



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.88 OF 2016**

***(BEFORE D. K. N. MARETE)***

**JAMES MAKORI OMANGA.....CLAIMANT**

**VERSUS**

**MOI UNIVERSITY.....RESPONDENT**

**JUDGEMENT**

This matter is brought to court vide a Statement of Claim dated 28th April, 2016. It does not disclose the issue (s) in dispute on its face.

The matter was also originated by way of Notice of Motion dated 28th April, 2016 and brought to court under a certificate of urgency of 3rd May, 2016 and seeks the following orders of court;

1. *The application be heard exparte in the 1<sup>st</sup> instance.*
2. *Pending the hearing interpartes and the determination of the application the respondent, its agents and or servants be restrained from retiring the claimant from its employment.*
3. *Pending the hearing and the determination of the claim the respondent be restrained from retiring the claimant from its employment.*
4. *Costs of the application be borne by the respondent.*

This was grounded as follows;

- a. *The claimant is due to retire at the end of the financial year following his attainment of 65 years of age due to take place 5 years from now.*
- b. *The claimant has been prematurely served with a retirement notice dated 1<sup>st</sup> July, 2015.*
- c. *The notice of retirement is contrary and ultra vires the respondent's terms and conditions of service for the claimant.*
- d. *The respondent has despite being notified of the error in the notice insisted that the claimant retires by 30/6/2016.*

- e. *The notice of retirement is unfair and unlawful.*
- f. *The respondent is acting arbitrarily.*
- g. *The claimant stands to suffer irreparable loss unless the respondent is restrained from effecting the retirement.*
- h. *The claimant's rights are being blatantly violated by the respondent.*
- i. *The dictates of fairness and equity.*

The respondent in response thereof brought in a Replying Affidavit sworn on 16th May, 2016.

The application came to court on 4th May, 2016 when it was ordered that it be disposed off in the ordinary course of business. A declaration of urgency was softly declined.

The matter was to come for hearing on 20th May, 2016 where the parties agreed to a conversion of the application to a full hearing for the main suit. The parties thereon rose to make submissions in a bid to have the suit disposed off and determined.

The issues in dispute in the circumstances of the case are;

1. Whether the notice of retirement to the claimant by the respondent is premature, untenable and *ultra vires* the terms and conditions of the respondent governing the claimant's employment?
2. When does the claimant attain retirement age?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this cause?

The 1st issue for determination is the legality of the notice of termination issued to the claimant by the respondent. The parties are opposed on this. The claimant's submission is that he was employed by the respondent on 21st February, 1985 – Annexure 1 of the Supporting Affidavit to the Notice of Motion. He was promoted variously ending on 6th June, 2014 where he rose to the position of Accountant Grade No. 12 – Annexures 6 and 7 refer.

The claimant's further case and submission is that the respondent operates under a legal charter incorporated in Legal Notice No. 202 of 2013. Section XXVI (1) (f) of this charter provides for issues of appointment, dismissal and retirement of her employees. It also enables and allows the respondent's council to develop other statutes to run its day to day management.

Under this charter, particularly S. 28 – the respondent enacted 41 states of which statute numbers 16 and 31 are relevant to this matter. Statute Nos 11 and 12 are especially relevant. The claimant's case lies on Sections 31 (11) (b) and provides for retirement of these cadres at the age of sixty-five (65).

*S. XXXI (11) (b)*

*For administrative staff in grades 11 to 15 on the thirtieth of June next after the date on which the member of staff attains the age of sixty-five (65) yrs; and*

The claimant was issued with a letter of retirement which comes into effect on 30th June, 2016. The claimant submits that it is invalid and a contravention of

the statutes as set out. This is as follows;

Statute XXXI- Staff Matters;

*11. Staff of the University shall retire from employment as follows:-*

*(a) For academic staff, on the thirtieth day of June next after the date on which the member of staff attains the age of seventy (70) year or such other age as may be determined by council from time to time.*

*(b) For Administrative Staff in grades 11 to 15 on the thirtieth of June next after the date on which the member of staff attains the age of sixty-five (65) years; and*

*(c) For all other staff in grades 1 to 10 on the thirtieth day of June next after the date on which the member of staff attains the age of sixty (60) years or such other age as may be determined by council from time to time.*

*12. The retirement age for those who shall join the University after the gazettelement of these statutes shall be sixty years for Administrative staff and 70 years for Academic staff or as shall be directed by the Government from time to time, but the council shall have powers to employ and retain staff on contract basis from time to time as need arises.*

This statute provides for staff matters and particularly staff retirement terms. In the case of the claimant statute XXXI (11) (b) provides for retirement of his cadre at sixty-five (65.)

It is the claimant's further submission that the CBA is also effective and provides for retirement in these terms. The claimant in the penultimate submits that no directive from any other authority would override the provisions of the respondent's statutes.

The respondent opposes the application and claim and bases this on their Replying Affidavit and defence. It is her further submission that the statute incepted by Legal Notice No.7 sets out the retirement age of the claimant at 60 years and this can only be increased by an agreement *inter partes*. Again, the government has set up a retirement age for public servants at 60 – Annexure No. NMS1 to the Replying Affidavit refers.

The respondent's further submission is that the retirement age of 65 set out in the CBA is no longer applicable as this was for the period 1st July, 2012 to 30th June, 2013. This is a 2015/2016 issue and therefore the retirement age is 60. She does not dispute the claimant's promotion on 6th June, 2014 but avers and submits this unshured in fresh terms and conditions for the claimant. The claimant was always aware of the retirement age at the time of promotion and therefore cannot renege on this.

The respondent's further submission and case is that a grant of the orders sought would be prejudicial to the respondent and public interest at large and would also be a contravention of the law. Statute XXXI (11) (b) is only applicable to administrative officers in office at the time of the enactment of these statutes.

In the penultimate, the respondent submits a balance of convenience in favour of herself and also that this claim is made in bad faith. And this is the test.

The 1st issue for determination is whether the notice of retirement to the claimant by the respondent is premature, untenable and *ultra vires* the terms and conditions of the respondent governing the claimant's employment. This, to me, is a straight forward matter and hinges on the provisions of the statute guiding the conduct of business by the respondent, particularly statute XXXI (11) (b) above cited. This sets out the retirement age of the claimant at 65. Any arguments and submissions by the respondent to the contrary are fallacious.

If the respondent wished to come out with a varied position, on retirement, in this cadre of employment, like is submitted by the respondent, the easier option would have to provide for this in writing at the time

of enactment of the statutes.

I agree with the submissions of the claimant that as it is now, the respondent's position is untenable and unacceptable. It is a contradiction of terms. It would be altogether illegitimate. I therefore find that the retirement notice to the claimant by the respondent was as premature as it was unlawful and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is when does the claimant attain retirement age. To me, this is as clear as daylight. We need not belabor on it. Section XXXI (11) (b) of the respondent's statute provide for retirement in the claimant's cadre at sixty-five (65) years of age. This is not negotiable. And this answers the 2nd issue for determination.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. This is a case of costs following the event and I find as such.

I am therefore inclined to allow the claim, declare and order relief as follows;

1. That a declaration be and is hereby made that the notice of retirement made by the respondent to the claimant is premature, legally untenable, *ultra vires* the respondent's terms and condition of service governing the claimant's employment.
2. The claimant's retirement shall be on attainment of the age of sixty-five (65) years.
3. The costs of this claim shall be borne by the respondent.

**Delivered, dated and signed this 17th day of June 2016.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Momanyi instructed by Anassi Momanyi & Company Advocates for the claimant.
2. M/s Hayo instructed by M/s Nyairo & Company Advocates for the respondent.