REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE 330 OF 2011

1. JOSEPH MUTHAMA NDAMBUKI

2. JOSEPH MOGIRE BOSIRE

3. ROSE KARIMI M'REWA

4. LUCY G. WAWERU ………………………………………….PLAINTIFFS

VERSUS

DELMONTE (K) LIMITED……………....…………………….`DEFENDANT

RULING

1. The Application before the Court is one dated **20/09/2008** ("Application"). It has been brought by the **Defendant, Del Monte (K) Limited** ("Applicant") and is predicated under Order VI, Rules 13(1)(b); (c) and (d) and Rule 16 of the (Old) Civil Procedure Rules and, for good measure, section 3A of the Civil Procedure Act. It prays that the suit be struck out with costs on the ground that it is devoid of merit, is frivolous, vexatious and an abuse of the process of the Court. The Application is supported by the Supporting Affidavit of **Harry O. Odondi.**

2. The Application is opposed by the Plaintiffs, **Joseph Muthama Ndambuki**; **Joseph Mogire Bosire**; **Rose Karimi M'Rewa**; and **Lucy G. Waweru** (collectively, "Plaintiffs"). Their advocate of record, S.N. Gikera & Co. Advocates filed Grounds of Opposition dated 07/07/2011.

3. By an order of *Justice Dulu*, the Application was canvassed by way of written submissions. After a number of mentions in court, the matter was placed before me on 23/11/2011 for purposes of confirming if the parties had filed their written submissions. Although each party had filed their submissions, neither party was present in court during the mention. I elected to give a date for the ruling.

4.The thrust of the Plaintiffs' case is that the Applicant's decision to end their employment was either a wrongful termination or an unlawful dismissal – either of which would amount to a breach of the contractual employment or, in the alternative, statutory breach. The overall claim is that the Applicant used the pretext that they had lodged false medical claims against it in order to gain grounds to end their employment while the truth of the matter is that the Applicant merely aimed to prevent the Plaintiffs from benefitting from their entitlement under a retrenchment package.

5. Based on this, the Plaintiffs claim the Applicant breached their employment contract and they particularize the breach thus:

a.That the Applicant failed to provide the Plaintiffs with reasonable grounds for dismissal;

b.That the Defendant failed to accord the Plaintiffs due process of the law, thereby offending the rules of natural justice;

c.That the Applicant refused and/or neglected to compensate the Plaintiffs; and

d. That the Applicant failed to accord the Plaintiffs an opportunity to be heard.

6.The Plaintiffs claim general damages for wrongful dismissal and special damages which they generally particularize as follows, for each Plaintiff:

a.Salaries and allowances for twenty (20) months;

b. Fees for their children for various terms

c. Retrenchment packages based on the salary at the time the employment ended; the number of years served; 3 months' salary in lieu of notice; and *pro rata* leave allowance.

7.The Applicant's defence is simple enough: the Plaintiffs' employment were terminated lawfully in accordance with the express terms and conditions set forth in their respective Letters of Appointment and signed by both parties.

8.The Applicant repeats this simple theory of denial of liability in the present Application, and seeks to demonstrate that the Plaintiffs' suit is simply not sustainable and must be struck out.

9.First, the Applicant demonstrates that each of the Plaintiffs was hired after being given a Letter of Appointment on Probation which both the employee and the Applicant signed followed by a letter of confirmation of appointment at the end of the probationary period. The Letters of Appointments which each Plaintiff signed have an identical fourth paragraph to the effect that:

Upon successful completion of your probation period, you will be confirmed in your position by letter of confirmation. At any time after the completion of your probationary services, the Company shall be entitled to terminate your appointment by giving you one and a half (1½) calendar months' notice, in writing or to pay you one and a half (1½) months; salary in lieu of notice, plus any *pro rata* leave due. If, during your period of service you should wish to leave the services of the Company, you must give the Company one and a half (1½) months' notice in writing or pay the Company one and a half (1½) months; salary in lieu of notice. After your confirmation and serving at least six months service with the company, you shall join Del Monte Staff Retirement Benefits Scheme.

In [the] event of disobedience, unlawful acts, gross misconduct or habitual intemperance on your part, however, the Company shall have the right to terminate your appointment without notice, paying only such salary as may be due to you up to and including the day on which your appointment is terminated by the Company in writing

10.The Applicants' position is that it lawfully terminated the employment of all the Plaintiffs pursuant to this express term of their employment contracts, and as permitted by law. It so stated clearly in the letters it sent to each of the Plaintiffs when their employment ended. In material part, each of the letters read:

Management has directed that your services be and are hereby terminated with effect from 31st October, 2005 in accordance with your contract and company policy.

