



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO.299 OF 2013

SAMUEL KIPLANGAT KOECH.....CLAIMANT

-VERSUS-

KIPSIGIS TEACHERS SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITED.....1ST RESPONDENT

IMARISHA SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th October, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 05.09.2013 through Mongeri & Company Advocates. The amended memorandum of claim was filed on 12.09.2013. The claimant prayed for judgment against the respondents for:

- a. Benefits payable Kshs. 7, 531, 650.00.
- b. Leave allowance Kshs. 52, 260.00.
- c. Costs of the suit.
- d. Any other relief the honourable court may deem fit to grant.

The response to the amended memorandum of claim was filed on 26.09.2013 through Kipkorir Tele & Kitur Advocates. The respondents prayed that the claimant's claim be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Antony Kipng'etich Korir. The claimant was employed by the 1st respondent whose name later changed to the 2nd respondent. The claimant was employed on 8.8.1990 as a book keeper and promoted to a cashier. At retirement the claimant was paid a gross monthly pay of Kshs. 124, 681.25 and the basic salary being Kshs. 59, 775.00.

The claimant served in the respondent's management cadre. The claimant retired on 18.01.2012 and it was his case that at retirement the agreement of terms and conditions of service between the 1st respondent and its management staff was in force for the years 2011 and 2012. The claimant testified that he left service for retirement on account of ill health characterised with paralysis of the left side of the

body. The claimant's testimony was that the board decided to retire him without a medical report on his fitness to work and although the 2nd respondent was willing to reengage him in service, the claimant stated that he was not keen to go back to the employment. Upon retirement he was paid Kshs. 145, 457.50 as retirement dues. It was his case that he ought to have been paid Kshs. 124, 681.25 x 21 years for gratuity or service pay being one month gross pay for each of the 21 complete years of service. The claimant admitted that at retirement he owed the respondents a sum of Kshs. 699, 700.00 being loan and an advance making a total of Kshs. 738, 700.00 owed.

The claimant confirmed that he was paid the due leave allowance so that he withdrew the claim on leave as prayed for. The claimant further urged that he be awarded Kshs. 7, 531, 650.00 as set out in the claim. The claimant further testified that when the board decided to retire him, he never objected to the decision and the board decided to employ his son. The claimant's case was that his son replaced him as a cashier but he did not take the claimant's benefits.

RW testified that he had never seen the agreement of terms and conditions of service between the 1st respondent and its management staff which the claimant testified was in force for the years 2011 and 2012. RW testified that in 2012 the CBA applied and offered guidance in computing the claimant's dues. RW testified that the claimant served on 3 years contract renewable; at retirement he had 29 pending months of service to make the 3 years; he was paid half monthly salary for each pending month of service as decided by the board on humanitarian grounds; the claimant was paid gratuity for the 7 months served; and the claimant was not entitled to severance pay for 21 years because he served on 3 years contracts and was paid gratuity at the end of every such contracts.

The court has considered the pleadings, the evidence and the submissions and makes findings as follows:

1. The claimant served on 3 year renewable contracts and at every renewal there is no doubt that he was paid gratuity for every 3 years' contract.
2. There is no doubt that throughout the claimant's service he was a member of the National Social Security Fund.
3. The termination of the claimant's employment was through amicable arrangements under which the claimant was paid gratuity for the 7 months he had served and half salary for the 29 pending months of the 3 years' last contract of service. The claimant's son was employed to replace the claimant as a cashier. During the hearing the respondents confirmed that they were willing to reabsorb the claimant into employment but the claimant rejected the offer.
4. The court has looked for but failed to find the basis of the claimant's claim for service pay for 21 years being Kshs. 7, 583, 910.00 as prayed for. The court has found that whereas the claimant was to serve on probationary terms at initial appointment and thereafter get confirmed into permanent service, the material before the court showed that subsequently the parties agreed upon the renewable 3 years' contract with payment of a gratuity every after the term service. The claimant was paid the gratuity for every 3 years of fixed term contracts and payment of 21 years service as claimed by the claimant would amount to double payment of gratuity or service pay as it is also known. As submitted for the respondents, allowing the claimant's claim and prayer would amount to unjust enrichment.
5. The claimant withdrew the claim for leave allowance and the court finds that the prayer was accordingly withdrawn.

In conclusion, judgment is entered for the respondent against the claimant for dismissal of the memorandum of claim, as amended, with costs.

Signed, dated and delivered in court at **Nakuru** this **Friday, 17th October, 2014**.

BYRAM ONGAYA

JUDGE