



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

CAUSE NO. 242 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ERNEST TUIGACLAIMANT

VERSUS

MASINDE UNIVERSITY OF

SCIENCE TECHNOLOGYRESPONDENT

R U L I N G

Before me for determination is an application by the Claimant seeking the following orders:-

- a) An order of injunction restraining the Respondent from retiring the Claimant at the age of 60 years.
- b) An order of prohibition prohibiting the Respondent from retiring the Claimant until he attains the age of 65 years.
- c) Costs of this cause.

The application is made under Section 12(3) (I) of the Employment and Labour Relations Court Act and grounds on the face thereof. It is supported by the affidavit of ERNEST TUIGA the Claimant sworn on 8th July, 2015.

In the affidavit the Claimant deposes that he was employed by the Respondent Masinde Muliro University of Science & Technology as a Games Tutor Grade (XII) in October 2003. His compulsory retirement age according to the Collective

Bargaining Agreement Clause 28 is 65 years. The Claimant attached a copy of a letter written by the Respondent to Barclays Bank introducing the Claimant to the bank for purposes of taking a loan in which the Respondent confirmed that the Claimant's retirement age is 65 years.

By letter dated 5th January, 2015 the Respondent notified the Claimant that his last working day will be 12th July, 2015 which was his 60th birthday, based on a circular from the Chief Staff and Head of Public Service. The Claimant was aggrieved by the notification of retirement and filed his claim herein and this application. He avers that the circular from the Chief of Staff and Head of Public Service does not apply to him. He further avers that he will suffer considerable loss and damage should he be retired

prematurely and prays that the orders restraining the Respondent from retiring him prematurely be granted pending hearing and determination of his claim.

The Respondent filed a replying affidavit of Professor Joseph Rotich, its Deputy Vice Chancellor. He deposes that the Respondent is a public University established under the Universities Act and its budget and expenditure is approved by the Government. That as such it is subject to official government policy as contained in Circular No. OP/CAB,2/7A dated 14th February, 2014 from the Chief of Staff and Head of Public Service. He deposed that during a meeting held on 4th December, 2014 the Respondent's Council, its governing body, resolved to implement the circular and as a consequence issued the retirement notice to the Claimant.

He further deposed that the Claimant has not shown a prima facie case with probability of success, or demonstrated that he will suffer irreparable harm that is not capable of being compensated with damages.

Prof. Rotich further deposed that the ex-parte interim orders granted to the Claimant were served on the Respondent on 14th July, 2015 after the Claimant's retirement had already taken effect on 12th July, 2015 and was thus overtaken by events; that retaining the Claimant in service until 65 years would be contrary to Government Policy and would subject the Respondent to irreparable harm, that the application is frivolous, vexatious and bad in law and ought to be dismissed with costs.

The application was argued on 1st October, 2015. Mr. Bruce Odeny appeared for the Claimant while Miss Oyombe appeared for the Respondent. Mr. Odeny submitted that the law on injunctions is contained in the principles set in the case of *Giella v Cassman Brown*. He referred to Section 26 of the Employment Act which provides as follows:-

"(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply".

He submitted that the Claimant's terms are contained in the CBA which provides for retirement age at 65 years. That the Claimant adjusted his life based on the promise to his detriment as he took a loan from Barclays bank on the guarantee of employment to 65 years. He submitted that a circular cannot take precedence over the law or the CBA. Mr. Odeny further submitted that although the Respondent is a public body it operates under the University Charter which creates a Council in which all authority rests. That part of the role of the Council is to employ staff, that the Respondent does not rely on Public Service Commission to employ its staff and the Government circular on staff is not binding on the Council. He submitted that the circular excludes some staff and there is no indication that the Respondent wrote to the Public Service to explain the existence of the CBA nor is there any penal consequence that the Respondent will suffer if it did not comply with the circular.

Mr. Odeny further submitted that the balance of convenience is in favour of the Claimant, that if stay is not granted there will be nothing to determine in the main suit. He further submitted that there is no harm to be visited upon the Respondent should the orders be granted. That the Claimant has legitimate expectation to retire at 65 years. He prayed that the orders be granted.

