



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1939 & of 1999 & 1661 of 2001

CATHERINE NJUGUNI KANYAPLAINTIFF

VERSUS

COMMERCIAL BANK OF AFRICADEFENDANT

AND

CIVIL CASE NO.1661 OF 2001

RAPHAEL JONAH MUTAHI1ST PLAINTIFF

VIOLET MUMBUA NDAMBUKI2ND PLAINTIFF

VERSUS

COMMERCIAL BANK OF AFRICADEFENDANT

JUDGEMENT

In two civil suits herein, Civil suit No.1939 of 1999 brought by Catherine Njuguna Kanya and civil Suit No.1661 of 2001 brought by Raphael Jona Mulahi and Violet Mumbua Ndambuki against the Commercial Bank of Africa Limited similar orders were sought.

In Civil Suit No.1939 of 1999 the following orders were sought:-

1. **An injunction to restrain the calling in of the Plaintiff's house loan and charging of a commercial rate of interest on the loan from the date of termination.**
2. **Costs of this suit and interest thereon until payment in full.**
 - a) **A Declaration that pursuant to being declared redundant the Plaintiff is entitled to be treated as an approved retiree.**
 - b) **A declaration that pursuant to the Defendant's normal treatment of non disciplinary cessations of employment, i.e. approved retirement the Plaintiff do continue paying her house**

loan at staff rates with effect from the date of payment of her redundancy package.

c) **A Declaration that the Defendant is in breach of legal and contractual Provisions relating to Redundancy and General Damages for loss of service and career prospects and earnings.**

In civil Case No.1661 of 2001 the following orders were sought.

d) **A declaration that pursuant to being declared redundant the Plaintiffs are entitled to be treated as approved retirees.**

e) **A Declaration that pursuant to the Defendant's normal treatment of non disciplinary cessations of employment, i.e. approved retirement, the Plaintiffs do continue paying their house loans at staff rates with effect from the date of payment of their redundancy package.**

f) **A permanent injunction restraining the Defendant from levying charges on the plaintiffs' house loans other than staff rate charges and a Mandatory injunction against interest and charges wrongly levied AND a permanent injunction restraining the sale of the Plaintiffs' houses, other than for default in paying their loans at staff rates.**

g) **A Declaration that the Defendant is in breach of legal and contractual provisions relating to Redundancy and General Damages for loss of service and career prospects and earnings, costs of this suit and interest thereon until payment in full.**

It is the Plaintiffs case that having been employed by the Defendant, the Defendant had by dismissing the Plaintiffs from its employment breached legal and contractual provisions relating to redundancy and thereby rendered itself liable to pay the Plaintiffs general damages. Additionally that each of the Plaintiffs are entitled to be dealt with as approved retirees the effect of which I will deal with later. Also that a declaration be made that the Plaintiffs are entitled to continue paying their respective house loans at staff rates.

The Defendants reply is that the Plaintiffs each were lawfully dismissed from the Defendant's employment after having failed to resume duty despite having been given warning notices. That subsequent applications by the plaintiffs for reinstatement were rejected. The Defendant denied that there was any right in the Plaintiff to continue loans granted by them at staff rates after their employment was terminated.

The three Plaintiffs took part in a strike together with many other Bank employees called by the Union but which did not relate to any dispute between the employees and the various banks for which they worked.

The three Plaintiffs as a result did not work on the 3rd August 1998. A circular was sent to all employees on strike by the Defendant on the 3rd August 1998 asking the employees to return to work. The Plaintiffs did not return to work as asked and on the 4.8.1998 a further notice was sent informing all employees on strike that if they did not resume performance of their duties by 3 p.m. on that day immediate disciplinary action would be taken against them. The Plaintiff did not obey this request and on the 5th August 1998 all three were issued with a letter dated the 5.8.1998 which stated:-

“Reference is made to the two notices already issued to you which by their very contents and nature constituted a warning to the effect that you should resume duty immediately.

It is noted that you have refused and/or declined to obey lawful and proper order given to you by a person placed in authority over you as provided under Clause A5 b(iv) of the Collective Bargaining Agreement.

In essence you have neglected to perform the duties for which you were employed.

Your conduct constitutes a serious fundamental breach of your contract of employment and the Bank has no alternative but to hereby dismiss you from employment with effect from 3.00 p.m. 5th August, 1998.

Your final dues if any will be computed and paid to you in due course, less any amounts you may be owing the Bank.”

Clause A5b (IV) of the Collective Bargaining Agreement which deals with dismissal after warning and gives the Management the right to dismiss the employee, if inter alia, the employee refuses to obey a proper order of any person placed in authority. The Plaintiffs asked to be reinstated in the Defendant's employment but this request was not approved. After their dismissal at least one of the Plaintiffs Raphael Jonah Mutuku wrote to the Defendant asking that in the event that he was not reinstated then could favourable consideration be given to his reinstatement. This request was not agreed to.

