



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NUMBER 1774 OF 2014**

**GEORGE KURIA KAMANDA..... CLAIMANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PENSION.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. by a Notice of Motion dated 1<sup>st</sup> December, 2014 brought under certificate of urgency the claimant seeks an order of temporary stay of payment and computation of his pension pending the hearing and determination of the suit herein. The applicant further sought that the Court restrains the Director of Pensions from calculating and paying out to the claimant his pension on the basis of the respondent's erroneous letter dated 26<sup>th</sup> August, 2014.
2. The application was founded on the grounds that the claimant was hired as a permanent and pensionable teacher in 1975. He worked rising through the ranks until 31<sup>st</sup> August, 2013 when he retired at the mandatory age of 60 years and was issued with clearance certificate dated 9<sup>th</sup> September, 2013 signifying acknowledgment of his retirement.
3. According to him, however, by a letter dated 26<sup>th</sup> August 2014 the 1<sup>st</sup> respondent unprocedurally sought to reverse his retirement deeming him to have retired on 1<sup>st</sup> September, 2008 which according to him was fictional and not borne by facts.
4. In his affidavit in support of the application he depones in the main as follows:-
  - (a) That by a letter dated 22<sup>nd</sup> November 2008, he was informed by the Respondent that he was due for compulsory retirement and that his last day of service was to be 30<sup>th</sup> April 2009 when he would have attained the age of 55. However, the Respondent revoked that position through a letter dated 12<sup>th</sup> April 2011 informing him that his last day of service was to be 31<sup>st</sup> August 2013 when he would have attained the age of 60. This followed a directive reviewing the mandatory retirement age for Civil Servants signed by the Secretary to the Cabinet and Head of the Public Service.
  - (b) That his last payslip dated 31<sup>st</sup> August 2013, indicated that his basic pay was Kenya Shillings One hundred and three thousand eight hundred and ninety four (Kshs.103,893.00) at the time of his retirement.

(c) That while he was waiting for the processing of his pension from the time of his retirement in 2013 he was astonished to receive a letter from the Respondent dated 26<sup>th</sup> August, 2014 which deemed him to have retired on 1<sup>st</sup> September 2008 at the age of 55 years – a fictional claim not clearly borne by the facts.

(d) That he was apprehensive that the said letter would adversely affect the calculations of his pension and payment thereafter.

5. The first respondent through one Josephine Maundu deponed in response as follows:-

(a) That the claimant was employed by the respondent on or about April 1975 and had been working with the respondent up to the time of his retirement.

(b) That before 2007 the Commission didn't have its own payroll and therefore was using the Government Information Technology Systems (GITS) which it inherited from the Government and which contained many errors in regard to the information of teachers like the date of births and date of first appointments.

(c) That after 2007 the Commission started "cleansing" government Information Technology Systems GITS in order to obtain an error free system to be used for the Integrated Payroll Personal Data(IPPD) system which had been acquired in 2006.

(d) That the said cleaning/correction of errors had been incessant/gradual process from 2007 to 2010.

(e) That the claimant, according to the employment record was born on 28/6/1953 and therefore he ought to have retired with effect from 1/9/2008 having attained 55 years.

(f) That on 20<sup>th</sup> March, 2009, the Respondent among other Government entities received a circular from the Secretary to the Cabinet and Head of Public Service directing that with effect from 1<sup>st</sup> April 2009 all public servants would retire upon attaining 60 years from the previous years.

(g) That the circular further directed public servants who had not attained 55 years at 5<sup>th</sup> March 2009 to continue to serve till they attained 60 years if they wished.

(h) That the Claimant was among the teachers whose personal information had errors specifically date of birth and when the payroll was cleansed in 2010 it was established that the 139 teachers including the claimant had already attained the age of 55 years by 2008 and ought to have retired at the age of 55 years.

(i) That the Claimant continued to serve even after attaining the age of 55 years in 2008.

(j) That the Commission wrote to the Principal Administrative Secretary, Directorate of Public Service Management (DPSM) a report dated 6<sup>th</sup> March 2014 explaining the circumstances under which the 139 teachers including the Claimant were retained in employment having attained 55 years in 2008 before the extension of the retirement age for civil servants to 60 years and sought authority for the extension of service of the said teachers in order to facilitate the pension payment.

(k) That the Commission further vide a letter dated 9<sup>th</sup> May 2014 wrote to Principal Administrative Secretary, Directorate of Public Service Management confirming that the 139 teachers including the claimant had worked satisfactorily up to the age of 60 years because by the time the payroll was cleansed and their actual dates of birth was established the effect of the circular allowing public servants to work up to the age of 60 years had

already taken effect.

(l) That the Commission received a letter dated 9<sup>th</sup> June 2014 from the Ministry of Devolution and Planning directing that the 139 teachers including the Claimant be paid pension up to the age of 55 years and for the period exceeding the mandatory retirement age (55 years) be deemed as period served under contract appointment and further advised that they will be eligible for service gratuity for the extended period of five years.

(m) To this end, the commission was willing to process the pension claims up to the age of 55 years for the Claimant and pay service gratuity at the rate of 31% of the basic salary per annum for the five years he worked up to and including his last day of service.

6. In his submission in support of the application, Mrs Kamau for the applicant submitted that upon attaining 55 years, the claimant was informed by the 1<sup>st</sup> respondent by a letter dated 22<sup>nd</sup> November, 2008 that he was due for compulsory retirement. However, following a Government directive reviewing mandatory retirement age for civil servants and members of teaching service, the 1<sup>st</sup> respondent vide a letter dated 12<sup>th</sup> April, 2011 revoked the claimant's notice of retirement and revised his last working day to 31<sup>st</sup> August, 2013. A clearance certificate issued to the claimant by the 1<sup>st</sup> respondent confirmed that he worked until 31<sup>st</sup> August, 2013.

