



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 111 OF 2012**

**HALIMA KASI TONU**

**SUSAN OCHOLA**

**MARY ADHIAMBO MARCUS**

**ELIZABETH MGHOI MKOBA & 30 OTHERS .....PLAINTIFFS**

**V E R S U S**

**THE BOARD OF TRUSTEES TELEPOSTA PENSION SCHEME**

**LLOYD MASIKA LIMITED ..... DEFENDANTS**

**RULING**

1. Plaintiffs are former employees of the then Kenya Postal and Telecommunication and were contributors to the Pension Scheme known as Teleposta Pension Scheme. During their employment as stated above they were tenants at the property **MOMBASA/BLOCK XXIII/184/MI** registered in the name of 1<sup>st</sup> Defendant situated along Nyerere Avenue, Mombasa. Plaintiff pleaded that they have continued to be contributors to 1<sup>st</sup> Defendant's Scheme to date. In their Plaintiffs pleaded that before their retrenchment in 1999 they were paying rent to 1<sup>st</sup> Defendant at Kshs. 6,900/- per month.
2. They further pleaded that in 2012 they declined the request of the 2<sup>nd</sup> Defendant to sign leases and to pay increased rent of Kshs. 18,000/- and rental deposit of Kshs. 37,000/-.
3. Plaintiff then pleaded as follows-
  - **Earlier on the 1<sup>st</sup> Defendant had offered to sell on priority basis the premises to them (sic) which comprises of two bedrooms a kitchen and a sitting room for a consideration of Kshs. 1,300,000/- and finally offered the Plaintiffs the same premises at Kshs. 4,500,000/- per flat which the Plaintiffs all along accepted but the 1<sup>st</sup> Defendant neglected ignored and all kept silent on the offer, rendering them tenants in their own Scheme.**

- **That, the Plaintiffs undertook their own valuation by their own valuer and realized that the Defendants had overvalued the premises which were only worth Kshs. 1,051,000/-.**
- **That, the Defendants' intention is calculated to rip off the Plaintiffs who are the contributors/owners of the premises so that they commercialize, and sell to third parties for their own private gains, notwithstanding the Plaintiffs' interest in the property and scheme generally.**

4. Plaintiffs' final prayers are-

- a. **A permanent injunction restraining the Defendants by themselves, servants, agents, employees or any other person howsoever from increasing rent, demanding service charge or any other levies whatsoever.**
- b. **That, the 1<sup>st</sup> Defendant be compelled to sell the flats/housing units on Plot No. MOMBASA/BLOCK XXIII/184 MI to the Plaintiffs at the initial offer with liberty to the Plaintiffs to source funds from any quarters as may be appropriate and lawful to do/unconditionally.**
- c. **A declaration that the 1<sup>st</sup> Defendants/Trustees occupation of the current office is null and void for want of authority.**

5. What is before me for consideration is Notice of Motion dated 25<sup>th</sup> September 2013. It is filed by the Defendants for orders that-

- a. **THAT Plaintiff's Complaint dated 12<sup>th</sup> June 2012 and the Application dated 12<sup>th</sup> June 2012 be struck out.**
- b. **THAT in the alternative to prayer (b) the Plaintiffs suit and application be dismissed for want of prosecution.**

The first prayer is brought under Order 2 Rule 15(b) (c) and (d) of the Civil Procedure Rules which provide that the Court may strike out a suit where it is scandalous, frivolous or vexatious; or may prejudice embarrass or delay fair trial of the action; or it is otherwise an abuse of the process of the Court.

6. Defendants supported its prayer for striking out of the suit on three broad grounds.
7. Firstly Defendants provided a copy of the Title of MOMBASA/BLOCK XXIII/184/1 which according to Defendant is different from the Title cited by Plaintiffs in their Complaint. Defendant therefore submitted that since the property cited in the Complaint does not exist the Plaintiffs' suit must fail.
8. In my view the Court must reject that submission by Defendants because the fact they attached one Title document which bears different numbers to the one cited by Plaintiff does not necessarily mean that the one cited by Plaintiffs does not exist.
9. Secondly Defendant sought for the suit to be struck out on the ground that the Trust Deed of the 1<sup>st</sup> Defendant provided under Clause 35, for parties to refer their disputes to Arbitration by a single Arbitrator appointed by agreement with the parties but in default one to be appointed by the Chairman at the time of Chartered Institute of Arbitrators. Defendants submitted that in view of that Clause this Court had no jurisdiction.
10. Section 6(1) of The Arbitration Act is relevant here. It provides-

**"A Court before which proceedings are brought in a matter which is the subject of an**

arbitration shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay of proceedings and refer the parties to Arbitration unless it finds-

- a. that the Arbitration agreement is null and void, inoperative or incapable of being performed; or
- b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration ...”

11. In this case Defendant have not sought to stay this suit in order for it to be referred to Arbitration. In fact in my view the Defendants are now estopped from seeking such stay having filed Notice of Appointment and their Defence under protest. In this regard I rely on the case SAFARICOM LIMITED v FLASHCOM LIMITED [2012]eKLR viz-

“In the case of CORPORATE INSURANCE CO. –Vs- WACHIRA (1995-1998)IEA 20 it was held that the arbitral clause in the contract in question was in the nature of a Scott –v- Avery clause which provides that disputes shall be referred to arbitration. The Court went on to hold that;

“In the present Case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.”