Subsequently the Union referred a dispute to the Industrial court on behalf of amongst others the three Plaintiffs. The decision of the Industrial Court was an award of the court given on the 7th March, 2001. It found that the reason for the dismissal of the Plaintiffs, was due to some ulterior reasons. The court was of the view that the Defendant wished to get rid of the Plaintiffs because they wished to replace them with other staff but did not wish to pay them their dues which they would have had to pay if the Plaintiffs were retired under a retirement scheme.

The court awarded the Plaintiff and others their redundancy benefits as is contained in Clause 7 of the Collective Bargaining Agreement on the basis that they were deemed to have been declared redundant. This I take it as a form of constructive redundancy. One of the exceptions to the award is in respect of employees who have taken legal action against their employer. Although the three Plaintiffs have taken action as I understand it the Defendants are willing to give the Plaintiff the amount of redundancy awarded by the Industrial court.

The questions in issue are:-

1. Are the Plaintiffs entitled to be treated as approved retirees
2. Are the Plaintiffs entitled to an injunction restraining the sale of their properties
3. Is the Defendant in breach of the contract of employment of the Plaintiffs by dismissing them and if so are the Plaintiffs entitled to damages.
4. Are the plaintiffs entitled to interest on the sums due for redundancy.
5. Are the Plaintiffs entitled to costs and interest thereon

I accept that the Plaintiffs had satisfactory records as employees and the only blot on their copybook

is going on strike in circumstances which rendered it unlawful. I can fully appreciate that the Plaintiffs feel aggrieved by their dismissal particularly as other employees who had committed the same offence as they had, namely joining the unlawful strike, were nevertheless reinstated in their former positions.

The remedy available to the plaintiffs in a court of law is not synonymous with the remedies which the Industrial Court can award. Under section 14(7) of the Trade Disputes Act the Industrial Court has power to take cognizance of a dispute and inquire into the dispute and made an award thereon. The jurisdiction of the Industrial court is more analogous to that of an arbitrator appointed under the provisions of the Arbitration Act.

From the award of the Industrial Court it is clear that it determined that the dismissal of the Plaintiff was tantamount to declaring them redundant. It is for this reason that they are now entitled to redundancy pay.

That award did not and could not have any impact on the contractual position between the parties arising from the act of dismissal.

I am not being asked to award damages for wrongful dismissal, what, as I understand it, the plaintiffs are seeking is what the Plaintiffs consider they are entitled to on being made redundant. As the award of the Industrial Court is binding upon both the Plaintiff and Defendant I must hold that the termination of the Plaintiffs' services was due to their being made redundant.

The provision with regard to approved retiree is to be found in clause 11 of the Employees Loan Policy, which was incorporated in the Plaintiffs terms of service.

All of the Plaintiffs had been granted loans to purchase houses which loan were secured to the defendant by charges over them. The Plaintiffs enjoyed preferential rates of interest on these loans.

The evidence is that certain members of staff were allowed to continue with these preferential rates of interest after leaving the employment of the defendant.

The Plaintiffs' claim that they are in this category by virtue of the fact that they were deemed to have been made redundant. The Defendant's position is that an approved retiree is a person who the Board of Directors of the Defendant approved and fall into the category of persons who had either retired in the normal course of events or who had retired early under a Voluntary Retirement Scheme. These did not include the Plaintiffs.

In my view the Plaintiffs do not fall in the category of employees who are approved retirees. Their services were terminated for absence and at most they were made redundant by the award of the Industrial court. They cannot be said to have left the Defendants employment by virtue of retirement whether early or not and in order to be approved retirees I accept that the Defendant's Board of directors should have made the necessary decision which they did not.

Having so decided, the Plaintiffs are subject to commercial rates of interest on their loans and are not entitled to the benefit of the injunction asked for.

Both under the provisions of clause A5 (b) (IV) of the Collective Bargaining Agreement and Section 17 (a) of the Employment Act the Plaintiffs were dismissed from employment, the Defendant having a right to so.

I cannot see that the award of the Industrial Court deeming the Plaintiff to have been made redundant, can ex post facto alter this position. I view the award as compensation granted to the Plaintiff but outside the contractual position which determined the position of the Plaintiffs. Having so found the Plaintiffs are not entitled to damages.

I have considerable sympathy with the Plaintiffs who had worked for the Defendant for some considerable time. It is difficult to blame them for joining a strike in which thousands of others took part. However, it was unfortunately for them unlawful which gave the Defendant the right to dismiss them. The Defendant was under no duty to reemploy them. The question of interest on the redundancy payments is in the discretion of the court pursuant to section 26 of the Civil Procedure Act and in the exercise of its inherent jurisdiction, I order that interest be paid on the outstanding redundancy payments from the date when the Plaintiffs were dismissed until the date of this judgement at the same commercial rates as are applicable to the loans granted to the Plaintiffs. For the avoidance of doubt that interest will be calculated on the redundancy payments (if any) prior to the loans at the initial rate applicable to those loans after the dismissal of the Plaintiff.

In my view the Plaintiffs having partially succeeded, I order each party to pay their own costs.

Dated and delivered at Nairobi this 25th day of May, 2006.

P. J. RANSLEY

JUDGE



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