



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 372 OF 2015

(Formerly Kisumu HCCC No.32 of 2014)

(Before Hon. Lady Justice Maureen Onyango)

WILLIS OGOLA OKENDO.....CLAIMANT

-Versus-

COLLINS OYUU.....1ST RESPONDENT

GILBERT NDOLO OWUOR.....2ND RESPONDENT

CLEMENT OMOLO.....3RD DEFENDANT

KENYA NATIONAL UNION OF TEACHERS (KNUT)...4TH RESPONDENT

JUDGEMENT

By his undated plaint filed at the High Court on 23rd September 2014, the Claimant WILLIS OGOLA OKENDO seeks the following orders against the Defendants -

- (i) An order directing the defendants to pay old age and death allowances for my two sons and my mother and act according to its (KNUT) Constitution. Honourable court to determine.
- (ii) Cost of this suit to be borne by defendant jointly and severally.
- (iii) The honourable court to determine the interest as from the year I retired 30th August, 2004 to date.
- (iv) Any other or further remedy/relief this honourable court may deem fit to grant.

The Respondents filed a defence on 3rd October, 2014 in which they deny that the Plaintiff is entitled to the orders sought.

For some unexplained reason, the Plaintiff filed a request for Judgement on 8th January, 2015 and Judgment was entered for the Plaintiff against the 1st, 2nd and 3rd Defendants as prayed in the plaint pending formal proof. This is inspite of the Plaintiff having filed a reply to the Defence on 4th November, 2014.

The Respondents filed an application for setting aside interlocutory judgement on 12th May, 2015 but

apparently it was never heard. Since there was a defence on record, the application was unnecessary.

At the hearing of the case the Claimant testified on his behalf while the Respondent called one witness GILBERT NDOLO OWUOR, the Executive Secretary, Kenya National Union of Teacher (KNUT) Bondo Branch (RW1) and is also the 2nd Respondent.

The Claimant testified that he was employed as a primary school teacher in 1974 and retired on 31st August 2004. As an employee of Teachers Service Commission he automatically became a member of Kenya National Union of Teachers (KNUT) and paid a subscription of 1% of his salary every month. He referred the court to his payslip to confirm payment of the monthly subscription.

He testified that in 1994 he was elected as Sub-Branch Treasurer and was an automatic delegate to the 38th Annual Delegates Conference (ADC) of KNUT held in Nairobi on 7th and 8th December 1995. He testified that at the meeting there was amendment of the schemes listed at page 6 and 7 of the minutes being the co-operative, the burial and Benevolent Schemes, the Children Education Scheme and the Investment Scheme. He testified that the Investment Scheme was to be managed by the National Office and not the Branch Office. He testified that subsequently KNUT Constitution was amended to increase monthly subscription from 1% to 2%. However the scheme was not registered.

The Claimant testified that on 30th August, 2004 he wrote a letter to the 4th Respondent requesting for old age allowance. He urged the court to order the 4th Respondent to pay him old age allowance as provided under Article 12 of the KNUT Constitution. He further prayed for an order for payment of death allowance for his 2 sons and his mother as provided in the KNUT Constitution through the relevant schemes.

Under cross examination the Claimant stated that he was aware that upon retirement his membership to the Union ceased. He stated that he was not aware that burial, development and death allowances are only payable to existing members.

He stated that one of his sons died in 2007 and the other in 2008 after he retired and that he spent shs.780,000 on sickness and burial of his two sons and his mother but did not have receipts.

For the Respondent RW1 testified that the Claimant ceased to be a member of the Burial and Benevolent Fund when he retired. He stated that the Burial and Benevolent Fund is used to give members a decent burial but if they retired their contributions were refunded as was the case of the Claimant. He testified that after the refund the member is not entitled to any further benefits. He testified that the scheme is managed at the branch office and each branch has its own fund.

RW1 testified that death allowance is paid to members at the time of bereavement. He testified that the Claimant is not owed anything by the Respondents as his dependants died after he had retired and ceased to be a member of the scheme.

Determination

The plaint herein seeks an order compelling the Respondents to pay old age and death allowances to the plaintiff in respect of his two sons and mother following their death. The Plaintiff relies on Article XII 4(d) of the 4th Respondent's Constitution which provides that the funds of the union may be expended on several objectives set out therein including -

"such allowances to members or their dependants on account of death, old age sickness, accidents or unemployment as the National Executive Council may from time to time prescribe."

The Plaintiff argues that having been a member of KNUT and having contributed 2% of his basic salary as subscription on the promise that he would become a member and benefit from schemes established by the Respondents following the 38th Annual Delegates Conference (ADC) held on 7th December, 1995 he

is entitled to refund of burial expenses for his mother and two sons as well as old age allowance for himself as a retired member of the Union and the said schemes. The Plaintiff submits that before the 38th ADC the monthly subscription was 1% of basic salary but the delegates agreed to increase the subscriptions to 2% to cater for the schemes to be introduced being -

(a) Teachers/Children Education Fund.

(b) The Burial and Benevolent Fund.

He further argues that the 4th Respondent promised to establish an Investment/Enterprise Scheme where the additional 1% subscription would be invested.

The Respondents state that the Plaintiff's rights under the various schemes, which are managed at branches level, ceased upon his retirement. The Respondent further argues that the plaintiff was paid his benefits under the schemes upon his retirement.

The issue for determination is therefore whether the Plaintiff is entitled to payment of old age and death allowances for his mother and two sons as prayed.

In the affidavit of Wilson Sossion Sworn on 25th May, 2016 it is stated at paragraph 12 and 13 that the plaintiff was paid what was due to him and both the head office and the branch were discharged of any obligation to the Claimant upon his retirement.

Gilbert Ndolo Owuor the 2nd Respondent also in his witness statement states that the Plaintiff retired and was paid fully what was due to him. In his testimony in court Mr. Owuor stated that a member of the Burial and Benevolent Fund (BBF) who dies while in service is given a decent burial while one who retires is refunded his contributions which the Plaintiff was refunded his contributions.

No evidence was produced by the Respondents to prove that indeed the plaintiff was paid any money as a refund of his contributions. The Respondents did not even produce any documents to support what they have stated in their defence to the claim by the Plaintiff. If there is a scheme, there must be a document which sets out the benefits or entitlement of members. The Respondents stated there is such scheme but have not produced any.

The Respondents constitution expressly provides for payment of allowances to members or their dependants on account of death, old age, sickness, accidents or unemployment **as the National Executive Council may from time to time prescribe**. The Respondents have not produced to court what has been prescribed by the National Executive Council for such allowances that are operational now.

In the letter dated 9th August 2012, Mr. D. O. Osiany the Respondent's then Secretary General wrote a letter to the Plaintiff in the following terms -

KNUT/RARIEDA/832/8/2012

August 9, 2012

Mr. Willis Ogola Okendo

P O Box 93-40604

RAGENG'NI

OLD AGE ALLOWANCE PAYMENT

We acknowledge with thanks receipt of your letter dated June 6, 2012 on the above subject.

We wish to inform you that your request for old age allowance payment can only be decided upon by the National Executive Council (NEC). For that reasons, we shall put forward your request during the next NEC meeting and then communicate to you their decision on the matter.

(D. O. OSIANY)

SECRETARY GENERAL

K.N.U.T.

Again on 25th June, 2014 Mr. Wilson Sossion, Secretary General of the 4th Respondent wrote to the claimant as follows -

KNUT/RARIEDA/832/8/2014

June 25, 2014

Mr. Willis Ogola Okendo

P O Box 93-40603

RAGENG'NI

PAYMENT OF OLD AGE ALLOWANCE

We acknowledge receipt of your letter dated 18th June, 2014 on the above subject.

Please, note that all the KNUT schemes you have mentioned in your letter are being operated by the KNUT branches in all the counties. If in case you were not paid any benefits from the schemes you belonged to after your retirement, then you should go ahead and contact your branch on the same.

By copies of this letter, the Executive Secretaries of KNUT Siaya, Bondo and Rarieda Branches are hereby notified about your demand notice and also requested to study your letter and act accordingly if necessary.

(WILSON SOSSION)

SECRETARY GENERAL

K.N.U.T.

These letters followed requests by the plaintiff for assistance. Such assistance is provided for in the 4th Respondent's Constitution. Constitutions are intended to be complied with. They are not documents that are intended to be kept on shelves to gather dust. A constitution of a trade union, like a memorandum of association of a company, sets out the rights and responsibilities of a union, its powers and the manner in which it is governed. No clauses or articles are intended to be overlooked or ignored. A trade Union must give effect to all clauses of its constitution as none of the clauses is included in the constitution by accident.

I find that the Plaintiff has a legitimate expectation to benefit from old age allowance as provided under Article XII(3)(f) and as promised in the letter dated 9th August, 2012. I however find that his demand for payment of death benefits in respect of his deceased wife and sons is borne of a misunderstanding of the said clause as it does not provide for payment of death or burial allowances for dependants of members who are alive but for payments to dependants in the event of the death of a member.

For the foregoing reasons, I order that the 4th Respondent includes in its agenda for the next National Executive Committee meeting the request by the Plaintiff for payment of old age allowance as promised in the letter dated 9th August, 2012 and that the decision of the National Executive Committee be communicated to the Plaintiff.

Each party shall bear its costs.

Dated and signed and delivered this 24th day of November, 2016

MAUREEN ONYANGO

JUDGE