



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 113 of 2010**

**SAMUEL OKOTH & 7 OTHERS .....PLAINTIFFS**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LTD.....DEFENDANT**

**R U L I N G**

1. The Plaintiffs were at one time employees of various institutions which were in 1991 taken over by or amalgamated into the Defendant under the **Consolidated Bank of Kenya Act, 1991** (the Act). Each of them filed suit in the Chief Magistrate's Court, Nairobi vide **Nairobi CMCC Numbers 4683, 4684, 4685, 4686, 4687, 4688, 4689 and 6772, all of 2002**. Each claimed in his/her suit a declaration that the Defendant is liable to pay him/her unpaid severance pay based on **section 11(1)** of the Act, together with interest thereon at commercial rates from 22<sup>nd</sup> December 2000 until payment in full; an order that the Defendant do issue to him/her a comprehensive certificate of service as pleaded; and costs of the suit together with interest thereon at court rates.
2. As all the eight suits raised similar issues of law and fact and the Defendant was common in all of them, one of the suits was by order of the court selected as a test suit whose outcome would apply to all the other suits. The test suit was **Nairobi CMCC No. 4686 of 2002**.
3. The test suit was fully heard by the lower court. The Plaintiff's claims were dismissed. The Plaintiff in the case, SAMUEL OKOTH, appealed to the High Court vide **Nairobi HC Civil Appeal No. 231 of 2005**. In a judgment delivered on 12<sup>th</sup> May 2009 the High Court (Okwengu, J as she then was) allowed the appeal, set aside the judgment of the lower court and substituted therefor judgment in favour of the Plaintiff declaring that the Defendant was liable to pay him Plaintiff severance pay based on section 11 (1) of the Act. The court further ordered that the Defendant do issue the Plaintiff a comprehensive certificate of service for all the years worked. The court also granted him costs of the suit in the lower court and of the appeal.
4. The Defendant says that it appealed against that judgement of the High Court vide **Court of Appeal Civil Appeal No 70 of 2011** which is pending.
5. On 1<sup>st</sup> March 2010 the Plaintiffs filed the present suit. Each of them quantified and claimed his or her severance pay based on section 11(1) of the Act as decreed by the court in Nairobi HC Civil Appeal No. 231 of 2005. They each also claimed a "complete and accurate" certificate of service and their costs of the lower court suits, again as decreed in Nairobi HC Civil Appeal No. 231 of 2005.
6. On 26<sup>th</sup> March 2010 the Defendant filed a statement of defence dated 23<sup>rd</sup> March 201. It denied the Plaintiffs' several claims. The Plaintiffs filed a reply to the defence joining issue with the Defendant.

7. On 16<sup>th</sup> December 2010 the Plaintiffs filed a statement of issues dated 9<sup>th</sup> December 2010, and on the 17<sup>th</sup> December 2010 they filed their list and bundle of documents. The Defendant similarly filed its list and bundle of documents, and also witness statements, on 2<sup>nd</sup> November 2011.

8. In the meantime, on 5<sup>th</sup> July 2011 the Defendant applied by **notice of motion of the same date** seeking the main order that the Plaintiffs' suit be struck out and dismissed with costs "for being an abuse of the process of the court. That application is the subject of this ruling. The application is brought under **Order 2, rule 15(1)(d)** of the **Civil Procedure Rules** (the **Rules**).

9. The grounds for the application appearing on the face thereof include –

(i) That this court has no jurisdiction to hear the suit and that it ought to have been filed before the Industrial Court as provided for under **section 12(1)** of the **Labour Institutions Act, No. 12 of 2007**.

(ii) That the suit is *res judicata* vide Nairobi CMCC Numbers 4683, 4684, 4685, 4686, 4687, 4688, 4689 and 6772, all of 2002.

(iii) That the suit is statute-barred vide **section 4(1)** of the **Limitation of Actions Act, Cap 22**.

(iv) That the suit is bad for joinder of the Plaintiffs.

10. There is a supporting affidavit sworn by one JANET MWALUMA, a legal manager with the Defendant. It sets out the evidential basis for the grounds upon which the application has been made.

