



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 411 OF 2012

GILBERT MBUGUA KAIRU CLAIMANT

VERSUS

COFFEE RESEARCH FOUNDATIONRESPONDENT

M/S Chege for Claimant

Mr. Gathii for Respondent

JUDGMENT

1. Dr. Gilbert Mbugua Kibiru, the Claimant filed a memorandum of claim on 13th March 2012 seeking various reliefs to wit:

- a. Kshs.2,391,053.35 being the service benefits due to the Claimant for the period January 2005 to 2011;
- b. interest on the above from the date of default to the date of payment;
- c. interest on Kshs.3,406,154/= being the 1/3 of the commutable pension from the date of payment;
- d. Kshs.545,706/= being 3 months salary in lieu of leave days not taken into account in setting the correct date of retirement;
- e. that the Respondents be compelled to update NSSF contributions to facilitate payment of dues to the Claimant;
- f. costs of the suit;
- g. any other relief the Court may deem fit to grant.

Summary of facts

2. The Claimant was in the employment of the Respondent as a Research Scientist for a period of about 34 years.
3. During the tenure of the Claimant, the Government reviewed the retirement age from 55 to 65 years with voluntary retirement increased from 50 years to 55 years with effect from 1st July 2003.
4. The Respondent has a Staff Benefits Scheme (hereinafter referred to as the Scheme which retained contributions from both the Claimant and the Respondent his employer. The Scheme's Trust deed and rules only provide for continued contributions until the age of 55 years.

5. Upon attaining 55 years, the Claimant gave notice to the Respondent that he would continue serving and not voluntarily retire and also sought to be availed contract terms under which he would be able to earn pension since he was no longer a contributing member of the scheme owing to the age limit.
6. The Respondent declined the request for placement on contract terms since the retirement age for research scientists had been enhanced by the Government and he was thus a pensionable employee.
7. The Claimant was further advised that he could neither draw the one third of his commutable pension since he had not left the service of the Respondent.
8. The Respondent also proceeded to stop all contributions on behalf of the Claimant to the Scheme on advice that he had attained the age of 55 years. The Claimant continually sought to be availed a personal service agreement by the Respondent to enable him earn pension after the age of 55 since the Scheme's Rules did not allow his continued contribution.
9. The Respondent promised to review the provisions of the Scheme's Rules in regard to the age of retirement and appointed an *ad hoc* committee for this purpose whose recommendations were withdrawn immediately after their adoption.

The Claimant was never availed a personal service agreement for the duration from January 2005 to June 2011 when he would have actually retired and never earned pension.

10. The Claimant gave his retirement notice on the 18th August with interest to retire on the 30th June 2011 but his retirement date was calculated to be on the 31st March, 2011. By so doing, the Claimant contends that the Respondent failed to take into account the Government's regulation that grants 30 days leave prior to retirement to any civil servant. The Claimant claims payment in lieu of leave for the year 2011 to which he claims entitlement.
11. The Respondent paid the Claimant Kshs.687,597.25 as exgratia payment in lieu of pension that would have been earned for the period January 2005 to 30th June 2011. The Claimant contests this payment and instead claims Kshs.2,391,053.35 which he states was the correct benefits due to him for the period January 2005 to June 2011 and claims interest on the amount from the date of default to payment in full.
12. The Claimant seeks an updated NSSF record to enable him access his dues. The Court notes that this is a record that is readily available to the Claimant from the NSSF office.
13. The Claimant states that the Respondent is bound by the Government's circular dated 14th December 2000 on payment of service gratuity to officers serving on local agreements although he was not placed on contract for the period January 2005 to June 2011. This is the basis of the claim for Kshs.2,391,055.35 being gratuity calculated at 31 % of the basic pay in terms of the aforesaid circular.
14. The Respondent refutes this claim stating that it paid the Claimant the due service gratuity based on the Rules of the Scheme. It is a fact that the Claimant retired from the scheme at the age of 55 years and therefore the Trust Deed and the Rules were not applicable to him thereafter.
15. The Claimant further seeks payment of interest on the $\frac{1}{3}$ commutable pension from the scheme to which he was entitled but was denied by the Respondent upon attaining the age of 55 years. The Respondent held the amount until June 2011 when the Claimant actually left employment.

According to the Claimant, the retention violated the Trust Deed and the Rules of the Scheme and was therefore unlawful.

16. With regard to payment of 3 months salary in lieu of leave days, this claim is based on the alleged failure by the Respondent to take into account Government Regulations on the matter. The Notice to

retire is dated 18th August 2010 and the retirement was to take effect on 1st May 2011.

The Respondent responded to the notice by a letter dated 21st January 2011 stating that the Board of Directors had approved the request to retire from the Foundation's services. The Claimant was advised that his terminal leave was to end on 22nd March 2011. The Respondent refutes any further payment in lieu of leave stating that this was fully taken care of in its payment of terminal benefits to the Claimant.

17. According to the Code of Regulations for Government employees, Revised Edition 2006 and in particular Regulation N15(3):

“an officer who is due for retirement will also be entitled in addition to his annual leave, thirty (30) days leave pending retirement”.

18. The Claimant alleges that the Respondent failed to accord him 30 extra leave days in addition to the 30 days owed him for the year 2010 – 2011.

The Respondent also failed to exclude weekends and public holidays in computation of terminal leave. That had the Respondent done so, the retirement would have taken effect on 30th June 2011 and not 22nd March 2011 and therefore he is entitled to payment of Kshs.545,706/= being three months salary in lieu of leave days not taken into account by the Respondent in its computation of terminal benefits.

19. The Claimant testified at length in support of the particulars of claim and was closely cross examined by counsel for the Respondent.

By and large he answered most questions in a satisfactory manner and was no doubt a senior employee of the Respondent in good standing throughout the period of service as a scientist. He was placed in a very awkward position vis a vis his employer from the age of 55 years when various promises made to him by the Respondent were not honoured and he persistently made demands to the Respondent to rectify the situation to avoid further litigation. It is without doubt that his early retirement before attaining the age of 65 years was in consideration of this strenuous relationship towards the end of his service.

Reply to statement of claim

20. The Respondent denies the three main claims by the Claimant being payment of gratuity at 31 % of the basic salary from January 2005 to 30th June 2011 and interest thereof; interest on the $\frac{1}{3}$ commutable pension payable upon attainment of age 55 until 25th July 2011 when the pension was actually paid; and payment of three (3) months salary in lieu of leave days not taken and not taken into account by the Respondent in computing terminal benefits.

21. With respect to this last claim, the Respondent avers that the Trust deed Rules stipulated that if a member remained in the service of the sponsor after the named retirement date, contributions would cease but payment of the pension would be deferred until actual retirement.

22. The Court had opportunity to peruse the **“COFFEE RESEARCH FOUNDATION STAFF RETIREMENT BENEFITS SCHEME - TRUST DEED AND RULES** dated 24th May, 2005 and **Rule (g)** reads as follows:

“if a member remains in the service of the sponsor after Normal Retirement Date, contributions by him or on his behalf shall cease at the Normal Retirement Date and the members pension shall be deferred until he actually retires.”

23. It is common cause that the normal retirement date for the purposes of the scheme was 55 years. It is also common cause that the Claimant remained in the service of the sponsor after 55 years. It is also not in dispute that the contributions by him and on his behalf ceased upon Normal Retirement Date which was 55. It is therefore without a doubt that the members pension became due and payable upon his

'actual' retirement in the year 2011. This Claim has no basis therefore and the same is dismissed.

24. Concerning the claim for payment in lieu of leave, the Respondent relies on its **"General conditions of service for senior staff – Administrative circular No. 9:08: Leave Entitlement"** and in particular Rule D titled Accumulation of Leave. Rule D(i) thereof reads:

"an employee may be allowed to carry forward from any leave year one half of his leave entitlement. Any leave carried forward in excess of this will be forfeited except in exceptional circumstances when the Foundation may approve extra accumulation at its discretion."

25. The Claimant tendered a memorandum dated 18th June, 2010 addressed to him by **Mr. Kenndy Alusa**, Administrative Manager which reads as follows:

"According to our records you have an outstanding leave of 185 days and are advised to take 140 days before the end of June 2010 or forfeit the same.

You are further advised to make sure that from the remaining 45 days at least 30 days be taken before end of December 2010 or all days be utilized.

By a copy of this memo, staff in charge of leave management is advised to effect the above changes in the leave management records."

26. This memo appears vexatious and utterly unreasonable on the face of it because it was practically impossible for the Claimant to utilize 140 days leave between 18th June 2010 and end of June 2010.

No further correspondence was produced by either party regarding this matter. The leave days claimed by the Claimant comprise of 30 days terminal leave in terms of government regulations and 60 days outstanding annual leave.

27. The Claimant in the Court's considered view has adequately shown that there were at least sixty (60) untaken leave days due to him as at the time of his retirement and that he was also entitled to 30 days terminal leave pending retirement. The Respondent has failed to satisfactorily rebut this evidence by the Claimant.

28. The court finds that this claim has been proved on a balance of probabilities and awards the Claimant Kshs.545,706/= in respect thereof.

29. Regarding the claim for Kshs.2,391,053.35 being pension payable at 31% of the Claimant's basic salary between January 2005 and 30th June 2011, it is common cause that this benefit was only applicable to senior civil servants on contract terms as opposed to permanent and pensionable employees. It is admitted that the scheme did not apply to the Claimant during this period.

Furthermore, the Claimant was registered with NSSF and his contributions were made until he actually retired from the employment of the Respondent.

30. It is also common cause that an exgratia payment of Kshs.687,598.25 was paid by the Respondent to the Claimant with respect to the period January 2005 to the date of retirement. This was calculated at 15.5% of the Claimant's salary which otherwise would have been contribution by the employer to the scheme if the Claimant was eligible after 55 years.

31. Whereas it is regrettable that the Claimant has kept out of the sponsors scheme for the entire period of service after attainment of 55 years in spite of unfulfilled promises to rectify the situation, his claim for payment of gratuity applicable to civil servants on fixed term contracts is untenable given that he was not that category of employee. This claim is therefore dismissed.

32. In the final analysis the Court awards the Claimant Kshs.545,706/= in lieu of leave days not taken.

The rest of the claims are dismissed. This amount is payable with interest at Court rates from the date it became due and payable on 25th July 2011.

The Respondent is also to pay costs of the suit.

Dated and Delivered on the 20th day of June, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE