



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2028 of 2011

CHARLES M. SHITIAVAI PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI DEFENDANT

JUDGMENT

This is a claim by the claimant herein Charles M. Shitiavai against the Respondent the City Council of Nairobi. By a memorandum of claim dated 30th November, 2011, and filed through the firm of Njeru Gichovi and Company Advocates, the Claimant sought some reliefs from this court.

The Claimant's case is that he was employed by the Respondent as a Security Officer in or about 1987. He further states that the Respondent purported to retire him on grounds of age in 2005 but failed to notify him until February, 2006 and then failed to pay him his terminal dues. The claimant filed a suit in 2008 and judgment was given to the Grievant in the sum of Ksh.906,992/25 being his dues up to March, 2006. The Respondent paid the grievant the said sum of Ksh.906,992/25 in the month of August, 2010. That pursuant to the terms of the Pensions (Amendment) Act, 2003, Section 16A, the Respondent is under obligation to pay the Grievant monthly salary until the Grievant recovers his terminal dues.

The claimant now claims Ksh.19,655/= being his salary for 52 months being the period between April 2006 to August 2010 amounting to 1,022,060. This is what the claimant claims from this court.

The Respondent in their defence aver that it is indeed true that the claimant was paid his dues of Ksh.906,992.25 pursuant to Chief Magistrates Civil Suit 7449 of 2008 and also in relation to High Court Miscellaneous (JR Appl. No. 488 of 2009). However, the Respondent denies that the Respondent's claim herein fails under the purview and or in pursuant to the terms of Pension (Amendment) Act 2003 Section 16A and the Defendant avers that the claimant herein was a Member of the Provident Fund and thus any further claim should be directed to the Provident Fund Act, 273 Laws of Kenya.

The Defendant avers that they are strangers to the allegations made in the memorandum of claim being the claim for 52 months salary being Ksh.1,022,060. The Respondent also avers that the claim is time barred and that this court lacks jurisdiction to determine this matter as any other claim can be entertained in this previous suits filed by the claimant herein.

The parties herein agreed not to call any evidence but sought the court's consent to have the court write a judgment based on pleadings and submissions filed herein.

The claimant filed their submissions on 23rd October, 2012. In their submissions the claimants content that what they are seeking is payment for the period March 2006 till the time payment was released i.e. August 2010 which is not part of the earlier claim and is therefore not “*res redicata*”. The claimants also submitted that there is no evidence shown that the Grievant was a member of the Provident Fund.

The Respondents on the other hand submitted that the issues before this court were fully addressed in the Lower Court is CMCC 7449 of 2008. They cited Civil Case 1262 of 2005 Francis Njuguna Mwangi Vs Joseph Mahuro Maina and CA No. 269/2001 Baer Albhai Nauji Vs Sultan Tasham Lawi and another

Having considered the evidence adduced before this court through the various Memoranda and submissions filed, the issues for determination are as follows:

1. Whether this court has jurisdiction to handle this claim.
2. If the answer to 1 above is Yes whether the issues raised are *res judicata*.
3. If the answer to question 3 is No, what remedies the claimant is entitled to.

I will address question 1 above. The jurisdiction of the Industrial Court is well articulated under Section 162 (2) the Constitution of Kenya 2010 which states that,

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

(a) Employment and Labour relations; and”

Subsequent to this Constitutional provision, the Industrial Court Act, 2011 was enacted by Parliament and passed into law on 30th August, 2011.

Section 12 (1) of the Industrial Court Act 2011 states that:

“The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accord with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including

(a) Disputes relating to or arising out of employment between an employer and an employee;

(b)”.

By virtue of this provision, any dispute relating to or arising out of an employment relationship is supposed to be resolved by the Industrial Court as established under Section 4 of the Industrial Court Act, 2011.

When the Pensions Act was enacted in the 1950’s the Industrial Court as currently constituted did not exist. This may explain why there is no reference to this court. However, any disputes relating to an employer and employee should be handled by the Industrial Court. It is true that the Civil Magistrate’s Court and the High Court had previously handled this suit. However, with the establishment of this court under the new regime of Labour Laws in 2007 and subsequently under the new Constitution the court is the right forum to resolve this suit. I therefore find that this court has jurisdiction to entertain this matter.

Now to the second question. Is the matter *res judicata*? What was handled by the High court as per the order given by Hon. Justice Gacheche was payment of the decretal sum and interest awarded in Chief Magistrate’s Court Civil Case No. 7449 of 2008 amounting to Ksh.906,592/25 as of 11th March 2009 and further interest thereon at court rates till payments in full.

It is apparent that payments were made in 2010 August. What continued to accrue after this order was not paid to the claimant. The matter is therefore now being sought before this court and I find this is not *res judicata*.

Now to the last question, what remedy is the claimant entitled to? The claimant seeks payment of his dues till the day he was finally paid.

Section 16A of Pensions Act states as follows:

“A person to whom a pension or other allowance is payable under this Act shall be entitled to be retained in the service until the payment is full of the gratuity payable to him consequent upon the exercise by him of his option to receive such gratuity under the provisions of this Act”.

The provision is explicit that what is due or owing for a pensioner must be paid in full. If these amounts remain outstanding, it is deemed that the recipient is still in employment and he shall be entitled to his full pay.

The mischief sought to be averted by this provision is the delay usually caused by the department, responsible in paying the beneficiaries. As Parliament sought to cure this mischief, it is expected that courts must enforce rights of retirees who continue to suffer due to delays occasioned by the payments due to them.

The Constitution of Kenya, 2010 tends to give prudence to this right providing at Article 27 (1) (2) that

“(1) Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the actions...”

It is imperative here that the claimant should have been paid his dues as pronounced by court. There was a considerable delay and he was paid in October 2010. He is therefore right in claiming the salary from the time he was retired to the time he was paid in 2011 as it is presumed he was still on duty.

The Respondent has submitted that the claimant should not be governed by the provisions of the Pensions Act but the Local Government Provident Fund Act. Under Section 2 of the Local Government Provident Fund Act;

“The Act shall apply to every local authority, which with the approval of the minutes resolves to bound by the provisions thereof and shall so apply from the date specified as the resolution

and Section 7(1) of the same Act;

“A local authority may from time to time by resolution designate any post within its establishment for the purpose of this Act with effect from the date specified in the resolution”.

It has not been established by the Respondent that they were one of the Local Authorities bound by provision of this Act and in any case, it is also not established by Respondents that the claimant was a designated person for the purpose of this Act

The claimant’s prayers are therefore established. This amount to salary for 52 months from April 2006 to August 2010

This is equivalent to

= Ksh.1,022,060/=

I therefore find for the claimant and enter judgment for Ksh.1,022,060/=. This Respondent will pay costs of this cause.

Signed, dated and delivered in court at Nairobi this 20th day of November, 2012.

**HELLEN WASILWA
JUDGE**

No appearances:

Gichovi & Company Advocates for Claimant

Abwao Patrick Odhiambo for Respondent