You will be paid:

- All days worked up to 31st October 2005
- Pro rata leave due

- One and a half (1½) months' salary in lieu of notice less any debt owing to the company.
- Your pension contribution and interest earned thereof.

11. The Applicant's position is that it is settled law that the employer has a right to terminate the employment in accordance with the express terms of the written contract. The Applicant relies on the case of *East African Airways v Knight* (1979) EA 165 and its progeny including: *Muuthuri v National Industrial Credit Bank Ltd* (2003) KLR 145; *Joseph Okumu Simiyu v Standard Bank (K) Ltd* (unreported). The principle which these cases establish is that where the contract of employment provides for a notice period or other way of terminating the contract between the employer and employee, either party can end the relationship by following the express terms of the contract. Conversely, where the employer has wrongfully dismissed the employee, and the contract contains a notice period, damages payable to the employee can be worked out only on the basis of the notice period. Finally, if no notice period is provided for, a reasonable period of notice is implied and enforced. In the words of the Court of Appeal uttered more recently in *Kenya Revenue Authority v Menginya Salim Murgani* (Civil Appeal No. 108 of 2010) [2010] eKLR:

Indeed, a contracting party does not have to rely on a misconduct in order to terminate a contract of service and a party can terminate such a contract without giving any reason! In the circumstances of this case and on the basis of the recorded evidence, if the reasons for dismissal were wrongful the measure of damages should have been in respect of the period of notice specified in the contract, and if not specified a reasonable notice.

12.Based on the settled law and the undisputed facts in the case, the Applicant argues that the Plaintiffs' suit is frivolous, vexatious and an abuse of the process of the Court. This, the Applicant argues, is mainly because the Plaintiffs' suit simply cannot be sustained in the face of the law. It is absolutely groundless and lacks in seriousness.

13.On their part, the Plaintiffs remind the Court of the extremely high standard which the Court must use to strike out a suit. The locus classicus in this respect is, of course, the case of *DT Dobie & Co. (K) Ltd v Joseph Muchin*a [1982] KLR 1 where Justice Madan held that:

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross examination in the ordinary way"… No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it.

14.I would agree with the Plaintiffs that this very high standard is the correct one to apply in this Application. This Application, if successful, will be dispositive of the case. It therefore behooves the Court to exercise utmost vigilance in analyzing the uncontested facts and law before pronouncing on the Application. The Court is guided by the admonition of *Justice Madan* set out above. As *Justice Madan* correctly stated, striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the pleadings are beyond redemption. Where a reasonable cause of action is disclosed, it would be improper to strike out the suit.

15. I regret that even after exercising this highest level of care and generous attitude towards the Plaintiffs' suit, their case simply cannot survive. The Plaintiffs urge that their Plaint discloses a reasonable cause of action namely that the Defendant "falsely (sic) terminated the Plaintiffs' employment on or about October 2005 on the grounds that the Plaintiffs jointly and severally lodged false medical claims against the Applicant." (See Plaintiffs' Written Submissions dated 20/09/2011 at p. 3). The

Plaintiffs list, without elaboration, what it terms six "profoundly triable issues." The six "profoundly triable issues" the Plaintiffs list, quoted verbatim, are:

a. Unlawfully terminating the Plaintiffs' employment

b. Failing to give the Plaintiffs reasonable grounds for dismissal

c. Failing to accord the Plaintiffs due process of the law, thereby offending the rules of natural justice

d. Refusing to compensate and/or adequately compensate the Plaintiffs

e. Failing to accord the Plaintiffs an opportunity to be heard

f. Preventing the Plaintiffs from accessing their entitlement under the retrenchment package.

I will go through each of these issues presently.

16.The Plaintiffs say the first triable issue is "unlawfully terminating the Plaintiffs unemployment." However, the Plaintiffs do not explain, especially in the face of the jurisprudence of employment contracts set out above, why or how the termination of their employment was unlawful. The Plaintiffs do not distinguish the cases cited by the Applicant or explain why the law on notice does not apply to their case. It is important to point out here that the core facts are uncontested: the Applicant does not deny terminating the Plaintiffs' employment; it only claims that it did so pursuant to the express terms of the employment contract. The Plaintiffs have said nothing about this central argument by the Applicant. The Court is left to imagine what kind of responses the Plaintiffs might raise to this central argument and how going to full trial might assist them in doing so. One can imagine, for example, that the Plaintiffs hope to argue that there is a statute or subsequent contract which overrides or modifies the contractual terms set out in their Letter of Appointment. Yet this is neither pleaded nor alleged or even alluded to. It is important to recall that the Applicant paid to the Plaintiffs salary in lieu of notice. It is, further, important to recall that the law (at least as it stood at the time the cause of action arose) provided that, at least absent special circumstances, which have been neither pleaded, alleged or even alluded to, even in cases of wrongful dismissal, the measure of general damages is salary for the notice period. In the circumstances, even while the Court has tried to bend over backwards to inject life into the suit using this issue, it is simply a lost cause.

