



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 437 OF 2013

THOMAS NYONGESA MABONGA.....1ST CLAIMANT

SILFANO LIHANDA SHIBIT.....2ND CLAIMANT

-VERSUS-

**ELDORET WATER AND SANITATION COMPANY
LIMITED.....RESPONDENT**

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

JUDGMENT

The claimants are **Thomas Nyongesa Mabonga** and **Silfano Lihanda Shibit**. The respondent is **Eldoret Water and Sanitation Company Limited**.

The claimants filed the memorandum of claim on 16.12.2013 through Onyinkwa & Company Advocates and prayed for judgment against the respondent for:

- a. **A declaration that the compulsory retirement notices given to the claimants and terminal leave are unlawful and illegal and the same are revoked.**
- b. **The honourable court to issue an order reinstating the claimants back to employment until they attain their official retirement age.**
- c. **In alternative, the court to order and compel the respondent to pay the claimants the one year salary and other dues owing them.**
- d. **The honourable court to issue an order restraining the respondent, its agents and servants from further terminating the services of the claimants until they attain their official retirement age.**
- e. **Costs and interest of the suit at court rates.**
- f. **Any other relief that the honourable court may deem fit and just to grant.**

The claimants filed an application on 16.12.2013 together with the supporting affidavit of the 1st claimant. The respondent filed the affidavits of Peris Cheruto on 19.02.2014 and on 28.02.2014. By the parties' consent, the court made interim orders staying the implementation of the retirement notices issued to the claimants by the respondent.

The suit was fixed for hearing on 20.03.2014 and the parties opted not to call witnesses but to rely on the documents on record. Written submissions were filed for the parties.

It is not disputed that claimants were employed by the respondent. It is not also disputed that the claimants were born in 1954 as verified by their respective national identification cards. The specific dates of the claimants' dates of birth were not indicated in the identity cards.

Clause 29(1) (a) of the collective agreement that applied to the claimants' service states that the respondent could call upon an employee to retire any time upon attaining 60 years of age and a notice of retirement shall be given to the officer 6 months in advance of the 60th birthday and provided that an officer may exercise the option to retire on or after attaining the age of 55 years by giving 6 months notice. Clause 29 (1) (c) of the collective agreement states thus,

“Where documentary evidence of an officer’s age is obtainable or inconclusive, his assumed age will be determined by reference to the date in his identity card together with the recommendations of the medical officer of health, and in such case the anniversary of his birthday shall be deemed to be 31st December.”

Each claimant received the respondent's notice of retirement dated 10.06.2013 conveying a six months retirement notice effective June, 2013 to 31.12.2013. Each claimant was also paid three months in advance for October, November and December, 2013 so as to proceed on a terminal leave up to 31.12.2013, the effective date of the retirement.

The only issue for determination in this case is to determine the effective date of the claimants' retirement.

The court finds that the parties are bound by the provisions of *clause 29 (1) (c)* of the Collective Agreement. The age of the claimants is determinable by reference to the date indicated in their identity cards and the anniversary of the birthday shall be December, 31st. The identity cards show that they were born in 1954 and the anniversary of their birthday under the clause is 31st December, 1954; meaning as submitted for the respondent, to have been one year on 31st December 1954, they must have been born on or about 1st January, 1954. As submitted for the respondent, a person whose first birthday was 31st December, 1954 attained 60 years on 31st December, 2013 being $2013 - 1954 = 59 + 1 = 60$ years. The court therefore finds that the claimants' retirement notice and the subsequent retirement decision did not breach the provisions of the collective agreement on mandatory retirement age of 60 years.

Accordingly, the claimants' suit is dismissed with costs.

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

BYRAM ONGAYA

JUDGE