



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 116 of 2013

MAURICE M. MUNYAO & 148 OTHERSCLAIMANTS

VERSUS

ALBERT CHUREMBO MUMBA & 7 OTHERSRESPONDENT

J U D G M E N T

INTRODUCTION

The claim before the court is contained in the claimant's Re-re-amended plaint filed in court on 3/7/2012. It seeks to recover kshs.202,199,424.50 as at 2/7/2012 plus interest in addition to the declaration prayed in the plaint.

The main contention by the claimants is that the defendant had no proper or legal authority to amend the Trust Deed and the Rules of the Kenya Ports Authority Pension Scheme as they did in 2002 and 2005 including the introduction of remedial pension plan of 2004. The contention by the defence on other other hand is that the respondents had the power to do the impugned amendments of the Trust Deed and the rules and to impose the remedial pension plan without seeking and obtaining consent from the claimants so long as the sponsors, Kenya Revenue Authority and the Retirement Benefits Authority were in agreement.

The case was heard on 23/11/2011, 24/4/2012, 15/5/2012, 24/9/13, 26/9/13 and 30/9/2013 when the claimants were represented by Maurice M. Munyao (1st claimants) and Apollo O. Ogwambo (104th claimant) as their witnesses while the defence called Mr. Patrick Kibor as their only witness.

CLAIMANTS CASE

Some of the claimants initially worked for East African Cargo Handling Services which changed to Kenya Cargo Handling Service while others were working for Kenya Ports Authority (KPA). The two entities then merged on 31/12/1986 under the name of KPA.

On 1-4-1998 a Trust Deed for the establishment of KPA pension scheme was made backdating the effective date to 1/1/1998. It named the respondents and/or predecessors as the trustees. The trustees were to hold the schemes' assets in trust for members. They were also to manage and administer the Trust according to the Deed and the Rules and ensure that there were sufficient funds by inter alia receiving members contributions from the employer.

Clause 15(a) of the 1998 Trust Deed, provided that the trustees had the power to amend the deed

and the Rules with the approval of the KPA (sponsor) provided that no alteration which diminishes the benefits of a pensioner, dependant or member would take effect without the consent of the pensioner, dependant or member. The trustees were not therefore to decrease the pension without the consent of the pensioner, dependant or member.

The Member was entitled to get pension based on pensionable salary in his last years before retirement. The deed and Rules defined pensionable salary as the annual basic salary plus annual housing allowance. The Deed of amendment of 2002 amended Clause 15 by introducing Clause 24 which replaced Clause 15 of 1998 Deed and took away the need to seek consent of the pensioner, dependant and members before diminishing their pension. The said Clause 24 of the 2002 Deed only required the consent of the sponsor and provided that no alteration, amendment or modification of the deed or the Rules shall be made which diminishes any pension already being paid in accordance with the Rules or any rights or interests which shall have accrued to each prospective beneficiary in respect of pension benefits secured under the scheme up to the date of which such alteration takes effect unless such alterations (whether retrospective or otherwise) is necessary in order to secure approval or continued registration under the RBA or the Income Tax Act.

The claimant never gave their consent before the amendments of the 1998 Deed by the 2002 Deed of Amendment which had the effect of decreasing their pension. The deed of Amendment of 2002 was not for the benefit of the members of the scheme. The Amendment was supposed to be supplemental to the original Trust Deed according to the recital but its operative part deleted the original Deed and Rules in its entirety. The 2002 Deed of Amendment paved way for the KPA Staff Pension Scheme Statutory Remedial Plan which was agreed upon between the sponsor and the respondents and endorsed by the alleged members AGM held on 8/5/2004. The said Remedial Plan decreased the benefits of the members and was necessitated by financial deficit on the part of the scheme.

Under the plan the pensionable salary was altered to mean the average salary for the last 3 years preceding retirement plus housing allowance as at June 2003. The claimants were not consulted before the remedial plan was put in place and they denied ever holding the alleged AGM of 8/5/2004 or at all. The plan was only okyed by the RBA, KRA, KPA and the respondents based on an actuarial report from a partisan Actuary fraudulently appointed by the Sponsor. As a result of the aforesaid amendments and the remedial plan, the claimant lost kshs.202,199,424.50 both in lumpsum and monthly pension as at July 2012 and they continue to accrue the loss of pension which as at the close of the hearing in September 2013 the amount had increased to ksh.232,263,453.35 in aggregate.