17. The Plaintiffs' next two and the fifth alleged triable issues are really one and can be lumped together. They render one thus: "failing to give the Plaintiffs reasonable grounds for dismissal." They frame the other one thus: "failing to accord the Plaintiffs' due process of the law, thereby offending the rules of natural justice." Lastly, they couch the last one thus: "failing to accord the Plaintiffs an opportunity to be heard." All these issues are hinged on the presumption that before an employee is discharged, dismissed or terminated, there is a legal requirement outside the confines of the contract between the parties which compels the employer to give the employee a hearing and, while doing so, follow the rules of natural justice. Again, here, in the face of the *Knight Case* and its progeny, the Plaintiffs needed to do more to show these are a triable issues. To reiterate, the law, at least as it stood at the time, gave the Applicant a right to terminate the employment contract upon complying with the notice period in the employment contract. The law did not impose an obligation on the employer to have any hearing or even provide a reason for the dismissal. In the *Murgani Case* cited above, the Court of Appeal categorically says the employer does not have to give any reason for termination of the employment contract as long as they abide by the contractual terms to pay salary in lieu of notice. I would venture to suggest that the only limitation to that general legal principle established in our jurisprudence is that where the employer actually states a reason for termination or dismissal, the reasons must be in accordance with public policy. I would suggest, for example, that an employer could not dismiss an employee because she comes from a particular ethnic group. This would violate clear public policy. However, this Public Policy limitation to the right of an employer to discharge or discipline an employee is not triggered here and there appears little reason to go to trial based on these alleged triable issues. The Plaintiffs do not claim that their contract of employment gave them a right to be heard before termination of their contract. And

neither is that position tenable in the face of the documentary and affidavit evidence on record which remains uncontroverted and must be taken as true at this point.

18.Next, the Plaintiffs say that it is a triable issue that the Applicant "refus[ed] to compensate and/or adequately compensate the Plaintiffs." Without more, and with respect to the Plaintiffs and their counsel, framed in this general way, this seems like a Hail Mary pass in American Football: a desperation, last-ditch effort to salvage a desperate situation. The Plaintiffs do not say what compensation the Applicant failed to provide, and it is not obvious from their pleadings or submissions either. For one, as the termination letters show, it is clear that the Plaintiffs were paid some amounts (including salary in lieu of notice and termination, pro-rated leave, and contributions to the pension scheme). It is not clear what other "compensation" the Plaintiffs claim, and in the face of the authorities cited above, there seems little purpose in prolonging this matter only for the Plaintiffs to face the inevitable. A bare assertion that the Applicant refused to adequately compensate does not automatically transform this suit into a sustainable one.

19. Lastly, the Plaintiffs claim that it is a triable issue whether the Applicant prevented the Plaintiffs from accessing their entitlement under the retrenchment package. I have given anxious consideration to this last head because it comes closest to raising a triable issue. Ultimately, I have concluded that it is not enough to let this case persist. I have reached this conclusion for two reasons. First, the Plaintiffs provide no details at all about the retrenchment package they allege existed, which they allege the Applicant was trying to circumvent. The Applicant, in its Statement of Defence and in the Supporting Affidavit of Harry O. Odondi, have denied that any such retrenchment package existed and that the Plaintiffs were entitled to any. The Plaintiffs have proffered no proof at all and have not even suggested how they intend to demonstrate the existence of the alleged retrenchment package in the face of this flat-out denial by the Applicant. Besides, the Plaintiffs have neither joined the Applicant's allegations in the Statement of Defence nor contested the Affidavit evidence of Harry O. Odondi. The Court must, therefore, take the Applicant's position as the correct one that the Plaintiffs are not entitled to any retrenchment package. I must add that the situation might have been different if the Plaintiffs had even offered to show that their employment contract with the Applicant entitled them to a retrenchment package.

20. In the end, I return to the cautionary words of *Justice Madan* in the *DT Dobie Case* cited above wherein he counsels:

A suit should only be struck out if it is so weak, that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment it should not be struck out. The redemptability and curability of a suit are determined by looking at the cause of action or the major complaint of the Plaintiff and determining whether that complaint on the facts before the Court is maintainable or not.

21. Even after warning myself of the fact that striking out a suit is a draconian and radical action; even after viewing the pleadings in the light most favorable to the Plaintiffs; even after trying my level best to inject life into this suit by the Plaintiffs, I am unable to save the Plaintiffs' suit. Only one conclusion is warranted, and that is that the suit discloses no reasonable cause of action and it must be struck out with costs. I so order.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this day **23RD** day of **JANUARY 2012**.

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J.M. NGUGI
JUDGE