



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1084 OF 2015**

**BANKING, INSURANCE & FINANCE UNION (KENYA) ..... CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED..... RESPONDENT**

**RULING**

1. On 24<sup>th</sup> June 2015, the Claimant Banking, Insurance & Finance Union (BIFU) filed their application through Notice of Motion under the provisions of section 12(4) of the Industrial Court Act [Employment and Labour Relations Court Act] and section 74 of the Labour Relations Act and seeking for orders that;

- a. Spent.
- b. *The Court be pleased to issue interim ex orders restraining the respondents from terminating the services of Messrs Evanson Maina Wachira, Miriam Mzee Mohamed, Mary Adhiambo Ochieng, Francis Alutsimbi Akonya, Richard Muhuyu Gikonyo and Allan Munzatsi Kaisha on the basis of early retirement until this application is heard and determined inter parties*
- c. *The Court do issue an order prohibiting the respondents themselves or by their recognised agents or principals from unfairly and unlawfully terminating the services of Messrs Evanson Maina Wachira, Miriam Mzee Mohamed, Mary Adhiambo Ochieng, Francis Alutsimbi Akonya, Richard Muhuyu Gikonyo and Allan Munzatsi who have been issued with letters by the respondents of the intention to terminate their services on the basis of early retirement until this this application is heard and determined interparties.*
- d. *This Court do issue an order compelling the respondents to stop the already envisaged arbitrary, unprocedural and unlawful terminations of the six (6) grievants mentioned in (ii) and (iii) who are members of the Claimant union on the basis of early retirement until the hearing and determination of the application.*
- e. ...

2. The application is supported by the annexed affidavit of Joseph Ole Tipape and on the grounds that the parties herein have a recognition agreement signed between the Claimant union and the Kenya Bankers Association (KBA) on behalf of the Respondent as a member. The grievants are employees of the Respondent covered by the Collective agreement (CBA) that cover both parties herein. In the agreements between the parties, there is not provision for early retirement and in that case any termination of employment must be based on the provisions of sections 41, 42, 43 and 44 of the Employment Act. The parties herein also have clause No.A5 of the CBA that make provision for disciplinary proceedings before termination but none of the above procedures have been applied by the Respondent to seek the termination of the grievants on early retirement.

3. Other grounds in support of the application are that the grievants are long serving employees of the Respondent some for over 30 years; since 2013 the Respondent have devised various tactics to sending

employees home without any justifiable cause; the new idea of early retirement is not legal, not in the CBA or in the contracts of employment. Early retirement is an option left to an employee as otherwise, retirement age is at 60 years. Such an option if left to the respondent, it will be arbitrarily used against Claimants. The 6 grievants herein have rejected the proposal by the Respondent to retire early and would like to continue in service until their retirement age at 60 years. The grievants are however gripped in fear and uncertainty since the Respondent has displayed an anti-union behaviour and threatened them with termination. In 2013 the Respondent initiated a similar process of mass lay off but the Claimant challenged this in Court and still pending arbitration. That if the grievants are terminated they will suffer irreparable loss of livelihood since some are servicing mortgages secured by their employment and others have liabilities pegged on their retirement age. Such mortgages and liabilities cannot be cleared as what is offered in early retirement is 3 months payment.

4. In the affidavit of Mr Tipape he supports the application and the grounds upon which it is based. That being the 1<sup>st</sup> Deputy General Secretary of BIFU, he is aware of the recognition agreement and the CBA between the parties herein and none has a provision for early retirement. The package being offered by the Respondent to the grievants in early retirement is a drop in the ocean noting the huge loans they are processing and cannot be cleared as such and will therefore be exposed to serious damage. The Respondent has no absolute right to interrupt the contractual obligations between its employees and themselves at will. The Claimant has reported a trade dispute with the Minister but seek to secure the grievants employment pending resolution of the matter.

5. In reply, the Respondent filed the Replying Affidavit sworn by Jacob Makanga and filed on 28<sup>th</sup> July 2015. That Mr Makanga as the Human Resource Officer of the Respondent is conversant with the matter herein. The grievants have each got a contract of employment that outline the terms and conditions of service which include the application of the general rules in respect of staff in the Respondent employment which are binding. The Respondent has a human resource manual which entails the rules and procedures governing employees at the bank and Rule 9.4.1 state that the official retirement age is 60 years but gives the option of early retirement from the age of 50 years either at the respondent's discretion or at the request of an employee. All the grievants have attained age 50 and the Respondent thus exercised its discretion and informed them of the intention to retire them under the rule. The Respondent is thus acting within its power both by the letter of appointment and human resource manual.

6. The Respondent also state that the claimant has not met the threshold for the grant of the orders sought. To seek an injunction in the manner outlined by the Claimant is contrary to the set principles in law. There is no case set out against the Respondent to warrant the orders sought. The grievants are bound by their contracts and the Court cannot change such contracts. There is therefore no prima facie case established by the Claimant to justify an injunction. The retirement age can be agreed and the dues payable agreed upon.

