



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO 806 OF 2011

AGNES WACHU & 104 OTHERS.....CLAIMANTS

VS

BARCLAYS BANK OF KENYA.....RESPONDENT

RULING

Before me for determination is a Notice of Motion dated 9th October, 2013 seeking the following orders:-

1. That this Honourable Court be pleased to set aside the Ruling dated 24th April, 2013 by Justice J. Abuodha
2. That this Honourable Court be pleased to fix a hearing date for the case on priority basis.
3. That costs be in the cause.

The grounds upon which this application are grounded are the following:

1. That the Claim herein was filed around 25th May, 2011.
2. That the Claim herein was to be originally heard by Justice Kosgei (as he then was) by way of written submission on 10th October, 2011.
3. That the claim was subsequently reallocated to Justice Abuodha who delivered the instant Ruling.
4. That whereas the Claim is premised on severance payments due and payable to the Claimants on account of their completed years of service as a result of breaches of the Law and discrimination, the said Ruling purported to deal with a sub-set of the claim.
5. That the Ruling sought to be set aside did not conclusively address the whole suit as claimed neither did it exhaustively deal with the sub-issue it sought to dispose of.
6. That the said Ruling is ambiguous as it attempts to sever a cause of action which is unseverable by virtue of the contents of the claim.
7. That whereas the said Ruling at page 3 the Honourable Judge observes that the Claimants

averred that **“In further support of their argument, the claimants averred that the act of the respondent capping their exit package to 16 years amounted to discrimination since in previous similar cases as the respondent has calculated the exit packages based on years of completed survive”**. The Ruling itself purports to determine the issue of 16 years but again states that the court is unable to determine the issue of discrimination. The holding therefore leaves the matter unresolved.

8. That the said Ruling analyzed calculations for one Claimant only whereas the claim consists of 105 Claimants. The Honourable Judge at page 11 of the Ruling noted that **“The Claimants are 105 in number, therefore it would not be practical in this ruling to mathematically calculate each of their entitlement under the statutory minimum for comparison with the offer made and paid to the claimants. The court will therefore use the basic earnings of the first claimant to establish this fact and the result will be replicated for the rest”**. This means that the Ruling did not conclusively deal with the matter as relates to other Claimants.

9. That the claim herein being founded on documentary evidence ought to proceed by way of **viva voce** evidence in order to enable the Claimants adduce evidential documents in support of their case

10. That the said Ruling by its very nature has led to the Claimants being unable to have their case proceed as it purport to determine one aspect of the case and also refrains from making a conclusive determination of the same.

11. That unless the said ruling is set aside to allow this case proceed to full hearing the claimants are unable to progress the matter further.

12. That the Claimants would like to have their claim determined with finality as a wholesome suit.

13. That unless the Ruling is set aside, it has the effect of clogging and constraining this court’s power and constitutional mandate to look into all the aspects of the case in determining the claim.

14. That this Honourable Court has inherent and lawful power to set aside the said Ruling and allow this case to proceed to full hearing on priority basis owing to its age.

15. That no prejudice will be occasioned to the Respondent as they still have a chance to defend themselves.

The application is supported by the affidavit of Godfrey Wafula Wasike, the 31st Claimant who deposes that he has the authority of all the other Claimants to swear the affidavit on their behalf.

The Respondent filed a replying affidavit of Waweru Mathenge, the Respondents Legal Counsel sworn and filed on 29th October, 2013. The Respondent also filed skeleton submissions on 17th January, 2014.

The application was argued before me on 21st January, 2014 when the Claimant was represented by Mr. Amadi instructed by the firm of Koceyo & Company Advocates wrote the Respondent was represented by Mr. Mwangi instructed by the firm of Mohammed Muigai Advocates.

The background of the application is that this case was filed by 105 Claimants who are former employees of the Respondent. The Claimants were declared redundant and paid their terminal benefits which included severance pay at the rate of 45 days salary for each 16 years of service. Any years worked above 16 years were not paid.

The Claimants allege that they were discriminated and underpaid by the Respondent as compared to their colleagues who had worked for 16 years or less and that the capping was in violation of the provisions of the Employment Act. They seek payment of the balance of unpaid terminal benefits for the period worked over and above 16 years, leave not taken and interest on the two items at 20% per annum from 31st January to 13th May 2011 and thereafter interest at court rates. They further seek costs of the claim.

The Respondents position as stated in the Memorandum of Response is that the amounts paid to the Claimants were in excess of all terminal dues recognized by law, that no part of the exit package deprived any claimant his entitlement under the law, that the Claimants signed discharge certificates confirming that they had no further claims against the respondent and are therefore stopped from making further claims against the Respondents.

