



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 688 OF 2007

1. AINEAH LIKUMBA ASIENYA

2. FRANCISCA WANJIKU MUIGAI

3. FREDERICK ODENG OKELLO

4. NASHON PHILIP ODUOR

5. JAMLECK MBAE MWIRICHIA

6. TOBIAS OBUKWI WANZALA

7. EBBY KAHAI MUDAVADI

8. FRANCIS MUTUNGI MUTUNE

9. NELSON MARK ETALE

10. EDWARD SEWE OCHOLO

11. CHARLES JOHN OKETCH

12. MARTIN KISOMBEM WANJALA..... PLAINTIFFS

VERSUS

THE POSTAL CORPORATION OF KENYA.....1ST DEFENDANT

THE POSTMASTER GENERAL

POSTAL CORPORATION OF KENYA 2ND DEFENDANT

RULING

Notice of Motion dated 21/10/08 under Order XXX V 1 (a) 2 and 3 and Order 39 rules 1 and 2 seeking summary judgment for plaintiff in the sum of Kshs.36,560,752.75 with interest pleaded in the Amended plaint. Prayer 2 also seeks interlocutory injunction against the first defendant to restrain the first defendant from selling or otherwise disposing of the affected plaintiff's property held by first defendant as security for loan advanced to the plaintiffs. Prayer 3 seeks the remainder of claims to proceed to hearing and assessment of damages.

The supporting affidavit is sworn by Fredrick Ondeng Okello and the grounds written on the application. The supporting affidavit shows that the deponent is the 3rd plaintiff in this suit and that he has authority of co- plaintiff's to swear this affidavit. He states that at the time his services was terminated he was manager in the Human Resources Department and he is conversant with the Corporations Personnel Policies and calculations of terminal benefits and that he is competent to swear this affidavit under Order XXX V rule 1 (2) (now order No. 36).

The plaint was amended in court on 6/6/2008 and filed on 25/6/2008. After amendment of that the defendants failed to amend their defence. Therefore the defendants would not be able to show that they are entitled to leave to defend the suit. Also the defence on record does not deny or refute liquidated claims as stated in the Amended plaint. There is no defence to the claims of the plaintiffs as stated in para.11 of the supporting affidavit being Ksh.36.560.752.75. defences do not raise any triable issues.

It is deponed that the defendants have sent demand letters to the plaintiff for payment of loans held the defendants as employees and some of the plaintiffs have received dividends. The deponents prays for interlocutory judgment.

On page 17 of the documents the entitlements of all the plaintiffs is stated amounting to Kshs.36,560,752.75. The claim under para. 41 of the amended plaint. The deponent has attached the supporting documents as attached to the affidavit.

For the defendant respondents an affidavit is sworn by the Corporation Sec. Hellen Ambasa. She swears that she is the principal officer of the Corporation. She swears that the parties have been seeking an amicable solution of this suit but if plaintiffs are not interested the defendants ought to be permitted to defend the suit. She does not explain why defence of amended plaint has not been filed.

She swears that the plaint is incompetent for the reasons that the office of Postmaster General has no capacity to sue and be sued in that name and that his office and any officer holding that office is not liable for any action claim or demand in respect of any matter done in furtherance of the functions of Board of first defendant. Only the first defendant can be sued.

Further the applicants are not entitled to summary judgment as statement of defence filed on 8/11/2007 and the draft amendment and counterclaim raise a number of triable issues. The applicant having conceded owing the some sum of money the defendant should be allowed to defend the suit. Also Kshs.36,560,752.75 is not a debt and claim of summary judgment is not available to the applicants. The parties have filed lists of authority in support of their submissions.

The applicant/plaintiff has 4 authorities the first of which is

1. Banque Indosney –vs- D. J. Lowe & Co. Ltd where the Court of Appeal held

“that the burden of proof was on defendant to satisfy the court that he was entitled to defend the suit.”

2. Kenindia Insurance Co. Ltd –vs- Commercial Bank of Arica Ltd 2 Others

Where it was held by Court of Appeal

“Summary judgment was a procedure to be resorted to in the clearest of cases and if defendant

shows a bona fide triable issue he must be allowed to defend the suit but the defence that raised triable issues does not mean one that must succeed.”

In this case the defence did not raise any triable issues.

In **Panafrica Buldes and Contractors Ltd –vs- Singh** it was held by court of appeal

3. Gurbaksh Singh & Sons Ltd –vs- Njiri Emporium Ltd where it was held that summary judgment may be granted for a debt or liquidated demand with or without interest unless defendant shows that he should have leave to defend the suit.

Also it was held that summary judgment should only be entered where the amount claimed has been specified is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic. If the ascertainment of the sum claimed required investigation beyond mere calculation then the sum claimed was not a debt or liquidated demand.

For respondents the list of authorities has 20 cases.

In **HCCC No.1484 of 2001 Stephen Kipkebut –vs- Mathew Wachira** application was under Order 35 old rules and Order 6 rule 13 it was said:-

“Striking out is a draconian remedy and it is only resorted to on clear and obvious case.”

Also the case of Gurbaksh Singh & Sons is cited by the applicants and considered above.

In **Kobil Petroleum Ltd –vs- Marsman & Co. Ltd 2005 e KLR** Anyara Emukule Judge stated

“summary procedure must not be used for obtaining an immediate trial the question must be short and defendant on few documents and a defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition where the defence is a point of law and the court sees at once that the point is misconceived or if arguable plainly unsustainable summary judgment will be given.”

The court has also read all the authorities cited by the respondent it is clear that the applicants do not ask for full judgment claimed in the plaint. They ask for the liquidated claim. The order allows a party making application for summary judgment to apply for what is liquidated or part thereof. In this application the applicants apply for part of the claim. The amount is ascertained under the paragraph 11 of the supporting affidavit and in paragraph 40 and 41 of the amended plaint as Kshs.36,560,752.75 payable to the 12 plaintiffs/applicants.

It is also clear that there is no denial of the said claim by the defendant in fact the defendant is eager to settle the matter but there is long delay which is causing anxiety to the plaintiffs. The deponent states that their advocates has said the statement of defence which is filed does not disclose any triable issues. The plaintiffs were retrenched.

In the authority of *Banque indosuez* the Court of Appeal said that the burden of proof is on the defendant to satisfy the court that they should be granted leave to defend. In the present case the defendants did not file defence the defendants did not file defence to amended plaint but they have proceeded to file only draft defence. This cannot be considered as it is not filed in court. It cannot therefore be said the defendant has discharged its burden of proof.

In the case of Gurbakh Singh it was held that summary judgment can be granted for a debt with or without interest. Also “where the demands has been specified and is due and payable”. In this case the applicants have specified the claim and it does not need investigation beyond mere calculation a mere matter of arithmetic.

It is sworn that the applicants owe money to their employer as a result of the loans advanced to some of them. They ask that pending the determination that the injunctions issue against the defendant until when their full claims will be determined. This is fair.

On the whole it is my view that the applicants claims be paid since there is no defence. The plaintiffs did not leave their employment but were forcefully denied their employment thereby being rendered without income.

On these grounds I allow the application. I order that the Kshs.36,560,752.75 be paid to the applicants forthwith and temporary injunction as prayed is hereby issued against the defendant.

The remainder of the plaintiffs claims shall proceed to trial. Costs of the application shall await the final judgment.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of June, 2012.

**J.N. KHAMINWA
JUDGE**