



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 99 OF 2013

[FORMERLY HIGH COURT CIVIL SUIT NO. 212 OF 2006 AT NAKURU]

JAMES MUIRURI WANGAI.....CLAIMANT

-VERSUS-

PYRETHRUM BOARD OF KENYA..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th March, 2014)

JUDGMENT

The claimant is **James Muiruri Wangai**. The respondent is Pyrethrum Board of Kenya. The claimant filed a plaint on 02.11.2006 through Mburu Njoroge & Company Advocates. The statement of defence was filed for the respondent on 04.12.2006 through Rodi Orege & Company Advocates. The claimant filed the amended plaint on 19.12.2006. The claimant prayed for judgment against the respondent for:

- a. **The amount of Kshs.3,510,946.00 being the plaintiff's claim for terminal benefits and consultancy fees against the defendant.**
- b. **Costs of the suit.**
- c. **Interest on (a) and (b) at court rates.**
- d. **Any other relief the court may grant.**

The respondent filed the amended statement of defence and counterclaim on 29.01.2007 and subsequently filed the further amended statement of defence and counterclaim on 21.10.2010. The respondent prayed that the claimant's suit be dismissed with costs and further prayed for judgment against the claimant for:

- a. **A sum of Kshs.1,622,384.10.**
- b. **Costs of the counterclaim.**
- c. **Interest on (a) and (b) above at court rates.**

The claimant gave testimony to support his case and he called one witness, Joshua Chebor Kiptoo (**CW**), the respondent's former Chief Executive Officer from December 1995 to March 2003. The respondent's witnesses were Rufus Chege Ngotho (**RW1**), the respondent's Financial Accountant and Rosaline Chepng'eno (**RW2**), the respondent's Human Resource Officer. The parties further consented to file and rely on the affidavit of Rufus Ngotho filed on 18.12.2013 and the claimant's replying affidavit thereto filed on 22.01.2014.

By the letter dated 28.07.1983, the respondent offered the claimant employment as a Marketing Manager. The claimant accepted the offer and was issued with the letter of appointment dated 26.08.1983. The claimant reported for work on 1.1.1984 and served for 19 years and 9 months till retirement on 30.09.2003. At retirement, he earned a basic pay of Kshs.117,535.00 plus allowances. Throughout the employment, the claimant served as the respondent's Marketing Manager except for 3 months being March, April and May, 2003 when he served as the Acting Managing Director pending the appointment of the substantive Chief Executive Officer.

The respondent which is a state corporation initiated a reorganisation programme in October, 2001 involving the modernisation of the respondent's factory, reduction of labour force, and redeployment of labour force by matching individual qualifications and the respondent's needs. The workforce was bloated and there was need to down-size. The respondent's board approved the down-sizing of staff and the Human Resource Officer conveyed the decision to the staff through circular No. 17/DKC 9607/rcs of 18.10.2001 being No. 9 on the claimant's list of documents filed on 07.03.2007. The circular was addressed to all permanent employees and conveyed the respondent's strategy to re-organize and restructure including right-sizing so as to increase effectiveness, efficiency and productivity. The circular stated that to achieve the objectives, the respondent had prepared a package for those employees who wished to take advantage of an offer whose details would be obtained from their respective Heads of Department. The circular further stated that those employees interested in the termination on reorganisation were to submit their requests in own hand writing to the respondent's administrative officer through the respective Heads of Department not later than 7th November, 2001. The circular concluded that all applications would be processed without undue delay and the respondent reserved the right to accept or reject any application. The attachment to the circular titled package content provided for 6 months pay in lieu of notice and 27 days pay for every year worked being for service rendered. The union members would also earn Kshs.150,000.00 and Kshs.200,000.00 for management employees as the golden handshake.

The claimant's case was that he applied for the package on 19.10.2001 because he was the Marketing Manager and like other Heads of Department, the Chief Executive Officer directed that he could not take advantage of the package until after end of June 2002 when the other employees would have already left. The claimant testified that he was involved in down-sizing of other staff and the process was finalised by December, 2001. A meeting of the respondent's board was held on 18.12.2001 to receive the report of implementation of the reorganisation and down-sizing process. The report showed that one Joash Osiemo, the Factory Manager and therefore a Head of Department had been allowed to take the package. The court notes that the details of the terms and conditions of service for the said Joash Osiemo were not provided in the evidence.

