



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 4 OF 2014

(Before D. K. N. Marete)

JOEL KIBET ROTICH.....CLAIMANT

VERSUS

KENYA POWER AND LIGHTING CO, LTD.....1ST RESPONDENT

**THE TRUSTEE, THE RETIREMENT BENEFITS SCHEME.....2ND
RESPONDENT**

JUDGEMENT

This matter is originated by way of a Statement of Claims dated 23rd October, 2014. The issues in dispute are therein cited as;

- 1. Estimated maturity value at retirement from staff Provident Fund and Life Assurance Scheme.*
- 2. Benefits from Retirement Benefits Scheme Regulations of Kenya Power and Lighting.*
- 3. Long term service Award*
- 4. Overtime payment for the month of April 1995.*

The respondents deny the claim and in their respective response to the claim pray that the same be dismissed with costs.

The claimant's case is that at all material time he was an employee of the 1st respondent. The 1st respondent had in place a retirement scheme in the name of the 2nd respondent.

The claimant's further case is that he was employed by the 1st respondent on 3rd

January, 1978 as an Apprentice at a salary of Kshs.600.00 per month for the first year and thereafter as follows;

- Kshs.800.00 for the second year.
- Kshs.1000.00 for the third year.
- Kshs.1200.00 for the fourth year.

On 1st January, 1982 he was confirmed on employment and his salary agreed at Kshs.2,300.00 per month.

The claimant's further case is that he worked diligently and contributed towards his retirement benefits until 30th April, 1995 when he voluntarily retired at age 42. He was paid Kshs.1,217,345.95. He now seeks a resolution of non payment of his retirement benefits by the employer.

He prays as follows;

- 1. Estimated maturity value at retirement from staff provident fund and Life Assurance Scheme.*
- 2. Benefits from Retirement Benefits Scheme Regulations of Kenya Power & Lighting Co, LTD.*
- 3. Long term service Award.*
- 4. Overtime payment for the month of April, 1995*

The 1st respondent's case is one of denial of the claim. She avers that the claimant voluntarily retired at age 32 and is therefore not entitled to or eligible for pension but a lump sum payment subject to the regulations of the scheme of which the claimant is duly notified.

It is her further case that in the light of the claimant's age at retirement, he was duly paid a lump sum of Kshs.1,217,345.95 in line with the pension scheme, receipt of which is acknowledged and therefore the claim is unnecessary and an abuse of the court process. He was also paid all his terminal dues including the retirement benefits and overtime and discharged the 1st respondent from any further liability. This claim is therefore frivolous, vexatious and does not disclose any cause of action, or at all.

The 1st respondent further raises issues of preliminary objection on grounds of time bar and avers that at an opportune time, she would pray that the claim be struck out.

The 2nd respondent also denies the claim. Her case is that the claimant having retired at 42 years, he was not entitled to nor eligible to pension but rather was only entitled to and was paid the surrender value of his contributions amounting to Kshs.100,122.00 and his employer's contribution amounting to Kshs.181,359.00 all totaling to 281,481.00. This was as per the 1st Respondent's Staff Reduction Scheme of 29th November, 1994, the 1st Respondent's Staff Retirement Benefits Scheme chart of 30th April, 1995 and the 2nd respondent's rules on pension. Her participation was only in a remission of Kshs.281,481.00 being retirement benefits scheme contributions and Kshs.32,144.00 being Claimant's Provident Fund Contributions to the 1st respondent for payment to the claimant.

Her further case is as follows;

7. That in further response, the Staff Reduction Scheme Memorandum of 29.11.1994 was clear that all employees who opted to retire and were under the age of 4 years, such as the Claimant herein, would receive Notice payment of three months of last gross salary, three (3) months of last gross salary for every year worked and a golden handshake of Kshs.100,000/-. However, it was categorically clear that only retiring employees who had attained the age of 45 years and above were eligible for pension under the then Retirement Benefits Scheme.

8. That in further response, having appreciated the merits and demerits of the 1st Respondent's Staff Reduction Scheme, the Claimant voluntarily offered to retire and was paid the surrender value of his Retirement Benefits Scheme contributions as well as those of his employer totaling to

Kshs.281,481/- (See Annexure marked "D" being the payment Voucher of 8.5.1995)

9. That additionally upon retirement, the Claimant was paid the surrender value of his Provident Fund contributions as well as those of his employer totaling to Kshs.32,144/-.

In the light of the foregoing, the claimant's penultimate case is that this claim as filed is frivolous, vexatious and gross abuse of the court process as the claimant then aged 42 knew that all along he was not entitled to pension as this was payable to those who retired at or after 45.

The matter came to court variously until 29th November, 2017 when it was heard *inter partes*. At the hearing CW 1- Joel Kibet Rotich, the claimant testified in reiteration of his the claim. He set out by adopting his witness statement dated 8th July, 2014 and filed on 23rd October, 2017. It was his testimony that he was not paid any full benefits and that the statement for 1994 was not out at the time of his retirement.