11. The Plaintiffs opposed the application by **replying affidavit sworn by the 1<sup>st</sup> Plaintiff and filed on 21<sup>st</sup> October 2011**. The following grounds of opposition emerge from the said affidavit –

(i) That the suit is an action brought upon a judgment within the meaning of **section 4(4)** of the Limitation of Actions Act.

(ii) That the suit is thus not time-barred, having been filed within the relevant statutory period.

(iii) That the present suit was necessitated by the Defendant's failure to honour the declaratory judgment rendered in Nairobi HC Civil Appeal No 231 of 2005.

(iv) That no wrong should go without a remedy.

(v) That a court order or judgment should not be made in vain, and it is thus essential that the aforesaid declaratory judgment be enforced in the manner sought in the present suit.

(vi) That the Plaintiffs filed the present suit in exercise of their residual right to enforce a judgment.

(vii) That the suit cannot be defeated on account of joinder or misjoinder of parties in light of the provisions of **Order 1, rule 9** of the Rules.

(viii) That the issue of liability having been heard and determined by this court vide the declaratory judgment in Nairobi Civil Appeal No. 231 of 2005, and the present suit being for enforcement of that declaratory judgment, this court has jurisdiction to hear and determine the suit under **section 22** of the **Sixth Schedule (Judicial Proceedings and Pending Matters)** of the **Constitution of Kenya**.

12. The application was canvassed by way of written submissions. Those of the Defendant were filed on 16<sup>th</sup> November 2011 while those of the Plaintiffs were filed on 28<sup>th</sup> November 2011. I have considered those submissions, together with the authorities appearing in the respective lists of authorities of the parties. The submissions elaborate the respective grounds for the application and grounds of opposition of

the parties.

13. The first issue I have to consider is whether the suit represents fresh claims by the Plaintiffs based upon their respective contracts of employment with the Defendant, or whether the suit seeks merely to enforce the declaratory judgment given in Nairobi HC Civil Appeal No 231 of 2005. This issue raises no problem at all. The respective rights of the parties pleaded in the eight (8) suits filed in the lower court were determined in Nairobi HC Civil Appeal No 231 of 2005. The court declared in that appeal –

**(i) that the Defendant was liable to pay the Plaintiffs their respective severance pay based on section 11(1) of the Consolidated Bank of Kenya Act;**

**(ii) that the Defendant must issue to each Plaintiff a comprehensive certificate of service for all the years served; and**

**(iii) that the Defendant shall pay the Plaintiffs' costs of the suit in the lower court as well as in the appeal.**

14. The present suit merely seeks to enforce that declaratory judgment. The suit does not seek to litigate afresh rights already litigated upon and declared in the said judgment. In regard to the monetary aspect of the declaratory judgment, all that will be done is an arithmetic calculation of what each Plaintiff is entitled to under section 11(1) of the Consolidated Bank of Kenya Act as declared in the declaratory judgment. There will be no fresh litigation regarding the Plaintiffs' entitlement to the severance pay. That was litigated upon and determined in the aforesaid appeal.

15. The suit is thus not *res judicata*. It is an action brought upon a judgment within the meaning of section 4(4) of the Limitation of Actions Act which provides -

**“4(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of a property to be made at a certain date at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”**

16. Is the action time-barred? It is not. The judgment sought to be enforced was delivered on 12<sup>th</sup> May 2009. The present suit was filed on 1<sup>st</sup> March 2010. Twelve years is a long way away.

17. Does this court have jurisdiction to hear and determine the suit? As already noted, the issue of liability was canvassed before and determined by this court in Nairobi HC Civil Appeal No 231 of 2005. I have also accepted the position that this suit is an action to enforce the decretal judgment rendered in the appeal. This court certainly has jurisdiction to enforce its own judgment.

18. Regarding the issue of joinder, the Plaintiffs are simply seeking to enforce a declaratory judgment they already have. They are not seeking the adjudication of any “disparate claims”. The adjudication of their claims has already been done. They have properly come to court in one common suit.

19. The application is entirely misconceived and an attempt to deny the Plaintiffs what has already been decreed in their favour. Their suit is not an abuse of the process of the court. The application is dismissed with costs to the Plaintiffs. It is so ordered.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER 2012**

**H.P.G. WAWERU  
JUDGE**

**DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF NOVEMBER 2012**