings Mortgages (KSML) on 22nd February 1999. My answer would be ‘No’ because by then, the Kenya Savings Mortgages (KSML) did not exist and his letter was received by Consolidated Bank of Kenya (CBK) and a reply to it also emanated from (G. Muthama, HR Officer) of Consolidated Bank of Kenya (CBK) on 25/2/1999.

41. It is therefore my finding on this issue that indeed the Claimant and Respondent has an employment relation following the vesting of the Kenya Savings Mortgages (KSML) to Consolidated Bank of Kenya (CBK) following the coming in force of Consolidated Bank of Kenya (CBK) Act No. 5 of 1991 on 14.6.1991.

42. On the 2nd issue on terms and conditions of service, I refer to Section 11(1) of the Consolidated Bank of Kenya (CBK) Act (supra) which states as follows:

“Any person who is employed by a subsidiary immediately before the vesting day shall on that day become an employee of Consolidated Bank on the same terms and conditions of service as his existing terms and conditions and subject to any subsisting notice of termination, resignation or variation, and such employment with the subsidiary and Consolidated Bank shall be deemed to be a single continuing employment.”

43. It therefore follows the terms and conditions governing this relationship were as previously held by the Claimant under the employment of Kenya Savings Mortgages (KSML) his former employer. These terms are therefore drawn from his appointment letter dated 28th September 1984 and a subsequent memo dated 16th April 1985 and a subsequent memo dated 16th April 1985.

44. On the last issue, the Claimant has sought various remedies enumerated in Amended Plaintiff dated 24th August 2006. He seeks payment of the following: -

“The Plaintiff contends that the defendant owes him a sum of Kshs.315,745 made up as follows: -

a) Service gratuity (15 x 34,824) x 15	Kshs. 261,180.00
b) One month’s salary in lieu of notice	Kshs. 34,824.00
c) Unpaid leave for 94 days	Kshs.109,115.00
d) Pensions due	Kshs.118,757.30
TOTAL	Kshs.523,876.30
<u>Less paid</u>	
i) Part paid of the unpaid leave	Kshs. 89,374.00
For 90 days	
ii) Pensions due	Kshs.118,757.30
TOTAL	Kshs.315,745.00

45. The Respondent did not address themselves to these prayers. However I note that the Claimant admits that he was part paid some of these terminal dues. He was a member of Staff Pension Scheme and so by virtue of that fact he is not entitled to gratuity.

46. I find that he is entitled to other prayers sought and I award him as follows:

1. 1 month’s salary in lieu of notice Kshs. 34,824/=.

2. Unpaid leave for 94 days

=94/30 x 34824 = 109,115.00

3. 12 months salary as damages for unfair and

wrongful termination being in breach of his

right to natural justice = 12 x 34,824 = 417,888/=

4. Pension due =	= 118,757.30
TOTAL	= 680,584/=
Less paid	= 89,374/=
Balance	=<u>591,210/=</u>

5. The Respondent will pay costs of this suit and interest at Court rates with effect from the date of filing suit on 18th July 2000 on the terminal dues and on damages with effect from the date of the judgment.

Read in open Court this 29th day of June 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Chebet holding brief for Mwangi for Claimant – Present

Mugugo holding brief for Onyango for Respondent – Present