



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 106 OF 2013

(FORMERLY HCCC NO. 108 OF 2004 AT NAKURU)

TIMOTHY MANYARA AND 144 OTHERS.....CLAIMANTS

-VERSUS-

PYRETHRUM BOARD OF KENYA..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th September, 2013)

JUDGMENT

The claimants are 145 employees who served the respondent in various capacities and varying tenures prior to the termination of their respective employment on account of redundancy. They filed a plaint on 08.04.2004 through Wamaasa Mongeri & Company Advocates together with the relevant verifying affidavits sworn by the claimants. The respondent filed a statement of defence on 28.04.2004 through Ochieng' Rodi Orege & Company Advocates.

The claimants prayed for judgment against the respondent for:

- a. A declaration that the unionisable claimants are entitled to salary arrears in terms of paragraph 19 of the plaint.
- b. Orders in terms of paragraph 15 of the plaint thus:
 - i. A declaration that the claimants' retrenchment was illegal and irregularly done.
 - ii. An order directing the respondent to pay each of the claimants the amount of tax deducted from their terminal dues and as set out in paragraph 10 of the plaint.
 - iii. An order that the respondent pays each claimant in accordance with the provisions of clause 15(f) of the trust deed and as tabulated in paragraph 15 of the plaint.
- c. Payment of a principal sum of Kshs.620,195,157.00.
- d. Costs of the suit plus VAT thereon.
- e. Interest on (b) and (c) at court rates from 1st December, 2001 until payment in full.
- f. Any other or further relief the honourable court may deem fit to grant.

The respondent filed an amended statement of defence on 7.05.2004 and prayed for the dismissal of the

claimants' suit with costs.

Following the transfer of the suit to this court, the parties by consent recorded in court agreed that the hearing and determination would proceed on the basis of the pleadings and the documents filed for the parties in the suit and the parties would call their respective witnesses at the hearing.

The claimants' witnesses included the 1st claimant Timothy Manyara (**CW1**) and 3rd claimant Lukas Otieno Oguttu (**CW2**). The respondent's witness was its ICT manager Kenneth Rono (**RW**). The case was heard on 27.06.2013, 19.07.2013 and 26.07.2013.

The parties informed the court that they had recorded consent on the issue and prayer for salary arrears for unionisable staff so that the matter had been settled. The claimant's counsel further informed the court that the prayer for a declaration that the claimants' retrenchment was illegal and irregularly done had been abandoned. Accordingly, the main issues in dispute and for determination in this judgment relate to whether the claimants' are entitled to the prayers for:

- i. An order directing the respondent to pay each of the claimants the amount of tax deducted from their terminal dues and as set out in paragraph 10 of the plaint.
- ii. An order that the respondent pays each claimant in accordance with the provisions of clause 15(f) of the trust deed and as tabulated in paragraph 15 of the plaint.

Another issue put forward for determination by counsel for the claimants was whether the 1st claimant's dues were not properly calculated.

The claimants were at all material times employees of the respondent serving in various capacities on permanent and pensionable terms. In October 2001, the respondent initiated reorganization and retrenchment exercise that entailed re-organization and restructuring including right-sizing so as to increase effectiveness, efficiency and productivity.

The witnesses spent considerable time attempting to show, on the part of the claimants, that the re-organization and retrenchment targeted some employees while ring fencing others that were allegedly favoured to continue in employment. The respondent's witness RW denied such position and insisted that the process was voluntary. Nevertheless, the court finds that whether the process targeted employees or was voluntary does not go to the foundations of the decision to be arrived at on the cited issues in dispute.

The claimants were served letters inviting them to opt to take a prescribed package as payment for terminal dues for separation under the exercise. The letter further stated thus, **"NB. Members of the Staff Superannuation Scheme will be paid their pension dues as per the Trust Deed and Regulations of the Scheme."**

There is no dispute that all the claimants were members of the Scheme and the internal memorandum at folio 3 of the Plaintiffs' list of documents clearly shows that permanent and pensionable employees were served with the circular to take up the package as offered by the respondent.

The formula for calculating the pension due under the Scheme for purposes of the reorganization and retrenchment process was given by the Scheme's secretary as per folio 16 on the plaintiffs' list of documents. The Scheme's Trust Deed is at folio 36 and the Regulations at folio 52 of the list.

The founder of the scheme was the respondent. The respondent as the founder agreed to deduct money from the employees and itself to contribute to the Scheme's Fund. CW2 who was a trustee stated that he did not recall the respondent opening independent accounts for the Scheme's money and the Scheme's monies were mixed up with the respondent's monies. The claimants' pay slips filed showed that they were deducted the contributions to the scheme.