According to the claimants the pension should have been based on their respective annual basic salary plus annual housing allowance for their last year of service multiplied by total number of months served divided by 480 multiplied by 20 divided by 4. However upon retirement, all claimants had their pension calculated according to the Remedial Pension Plan of 2004 which used the average of the annual salary for the last 3 years as the pensionable salary plus housing allowance as at June 2003. That was against the original Trust Deed of 1-4-1998 and had the effect of diminishing both the lumpsum and monthly pension for all the claimants.

In addition, 5 claimants including CW2 suffered extra loss above the others because although they had received salary increase just a few days before their retirement, their lumpsum and monthly pension was calculated using their basic salary before the increase plus housing allowance for June 2003. The claimants therefore prayed for judgment as prayed in their plaint plus the said accruals as at the time of the close of the trial because the amendment of the Trust Deed and Rules was without authority, fraudulent, wrongful, illegal and unconstitutional because they resulted in diminishing their benefit without their consent.

The claimants contended that the alleged financial deficit in the scheme's fund was not valid and genuine because it was caused by failure by the sponsor to remit kshs. 6,857,627,602.00 as at 31/12/2003 which debt accrued to 6,982,340,602.00 at at 31/12/2004. They further contended that respondents breached their obligation by failing to collect the said debt from the sponsor and instead fraudulently colluded with the sponsor to amend the Trust Deed and put in place a Remedial Pension Plan without

disclosing to RBA and the Commissioner for Income Tax that the sponsor had failed to remit pension contribution to the Scheme.

According to the claimant, had the respondents not fraudulently concealed the fact that the sponsor owed the ksh.6.9 billion pension contribution to the scheme, the Remedial Pension Plan would not have been approved because it was not necessary. According to them the fraudulent failure by the respondents' to factor the over 6.9 billion debt payable by the sponsor in their accounts was for the benefit of the sponsor and the detriment of the claimants and other members. Consequently the claimants content that the fraudulent concealment of the debt owed by the sponsor and the decreasing of the claimants benefits accruing under their original Trust Deed amounts to gross abuse and breach of trust created under the Trust Deed, Deed of Amendment and/or the constitution of the Republic of Kenya.

DEFENCE CASE

RW1 is the Assistant Pensions Officer employed by the KPA (sponsor) but seconded to the KPA pension Scheme together with 12 other pension staff. RW1 stated that the 1998 Trust Deed gave the respondents exclusive power to manage the scheme under Clause 6A. The respondents were not to consult the members including the claimants on any matter. He contended that the 2002/2003 amendment to the Deed was with the approval of the RBA, sponsor and the Actuary. He confirmed that the RBA authorized the respondents to effect the remedial Plan by a letter dated 19/12/2003 which had the effect of amending the Trust Deed.

He further contended that the amendment did not affect the benefits of the already retired members but only the future retirees. According to the RW1 the Remedial Pension Plan was in accordance with Clause 24 of the 2002 Deed of Amendment which required that an amendment to the Deed could not reduce benefits without the consent of the sponsor, RBA and Income Tax Commissioner. He added that the sponsor complied with the Remedial Pension Plan by transferring Assets worth 1.2 billion plus an additional transfer of Assets worth 600 million per year for 6 years which total to 4.8. billion free injection.

RW1 admitted that some management staff had their salaries increased effective 1/7/2007 just before their retirement. He invited the affected claimants to raise the claim with the office. He confirmed that whenever a genuine claim was raised, he always recalculates the sums to correct any error.

On cross examination he admitted that he was never a member of the board of trustees and was not able to tell the court the boards decisions/resolutions. He also admitted that Clause 15 of the 1998 Deed of Trust barred the respondents from amending the Deed or the Rules without the consent of the members if the amendment had the effect of diminishing their benefits under the Pension Scheme. He admitted that no consent to amend the original Deed was sought from the members including the claimants. He also confirmed that the respondents minutes showed that the Actuary was appointed by the respondent to evaluate the scheme.

He confirmed that the 1998 Deed provided that the pension was to be calculated based on the annual basic salary plus annual housing allowance for the retirees last year of service. He also confirmed that every year the scheme produced a statement of the members accounts. RW1 denied that there was any AGM of the scheme in 2004. He admitted that the special Actuary whose report led to the Remedial Pension Plan was appointed by the sponsor. He also admitted that in 2003 the sponsor owed ksh.6.8 billion to the pension scheme being members and the employers contribution. That the said debt accrued to ksh.6.9 billion by December 2004. He explained that the debt arose during the merger of KPA and the Kenya Cargo Handlers Ltd. The latter had a contributory pension scheme while KPA had a non-contributory scheme. That during the merger KPA was to transfer to the respondents the pension that had accrued to her employees before the merger.