7. Counsel further submitted that there was no basis in fact or in law to claim that the period the claimant worked after he was deemed to have attained 55 years was served under contract. According to counsel the 1<sup>st</sup> respondent had clear guidelines in its code of regulations stipulating how an employee could be employed and retained on contract. To this end Counsel drew the Court's attention to section 56 of the respondent's code of regulations which provided inter alia that the 1<sup>st</sup> respondent could employ a retired teacher eligible for re-employment by the commission on contractual terms for a specific period. The section further provided that a teacher appointed on contractual terms would contribute to NSSF in accordance with the NSSF Act in force at the time.

8. Counsel in this regard submitted that the claimant neither signed any contract as stipulated in section 56 of the respondent's code of regulations nor contributed to NSSF as required by employees hired on contract.

9. In conclusion, Counsel urged the Court to find that the claimant retired on 31<sup>st</sup> August, 2013 and order that his pension be calculated on the basis of his last day of employment and his last payslip.

10. Counsel for the 1<sup>st</sup> respondent Ms. Naeku on the other hand submitted that the role of the 1<sup>st</sup> respondent was merely facilitative on issues relating to the payment of pension and related benefits. This merely involved the preparation and transmission of pension forms in respect of teachers. According to Counsel therefore the respondent does not pay pension to its employees but merely computes and transmits the claim to the Director of Pensions for verification and payment. In the present case the 1<sup>st</sup> respondent duly prepared all the documentation and transmitted the same to the Director of Pensions in line with the terms of service of the claimant.

11. Regarding the date of retirement, counsel submitted that by a circular dated 20<sup>th</sup> March, 2008 retirement age was revised from 55 to 60 years. For the 1<sup>st</sup> respondent, teachers who had not attained the age of 55 years as at 5<sup>th</sup> March, 2009 qualified to work up to 60 years and be paid pension. However, those who had already received retirement notices or had their pension claims already prepared but had not attained the age of 55 years as at 5<sup>th</sup> March 2009 were to continue to serve until they attained 60 years if they so wished. It was the 1<sup>st</sup> respondent's submission that the claimant had already attained the age of 55 years in 2008 and was not covered to benefit from the circular reviewing the retirement age to 60 years.

12. Counsel further submitted that it was not in dispute that the claimant was born on 26<sup>th</sup> June, 1953 and had therefore attained 55 years in the year 2008. However according to Counsel the claimant's date of birth was erroneously and irregularly captured in the human resource data bank leading to his retention on the payroll after 2008. According to Counsel all other teachers that were born in 1953 were duly retired in 2008.

13. On 4<sup>th</sup> February, 2014, I directed that parties do file submissions on the issue of the claimant's retirement date as it was felt that if the issue was resolved, the question of calculation of his pension would no longer be contentious and there might be no need to proceed to trial of the main suit.

14. It is not in dispute that the claimant was born on 26<sup>th</sup> June, 1953. In fact in his own further affidavit, sworn on 28<sup>th</sup> January, 2015 he concedes so. Arithmetically speaking therefore, the claimant attained 55 years around June, 2008.

15. The circular dated 20<sup>th</sup> March, 2009 reviewing the retirement age from 55 to 60 years was to take effect from 1<sup>st</sup> April, 2009. The circular further stated that employees that were serving on contract as at 5<sup>th</sup> March, 2009 after the attainment of the age of 55 years were to continue to serve for the duration of these contracts and contracts expiring before the attainment of the age of 60 years would be renewed in accordance with the provisions of the contracts concerned.

16. It would therefore seem to me that there is no dispute as to the actual retirement date of the claimant. The dispute however seem to be that upon attainment of the mandatory retirement age the 1<sup>st</sup> respondent allowed the claimant to continue working until 31<sup>st</sup> August, 2013 without issuing him with a contract as required by section 56 of the 1<sup>st</sup> respondent's code of regulations. According to the claimant therefore his retirement age was revised by the circular dated 20<sup>th</sup> March, 2009 from the Head of Public Service referred to earlier in this ruling.

17. By the time the circular in issue was released, the claimant had attained the mandatory retirement age which was then 55 years. His continuance in service therefore could only be deemed to have been contractual as required by section 56 of the 1<sup>st</sup> respondent's code of regulations. The omission to issue the claimant with a formal contract neither negated a discretion that was granted to the 1<sup>st</sup> respondent nor operated to extend what was official Government Policy that public servants with exception of Judges, Academic Staff in Public Universities, Research Scientists and Public Servants with disabilities, retire mandatorily upon attainment of 55 years.

18. It is therefore the finding of the Court on the issue of the claimant's retirement age that the same crystallised around June, 2008 and therefore he could not benefit from the circular dated 20<sup>th</sup> March, 2009 reviewing the retirement age from 55 years to 60 years since the same was later in time to the claimant's mandatory retirement date which was in June, 2008. The period served by the claimant past June, 2008 can only be deemed to be on contract as stipulated under section 56 of the 1<sup>st</sup> respondent's code of regulations.

19. This will be the finding of the Court on the issue of the claimant's retirement date which was submitted by the parties for determination.

20. It is so ordered.

Dated at Nairobi this 22<sup>nd</sup> day of May 2015

Abuodha J. N.

Judge

Delivered this 22<sup>nd</sup> day of May 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge