



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1848 OF 2014

RUFUS OSOTSI OLEFA.....CLAIMANT

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY LTD.....RESPONDENT

RULING

1. By a motion dated 16th October, 2014 brought under certificate of urgency the claimant seeks from the Court, an order of injunction directed to the respondent restraining the respondent from retiring the claimant from employment on 1st January, 2015 pending hearing and determination of the claim.
2. The application was brought on the ground that the respondent had issued the claimant with notices of retirement indicating he will be retired on 1st January, 2015 as he would have reached the mandatory retirement age of 60 years either on 31st December, 2014 or on 1st January, 2015 despite the fact that the personnel data from the claimant indicated that he was born in December, 1955 meaning he should retire on 1st December, 2015.
3. The intention to retire the claimant forced him to swear an affidavit on his date of birth and also obtain birth certificate to indicate that his date of birth was 1st December, 1955.
4. The claimant therefore contends that he will be 60 years old on 1st December, 2015 and not 31st December, 2014 hence should retire on 1st December, 2015. The claimant complained that he would suffer irreparably if he has to be retired prematurely on 1st January, 2015 as he would lose 12 months of service and payments both of which would impact negatively on his retirement benefits and pension.
5. In the affidavit in support of the motion, the claimant further depones that when he joined the respondent's services in 1991 he only signed an acceptance letter but not a personnel data form. This happened as well in 1996 and 2005. According to him he was given a personnel data form on 16th October, 2006 to fill which he did and indicated his date of birth as December, 1955.
6. The respondent in its grounds of opposition to the application states that it shall at the hearing inter partes rely on the documents filed by the claimant and annexed to the application in support of its grounds of objection.
7. The respondent further stated that upon being notified of intention to retire him, the claimant wrote to the human resource department stating that the age used to calculate his retirement age was wrong and he

claimed to have been born on 1st December, 1955 a date which was not included in the original documents at the time of his employment.

8. The respondent further stated that it had noticed with a lot of concern that some of their workers were altering their birth certificates and identity cards so as to extend their years of service beyond lawful retirement age.

9. According to the respondent, the claimant never included his date of birth when filling out the employee's personal records and as such as per the Employment Act if a date is not filled in the identity card, then the assumption of the day of birth would be the first day of the month and the year.

10. In reaching a decision on whether or not to confirm or discharge an interlocutory injunction, the Court albeit guardedly, usually attempt to analyse the case in the context of the now well settled principles in **Giella v. Cassman Brown** case and supplemented by **American Cynamid v. Ethicon**.

11. The principles set out in **Giella v. Cassman Brown** are that for an applicant to be entitled to an injunction he or she must first of all demonstrate that there is a prima facie case with probability of success. Once this is met, the next test is to satisfy the Court that damages would not be an adequate remedy if the claim ultimately succeeds. However if the Court is in doubt about the issue of prima facie case and or adequacy of damages, the issue will be decided on a balance of convenience. The aspect of balance of convenience was expounded on further by Lord Diplock in the **American Cynamid Case** when he observed:-

“...the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendants favour at the trial. The Court must weigh one need against another and determine where the balance of convenience lies.”

12. Before me are two conflicting positions. First the claimant contends that his date of birth was 1st December, 1955. In that regard he has exhibited Personal Records Form (P19 of his bundle) dated November, 2006; application for NHIF membership dated 2nd June, 2004; application to join Local Authority Pension Trust (LAPTRUST) submitted on 11th November, 2009. These documents show the claimant's month and year of birth but not the date of birth.

13. Further the applicant in his affidavit sworn on 18th January, 2014 states that his identity card number 0568056 only indicates his date of birth as 1955 without indicating the day or the month of birth but curiously the copy of the said identity card attached as appendix 9 at page 30 of his bundle of documents and which was issued on 6th August, 2014 show his date of birth as 1st December, 1955. Which means this may not be the identity card referred to in his affidavit. Nothing has been said of what happened to the identity card that showed the claimant's date of birth as simply 1955.

14. The respondent on its part contended that the Claimant never included his alleged date of birth when he was filling out the employee's personal records form and that it noticed with a lot of concern that some of their workers were altering their birth certificates and identity cards so as to extend their years of service beyond lawful retirement age.

15. The concern of the Court at this point is whether the claimant has made out a prima facie case with probability of success or not. If he has, would damages be inadequate to compensate him?

16. If the Court upholds the decision by the respondent to retire the claimant on 1st January, 2015 he will

lose his salary and benefits including pension for 11 months and these are quantifiable. On the other hand if the Court were to agree with the claimant and halt his retirement until 1st December, 2015, the respondent would if it later turns out that the claimant's retirement ought to be 1st January, 2015 lose to the extent of 11 months' salary and benefits which would have been drawn by the claimant.

17. The Court observed that whereas the claimant claims to have been born on 1st December, 1955 no document earlier than 2004 has been exhibited to show this besides it is curious to note that the claimant obtained the birth certificates and the new identity card after he had been issued with the notice of early retirement. There is therefore some measure of probability that these documents were procured as reaction to the early retirement notice. It is inexplicable why the claimant would when he was under no threat of retirement simply state his date of birth as 1955 or December, 1955 yet he knew it was 1st December, 1955.

18. To this extent the Court is of the view that the claimant has not made a prima facie case with probability of success and even if he did, he has not shown that damages would not adequately compensate him in the event that uncertainty over his actual retirement age is resolved in his favour. This application therefore fails and is hereby dismissed with costs.

19. It is so ordered.

Dated at Nairobi this 27th day of February 2015

Abuodha J. N.

Judge

Delivered this 27th day of February 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge