



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

Cause No. 30/2013

(formerly Nairobi No. 1229/2011)

(Before Hon. Justice Hellen Wasilwa on 19th June, 2013)

George Nyabira Nyatama & 3 OthersClaimant

Versus

Gusii Mwalimu Co-Operative Savings & Credit Society LtdRespondents

JUDGMENT

The claimants herein George Nyabira Nyatama, Joel Bernard Makaburi and Huruni Birundu filed their statement of claim on 26.7.2011 through the firm of O.M Otieno & Co. Advocates against the respondents Gusii Mwalimu Co-operative Savings and Credit Society Ltd.

The claimants also gave oral evidence before this court. The claimants' case is that they were employees of the respondents having been employed separately within the respondents Sacco to serve in their separate and respective portfolios. The claimants served in senior ranks of the respondents on permanent and pensionable terms and were paid monthly salary with terms as spelt out in the respondents terms and condition for Management and Staff. The claimants aver that the respondents besides being a Sacco Society, was subjected to the provision of the Co-operative Society Act and Control Director, Supervisor and/or Management of the Commissioner of Co-operative Society. The said Commissioner is responsible for the growth and development of the Co-operative Societies for the organization registration, operation, advancement, and dissolution and for administration of the provisions in accordance with the mandate and powers conferred under Section 3(3) of the Co-operative Act Cap 490

Laws of Kenya.

The claimants aver that, at the time they were employed, it was envisaged that they would retire at 55 years which was the mandatory age of retirement in the public service then. The claimants aver that during the pendency and subsistence of the contract of employment executed between the claimants and the respondents, the government reviewed the limit of the mandatory retirement age and enhanced the same from the previous 55 years to 60 years which change affected the contract of employment executed between the claimants and respondents. It is the claimant's case that this change in retirement age was duly communicated to the respondents vide a letter dated 20th March 2009, from the Commissioner of Co-operative Society. The Commissioner communicated the change to all co-operative society movements within the Republic of Kenya with instruction and this information was relied to all Provincial Co-operative Officers and District Co-operative vide a letter dated 30th November, 2009. The claimants contend that by this communication their retirement age was effectively raised from 55 to 60 years old and this superseded all prior and existing instruments fixing the retirement age to 50 years.

However, the claimants case is that, the respondents, with a view to circumvent the changes increasing their retirement age to 60 years unilaterally issued them with retirement notices on 30.11.2010 respectively. The respondents have since declined to allow the claimants to resume duty even after the anomaly was clearly pointed out to them the notices were issued in error.

At the time these notices were issued the claimants aver that they were 54 years of age. In 1st claimant's evidence he told court that he joined the respondents' employment in 1988, the 3rd claimant in 1983 and 2nd claimant in 1986. 1st claimant served the respondent as Deputy General Manager and a branch Manager. 2nd claimant was Chief Internal Auditor and 3rd claimant was Operations Manager. At the time the notices were issued, 1st claimant indicated that he was 54 years old as so was the 3rd claimant. However the 2nd claimant was 55 years then. These notices are annexed to the claimants' memorandum as evidence.

The claimants aver that whereas the respondents declined to apply the retirement age of 60 years to them, they applied it to its directors some of who are over 60 years. They state that no sooner were they retired that, the respondents employed their own relatives who have been listed in the claimant's memorandum of claim.

The claimants claim therefore is that the respondents action was malicious and they seek orders as follows:-

1. A declaration that the respondents decision of purporting to send the claimants to premature retirement at 55 years was unjust and unfair.
2. An order directing the respondents to immediately reinstate the claimants to their respective employment/positions until the time that they shall attain the age of 60 years together with payment of any salary or benefits which may be outstanding during the period of the compulsory leave they have been serving.
3. In the alternative and without prejudice, the respondents to pay the claimants their respective salary and benefits as accrued and as shall accrue and due from time to time until they reach the mandatory retirement age of 60 years.
4. Costs of the case.
5. Any other relief that this Honourable court may deem fit and just.

The respondents on the other hand filed their response to claim and counter-claim on 4.8.2011 through the firm of Osoro Mogikoyo & Co. Advocates. They admit that the claimants were their employees. Their contention is that the respondent is a Mwalimu Sacco constituted by members of the teaching profession and KNUT (Kenya National Union of Teachers) and from the central government. That this Sacco was formed to improve their members welfare. The Sacco gives loans to its members and also employs officials when a vacancy arises. The salary of workers comes from interest and commissions earned from the savings. They contend that they are a private venture and regulations as captured on pages 41 to 57 of the claimants documents.