Ms Oyombe for the Respondent submitted that the circular titled "Retention of officers beyond mandatory retirement age of 60 years" was addressed to among others, Vice Chancellors, that it came on 26th February, 2014 and had the effect of altering the terms of employment of the CBA produced by the Claimant which is for 2012 and the Applicant was informed that the circular would take effect on 12th July, 2014.

Ms. Oyombe further submitted that the Applicant has not demonstrated he will suffer irreparable harm as the letter attached as annexure ET 3 does not confirm any financial obligations to Barclays Bank as it is simply an introduction to the bank. She submitted that it is the Respondent who will suffer irreparable harm if the Claimant is retained in employment beyond the mandatory retirement age of 60 years. She further submitted that the retirement notice was to take effect on 12th July, 2014, but the Applicant served the Respondent on 14th July, 2014 when the retirement had already taken effect and the Applicant was no longer an employee. She therefore stated there was nothing to restrain and that the Applicant was not diligent or vigilant. She submitted that Section 26 of the Employment Act is not applicable to the Claimant as the Respondent was not relying on the CBA but on the directive of the Government.

In a brief response Mr. Odeny submitted that the Respondent was served on 10th July, 2015. Service was effected on Dr. Peter Mukula, Registrar, Administration and an affidavit of service was on record. He submitted that both the Employment Act and Labour Relations Act were binding on the Government and that a circular cannot change the terms of an employee to his detriment. He further submitted that the Claimant questioned his retirement notice but there was no response by the Respondent, hence his delay in coming to court. He further submitted that it would be unfair to retire the Claimant on directives of a 3rd party, and that the Claimant has a legitimate expectation and organised his affairs subject to the expectation that he would retire upon attaining the retirement age of 65 years.

Issues for Determination

I have carefully considered the application together with grounds in support thereof, the supporting affidavit and the annexures thereto. I have also considered the replying affidavit and the annexures thereto. I have further considered the submissions made in court by Counsel for both the parties.

At this stage the issue for determination is whether the Claimant meets the threshold in *Giella v Cassman Brown & Co. Ltd* [1973 EA 358] that is if the Applicant has established a prima facie case with probability of success, if he is likely to suffer harm that cannot be compensated by way of damages or in the alternative, if the balance of convenience tilts in his favour.

It is not in doubt that according to the Claimant's terms and conditions of service and in particular the CBA, his retirement age is 65 years. It is also not in doubt that the Claimant has not attained the mandatory retirement age of 65 years. It is further not in doubt that the Respondent was implementing a Government circular requiring the departments addressed therein not to retain in service officers beyond the mandatory retirement age.

The first paragraph of the letter is explicit about its intentions. It states that:-

"Your attention is invited to Office of the President Circular letter Ref. No. OP.CAB.2/7A dated 20th March, 2009, which among other things reviewed the mandatory retirement age of Public Servants from fifty five (55) years to sixty (60) years, with the exception of Judges, Academic Staff in Public Universities, Research Scientists and Public Servants with disabilities, whose retirement age ranges from sixty five (65) years to seventy four (74) years". emphasis added

It refers to employees whose mandatory retirement age was reviewed from 55 to 60 years. It recognises at paragraph 3 that there are officers whose retirement age ranges from 65 to 74 years who are not affected by the circular. The circular was not amending the retirement age of any employee but was discouraging requests for extension of service beyond retirement age. The Claimant has not attained

retirement age and has not requested for extension. Therefore the circular cannot be referring to him.

On the basis of the foregoing, I find that the Claimant has a prima facie case with high chances of success. I also find that should he be retired before attaining his mandatory retirement age he will suffer irreparable harm as his source of livelihood for which he had legitimate expectation until he attains the mandatory retirement age of 65 years will be brought to an abrupt end. I further find that the Respondent was served with orders of this court on 10th July, 2015 before the retirement date in the Claimants notice which is 12th July, 2015.

For the foregoing reasons I allow the application and order that the Respondent, its servants and/or agents be and are hereby restrained from retiring or threatening to retire the Claimant at the age of 60 years pending the hearing and determination of the claim herein. The costs shall be in the cause.

Dated signed and delivered in court in 13th day of November, 2015

MAUREEN ONYANGO

JUDGE