



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**CAUSE NO. 88 OF 2013**  
**(Formerly High Court Civil Suit No. 326 of 2004 at Nakuru)**

**HARRISON NDUNGU MWAI AND 500 OTHERS.....CLAIMANTS/PLAINTIFFS**

**- VERSUS -**

**THE HON. ATTORNEY GENERAL.....RESPONDENT/DEFENDANT**

**(Before Hon. Justice Byram Ongaya on Friday 30<sup>th</sup> May, 2014)**

**JUDGMENT**

**Harrison Ndungu Mwai and 314 other former civil servants** filed the plaint on 9.12.2004 through Kiplenge, Ogola & Mugambi Advocates. Job Kurgut Advocate appeared for the plaintiffs throughout the hearing. With the leave of the court, the amended plaint was filed on 16.10.2006 increasing the number of plaintiffs to 368. On 08.05.2004, the respondent filed the notice of preliminary objection that the suit contravenes mandatory provisions of the law and the same should be dismissed with costs to the defendant. With the leave of the court, the further amended plaint was filed on 12.07.2010 increasing the number of the plaintiffs to 497. The defendant filed the amended statement of defence on 10.02.2011.

The plaintiffs filed the further amended plaint on 31.07.2012 increasing the plaintiffs to 501. The defendant was sued on behalf of various ministries of the government where the plaintiffs worked as civil servants. The plaintiffs prayed for judgment against the defendant for:

- a. **A declaration that the defendant willfully and knowingly induced breach of contract employment of the plaintiffs by deceiving, luring, misleading and misrepresenting facts to the plaintiffs into accepting voluntary retirement.**
- b. **A declaration that the agreement between the defendant and the World Bank, International Monetary Fund, Bi-lateral donors to deceive the plaintiffs into voluntary retirement and refusing and neglecting to pay the plaintiffs as agreed is inhuman, degrading treatment and unconstitutional.**
- c. **A declaration that retrenchment in all its forms is illegal and unconstitutional and the defendant be prohibited from retrenching civil servants as a condition to getting grants, loans or aid from World Bank, International Monetary Fund, or any other lending institutions and Bilateral or Multi-lateral donors. OR ALTERNATIVELY:**
- d. **A declaration that the plaintiffs are entitled to be paid all their dues amounting to**

**Kshs.124,250,000.00.**

**e. The defendant be condemned to pay the costs of the suit.**

**f. Any other or further relief that the court may deem it fit and just to grant.**

The defendant filed the further amended statement of defence on 08.10.2013 and prayed that the plaintiff's suit be dismissed with costs. Charles M. Mutinda, Principal Litigation Counsel acted for the defendant.

The plaintiffs pleaded that at all material time, each was employed by the government of Kenya as per their respective contracts of service under terms and conditions of service as provided in the Civil Service Code of regulations (**COR**), the Service Commissions Act Cap. 185, the Pensions Act Cap.189 the Constitution of Kenya and all relevant Municipal and International Laws, or conventions governing labour and employment of the plaintiffs by the defendant. The plaintiffs further pleaded that on diverse dates between 1994 and 2000, the defendant colluded with officials, agents, employees and country representatives of the World Bank, International Monetary Fund and the Donor Community and deceived, misled and misrepresented to the plaintiffs into accepting voluntary retirement thereby inducing breach of contract of employment and occasioning intentional economic harm. The plaintiffs' case was that in retiring the plaintiffs, the respondent was acting in compliance with the conditions set out by the monetary institutions, the donor agencies and the plaintiffs held all the parties involved liable. The plaintiffs pleaded that the conduct of the monetary institutions and the donor agencies was *ultra vires* their instruments of constitutions, international conventions and the plaintiffs' rights as it was inhuman and degrading treatment against the plaintiffs. By conspiracy, the plaintiffs pleaded that they had been subjected to intentional economic harm as they were condemned by themselves, their families and dependants into permanent poverty and impoverishment. The plaintiffs urged that they would apply to the court to lift the immunity of the World Bank, International Monetary Fund and the Donor Agencies to enjoin them in the suit. The application was never filed for the plaintiffs by the close of the hearing of the suit.

The plaintiffs further pleaded particulars of breach against the government as follows:

- a. The government failed to disburse the training money as promised and as budgeted for and as a result many of the retirees were not trained and others were trained only for 2 days below the training period as expected.
- b. Failure to pay the safety net package or golden handshake to the voluntary early retirees as promised to be a lot of money enticing many of the retirees to complete the relevant forms. There were disparities in the pay of the safety net package as some were paid more and others grossly under paid.
- c. Failure to provide for transport for the retirees as provided in the COR.
- d. Failure to pay the retirees their National Social Security Fund (NSSF) dues as provided for in the retirement letters.
- e. Failure by government to ensure that co-operative societies refunded the retirees' shares.
- f. Failure by the government to remit leave allowances.
- g. Failure to implement the Civil Service Reform Programme Guidelines for the Voluntary Early Retirees dated 12. 10.1993.
- h. Payment of reduced benefits.
- i. Irregular termination of the plaintiffs' contracts of employment hence null and void termination.