They further contend that before the claimants were retired, they issued them with 3 months notice as per their terms and conditions of service and also prepared their retirement packages which was handed over to them. They contend that according to their terms, 55 years was their retirement age. They aver that the circular referred to enhancing the retirement age to 60 years does not relate to them. They aver that the claimants came to court as an after thought after taking their benefits. That the move was not aimed at employing relatives of officials of the respondents. The respondents also contend that since the claimants retired, they cannot be reinstated and neither can they be paid salary upto age of 60 since they are not offering any services to the respondents.

In relation to prayers for payment of gratuity to 1st claimant the respondents aver that in 1995/1996, the 1st claimant had been dismissed and was not paid any salary during the period and therefore his claim for gratuity for this period should be dismissed.

RW1 who gave evidence for respondent was cross examined by counsel for claimants and he stated that he is the Honourable Secretary of respondent but a full time teacher currently 59 years old. He also admitted that in some respects, the respondents is under the control of Commissioner of Co-operatives and Ministry of Co-operatives. He however said that the letter from the Commissioner of Co-operatives dated 30.11.2009 is not binding on them. He stated that the claimants were paid some salary after they retired for 6 months. He says this was in appreciation of the good work they had done.

Having heard the evidence of the parties, the issues for determination are as follows:-

1. **Whether the respondents are justified in retiring the claimants earlier than 60 years.**
2. **What is the import of the circulars from the Minister of Co-operatives and that of the Commissioner of Co-operatives on the running of the respondents affairs.**
3. **What remedies if any the claimants are entitled to.**

I will first look at the provision of law regulating Co-operative Societies. Under the Co-operative Societies Act Cap 490 LOK, all Co-operative Societies such as the respondents herein are registered by the Commissioner of Co-operatives under S. 3 of the said Act;

“the Commissioner shall be responsible for the growth and development of Co-operative Societies, for their organization, registration, operation advancement and dissolution and for administration of the provisions of this Act.”

It is worth mentioning that this office of the Commissioner is as office in the public service. However Co-operative Societies are body co-operate but under the control of the Commissioner as mentioned above in matters of organization and administration of the provisions of this Act. The respondents have submitted that they are not bound by circulars emanating from the Commissioner of Co-operative. However, it is my finding that this is not the correct position as the law gives the Commissioner power to check the development and advancement of Co-operatives including their administration.

The claimants herein were employed by respondents as they have indicated to court. It is true that they were expected to retire on attaining the age of 55 years. However by virtue of the circular from the office of the President Ref: No. OP.CAB./2/74 and further another from the Commissioner of Co-operative Development the retirement age of claimants was raised 60. The circular from Commissioner read in part as follows:-

“--- In this regard, it has been deemed necessary to review the retirement age for the Co-operative movement employees from 55 years to 60 years so as to be in tandem with the current retirement age policy of public officers.

Please communicate the contents of this circular to Co- operative Organization under your jurisdiction.”

This circular is very explicit that these officers retirement age was raised to 60 years and to have retired them at 55 years or any age below 60 years was unlawful and unfair.

I have already dealt with similar issue in **Cause No. 1A of 2013** involving another Co-operative Society where I made a similar finding. Indeed it would be a dangerous precedent to choose to ignore administrative circulars while at the same time choosing to admit to be under the same administrative arrangement in form of registration and development. That answers my 1st and 2nd issue.

The respondents referred this court to **R Vs The Commissioner of Co-operative Development & 2 Others, Ex-parte Appl. No. 93/2007** where the court found the decision of the Commission *ultra vires*. That case is distinguishable from the current case as in the former case, the Commissioner acted in *ultra vires* Section 4 and 27 of the Co-operatives Act and this case, the Commissioner has acted within the law.

What remedies then are the claimants entitled to? Already the claimants have been paid some moneys as admitted by themselves. They sought to be reinstated by court. However this will offend the provisions of S. 49(4) of the Employment Act 2007 which states that the practicality of reinstatement should be considered. The claimants have been out of employment for more than 3 years and under S. 12(3) (vii)- **“an order for reinstatement of any employee with three years of dismissal ---”** is considered subject to the three year capping and so it will not be prudent to order reinstatement.

Given that claimants were paid their terminal dues up-to the time they were retired. I will find the decision by respondents to retire them prematurely unlawful. I therefore order that they each be paid:-

1. **1 year's salary as per last pay compensation for unlawful retirement. This is subject to statutory deductions.**
2. **Respondents to pay costs of this case.**

HELLEN WASILWA

JUDGE

19/06/2013

Appearances:-

Miss Kusa for claimants present

Mose for respondents present

CC. Sammy Wamache.