In the case of FAIRLANE SUPERMARKET LIMITED –Vs- BARCLAYS BANK LIMITED NAI HCCC No. 102 of 2011 Odunga, J held that:-

“The option to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of CORPORATE INSURANCE CO. VS. WACHIRA (1995-1998)IEA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence .... Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.”

It is for that reason that second ground is rejected.

12. On the third ground Defendants stated that the Plaintiff had failed to plead the existence of a contract. It will be recalled that Plaintiffs pleaded that Defendants offered to sell to them the suit property but because the price that was quoted in the offer was inflated, according to the Plaintiffs, the Plaintiffs rejected it. Indeed one of the prayers in the Plaint is that the Court do compel Defendants to sell the property to the Plaintiff. It is obvious indeed from the Plaintiffs’ pleading that there is no contract between the parties. A similar circumstance was discussed in the case of SPELLMAN & WALKER CO. LTD v UNIVERSITY OF NAIROBI [2005]eKLR where I wholly associate myself with its holding as follows-

“The Plaintiff had merely expressed interest to take up the offer and made a proposal to make arrangements to discuss the matter within 7 days. In order for the binding contract to exist, there must be offer and acceptance.

CHITTY ON CONTRACTS 28<sup>th</sup> ED defines “offer” as follows:

“The offer is an expression of willingness to contract made with the intention that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed.”

**While “Acceptance” is defined as follows-**

**“An acceptance is a final expression of assent to the terms of an offer”**

**From the letter by the Plaintiff dated 15<sup>th</sup> May 1996 it is apparent that the plaintiff had expressed conditional acceptance awaiting further discussion. So that the acceptance did not amount to a final and unqualified expression of assent to the terms of the offer. So that there was no contract to be breached. Having come to that finding the plaintiff’s suit cannot therefore be sustained.”**

On that ground alone, that is that there is no contract which the Court is sought to enforce prayer (a) and (b) of the Plaint is frivolous and will be struck out. I do not however find that Plaintiffs’ prayer (c) for declaration that 1<sup>st</sup> Defendant’s Trustees are in office illegally to be frivolous and that prayer on that ground survives.

13. The Defendants further seek that the Plaintiffs’ suit be struck out on the ground that the suit abated because the Plaintiffs did not serve to them and have not served them to date with the Summons in this case. In my perusal of the Court file I noted that by affidavit of service sworn by Julius Kiprof Cheruiyot dated 21<sup>st</sup> June 2012 it was deposed that Defendants were on that same day served with Notice of Motion dated 12<sup>th</sup> June 2012 brought under Certificate of Urgency. I could not see any other affidavit of service indicating that the Defendants were served with the Summons. The Defendant on 26<sup>th</sup> February 2012 filed a Defence Under Protest and pleaded-

**“The Defendants shall avert that the Plaintiffs have not serve the Defendants with Summons to enter appearance which is mandatory requirement under Civil Procedure Rules, 2010 and that the Defence herein is filed under protest.”**

Plaintiffs did not file a reply to that Defence and that averment remained unchallenged. Further in the affidavit in support of the Notice of Motion under consideration Defendants repeated that averment. That too was not controverted by Plaintiff in the replying affidavit of Elizabeth Mghoi Mkoba dated 7<sup>th</sup> November 2013. Accordingly I will accept Defendant’s submission as the correct position that is that the Plaintiffs having filed this suit on 12<sup>th</sup> June 2012 have not to date served the Summons on Defendants.

14. I have perused the Court file and I was unable to confirm whether Plaintiffs filed Summons together with the Plaint as required under Order 5 Rule 1(3) of The Civil Procedure Rules. That Rule which is in mandatory terms states-

**“Every Summons shall be accompanied by a copy of the Plaint.”**

If Plaintiffs indeed did not file Summons simultaneously with the Plaint, then this suit shall be struck off for being in contravention to the above Rule.

15. If however the Plaintiffs did indeed file the Summons as required and have failed to collect those Summons for service on Defendants then this case by virtue of Order 5 Rule 1(6) has abated. That Rule provides-

**“Every Summons, except where the Court is to effect service, shall be collected for service within 30 days of issue or notification, whichever is later, failing which the suit shall abate.”**

16. If on the other hand Summons were filed and collected by Plaintiff but have not been served on the Defendants, Plaintiffs should have moved the Court under Order 5 Rule 2 to have the same extended since they expired twelve months after this suit was filed that is they expired on 12<sup>th</sup> June 2013. Since the Plaintiff did not move the Court under that Rule to extend the Summons

then Order 5 Rule 2(7) is applicable. That Rule provides-

**“Where no application has been made under Subrule (2) the Court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original Summons.”**

The twenty-four months expired on 12<sup>th</sup> June 2014. It follows that whatever is the correct scenario this suit should be struck out.

### **CONCLUSION**

17. Accordingly the orders of the Court are-

- a. **This suit is hereby struck out with costs to the Defendants.**
- b. **The Defendants are awarded costs of the Notice of Motion dated 25<sup>th</sup> September 2013.**

**DATED and DELIVERED at MOMBASA this 18<sup>TH</sup> day of SEPTEMBER, 2014.**

**MARY KASANGO**

**JUDGE**