RW1 confirmed on oath that had the sponsor paid the ksh.6.9 billion to the scheme as required following the merger, the Remedial Pension Plan would not have arisen. He further admitted that the respondents and/or their predecessors had the obligation to collect the said debt from the sponsor. He

also confirmed the Remedial Plan did not disclose the said debt of ksh.6.9 billion due from the sponsor but only volunteered ksh.1.2 billion as capital injection. RW1 confirmed that the Remedial Pension Plan was strictly private and confidential. That the members never participated in its making and it was never disclosed to them. He confirmed further that the Remedial Pension Plan was to end in 2012 but it was still continuing in 2013. He agreed that the scheme has accumulated money after the retirement age was increased to 60 years and the Remedial Pension Plan should therefore end.

After the close of the hearing both parties filed written submissions which the court has considered and is deeply indebted to the counsel appearing for the parties.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions can be summarized as follows:

- a. **whether the respondents and/or their predecessors had the absolute power to amend the original Deed of Trust of 1998.**
- b. **whether the 2002 Deed of Amendment and Rules and the subsequent Remedial Pension Plan were made in violation of Clause 15(c) of the Original Trust Deed of 1998.**
- c. **whether the Amendment to the 1998 Trust Deed in 2002 and the subsequent Remedial Pension Plan was fraudulent, illegal, wrongful, unlawful or unconstitutional.**
- d. **Whether the reliefs sought should issue.**
- e. **Whether unpleaded reliefs should issue.**

Did the Respondents and/or their predecessors have absolute power to amend the 1998 trust Deed

Both witnesses for the claimants and the RW1 agreed that Clause 15(c) of the 1998 Trust Deed allowed the Trustees with the approval of the employer to amend, revoke or modify by Deed any of the provisions of the Trust Deed and to amend the Rules by a resolutions of the meeting of the Trustees provided that:

“... no such alterations or modifications shall be made which;

(c) Reduces the benefits of a pensioner or dependent or affect the accrued benefits of a member except with the consent of such pensioner, Dependent or member.”

It is no doubt from the above quote that the Trustees power to amend, revoke or modify the Trust Deed and Rules was not absolute. The consent of the members including the claimants was required whenever an amendment, revocation or modification of the provisions of the Trust Deed and the Rules had the effect of decreasing the accrued benefits of a member in the pension scheme. As correctly submitted by the claimant and not denied by the defence the use of the word 'shall' under the Clause 15 of the Trust Deed made the compliance by the Trustee mandatory. The Trustee were bound to seek the consent of the claimants before amending the 1998 Trust Deed by the Deed of Amendment of 2002 because the effect of the said amendment plus the subsequent introduction of the Remedial Pension Plan was to diminish the pension benefit to members including the claimants.

Whether the Deed of Amendment of 2002 and the Remedial Pension Plan was in violation of Clause 15(c) of 1998 Trust Deed

It is obvious from the evidence that the 2002 Deed of Amendment took away the members right to participate in the process of amending the Trust Deed and gave the trustees absolute power to amend or modify the Trust Deed at the exclusion of all members even where there was to be loss of benefits provided the amendment or modification is necessary in order to secure approval or continued registration under the RBA Act or the Income Tax Act and provided further that the amendment or modification has been approved by the Commissioner of Income Tax and the RBA.

Evidence has demonstrated that the Remedial Pension Plan which was approved by the RBA by letter dated 19/12/2003 diminished the benefits of the members, including the claimants by two ways. Firstly it amended the definition of pensionable salary by averaging the basic salary over the 3 years preceding the retirement. Secondly it froze the housing allowance applicable to the amount payable as at 30/6/2003. As demonstrated by a formula for calculating the lumpsum and monthly pension by the claimants witnesses and not contested by the defence, it is clear that the ultimate effect of the amendments by the 2002 Deed of Amendment and the Remedial Plan approved in December 2003 by the RBA was to diminish both the lumpsum and monthly pension for the members including the claimants.