The Respondent further that they are liable on the promise to settle outstanding loans as that was a gratuitous promise. On the claim for outstanding leave the Respondent's position is that they paid the leave due.

When the parties appeared before Justice Kosgei (Rtd) on 1st July 2011 they recorded a consent in the following terms:-

1. That the question of liability be determined first.
2. That the Claimants to file their written submissions on liability only within 7 days from today and serve the same upon the Respondent.
3. That the Respondent to file Response within 14 days from date of service
4. That dispute be mentioned on 29th July, 2011 at 10 a.m. for purposes of highlighting submissions.

The case was mentioned severally after that on 29th August, 3rd October and 10th October, 2011. When the Respondents did not attend Court. On 10th October, 2011. Mr. Munyu appearing for the Claimants asked the court to prepare its award based on the submissions filed by the parties. The award was to be on notice. The award was not delivered until July 2012 when the court was reconstituted.

The case was thereafter allocated to Justice Abuodha who prepared a Ruling based on the submissions on record. Justice Abuocha was however transferred to Nyeri before he delivered the Ruling. He prepared the Ruling and it was delivered by Justice Nderi on 3rd May 2013. The file was thereafter allocated to me.

The parties appeared before me on 7th October, 2013 when the matter was fixed for hearing. The Respondent's position was that the ruling is bending and the parties should be allowed to proceed by way of written submissions on the outstanding issues. The Claimant on the other hand was of the opinion that the ruling was interlocutory and should not bind the court. The Claimants urged that the court proceeds to hear the case in wholesome and come up with its decision. I adjourned the matter and urged the parties to try to reach a consensus on the way forward or move the court for appropriate orders.

It is upon this background that the application before me was filed. Mr. Amadi for the Claimants argued that the ruling does not appear to capture the gist of the Claim and the issues the Claimants sought to be brought out. That the court dealt with the issue of Section 40 separately from the issue of discrimination, that the 2 issues should be dealt with together. That the Claimants position is discrimination in the manner in which the severance pay was implemented between employees with 16 years service and those with more than 16 years' service on the basis that those with 16 years service were paid for all years worked while those with more than 16 years service were denied the benefit for the years worked in excess of 16 years. That this is the element of discrimination that the claimants sought to be determined.

The second ground raised for the Claimants is that Justice Abuodha only calculated the benefits of one Claimant and applied it to all Claimants yet each Claimant's claim has been itemized. That by virtue of the ruling the Claimants are unable to proceed either to full hearing or appeal as there are no clear grounds to proceed with either. That the ruling directed that the issue of discrimination goes to full hearing yet it cannot be heard independently of section 40.

Mr. Amadi submitted that this ruling is ambiguous and should be set aside. For the Respondent Mr. Mwangi submitted that the application is made under section 16 of Industrial Court Act which provides that applications for review should be made to the Judge who delivered the Judgment to be reviewed. He stated that on that basis alone this court should not hear the Claimants application.

Secondly he submitted that the orders sought being the setting aside of a brother Judge's order should comply with the limited circumstances in which such orders are allowed as in ex-parte judgments. That in this case Counsel for the claimant alleges that the brother judge erred and therefore does not qualify for setting aside the decision of another Judge.

Thirdly, Mr. Mwangi submits that the Claimant's application is an appeal against the decision of Justice Abuodha. That there was a consent on 1st July, 2011 where parties asked the court to determine the issue of liability in a specific way, that the consent has not been challenged and continues to be valid. That even if the ruling is set aside the court would still be confronted with the consent, that this would be the same as asking the court to reach a different position based on the same submissions contrary to the principle of res judicata. That the Respondent's position which Justice Abuodha upheld was that the Claimants were all paid in excess of what they were entitled to as each of them was paid the equivalent of severance pay of 48 years yet none of them had worked for that period. That this argument was not controverted by the claimants. He urged the court to dismiss the application and order that the case proceeds to full trial as directed.

I have read the record in this case starting with the consent, the submissions by the parties pursuant to the consent and the Ruling of Justice Abuodha.

My understanding of the consent is that the parties requested the court to make a determination on liability first. From the pleadings, the issues of liability would be based on the prayers in the claim and the response in the Memorandum of Response.

These in my opinion are balance of exit package, discrimination, leave, and interest on loans. Some of the Claimants in addition claim cash bonuses.