## **Determination**

### **Whether the orders sought should be granted**

### **Whether this is a proper case for an injunction**

7. An injunction is a substantive equitable remedy granted upon establishment of right, or at interlocutory stage, a prima facie case, among other principles to be considered. An injunction may compel the doing or restrain the doing of a certain act as set out in *Giella v Cassman Brown*. However, such general principles that apply in matters of contracts do not automatically apply in employment and labour disputes and cannot apply without caution and or consideration of what is fair labour practice in the circumstances of each case as held in *Elizabeth Washeke & 62 Others Versus Airtel Networks (K) Limited & Another*, Cause No.1972 of 2013 thus;

*... Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still*

*exist.*

8. With regard to employment matters therefore, consideration must be given to the chances of success of the matter/main suit/main claim at trial and that if an injunction is not granted, it will negate the entire trial process and defeat the very purpose of an employee or an employer coming to Court in the first instance. See *Anne Kinyua versus Kenya Tea Zone Development Corporation & 3 Others* [2012] eKLR.

9. In this case, the Claimant seek orders stopping the termination of the grievants based on the notices for early retirement while a dispute has been reported to the Minister. Even though the outlined prayers are not worded in the nature that orders for injunction should where a party should outline from the onset the exact reason for the injunctive orders in the body of the Notice of Motion, I find the Notice of Motion and the annexed Affidavit of Joseph Tipape clearly outline the reasons and grounds upon which the orders are sought, the framing of the Notice of Motion should not defeat the purpose and intentions of the Claimant sought reliefs. It is clear the grievants have been issued with notices for early retirement and such a matter is contested and a dispute reported to the Minister. It is only fair that pending such a dispute resolution, the employment of the grievants be secured.

10. It is trite that the Court shall respect employment contracts in the terms and conditions set out by the parties. However such contracts must meet minimum constitutional and legal standards and principles. Such contract must also meet other contracts principles that require consent by the parties to it.

11. It is admitted here that the grievants were unionised employees and subject to the CBA between the parties and the legal consequences of the terms and conditions of the CBA is therefore binding. The Respondent as the employer equally has the human resource manual that was part of the contracts of employment. The contest then becomes on how the parties interpret the human resource manual with regard to the provisions for early retirement. On the one hand the Respondent takes the position that such retirement is discretionary on their part as set out under clause 9.4.1 of the human resource manual whereas the claimant's contest is that such retirement should be subject to the applicable employment law provisions set out under section 41, 43, and 44 of the Employment Act.

12. All employees who remained in employment as at 2<sup>nd</sup> June 2008 are subject to the provisions of the Employment Act, 2007 the rights and duties therein and all employers are also subject to the same in terms of the responsibilities and obligations thereto. What is therefore lawful and granted by statute cannot be taken away by any subsidiary provisions. Where there is a conflict between legislative provisions and a subsidiary provision, the same is easily resolved by the fact that the subsidiary provision or provisions have to give way to the parent legislation, as subsidiary legislation cannot be used to oust statutory provisions or constitutional provisions or in this case, subsidiary policy to a contract of employment governed by statutory provisions cannot oust that which is clearly provided for by statute.

13. Without going into the merits of the case, the human resource policy manual of the Respondent cannot be construed to be superior to the applicable statute herein, the Employment Act with regard to the termination and or retention of the employment of the grievants who are claimant's members. Equally, the existing CBA and the recognition of the Claimant by the Respondent as the representative of the grievants is a matter regulated by the Labour Relations Act and once such a relationship exists, any termination of the employment of the grievant must be in terms agreed upon between the Claimant and the respondent. To seek to apply the human resource manual suo motto on the basis that the Respondent has the discretion under the human resource manual is to defeat the very purpose of collective bargaining in matters that affect the employment of the Claimant members. To allow such a practice and application of discretion when it only suits the Respondent s the employer is tantamount to sanctioning an unfair labour practice. The recognition of the Claimant by the Respondent is to ensure that terms and conditions at work are agreed upon. Even where a matter such as early retirement is not specifically outlined in the CBA and only exists in a subsidiary policy to the employment contract, the resultant effect of the same is termination of employment that I find is regulated in law by the Employment Act that in this case is superior and should form the basis of reference.

It is therefore fair and just in the circumstances of this case that the grievants' employment remain

secured pending the hearing and determination of the matter herein and I direct as follows;

- a. The Respondent is hereby restrained from terminating the services and or employment of the grievants herein - **Messrs Evanson Maina Wachira, Miriam Mzee Mohamed, Mary Adhiambo Ochieng, Francis Alutsimbi Akonya, Richard Muhuyu Gikonyo and Allan Munzatsi Kaisha – pending the hearing and determination of the suit herein;**
- b. **Such orders as (a) above shall remain in force unless the stated grievants [Evanson Maina Wachira, Miriam Mzee Mohamed, Mary Adhiambo Ochieng, Francis Alutsimbi Akonya, Richard Muhuyu Gikonyo and Allan Munzatsi Kaisha] are terminated or terminate their employment for other separate and or good cause; and**
- c. **Costs shall be in the cause.**

Delivered, dated and signed in open Court at Nairobi this 28<sup>th</sup> Day of September, 2015.

**M. Mbaru**

**JUDGE**

In the presence of:

Court Assistant – Lilian Njenga

Joshua Mariete - BIFU.

Respondent Absent