Such amendments were gradual and a well thought scheme and the architects of the said amendments obviously had the intention of reducing the members benefits but because Clause 15(c) of the original Trust Deed was an obstacle, the same had to be removed first. As contended by the claimant witnesses and submitted by the defence counsel, it is obvious that Clause 15(c) gave the members veto power to stop any amendment which decreased their benefits. The amendment of Clause 15 of the original Trust Deed by Clause 24 of the 2002 Deed of Amendment and the subsequent Remedial Pension Plan was without the consent of the members including the claimants and therefore in violation of the said Clause 15(c) of the Trust Deed. Had the 2002 Deed of Amendment been consented to by the members including claimants the provisions of Clause 24 thereof would have been valid and the subsequent Remedial Pension Plan would have been lawful. The correct finding however is that the 2002 Deed of Amendment was without the claimants consent and therefore a violation of the Clause 15(c) of the 1998 Trust Deed. The subsequent Remedial Pension Plan was equally a violation of the Trust Deed.

Was the amendment of the Trust Deed through the 2002 Deed of Amendment and Remedial Plan fraudulent, wrongful, illegal and unconstitutional.

The genesis of the schemes financial woes was explained by RW1 as dating back to the date of merger between KPA and Kenya Cargo Handlers Ltd. The latter which had contributory pension scheme brought into the joint pension scheme the accrued pension for her employees like CW1. KPA which had a non-contributory pension scheme for her staff withheld her employees accrued pension after the merger which led to a serious solvency problem in the newly formed KPA Pension Scheme of 1998.

According to both the CW1, CW2 and RW1, the un-remitted pension on behalf of the former KPA staff had accrued to ksh.6,857,627,602.00 as at 31/12/2003 and kshs.6,982,340,602 as at 31/12/2004. According to all the said witnesses, had the KPA remitted the said over 6.8 billion to the KPA pension scheme, there would never have been any solvency problem and the Remedial Pension Plan under consideration would not have been necessary.

In addition had the respondent appointed an independent Actuary to evaluate the scheme without interference from the sponsor, the Remedial pension Plan would not have been introduced. On the other hand had the respondent and or their predecessor disclosed to the RBA and the Income Tax Commission that the sponsor had failed to remit the said over ksh.6.8 billion to the scheme the approval to effect the Remedial Plan by the said RBA and commissioner of Income Tax would not have been granted.

The foregoing conduct on the part of the respondent cannot be described in any other way, but fraudulent. First they schemed a far sighted plan to decrease the claimants benefits by amending Clause 15(c) of the 1998 Trust Deed in order to curtail the claimant's veto power, and secondly they colluded with the sponsors to conceal from the RBA and Commissioner of Income Tax the fact that the sponsor owed over kshs. 6.8 billion to the pension scheme. In the alternative the respondents condoned the sponsors interference and micro- management of the scheme by appointing an Actuary who concealed the sponsors indebtedness to the pension scheme and mis-advised the respondents, the RBA and the Commissioner for Income Tax towards the introduction of the Remedial Pension Plan. The court finds that the respondents deliberate concealment of the sponsors indebtedness to the government official while

seeking approval to reduce the claimants benefits to be fraudulent, wrongful and illegal.

On the other hand the fact that the said fraudulent conduct and activities by the respondents took away accrued benefits from the claimants without the consent, the same was unconstitutional within the meaning of Section 70 and 75 of the Constitution of Kenya which was in force upto August 2010. The said constitutional provisions granted the claimants right to property. In this courts' view accrued pension which has been authenticated by annual certificates or statements from the respondents and/or their predecessors fits within the definition of property. Rule 10 of the 1998 Trust Deed and Rule 5 of the 2002 Deed of Amendment vests the contributions for the members immediately and retirement benefits accrued from membership vesting in a member during his pensionable service.

Whether the reliefs sought should issue

In view of the courts findings, and the reasons above, the court makes declarations in terms of prayer (1) of the plaint which is simply that the amendment of 1998 Trust Deed and the Rules by the 2002 Deed of Amendment and all subsequent amendments to the Trust Deed or Resolutions by the respondents or their predecessors including the Remedial Pension Plan were fraudulent, wrongful, illegal and unconstitutional and therefore a nullity in so far as they had the effect of diminishing the accrued benefits of the members of the KPA Pension Scheme including the claimants without their consent and are hereby set aside and the status quo *ante* reinstated for purposes of recalculating the claimants pension.