In my opinion the consent entered into by the parties was ambiguous as it did not specify whether the liability was in respect of all the issues claimed in the memorandum of claim or on the issue of underpayment of exit package only. The submissions filed by both parties referred to all the issue in dispute. The submissions by Claimants specifically set out the issues for determination to include

- i. Whether the Claimants were correctly paid as provided by law.
- ii. Whether the bank was under a duty not conceal, make misrepresentations or not to disclose material facts to the Claimants.
- iii. Whether the Bank discriminated against the Claimants
- iv. Whether the bank was discharged from any liability by the Claimants.
- v. Whether the payment by the bank and discharge thereof was illegal.

On their part the Respondents made submissions on all the issues raised by the claimants. In other words the submissions by the parties covered all issues raised in the Memorandum of claim.

I have taken into consideration the fact that Justice Abuodha inherited this file when the file was pending for determination on the submissions filed by the parties. Indeed the file refers to a pending award yet what Justice Abuodha prepared was a ruling.

In my opinion there was a misunderstanding between what the parties wished to be done and what was actually done.

I find that the consent was not specific on what the court was intended to determine.

I further find that the issue of discrimination cannot be determined without referring to the exit package as the allegation in the claim is that the Claimants were discriminated in the calculation of the exit package. This is demonstrated by the ruling when at paragraph 3 of page 3 the court stated as follows:

“In further support of their argument, the Claimants averred that the act of the respondent capping their exit package to 16 years amounted to discrimination since in previous similar cases the respondent has calculated the exit packages based on years of completed service.”

In my opinion this is the gist of the claim by the Claimants for balance of exit package which the court would have to determine and which was not determined by Justice Abuodha. Instead, he left this issue to be determined at the hearing when at the last paragraph of page 17 of the ruling he stated as follows:-

“The issue of accrued and unpaid leave as well as discrimination are matters of evidence and are determined after receiving evidence at the trial.”

The Respondent has submitted that granting the orders sought would be sitting on appeal on Justice Abuodha's decision and the issue is res judicata. The Respondent

referred me to the case of **Dickson Mucho Muriuki vs Timothy Kagundu Muriuki & 6 Others eKLR, James Mwashori Mwaqkio Vs Kenya Commercial Bank Ltd (1998) eKLR, Ngugi Vs Kinyanjui & 3 Others (1989) KLR 146, Virgin Atlantic Airways Limited Vs Zodiac Seats UK Limited (2013) UKSC 46 Nyali Beach Hotel Limited Vs Kenya Commercial Bank Limited & Another (2006) E.A. 304**. All these cases are on the principle of res judicata. I have further been referred to **Halsbury's Laws of England 3rd Edition Volume 15, page 186** on the same principle. As I have pointed out above, Justice Abuodha did not determine the issue in dispute which as I have pointed out above is whether by paying the Claimants as they did in this case, the Respondent discriminated against them and therefore paid them less than what they were entitled to. This issue was left outstanding by Justice Abuodha to be determined after receiving evidence at the trial. This therefore means that the decision of Justice Abuodha does not have to be interfered with as it does not address the issue in dispute as clearly expressed in the ruling.

On the issue of a review being made before the Judge who made the decision, I believe that the Respondents having submitted themselves to the hearing of this case before me cannot again tie my hands by picking out for me what part of this case I can hear and what part I cannot hear. It is too late in the day for that kind of objection as I am already seized of this case.

In the final analysis it is my opinion that the cause of the mess in this case is the consent recorded by the parties on 1st July, 2011 which did not specify what the parties meant by asking the court to determine the question of liability. The consent did not specify whether the liability was on all issues in dispute or any one or more of the issues in dispute. The parties themselves, by their variant arguments, are not agreed on what they consented on. There was no meeting of minds.

To that extent the consent was vague as all the issues in dispute relate to the determination as to whether the Respondent is liable to the Claimants on all the prayers in the claim. I believe that ambiguity is one of the reasons upon which a consent can be set aside. I further believe that under the powers donated to me by Section 12 of the Industrial Court Act it is within my power to set aside the said consent even if none of the parties has specifically prayed for it, in order to pave way for the hearing and determination of

the case herein on the merits.

For these reasons I make the following orders: -

1) The consent recorded by the parties herein on 1st July 2011 and all consequent proceedings are hereby set aside on the grounds of ambiguity.

2) That this case proceeds for hearing de novo.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MARCH 2014

HON. LADY MAUREEN ONYANGO

JUDGE

In the Presence of:

Ilako holding brief for *claimants*

Mwangi for Respondent