The claimant testified that he re-applied for the package in 2002 but the respondent's Managing Director asked him to defer to retirement or any time he left employment as per the letter dated 26.02.2002 being No. 14 on the claimant's list. The letter conveyed to the claimant that the respondent wished to retain the claimant in employment until retirement age being attainment of 55 years.

The respondent's Chief Executive Officer wrote to the claimant the letter dated 18.01.2003 conveying that the claimant's services were very crucial and the respondent's board had decided that the claimant would serve for full term of 55 years as mandated by the Government. The evidence available did not show that the board's decision as conveyed in the letter of 18.01.2003 was ever varied one way or the other.

By the letter dated 11.03.2003, the respondent's Chief Executive Officer conveyed to the claimant that the Permanent Secretary in the parent Ministry of Agriculture had approved that the claimant could take the package and enter a contract to continue providing services to the respondent. The source and basis of the Permanent Secretary's approval was not established at the hearing.

By the letter dated 19.03.2003, the claimant was appointed Acting Chief Executive of the respondent. By letter dated 27.06.2003, the Permanent Secretary informed the claimant that Eng. Martin O. Owiti had been appointed the respondent's Chief Executive Officer and the claimant's acting capacity had

accordingly come to an end.

The claimant wrote to the respondent's Managing Director the letter of 26.06.2003 requesting to be allowed to retire under the re-organisation package. The letter stated as follows:

“RE: APPLICATION TO RETIRE FROM THE BOARD’S EMPLOYMENT

Please refer the discussions we have had in the last few days on the above subject.

Kindly be assured that my wish to retire with immediate effect is not a rush decision as the matter had been discussed with your predecessor on several occasions in the last 3 to 5 years. The board’s response had always been that I continue working and retire at a later date.

For this reason, I thank you most sincerely for valuing my meagre contributions to this great industry. I am proud to have served the board and will always treasure memories of my working life here.

I, however, feel totally burnt out and in dire need for new challenges and fresh air elsewhere. I therefore kindly request that I be released with immediate effect and not later than 30 September 2003 under the terms stated in your letters Ref. CE.7278/PF/rcs and CE.7405/PF/rcs dated 26 February 2002 and 11 March 2003 respectively. Copies of these letters are attached hereto for ease of reference.

Once again, thank you very much.

Yours faithfully, signed

James M. Wangai”

The managing director replied by the letter dated 2.08.2003. The letter stated as follows:

“Dear James,

RE: APPLICATION TO LEAVE BOARD’S EMPLOYMENT

Thank you for your letters dated 26th June 2003, 14th July 2003 and 17th July 2003 respectively on the above subject.

I wish to inform you that the Board of Directors have accepted with regret your request to leave Board’s employment with effect from 1st October 2003.

As regards your rights to the package, we are in the process of seeking guidance from the Government on the issue to enable the current Board to make a decision on the matter concerning yourself and your other colleagues. In the meantime, all departures are on normal retirement or contractual agreements as applicable.

You will be paid your terminal benefits in accordance with your employment terms upon handing over and completion of the clearance certificate less any debt owing.

On behalf of the Board of Directors, I wish to thank you for the many years of service rendered to Pyrethrum Board of Kenya and wish you best of luck in your future endeavours.

Yours sincerely,

Signed

Eng. Martin O. Owiti

MANAGING DIRECTOR”

The claimant testified that he was cleared by the Managing Director and the certificate of service dated 12.11.2003 was issued in his favour. The certificate stated that the reason for leaving employment was resignation. The claimant further testified that he was not paid the re-organisation package.

The claimant testified that he was on three year fixed contract and at every end of contract he was paid 25% gratuity; 20% being paid at every end of contract and 5% going to pension scheme. The claimant relied on the legal opinion by the respondent's Legal Officer dated 17.06.1996 which stated that the gratuity paid every after 3 years was not based on contract but was recognition of responsibility by the heads of department and the Chief Executive Officer. That the gratuity was also calculated to merely reward the senior officers who otherwise had been lowly ranked compared to the other state corporations. Accordingly, the claimant urged that his employment was permanent and he was entitled to the package.