- j. In absence of a trade union, the government took advantage of the vulnerable plaintiffs by making false promises that educed them to believe that by completing the retirement forms they would be paid **“a large sum of money”** as retirement dues but which turned out to be a hoax.
- k. The early retirement was inhuman, degrading, not transparent, not accountable and funds meant for the plaintiffs were embezzled or misappropriated and some plaintiffs took home a meager Kshs.60,000.00 or thereabouts.

It was the plaintiffs’ case that 33 of the plaintiffs have since died as a result of lack of money to meet their medical expenses. For others, their families disintegrated due to failure by the government to pay the safety net benefits as promised. The plaintiffs pleaded that their social status had suffered irredeemably as they had become the **“laughing stock”** in the community as persons who were easily duped to sign the retirement forms by the government. For each plaintiff, it was claimed that the government had failed to pay a sum of Kshs.250,000.00 comprising of Kshs.180,000.00 for golden handshake, training Kshs.40,000.00, and transport upon retirement Kshs.30,000.00. For the 501 plaintiffs, the sum claimed was Kshs.125,250,000.00.

The defendant denied that the plaintiffs were employed by the government and if they were ever employed by the government, they voluntarily retired under the Voluntary Early Retirement Scheme initiated by the defendant in 1993-2000 without forcing, deceiving or misleading the plaintiffs. The 1993-2000 voluntary retirement, the defendant pleaded, was optional and designed in accordance with the provisions of the former Constitution of Kenya (repealed), the Service Commissions Act Cap. 185, the Employment Act Cap.226 (repealed), and the Regulation of Wages and Conditions of Employment Act Cap. 229 (repealed). The plaintiff also pleaded that the World Bank, International Monetary Fund and the Donor Agencies were not privy or party to the early retirement of the plaintiffs.

The defendant pleaded that under the 1993-2000 Voluntary Early Retirement Scheme, Non-pensionable employees were entitled to:

- a. **Severance pay of 3 months current basic salary (as at retirement time) for each year worked in the Civil Service.**
- b. **3 months basic salary in lieu of notice.**
- c. **A golden handshake of Kshs.60,000.00.**
- d. **Leave earned paid for or officers were asked to utilize the pending leave days before retirement.**

The defendant pleaded that under the 1993-2000 Voluntary Early Retirement Scheme, Pensionable employees were entitled to:

- a. **Employees who had worked for 10 or more years were to get normal gratuity and pension benefits under the Pensions Act.**
- b. **Employees who had worked for less than 10 years were to get severance payment of 3 months of current basic salary (at time of retirement) for each year worked in the Civil Service.**
- c. **Payment in lieu of notice of 3 months of current basic salary (at time of retirement).**
- d. **A golden handshake of Kshs.60,000.00.**

The defendant stated that the claimants were paid all their respective dues as set out for the pensionable and non-pensionable employees. It was the defendant’s further case that permanent staff could draw pension benefits under the Pensions Act while those on temporary terms were not pensionable and could

not draw pension benefits under the Act. The defendant's case was that the plaintiffs were trained before retirement save those who opted not to attend the training as scheduled. The training prepared them for social and economic challenges in the post-retirement life and the defendant's case was that no funds were set aside for individual retirees as claimed.

The defendant's further case was that transport was not payable to the plaintiffs upon retirement because the same was covered under the prevailing government regulations. At the time, the relevant NSSF Act Cap. 258 prescribed that retirement dues and benefits were payable upon a retiree attaining the age of 50 years and the plaintiffs were not entitled to claim from the defendant their respective NSSF dues.

The case was heard on 3.12.2013. The plaintiffs' witnesses were plaintiff No. 159 Washington Kirobi Njoroge (**RW1**), plaintiff No. 298 Justine Nyamu Magondu (**RW2**), and plaintiff No. 123 Johnson K. Njoroge (**RW3**). The defendant's witnesses were Charles Iteba Omwenga, the Assistant Human Resource Management Officer for Public Service Commission (**DW1**) and Henry Wafula Wesioma (**DW2**) an Accountant at the Directorate of Public Service Management (**RW2**).

The court has considered the pleadings, the evidence and the submissions. The court makes findings as follows on the issues in dispute:

1. The **first issue** for determination is whether the government was induced to breach the plaintiffs' contracts of service through the completion of the voluntary early retirement forms. It is submitted for the plaintiffs that to achieve reduction of the work force, the government identified those it desired to retire, representations were made that the identified employee would be paid a lot of money for retirement benefits, they filled the forms without knowing the amount of due final benefits and when the benefits came, they were small and not as expected. It is said for the plaintiffs that all that took place in accordance with the designs hatched between the government and the World Bank, International Monetary Fund and the Donor Agencies. The court has considered the evidence and finds that no plaintiff raised a grievance or applied for review or appeal in view of the alleged low and sudden unexpected low pay of terminal dues. In the circumstances, the court finds that the alleged inducement did not take place. In making that finding, the court is guided that inducement to breach a contract entails a tortious interference with contractual relations (**see Black's Law Dictionary 9<sup>th</sup> Edition at page 1627**). It entails a 3<sup>rd</sup> party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties. The plaintiffs urged that the inducement of breach of their respective contracts of employment was by the World Bank, International Monetary Fund and the Donor Agencies but these were not parties to the suit and no evidence was provided to establish the alleged procurement of breach of contract. The court therefore finds that the plaintiffs did not establish inducement of breach of contract as claimed especially that the alleged 3<sup>rd</sup> parties were not parties to the suit and the inducement was not established.

