REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 1285 of 2003

SIMON IGECHA & 510 OTHERS …….....…….....…….. PLAINTIFFS

VERSUS

1. **KENYA BREWERIES LTD**

2. **HON THE ATTORNEY-GENERAL.....….. DEENDANTS**

R U L I N G

1. This is an application by the 1st Defendant **(notice of motion dated 19th August 2004)** seeking the main order that the plaint be struck out. There is an alternative prayer, "that such part of the claim by the Plaintiffs remaining subsequent to the ruling and order of the court made on 30th July 2004 be struck out".

2. The 1st Defendant also seeks an order that "the compromise reached between the Plaintiffs and the 1st Defendant for payment of KShs 5,000/00 in full and final settlement be recorded and judgment entered accordingly".

3. This last prayer seems misconceived because the order of 30th July 2004 entered judgment for the Plaintiffs against the 1st Defendant on admission to the effect that the 1st Defendant pay to each plaintiff the sum of KShs 5,000/00. If the court held that the 1st Defendant was liable **on admission** to pay to each Plaintiff KShs 5,000/00, it can hardly have been a compromise. In any case, that particular issue would appear to have been settled by the finding that it was an admission.

4. The application is stated to be brought under **section 3A** of the **Civil Procedure Act, Cap 21** (the **Act**) and under **Order XXIV, rule 6** and O**rder VI, rule 13(I) (b), (c)** & **(d)** of the old **Civil Procedure Rules** (the **Rules**).

5. The grounds for the application as stated on the face thereof are –

(i) That the Plaintiffs\' claim has been compromised by the execution of a certificate of discharge by the Plaintiffs advocate.

(ii) That the 1st Defendant has in its defence pleaded the terms of the compromise reached and given notice of this application.

(iii) That the Plaintiffs applied for judgment on admission under the terms of the certificate of

discharge, which application was granted.

(iv) That the Plaintiffs are not in the circumstances entitled to proceed with this suit which ought to be struck out with costs.

There is a supporting affidavit sworn by the 1st Defendant\'s advocate. It gives the evidential backing for the application.

6. The Plaintiffs opposed the application by replying affidavit filed on 18th November 2004 which was sworn by their advocate. In it the Plaintiffs\' case as pleaded in the plaint is more or less repeated.

7. On 10th December 2004 the Plaintiffs filed their own application by chamber summons dated 9th December 2004 seeking the main order "that they be allowed to proceed with the 1st Defendant's notice of motion dated 19th August 2004 by way of *viva voce* evidence to be adduced by **RUMBA KINUTHIA** and **LEONARD GITAU CHEGE** and the 1st Plaintiff Simon Igecha".

8. This application by the Plaintiffs was opposed by the 1st Defendant by its grounds of opposition dated 14th and filed on 16th December 2004.

9. The two applications (that is, the 1st Defendant\'s notice of motion dated 19th August 2004 and the Plaintiffs\' chamber summons dated 9th December 2004) were heard by Ojwang\', J (as he then was). In a ruling dated and delivered on 3rd February 2006, the Judge in effect allowed the Plaintiffs\' application and directed, in regard to the 1st Defendant\'s application, as follows -

"**(i) On priority the 1st Defendant\'s notice of motion dated 19th August 2004 shall be listed for substantive hearing within the Civil Division of the High Court.**

(ii) The hearing of the said (application) shall take place on the basis of *viva voice* evidence, with the Plaintiffs calling not more than three witnesses.

(iii) Mr Rumba Kinuthia, learned counsel for the Plaintiffs, will (at the) hearing, elect between attending court as counsel or as a witness; and if the latter, then the Plaintiffs shall instruct a different advocate to conduct their case up to the end.

(iv) The costs of the….notice of motion (dated) 19th August 2004 and of the....chamber summons dated 9th December 2004 shall abide the outcome of the hearing of the said notice of motion."

When the notice of motion dated 19th August 2004 came up for hearing before me, there was no mention at all of the above-stated directions by Ojwang, J that the application be heard by way of *viva voce* evidence. The learned counsels appearing did not even make oral submissions, choosing instead to put in written submissions. I was then myself not aware of the said directions by Ojwang, J.

10. The 1st Defendant's submissions were filed on 7th October 2008 while those of the Plaintiffs were filed on 28th October 2008. The 2nd Defendant filed written submissions on 4th November 2008. I have considered all these submissions.

I have also perused the huge court record. I have particularly read the aforesaid **ruling by Ojwang, J of 3rd February 2006**, and also the **ruling of Lenaola, J dated and delivered on 30th July 2004** (that resulted in the judgment on admission against the 1st Defendant for KShs 5,000/00 to each plaintiff). It is plain and obvious that the present application cannot succeed in view of findings made by the two learned judges in their respective rulings.

11. Lenaola, J stated as follows at paragraph 6 of his ruling -

"Without even going to the 1st Defendant\'s reply, clearly there are triable issues in the 1st Defendant\'s defence. Firstly, there is the averment at paragraph 12 of the 1st Defendant's defence regarding the goodwill fund, which is said to be by its terms and conditions binding on the Plaintiffs. The Plaintiffs don\'t think so and that becomes an issue for trial. Secondly, there is the averment at paragraphs 13 and 14 that the execution of the Certificate of Participation effectively discharged the 1st Defendant from liability and that HCCC 378/2003 would be withdrawn. The Plaintiffs think otherwise and still hold the 1st Defendant liable hence the filing of this suit. That surely is a serious issue for trial. That is also precisely what is averred at paragraph 16 of the 1st Defendant\'s defence: that this suit has been compromised and that the same should be struck out! At paragraph 17 and contrary to the Plaintiffs' assertion at paragraph 10 of the plaint that the draw created a binding contract between the parties, the 1st Defendant denies that any valid contract existed or exists and that it was not under any statutory or other obligation to make any payment to the Plaintiffs. That is a matter for trial and it is not as is claimed by the Plaintiffs, a triviality."

12. On his part Ojwang\', J said at page 16 of his ruling -

"**On the facts of this case, I think there is a genuine dispute between the Plaintiffs and the 1st Defendant. The 1st Defendant appears to have made a *contract* with any members *of the public* who cared to come along; and the plaintiffs came along and acted under the terms of the 1st Defendant\'s offer. Something then went, and the 1st Defendant partly consented to a solution, through making some payment. That payment did not satisfy the Plaintiffs, and they are *claiming more*.**

The issue could be litigated through a normal full trial. But, with the concessions already made by the 1st Defendant, the Plaintiffs think a speedier hearing process can be achieved, through calling oral testimony at the *application* stage. This proposal, in my views, is entirely reasonable, and I will make orders incorporating that position."

13. Both learned Judges found that the plaint and the 1st Defendant\'s defence raised several issues for trial at hearing of the action. The ruling of Lenaola, J was never appealed against. Leave was sought and obtained to appeal against the ruling of Ojwang, J. It is not clear if indeed an appeal was lodged. At any rate, both rulings of the learned judges are still in place. I cannot sit on appeal over their holdings as I enjoy, not any appellate, but co-ordinate, jurisdiction as they did.

14. In the result, the notice of motion dated 19th August 2004 is dismissed. As the Plaintiffs appear to have passed over the directions to try the application by way of *viva voce* evidence, something that they so vigorously sought for before Ojwang', J, I will order that the parties do bear their own costs of the application (and hence also the costs of the Plaintiffs' chamber summons dated 9th December 2004. Those will be the orders of the court.

15. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thanks God, I have now fully regained my health.

DATED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2012