



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 825 OF 2009

ANN KAJUJU CHARLES..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

R U L I N G

There are two applications that have been filed by the plaintiff and the defendant. The first application is dated 9th November 2009 and is brought under Sections 3A and 63(c) of the Civil Procedure Act and other enabling provisions of the law. It seeks the following orders

1. **THAT this application be certified as urgent and service on the defendant be dispensed with in the first instance.**
2. **THAT a mandatory injunction do issue compelling the defendant to immediately and unconditionally allow the plaintiff to access Account No. 1103312219 held by the plaintiff at Kenya Commercial Bank Othaya Branch in Nyeri to enable her withdraw the sum of kshs. 1,208,798 being her pension.**
3. **The costs for this application be provided.**
4. **Further or any other relief that the Honourable Court may deem fit to grant.**

The second application dated 18th January 2010 is brought under Section 3A and 6 of the Civil Procedure Act and Order XI Rule 1 of the Civil Procedure Rules. The said application seeks the following orders.

1. **THAT this application be certified urgent and the same be heard ex-parte in the first instance.**
2. **(a) That the trial of this suit and any proceeding arising therein be and is hereby stayed pending the hearing and final determination of HCCC No. 349 of 2009 – Milimani**

OR ALTERNATIVELY

(b) THAT this suit be consolidated with HCCC No. 349 of 2009 for purposes of trial and final disposal.

3. THAT the costs of this application be provided for.

In his submissions, the applicant's counsel Mr. Mungu submitted that they are seeking a mandatory injunction premised on Section 36 of the Retirement Act No. 3 of 1997. Apart from the above, he has also submitted that the facts of the case are in the supporting affidavit of the plaintiff. According to Mr. Mungu the plaintiff deposited her pensions benefit cheque that was issued by KCB pension scheme into account no. 1103312219 at the defendant's Othaya Branch. However, the defendant later purported to say that the account had been frozen and denied the plaintiff the access to those funds. It is the contention of the applicant's counsel that the freezing of the account is questionable. He also referred this court to annexure 'AKC' which is a statement that shows that the account is being operated in terms of the standing orders. Further to the above, the learned counsel also submitted that the defendant has not shown any reason at all why the plaintiff cannot be allowed to access the account and take away the pension. In addition to the above, he also submitted that the action of the defendant is one of impunity and flies in the face of section 36 of the Retirement Benefit Act No. 3 of 1997. His interpretation of that section is that the same does not allow the attachment of the proceeds from pension. In support of his submissions he quoted the following:

- *Re- Garrett [1930] Law Reports Chancery Division page 141*
- *Lockabail International Finance Limited vs. Agroport & Others – the Sea Hawk [1986] 1 All E.R. 901*
- *Halsbury's Laws (4th Edition) paragraph 948*

The applicant's counsel went at length to differentiate and distinguish the present suit from HCCC No. 349 of 2009, Milimani Commercial Court. Specifically, he submitted that in the latter case money had been allegedly stolen by several defendants and among them was the present plaintiff. In addition to the above, he also submitted that even if the plaintiff in her present suit is also involved in the other suit, nobody can attach the benefits due under Section 36 of the Retirement Benefits Act. Apart from the above, the applicant's counsel has also submitted that the action sought by the plaintiff is quite clear and not clouded by any controversy. He is of the view that it is not disputed that the money paid to the plaintiff and reflected in her account were her pension entitlements and that the same has not been disputed by the defendant. He also explained that pension has been given a very special immunity by section 36 of Retirement Benefits Act No. 3 of 1997 and is not classified as property like any other assets in form of liquid cash. He was of the view that this case should be decided at once since the facts are simple and are not in dispute.