2. The second issue for determination is whether the plaintiffs are entitled to the claim of Kshs.180,000.00 as prayed for. The plaintiffs' case was that the budget speech allegedly produced in court set aside Kshs.7.5 billion for golden handshake which was averagely Kshs.240,000.00 per employee. It was the plaintiffs' case that nevertheless, each was paid Kshs.40,000.00 only for golden handshake so that each was claiming Kshs.180,000.00. For the defendant, it is submitted that the golden handshake promised and paid to each plaintiff was Kshs.60,000.00. The defendant submitted that under note 18 of the relevant form, each plaintiff confirmed to have read and understood the benefits due under the early retirement scheme and willingly and voluntarily opted for the scheme. The defendant further submitted that the budget speech was not produced in court and in any event, a budget is but a projection of future income and expenses. The defendant also submitted that reference at page 34 of volume 2 of the plaintiffs' documents is clear. It provides that initial budgetary provision in 1998/1999 budget of 1.5 billion for voluntary early retirement scheme if fully utilized would enable the government retire approximately 6,250 employees at an average cost of Kshs.240,000.00 per retiree for the year 1998/1999. It was the defendant's case that the Kshs.240,000.00 per retiree would be the all inclusive cost of retiring one retiree and not the amount for golden handshake per retiree. The court agrees with the defendant's submission. There is nothing to hold the defendant liable to pay beyond whatever was clearly stated in the form as signed by each plaintiff and it is not tenable for the plaintiffs to turn around and argue that

they did not know whatever they were to be paid under the scheme. The court finds that the prayer will therefore fail.

3. The next issue for determination is whether the plaintiffs are each entitled to Kshs.40,000.00 training allowance. The evidence available shows that the government conducted group training for the retirees. The plaintiffs did not establish any basis for payment of individual training allowance as prayed for. The plaintiffs appear not to have raised grievances about the training. As submitted for the defendant, no training funds were specifically provided for each plaintiff to be paid under the voluntary early retirement scheme. Accordingly, the court finds that the claim will fail.

4. The plaintiffs prayed for travelling allowance at Kshs.30,000.00 for each plaintiff. Regulation K8 of the COR provided that each plaintiff was entitled to free transport to his or her home in Kenya upon retirement provided such transport was claimed and taken within two months of cessation of duty. Regulation K10 entitled each plaintiff to transport of certain scheduled heavy baggage by rail in addition to the free ticket allowance. Regulation K11 entitled each plaintiff to departmental transport or hired transport if rail transport was not available for the heavy baggage. There is no evidence that the plaintiffs applied for the free ticket allowance and baggage transport and were denied. The court finds that the claim for Kshs.30,000.00 per claimant lacked basis or justification and the prayer will fail. As submitted for the defendant, the claim was not provided for under the voluntary early retirement scheme and it was available as provided for in the COR.

5. The next issue for determination is whether the suit was time barred. The plaintiffs did not submit on that issue. The defendant submitted that the tort of inducement to breach the claimant's contracts of service was time barred under section 3(1) of the Public Authorities Limitation Act Cap. 39 Laws of Kenya. The section provides that no proceedings founded on tort shall be brought against the government or local authority after end of twelve months from the date on which the cause of action accrued. It was submitted that at paragraph 5 of further amended plaint, it was stated that the alleged tort occurred between 1994 and 2000 and suit was filed on 9.12.2004 being 4 years and 11 months after end of 2000. The defendant further submitted that even if the suit was based on the contract of employment, it was time barred under section 3(2) of the Public Authorities Limitations Act Cap. 39 of the Laws of Kenya which provides that no proceedings founded on contract shall be brought against the government or local authority after the end of three years from the date on which the cause of action accrued. The court has considered the defendant's submissions and uphold the holding of the Court of Appeal in **Thuranira Karauri –Versus- Agnes Ncheche Nyeri, Civil Appeal No. 192 of 1996** that a suit that is time barred is incompetent and fit for striking out as limitation goes to jurisdiction. Accordingly, the court finds that the plaintiffs' suit was time barred and therefore liable for dismissal.

6. It is not disputed that certain of the plaintiffs have since passed on. The court has taken into account that circumstance, the nature of the dispute and the time that lapsed from filing and hearing of the suit and finds that it will serve ends of justice that the parties bear own costs of the suit.

In conclusion, judgment is entered for the defendant against the plaintiffs for dismissal of the suit with orders that parties shall bear own costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday 30<sup>th</sup> May, 2014.**

**BYRAM ONGAYA**

**JUDGE**