The claimant further testified that he was only paid a surrender value – his contributions to the Retirement Benefits Scheme and that of his employer plus interest. He was not paid a pension. His position and testimony is that surrender value was for those who had done less than 7 years and in his case, he had done 17.

On cross-examination, the claimant testified that he was a senior technician at retirement and retired at 42. At that time early retirement was at 50 years while normal retirement was at 55 and this was determined by the scheme rules. The claimant further testified that he aware of the letter of 1st December, 2009 and the circular of 29th December, 1994 and its implications on retirement benefits for early retirees. He however, and curiously, did not attach the circular to the claim.

DW 1 – Susan Nguyo, an employee of the 2nd respondent testified in adoption of her witness statement dated 27th November, 2017. She also testified a reliance on the Statement of Response dated 10th February, 2017 and the annexed bundle of documents. It was her testimony that the claimant was rightly paid a surrender value by virtue of early retirement and this was proper in accordance with the scheme rules. Pension was only payable in the event of;

- Early retirement.
- Compulsory retirement.
- Medical retirement.
- Transfer to another public service.
- Abolition of office by founder, and
- Termination on public interest *et al.*

The issues for determination therefore are;

1. Whether the claimant is entitled to pension benefits and other relief sought?
2. Who bears the cost of the claim?

The 1st issue for determination is whether the claimant is entitled to pension benefits and other relief sought. He reiterates his case in a written submission dated 6th December, 2017 and submits that his misfortune is a consequence of the incompetence of the 1st respondent's who had failed to register him in the retirement scheme from the onset of his employment in January, 1978 and instead did this on 1st January, 1984. Further, the scheme did not take into account his seven years stint of service which qualified him to a pension on retirement.

The respondents in unison submit a denial of the claim. They put up a spirited submission that the claimant is not due to the claims sought as he was paid all his dues on early retirement. It is their case that the claim is a baseless fabrication by the claimant of which he does no support in evidence. The 2nd respondent submissions capture this as follows;

He also alleged in his testimony that the 2nd Respondent's amended its operational rules. At this point, the court asked him whether he had evidence to confirm the said change which he answered in the negative. He also alleged that an employee of the 1st Respondent qualified for Pension after 7 years of service. Again, he did not produce an iota of evidence to support his allegation.

Instead, what was clear and uncontested by both the Claimant and the 2nd Respondent was that the Staff Reduction Scheme was based on a Circular dated 29.11.1994 – which document was produced by the 2nd Respondent as Annexure A. See pages 1 – 10 of the 2nd Respondent’s Bundle of Documents filed in Court on 10.02.2017. This leads us to the 2nd Respondent’s case evidence.

Again, the respondent’s submit that the issue of pension was not pleaded in the claimant’s pleadings and only came out at the hearing. This therefore becomes a non starter and not issue for consideration as is observed in authority of **John Oduka Makaya vs. Anzelimo Calisto Ouma [2005] eKLR** where it was held that the trial court ought not allow evidence to be called on an issue that has not been pleaded by a party unless it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision. The court further observed thus;

The purpose of pleadings is to give the adversary notice of the case which has to be met at the trial. A litigant is bound to clearly lay bare his case so that his opponent is not taken by surprise. This will also enable the court or the parties to pick out the issues which the court will be called upon to determine.

This was followed in the authority of **Charles Kyalo Muthini v Nairobi City County [2016] eKLR** where Mbaru, J. held as follows;

29. The claim for 7 years due under his contract of employment was not pleaded and only arose in cross-examination. I find this as an afterthought. Such is declined.

This is a weak case for the claimant. It can only be won on the reverse. This is

because he does not in the least establish a case for the relief sought. The respondent’s outlandishly present a case against the claim of which the claimant is unable to controvert or rebut. This is because the issues in dispute come out clearly at a glance of the respective cases of the parties. The claim is a walk over as against the defence.

The claimant took up early retirement at age 42. All this time, he was fully aware of the consequences of his action. He would be subjected to the Retirement Benefits Scheme rules in a determination of what was due to him on such retirement. This was computed and paid to him. He did not raise a finger until far much later when he brought out this claim. This is an afterthought, a fishing expedition and an outright case of star gazing. I would agree with the respondent’s case and submission that the claim is frivolous, vexatious and a gross abuse of the process of court. I therefore find a case of no entitlement to relief sought. And this answers the 1st issue for determination.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 11th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Motanya instructed by Motanya & Company Advocates for the claimant.
2. Mr. Wachira instructed by Kipkenda & Company Advocates for the 2nd respondent.
3. Mr. Miruka holding brief for Muga instructed by Muga & Muga Associates for the 1st respondent.