The Scheme's Regulation 7 (b) at folio 63 of the plaintiffs' list of documents, provided for the calculation of pension. The Regulation stated as follows:

“Calculation of pension

Subject to provisions of the trust deed and the regulations, each member who shall retire from the permanent service of the founder on normal retirement dates shall be entitled to a pension at the annual rate of 1/432nd of his final pensionable emoluments for each completed month of his pensionable service. Such member's pension at normal retirement age or (as the case may be) approved early retirement age shall be increased by three per centum (3%) compounded annually and paid to the member in accordance with the regulations of the scheme. PROVIDED ALWAYS that all benefits derived from contribution made by a member shall vest immediately in the member.”

It was the claimants' case that they did not retire normally as envisaged under Regulation 7(b). Instead, it was their case that they were retrenched and left their employment for reasons beyond their control. Thus, it was their case that they were entitled to computation of the pension as per the Scheme's Regulation 15 (f) at folio 72 of the plaintiffs' list of documents. The Regulation stated as follows:

“Retrenchment

Where a member's service is terminated as a result of redundancy or ill-health or for any reason beyond the control of a member, the member will always be entitled to the full benefit secured by the employer's contributions made in respect of him. For the purpose of this regulation, years of service will be calculated from the date of first joining the employer and not years of membership of the scheme.”

The claimants in their suit therefore calculated their pension on the basis of the Regulation 15 (f) because, as per their case, they were retrenched and the calculations had to be based on years served from the effective date of their respective dates of appointment and not the dates of joining the Scheme. It was their further case that the respondent had invoked varied formulas in calculating their pension without any basis and prior explanations to the claimants. The various formulas invoked by the respondent are at folio 11, 16 to 21 and 22 to 23 and the application varied from one employee to the other. The employees did not know the formula applied in their individual cases. Upon receiving the pension benefits, the employee signed the acknowledgement thus,

“ACKNOWLEDGEMENT

I (employee's name) hereby acknowledge receipt of the sum of Kshs (amount received) of my dues from the Pyrethrum Board of Kenya Staff Superannuation Scheme upon my leaving the Board under its re-organisation.”

It was submitted for the claimants that the acknowledgement did not amount to a disclaimer freeing the respondent from the kind of claims they were making in the suit. The claimants further submitted that under regulation 15 at folio 48 of the plaintiffs' list of documents re-organisation entailed a new employer taking up or continuing the respondent's obligations under the Scheme as a founder. In the claimants' termination, it was testified, there was no new employer as envisaged in the regulation as the regulation did not apply and there was no re-organisation within the meaning as envisaged in that regulation. CW2 testified that as a trustee he knew that under Regulation 15 (f) on retrenchment, staff below 50 years of age at the time of the retrenchment would qualify as pensionable employees as opposed to when Regulation 7(b) is applied as was done by the respondent. CW2 further testified that prior to the Scheme coming into operation in 1991 the respondent and employees had put in place a Provident Fund which was dissolved, employees paid and it had nothing to do with the Pension Scheme.

On the other hand, the respondent's case was that Regulation 13 at folio 68 applied to the claimants because they were terminated on account of re-organisation. Regulation 13 stated as follows:

“ABOLITION OR OFFICE RE-ORGANISATION

If a member holding a pensionable office leaves the public service in consequence of the abolition of his office or for the purpose of facilitating improvement in the organization of the department to which he belongs by which greater efficiency or economy may be effected, he shall be entitled as from the date his retirement to a reduced deferred pension and lump sum based on pensionable emoluments and service at date of leaving calculated in accordance with regulation 7(b).”

The respondent’s case was that Regulation 7(b) was properly applied because the claimants were terminated on account of reorganisation. It was further submitted that it would be unfair for the respondent to be required to pay pension with respect to the period prior to establishment of the Scheme in 1991 because for that prior service the employees had been fully compensated under the Provident Fund that was dissolved to pave way for the establishment of the Scheme.

The court has considered the evidence and the submissions on the issue of the claim for unpaid pension and the relevant formula to have been applied and makes the following findings:

- a. There is no dispute that the claimants left their employment on account of redundancy. Redundancy in section 2 of the Employment Act, 2007 means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment. The court finds that the Scheme’s Regulation 15 (f) specifically refers to redundancy and retrenchment as used in the subtitle of the regulation is a mere sign post as it is a marginal note. The substantive provisions have to be examined and the court finds that the regulation applied in event of redundancy as was the case in the claimants’ termination.
- b. It is the opinion of the court that the primary principles on payments to the employee by the employer or the arrangements put in place by the employer are generally provided for in section 40 of the Employment Act, 2007. Upon redundancy, section 40(1) (g) provides that the employer shall pay the employee severance pay at the rate of not less than fifteen days pay for each completed year of service. In this case, the respondent paid 27 days per year worked and the general principle was complied with despite the redundancy taking place before the enactment of the Act. The court holds that redundancy payment acknowledges and compensates for the employees’ service and in the present case, the respondent duly complied.
- c. The Scheme’s Regulation 15 (f) is clear that, **“Where a member’s service is terminated as a result of redundancy or ill-health or for any reason beyond the control of a member, the member will always be entitled to the full benefit secured by the employer’s contributions made in respect of him. For the purpose of this regulation, years of service will be calculated from the date of first joining the employer and not years of membership of the scheme.”** It is the opinion of the court that the regulation provides for entitlement subject to two considerations that must be cumulatively satisfied. First, the benefits must have been secured for the member by the employer’s contributions made in respect of the member. Secondly, the years of service would be from the date of first joining the employer and not the Scheme. In this case, the court finds that the respondent could not have secured its contributions for the claimants prior to the establishment of the scheme in 1991. Accordingly, it would be unreasonable to expect the respondent to pay out of no contributions made for the years the claimants may have served prior to existence of the Scheme effective 1991. In any event, the claimants have by their own evidence confirmed that the respondent paid their respective and the respondent’s contributions to the Provident Fund and with respect to their service prior to 1991 and the coming into operation of the pension Scheme. The court finds that it would be unfair and unjust enrichment as double payment for the claimants to be paid twice with respect to same term of service.
- d. The court further finds that the respondent was entitled to apply the Scheme’s Regulation 7 (b) because, as found by the court, applying the Scheme’s Regulation 15 (f) would yield unfair

outcomes and the process having entailed a reorganization, the said Regulation 7(b) was the fair regulation to apply in paying pension to the affected employees.

- e. Accordingly, the court finds that the claimants are not entitled to the re-computation of their pension and payment of unpaid pension as claimed. The court further finds that in the circumstances of the case and taking into account the provisions of the Scheme's Regulations that had to apply, the respondent invoked the correct Regulation.

The claimants have claimed refund of the tax on their final package because they were entitled to tax exemption. The respondent has submitted that they were not so entitled because the package paid to them was superior to that generally offered to public officers by the Government in cases of retrenchment at all the material times. It is not disputed that the Government offered tax exemption in cases of redundancy such as the one under which the claimants were terminated.

The respondent has submitted that it was not for the respondent to grant the tax exemption but admits there were initiatives to obtain the tax exemption.

The court has carefully considered the submissions, the evidence and makes the following findings:

- a. The court finds that there is no dispute that there existed a general Government policy that public officers such as the claimants subjected to redundancy were entitled to tax exemption.
- b. The court finds that there is no evidence on record showing that the Government made a decision that the claimants would not enjoy the tax exemption because their package was more advantageous than that provided for public officers in similar circumstances.
- c. The court finds that in absence of evidence that the Government declined to grant the tax exemption, the respondent failed on its leadership and managerial responsibility as an employer benefiting out of the general Government redundancy policies to seek and obtain the exemption as was the claimant's legitimate expectation that the respondent would act in their best interest in view of the impending redundancy. The respondent failed to show that the tax as purportedly deducted was remitted as expected.
- d. Finally, the court finds that it was discriminatory for the respondent to have failed to access and accord the claimants the tax exemption as was the case prevailing in favour of public officers who were proceeding on redundancy.

In view of the findings, the court conclusively finds that the claimants are entitled to an order directing the respondent to pay each of the claimants the amount of tax deducted from their terminal dues and as set out in paragraph 10 of the plaint.

CW1 testified that his dues were underpaid by Kshs.306,900.00. The respondent has not disputed the figures of the claimed underpayment save for stating that the same was not specifically pleaded. The court has considered the ends of justice and finds that CW1 is entitled as claimed as the natural remedy to his injury in this suit or any other suit he would have filed independently. Indeed, the respondent as a responsible public employer that respects the law would anyway be expected and required to be honest in its dealings and correct any valid errors administratively. It has not been submitted that the claimant is time barred or for any other reason barred from seeking his fair terminal dues. He is granted as prayed.

The court has considered all the circumstances of this case and finds that the respondent shall pay half of the costs of the case.

It was submitted for the respondent that some of the claimants including the Jackson Kavindyo (2nd claimant), Evanson Ndegwa (31st claimant), Ronald Kitazi (51st claimant), and Sebastian O. Otworu (95th claimant) had passed on and their individual cases were not sustainable for want of substitution of the legal representatives of their respective estates. First, the evidence of the alleged demise of the stated claimants was not filed in court. Secondly, at the directions stage before the hearing of the suit the parties

entered a consent order that the matter was to proceed to hearing subject to future orders on substitution of departed claimants as parties will record appropriate substitution orders. The court holds that the parties are bound by the consent order and the submission made for the respondent is found unjustified.

In conclusion, the court enters judgment and makes the following orders:

- a. The respondent to pay the 1st claimant Kshs.306,900.00 being the underpayment of the due payments.
- b. The respondent to pay each of the claimants the amount of tax deducted from their terminal dues and as set out in paragraph 10 of the plaint.
- c. The respondent to pay the amounts in (a) and (b) by 1.12.2013, failing which interest to be payable at court rates with effect from 1.12.2001 till full payment.
- d. The parties, in view of their own consent order on record, shall record appropriate substitution orders for purposes of satisfying this judgment and where any of the claimants is deceased.
- e. The respondent to pay half costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 20th September, 2013.**

BYRAM ONGAYA

JUDGE