The claimant left employment at end of September, 2003 and the respondent's Managing Director told him about a consultancy in Europe and the USA. The claimant applied for the consultancy by the letter dated 28.11.2003. The Managing Director wrote on 12.11.2003 making a proposal that the claimant could accept to offer the consultancy. The letter stated in part thus, “**....If you accept to come with us to USA and pending the agreement on terms and conditions of your consultancy, PBK is prepared to pay for your expenses at the rates applicable to its senior employees and your requisite fees.**”

The claimant wrote the letter of 13.11.2003 accepting the offer for consultancy as per the offer in the respondent's letter of 12.11.2003. The claimant stated in the letter the purpose of the consultancy as helping the respondent by participating in business discussions in London, the UK and USA at meetings with respondent's manager in Europe, USA customers and attendance at task force meetings of Pyrethrin Joint Venture and the Non-Dietary Exposure Task Force as well as meetings of East African Pyrethrum Institute (EAPI) and RWATAKE. The task and duties would entail preparation for the meetings and participating in all discussions. The period was November 14 to December 14, 2003 subject to extension for a month by mutual agreement. For consideration, the claimant stated in the letter thus, “**As per salary and other benefits drawn in September 2003 including salary, gratuity, local travel and house allowance, insurance and medical benefits.**” The claimant rendered the consultancy services and he requested for pay from the respondent per the invoice dated 12.02.2004 for Kshs.281,482.65 and his testimony were that he had never been paid.

The claimant testified that he concluded another 2 months consultancy for period 17.05.2005 to 16.07.2005 and consideration was to be basic pay at termination being Kshs.117,535.00 per month. He rendered consultancy as expected and billed Kshs.235,070.00 per invoice of 5.05.2006 but was never paid. The consultancy entailed preparing results from experiments and filing the results with the environmental protection agency in the USA. The claimant's testimony was that he delivered on the consultancy successfully.

The claimant testified that he surrendered and accounted for all the monies that were paid to him for expenses during the foreign travels. If the surrender and accounts were not done then, the claimant testified, he could not have been given further monies for such purpose. The claimant further stated that he paid all telephone bills and the claims in the counterclaim were for 2003 yet he had vacated the house on 1.7.2001. Thus, the claimant stated that the counterclaim of Kshs.1,622,384.00 was not merited at all. The claimant stated that he was paid all dues in the resignation letter of 12.11.2003. If he owed the respondent any dues, it ought to have been deducted. Other than the package claims, the dues in the resignation letter would have been his due terminal benefits.

CW testified that senior officers on fixed term contracts of three years like the respondent were nevertheless permanent and pensionable staff. They were therefore entitled to the package upon re-organisation. CW further testified that as the Managing Director at the time, he recalled that whenever the claimant travelled, he surrendered and accounted for all the monies given for foreign travel expenses.

CW stated that he was the one who signed whenever the money was given and whenever the surrender and accounts were done. CW as the Chief Executive at the material time, did not recall any meeting of the respondent's board at which the board made a decision that the claimant's package on re-organisation would be retained to be paid at a future date. CW testified that after he left the respondent's employment, he did not know if the respondent's board made a decision to deny the claimant the package on re-organisation.

RW1 testified that the claimant had not accounted for monies given on foreign travel and he had not paid certain telephone bills for telephone line No.210247. RW2 testified that the claimant was on fixed term contract and gratuity and therefore he did not qualify for the re-organisation package. RW2's further testimony was that the claimant was never addressed individually to offer himself for the re-organisation package because he was not eligible. RW2 testified that she was not sure that the claimant rendered the consultancy services and the claimant only properly signed the consultancy agreement of 17.05.2005.

The issues for determination in this case are:

1. **Whether the claimant was entitled to the re-organisation package.**
2. **Whether the claimant is entitled to the remedies as prayed for.**
3. **Whether the respondent is entitled to the remedies as prayed for in the counterclaim.**

The court has considered the pleadings, the evidence and the submissions and makes the following findings.