Consequently the court orders and directs that status quo under the 1998 original Trust Deed and Rules be and is hereby restored in relation to the definition of Pensionable salary and claimants entitlement to both lumpsum and monthly pension. By the foregoing orders the court is has reviewed and corrected the erroneous procedure followed by Trustees in amending the original Trust Deed which had granted veto power to the members whenever an amendment of the deed would result in decreasing their accrued benefits.

The claim by the 1st claimant in paragraph 12 1(c) is dismissed because it is directed at the wrong defendants. As correctly submitted by the defence, a claim for goods allowance, token allowance, salary arrears in 2005, Bonuses for 2004/2005 and repatriation allowance should be directed to the employer and not the pension scheme.

The court however grants the reminder of prayer (b) being in aggregate kshs. 201,981,424.50 particulars where of are detailed under paragraph 12 of the Re-re-amendment plaint and I do not need to duplicate herein. The said sum is aggregate of the arrears of lumpsum and monthly arrears for all the claimants as at July 2012 as prayed in the Re-re-amended plaint. It is the difference between what the claimants were paid as lumpsum and monthly pension under the Remedial Pension Plan and what they ought to have been paid under the 1998 Trust Deed which has herein above been reinstated. The formula of calculating the actual pension given by the claimants evidence and not contested by the defence witnesses is as follows:

a. **lumpsum =**

final annual pensionable salary X total months of service/480 X 20/4

b. **monthly pension =**

final annual pensionable salary X total months served/480 X 0.75/12

Final Pensional salary to apply under the 1998 Trust Deed and Rules was defined as the pensionable salary in the last year of pensionable service. The same 1998 Trust Deed and Rules defined pensionable salary as the members annual basic salary and annual housing allowance. In view of the rule 10 under the 1998 Trust Deed and Rules 5 of the 2002 Deed of Amendment, the claimants are entitled to recover the aforesaid pension arrears in addition to further accruals since July 2012 till payment in full as prayed under prayer (b) of the Re-re-amended plaint.

Whether un-pleaded reliefs can be granted

This court was invited to make a decision on un-pleaded matters which were conversed during the hearing of evidence. The witnesses raised them and were cross examined on them by counsel. The issue concerns a matter which came to the knowledge of CW2 when the matter was pending hearing and RW1 did not contest it. It is about salary increment effective 1/7/2007 that was granted to 5 claimants who were of management cadre.

RW1 invited the affected claimants to go to his office for correction of the errors on final basic salary to reflect the increment of 1/7/2007. The court does not see any reason why the claimants should go elsewhere to start proving his claim afresh. The court finds that it is well seized of the power to make a decision on all matters raised during the hearing whether pleaded or not. Consequently, any matter raised during trial formed part of the dispute and they have to be resolved in order to give the case a final determination.

The court therefore directs and orders the respondents to correct the error done in respect of the monthly pensions for Karia Kiarie, CW2, Michael N. Rai, Christine Mbuja Oloo and Jacob Kaburu Kiara to reflect the salary increment made to them by KPA's letter dated 6/7/2007. Once the error of the pensionable salary is corrected the respondents will pay to the said claimants all their accrued pension arrears caused by the said error in addition to what has been awarded to them above under the aggregate award.

DISPOSITION

Judgment is entered for the claimants against the respondents, their predecessors and/or successors jointly and severally as follows:

- 1. The 2002 Deed of Amendment and Rules plus the subsequent Remedial Pension Plan is hereby declared to be fraudulent, wrongful, illegal and unconstitutional and consequently null and void *abinito* in so far as the same decreased the pension benefits of the members of the KPA Pension Scheme including the claimants without their consent.**
- 2. The respondents, and or their successors to pay to the claimants from the KPA Pension the following:**

(a) Kshs. 201,981,424.50 being the aggregate pension arrears to all the claimants as at July 2012 plus further accruals till payment in full which were occasioned by the impugned Remedial Pension Plan.

(b) Lumpsum and monthly pension arrears for Kiara kiarie, Apollo O. Ogwambo, Michael N. Rai, Christine Mbuja Oloo and Jacob Kaburu Kiara occasioned by the error of failure to apply the correct salary after the salary increment to them on 1/7/2007.

The claimants will have costs and interest at courts rates from the date of this judgment. The reason for the choice of effected date of interest is the some of the awards accrued after the filing of the suit and continue to accrue in future until they are settled.

Dated, signed and delivered this 14th day of February 2014.

O. N. Makau

Judge