



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1922 OF 2011

WILSON NGARO AHOYA.....CLAIMANT

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

JUDGMENT

1. The suit was commenced by the Claimant on 15th November 2011. He averred that he was employed by the Respondent and that upon retirement on 31st December 2005, the Respondent did not pay him his retirement dues. He averred that the refusal by the Respondent to pay him his retirement dues is unlawful, unfair and inhumane. He sought the payment of the funds due under the provident fund Kshs. 181,794/-, pay in lieu of uniform and non-issued items Kshs. 45,108/-, unpaid increase in provident fund Kshs. 9,612/-, interest for 2003, 2004, 2005 Kshs. 6,091/-, 58 days untaken leave 30,484/-, salary for the months the Claimant has waited to be paid his terminal dues, costs of the suit plus interest.

2. The Respondent filed its defence on 10th September 2012 and in the defence averred that the Claimant's salary arrears on provident fund amounting to Kshs. 9,412/- had been prepared but had remained uncollected by the Claimant and had gone stale. It was averred that in September 2005 the Claimant was paid Kshs. 16,348.20 in lieu of 35 leave days and Kshs. 1,758.60 in lieu of travelling allowance. The Respondent averred that only the uniform allowance amounting to Kshs. 45,108/- remained unpaid but that it would be paid in the 2012/2013 financial year. The Respondent averred that no interest had been declared from 2002 and therefore there was no further sum payable to the Claimant on account of his provident fund dues or interest. The Respondent urged that the suit be dismissed with costs.

3. The Claimant was heard on 12th May 2016. He testified that he had sued the Respondent due to non-payment of uniform, raises, leave dues and that the claim that had remained were the unpaid uniform dues Kshs. 45,108/- and the arrears not paid Kshs. 9,612/-, leave dues amounting to Kshs. 30,484/-, cost of the suit and interest.

4. In cross-examination by Mr. Ongicho, he testified that he was paid his provident fund dues after about one year and that what remained were the interest for provident fund for 2003, 2004 and 2005 as well as the leave dues and the Kshs. 9,612/-.

5. On re-examination by Mr. Mulapu, the Claimant testified that the terminal benefits did not include his leave pay and there was non-payment of Kshs. 9,612/- and that he never got a letter asking him to collect the cheque for Kshs. 9,612/-.

6. The defence did not call any witness. Parties opted to file submissions. The Claimant filed submissions on 24th May 2016 and the Respondent filed its submissions on 3rd June 2016. The Claimant submitted that some sums had been settled and what had remained unpaid were payment in lieu of uniform and unissued items, payment in lieu of leave not taken Kshs. 30,484/-. The Claimant submitted that the Employment Act provides under Section 74 that the employer shall keep records and that it was incumbent upon the Respondent to provide documentation showing the leave status of the Claimant. The Claimant submitted that the salary arrears were to be remitted to the provident fund in terms of Sections 8 and 9 of the Local Authorities Provident Fund Act as well as Rules 57 and 58 of the Local Authority Pensions Trust Rules 2007. On the issue of interest the Claimant submitted that under Section 10(c) of the Local Authorities Provident Fund Act, contributions made are deemed to be credited to the accounts of the members of the fund on the last day of each month in respect of which the deduction is made. It was submitted that the contributions so credited are deemed to attract interest at a minimum rate of 2.5% per annum and this is credited to the account of each member on the 30th of June each year until membership ceases by retirement or death of member. The Claimant submitted that under the Local Authority Pensions Trust Rules the contributions payable attract interest at the rate of 1.25%. The Claimant submitted that he was entitled to interest for the years 2003-2005 and sought that the Court adopts the interest rate of 10% as pleaded. The Claimant relied on the case of **Francis Mwangi Maina & Another v Town Clerk City Council of Nairobi & 3 Others [2014] eKLR**. The Claimant submitted that he was thus entitled to the prayers in his claim save for the concession made on payment received. He prayed for costs of the suit and interest.

7. The Respondent submitted that the sum of Kshs. 181,794.75 being the provident fund dues were paid and thus were not part of the claim before Court. The Respondent submitted that the Claimant's terminal leave dues for 35 days were paid together with leave travelling allowance. The Respondent submitted that the claim for unpaid uniform dues could not fall due at this juncture as it was a benefit that fell due in the course of the Claimant's employment. It was submitted that it had been overtaken by events. The Respondent submitted that it cannot be faulted for the failure by the Claimant to follow up on his dues in respect of the cheque for Kshs. 9,412/-. The Respondent submitted that interest thus would not fall due. The Respondent submitted that costs and interest are discretionary and that the Claimant was paid some dues in spite of the bureaucracy in the Respondent and thus sought that the Court does not condemn the Respondent to costs and instead order that each party do bear their own costs.

8. The claim before the Court relates largely to retirement benefits. Though the Court is the appellate court for such disputes, the Claimant approached the Court directly. He should have taken the matter before the Retirement Benefits Appeals Tribunal established under Section 47 of the Retirement Benefits Act. Be that as it may, I will deal with the claim as it would be a needless exercise to refer him to the Tribunal at this point. He however has nowhere to go on appeal once this decision is rendered. Under the Local Authorities Provident Fund Act, the sums can be invested and the interest accruing distributed to the members. The interest that can be credited to a member is fixed. It is 2.5% and no more. See Sections 11 and 12 of the Local Authority Provident Fund Act. The interest sought is a whopping 10% and cannot be granted. As regards the sums due for uniform, the same was conceded as being due by the Respondent and the Respondent cannot resile from its pleadings. The Claimant seeks additional sums for leave unpaid but there was no evidence led on the nonpayment alleged. A sum of Kshs. 9,612/- was admitted but Claimant was accused of failing to collect the cheque. The Respondent submits it was the responsibility of the Claimant to follow up. I do not think so. The Respondent had a responsibility to pay and therefore was bound to look for the Claimant so as to save itself from any suits for nonpayment. The Claimant sought salary for the period pending his payment and this claim cannot succeed as he ceased being an employee and is not entitled to salary from the Respondent or its successor in law.

9. In the premises this would fail. In the final analysis, I will enter judgment for the Claimant as follows:-

- i. Interest on provident fund dues Kshs. 1,522.80
- ii. Pay in lieu of uniform Kshs 45,108/-
- iii. Kshs. 9,612/-

iv. Costs of the suit

v. Interest on the sums in i), ii), iii) and iv) above at Court rates from date of judgment till payment in full.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of June 2016

Nzioki wa Makau

JUDGE