



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCC 159 OF 2009

LESIIT, J

FRANCIS BUNDI KIMATHIAPPLICANT/PLAINTIFF

V E R S U S

NATIONAL SECURITY INTELLIGENCE SERVICE.....RESPONDENT

RULING.

1. The application is brought by way of originating summons dated 26th February, 2014, and to quote verbatim, “**under provisions of Arbitration Act Cap 49 and Arbitration Rules section 1, 3 (1,2 and 3) beside the application rule (cap 21 sub. Leg.15 Laws of Kenya provisions of Government Proceedings Act Cap 40 section 4 (1) 2 and 3 Laws of Kenya**”(sic) the application seeks the following orders:
 - i. **That the honourable court be pleased to arbitrate this civil suit for determination since the Respondent State Counsel have failed/or refused to file, exchange, witnesses statement and any evidence document as we parties consented the way back on 19th June, 2012 before Justice Hon J.A Makau hitherto.**
 - ii. **That the Honourable court be gratified to set aside orders granted by Hon. Lady Justice J. Lesiit on 19th November 2013 to allow judgment of the substantive suit.**
 - iii. **The Honourable court be pleased to compel order against the Respondent State Counsel to pay the plaintiff for**
 - a. **General damages for denial to access medical insurance cover while in service which was of my right to getter with my Defendant prior to termination of the Plaintiff employment which ceased from 8th April, 2005 hitherto owed to fatal ailment.**
 - b. **Works man compensation for the suffering the plaintiff have suffered together with my dependant and extreme experience we have undergone of pursuit in this matter over a fatal ailment which affected me while in service thereafter hitherto where I am demanding at tune of ailment which affected me while in service thereafter hitherto where I am demanding at tune of Ksh.83,000,000 million shillings only for reparation damages caused by both Respondent and the Dependand after we had been discriminated, neglected to suffer.**
 - c. **The Respondent state counsel be compelled to produce the plaintiff certificate of service**

- from former employer which he had failed to produce over purported allegations which the same shall be surrendered in court at the hearing date of this application.**
- d. **The Respondent State counsel to restore back my pension benefits which were deferred until I attain the mandatory retirement age of 55 years whereas the same could be assessed at a reduced age of 50 years which the Respondent conspired with the Defendant and appropriated with/or converted into their own use.**
- iv. **That the Honourable court be gratified to make such better order as it may think just there on where the plaintiff was unconstitutionally discharged from my permanent and pensionable employment.**
- v. **That costs of this application be provided for.**

2. The said Application is said to be premised on the following grounds:

- 1. That an order for arbitration and award passed tax the substantive suit over implication of non compliance to rule and orders of the court, by the respondent state counsel where I deny served with any document to prove his burden of onus as we parties agreed.**
 - 2. A declaration that the Respondent counsel pleadings and defence dated 19th March 2010 is valid, vexatious and scandalous and an abuse of court process since it is insupportable by any document therefore incompetent and should be struck out with cost to the plaintiff.**
 - 3. A declaration that the respondent state counsel has severally contempt the orders made before this Hon court in his endeavor to subvert justice beside the substantive suit owed to legal misconception at his office.**
4. The Applicant was given directions on the application, which included an order directing him to serve the AG, who is the Respondent in this case. That was done. Despite service, the AG or Counsels under him did not have the courtesy to at least file a response. In the very least the AG should have been represented at the time set for the hearing of the Applicant's application dated 26th February, 2014.
5. Turning back to the application. The Applicant instituted this suit by way of a Plaint which was filed in court on 16th December 2009. In the Plaint the substantive prayers are declaratory in nature. Subsequently, the Applicant has filed so many documents, including applications, affidavits and submissions. These have been filed without leave. The most disturbing fact however is the fact the said documents seem to have been filed arbitrarily and irregularly as they do not relate to any particular matter.
6. I have carefully considered the instant Application, together with the submissions by the Applicant. It is difficult to understand the request made or orders sought by the Applicant. The grounds upon which the application is premised are not explicitly clear. This is because even though the Applicant has used legal terminologies, those terms don't fit the application or orders sought.
7. The Applicant has approached the court by way of an Originating Summons. Order 37 Rule 1 of the Civil Procedure Rules, CAP 21, Laws of Kenya, deals with persons who may take out Originating Summons and in respect of which matters. It provides as follows:

The executors or administrators of a deceased person, or any of them, and trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as a creditor, devisee, legatee, heir, or legal

representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-

(a)...

(b)...

8. Similarly Order 37 and in particular Rules 3, 4, 5,6,9,10,11 and 12 clearly sets out in detail the matters or questions in regard to what Originating Summons may be taken. These include various questions regarding real and moveable property, extensions of period of limitation and trusts.

9. The instant application seeks to have the matter referred to arbitration. It also seeks the setting aside of certain orders made in this case. It may be difficult to determine what the Applicant really seeks. However, it is very clear that the Originating Summons do not fall in the category of matters envisaged by Order 37 of the Civil Procedure Rules.

10. Looking at the Plaintiff, there is clearly a suit pending before this court. That suit is yet to be prosecuted. What the Applicant has in effect done in the instant application is filing a suit within a suit. A suit instituted by way of an Originating Summons is a complete suit. The Originating Summons cannot be superimposed upon a suit with a Plaintiff.

11. I have come to the conclusion that this application is bad in law and incompetent. Accordingly:

- 1. I strike it out the Originating Summons dated 26th February, 2014.**
- 2. The Applicant is ordered not to file any other document in this file whatsoever without the leave of the court.**
- 3. The Applicant is given 90 days to comply with Order 11 of the Civil Procedure Rules and take out a date for Trial Conference.**
- 4. in default of (3) above, this suit will stand dismissed with costs.**
- 5. There are no orders for costs to this application.**

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE, 2014.

LESIIT, J.

JUDGE