The 1st issue is whether the claimant was entitled to the re-organisation package. The court makes the following findings:

- a. The claimant was employed on a fixed term contract and paid gratuity at the end of every three years of the term contract. As opposed to permanent staff, the court finds that the claimant served on a fixed term contract and was sufficiently compensated for his services through the 25% gratuity paid every three years. The court further finds that the re-organisation was essentially an arrangement in the nature of redundancy and the reorganisation package was essentially a redundancy package recognising the long service of the affected permanent employees. The claimant was not one such employee.
- b. The respondent's board made a decision that the claimant would serve till retirement age of 55 years as he would be retained in employment because his services were crucial. It would be recalled that for every application for reorganisation package, the claimant retained the right to reject or accept the application. The court finds that for the claimant, expressly and by conduct of the parties, despite that the claimant was not qualified to apply, the application was rejected. The court finds that the testimony by claimant was that the whole process was completed and a report tabled to the board in December 2001. By the claimant's testimony, a meeting of the respondent's board was held on 18.12.2001 to receive the report of implementation of the reorganisation and down-sizing process. The court finds that the downsizing process and payment of the reorganisation packages was concluded in 2001 and thereafter it was not available to the employees. The court finds that it was a time bound arrangement available only during the stipulated time as per the circulars. The court holds that an employee cannot hold the employer to pay redundancy or reorganisation package as was called in this case beyond the time stipulated by the employer for an employee to take up the package as the circumstances of the employer could keep on changing for such purpose.
- c. The court finds that the reorganisation package was available only if the employee left on re-organisation. Section 40(1) (c) (d) of the Employment Act, 2007 stipulates that the selection process must be objective and not discriminatory. It would be discriminatory for the respondent to defer the redundancy package for any one employee as the claimant purported to urge. The court

further holds that the purpose of the redundancy or reorganisation package as it was called in the present case was to compensate the staff leaving employment for their long good service. In this case, the claimant did not leave and when he subsequently left it was not on account of reorganisation but it was upon resignation. The court finds that the claimant, upon resigning, could not have legitimately expected to continue in employment and at the same time earn reorganisation package whose period for implementation had come and died down.

For all the foregoing reasons, the court finds that the claimant is not entitled to the reorganisation package as prayed for. The prayer shall fail.

The 2nd issue for determination is whether the claimant is entitled to the other remedies, namely pay for the consultancy services. The court has evaluated the evidence and finds that the parties concluded the agreements for the two consultancy services. There is no material on record to suggest that the claimant did not render the services or he was paid for the services. The court finds that on a balance of probabilities, the services were rendered as expected and the claimant was not paid as per the invoices. The court finds that the claimant is entitled to **Kshs.516,552.65** for consultancy fees as prayed for.

The 3rd question is whether the claimant owes the respondent the money alleged and claimed as advances and advances not surrendered or accounted for by the claimant. The court has carefully considered the claims together with the claim for unpaid telephone bills. The claimant applied to resign and the respondent accepted the application. The claimant was then paid his terminal dues and he left the service of the respondent. The respondent has painted the case to have been that the claimant did not clear from the respondent's service. However, there is no evidence that the claimant failed to take any steps in the clearing process that would therefore have impaired the payment of his final dues. The court has considered the evidence and finds that the respondent was entitled to recover any due liabilities owed to the respondent by the claimant prior to accepting the resignation and prior to releasing the claimant's final benefits. The court finds that such recovery ought to have been carried out under the relevant disciplinary process or financial regulations. The respondent may be at liberty to make relevant recoveries, if proved to exist, from its officers who may have occasioned failure to make such recoveries under the relevant due processes. As between the parties in this suit, the court finds that they are bound by the resignation agreement and the clean release of the respondent from employment through paying his final dues. The court finds that the recovery of the alleged claims as per the counterclaim would be available only after the respondent's due internal administrative processes established such liability but which has not been shown to have taken place. The internal processes would entail invoking of any policy or legislative provisions that may have been breached and the claimant being given due chance to state his case. In the opinion of the court, the material before the court are allegations by the respondent which are devoid of hard findings by the respondent that the claimant is culpable as alleged and the counterclaim will therefore fail.

The court has considered the claimant's margins of success and finds that the respondent shall pay 50% of the costs of the suit.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. The respondent to pay the claimant **Kshs.516,552.65** by 1.05.2014, in default, interest to be payable at court rates from the date of the suit till full payment.
- b. The dismissal of the counter-claim.
- c. The respondent to pay the claimant's 50% of the costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 28th March, 2014.**

BYRAM ONGAYA

JUDGE