Secondly, the applicant's counsel has submitted that the defendant's application is bad in law and that the same should be struck out. The basis for the above position taken by the applicant is that HCCC 349 of 2009 raises very different issues and have nothing in coming save that the same parties are in both suits. In that suit the present defendant is claiming money from the present plaintiff which it alleges that the plaintiff stole. There is nothing in that suit to do with pension which is the only issue in this matter. He further emphasized that the two suits are completely different with different issues and that the argument that the account number in which the pension was paid is common is just raised to confuse issues and to try and complicate a rather simple issue. He is also of the considered opinion that even in the unlikely event that the defendant is successful in the said suit and gets judgment against the present plaintiff, it cannot attach the pension to satisfy the decree. As to whether the present suit should be stayed or consolidated with HCCC No. 349 of 2009 Milimani Commercial Court, the learned counsel adopted the above submissions. He is of the view that there is no justification for asking this suit to be stayed or consolidated with HCCC No. 349 of 2009. The learned counsel also submitted that the defendant's

application has been made in bad faith with ulterior motives other than to do justice. As far as the replying affidavit of Aloys Okari Ombuyi is concerned, the applicant's counsel stated that he is not an officer of the Corporation. He also added that Ombuyi has not exhibited any authority to allow him to swear the affidavit. He is also of the view that the said affidavit is not a narration of the facts of the case but are arguments that would be ordinarily be made by a counsel. He also took issue with the fact that Ombuyi's affidavit does not disclose any sources of information. He described the affidavit as defective and hence ought to be struck out in its entirety. In support of his submissions he quoted Order III rule 2(c) of the Civil Procedure Rules. That apart, he also quoted the following authorities:

- **Bombay Flour Mills v. Chunbhai M. Patel [1962] E.A. 803**
- **A. N. Phakey v. World Wide Agencies Limited [1948] 15 EACA 1.**

On the other hand, the plaintiff's application has been opposed by Mr. Mutua who appeared for the defendant. In his submissions, Mr. Mutua relied on the skeleton submissions together with a further set of submissions which were filed with the leave of the court. According to Mr. Mutua, the plaintiff's application dated 9th November, 2010 appears to be based on misapprehension of section 36 of the Retirement Benefits Act 1997. It is the contention of the defendant's counsel that the annexures show that the plaintiff had withdrawn her membership from the Retirement Benefits Scheme. He also submitted that it also shows that her retirement benefits had been paid. Specifically, she was paid Kshs. 1,208,798/- which was later banked in account No. 1103312219. He further explained that the said account is the subject of proceedings in this suit. Further to the above, he also submitted that section 36 applies to moneys held and managed by a retirement benefit scheme. In that context he submitted that the money paid to the plaintiff is not held by a Benefit Retirement Scheme and that the above section would not apply. As far as the case of **Re-Garrett** which was quoted above is concerned, the defendant's counsel submitted that in England the protection of the retirement benefits is not absolute. He informed the court that in appropriate cases, courts have the powers to make the orders for payment of pension money to creditors.

Secondly, the defendant's counsel submitted in relation to their application dated 18th January, 2010. The learned counsel submitted that there is sufficient material before this court to demonstrate that the issues relating to the bank account are also substantially raised in **HCCC No. 349 of 2009**. He is of the view that in the interest of justice, the two suits should not be tried separately. On the basis of the above, he has prayed for an order to either stay this suit or consolidated the two suits. In conclusion, the defendant's counsel submitted that on 9th July 2010, Honourable Justice Koome allowed the amended notice of motion unfreezing the bank account in issue pending the determination of **HCCC No. 349 of 2009**. He is of the view that allowing the plaintiff's application would be contrary to that ruling.

This court has carefully considered the opposing submissions by the learned counsels. In addition to the above, this court is also very alive to section 36 of the Retirement Benefits Act, 1997 which states as follows: -

“Notwithstanding anything to the contrary contained in any other written law, where a judgment or order against a member of a scheme is made, no execution or attachment or process of any nature shall be issued in respect of the contributions or funds of the member or his employer except in accordance with the scheme the scheme rules and such contribution shall not form part of the assets of the member or of his employer in the event of bankruptcy.”

The above provisions of the law are very clear but the court has to take other issues also into consideration. In this particular case, it has already been alleged by the defendant that the applicant had withdrawn her membership from the Retirement Benefits Scheme. Those are diametrically opposed positions which can only be solved by this court by the parties adducing evidence. Thereafter the court will be in a better position to decide as to whether the amount of money that went into the applicant's account actually was her pension. At this stage, it is not fair for this court to be judgmental as to whether or not the applicant was a member of the Retirement Benefit Scheme. Apart from the above, this court

has carefully considered the ruling which was delivered by Lady Justice Martha Koome in Civil suit No. 349 of 2009. From the above ruling, it is apparent that there was systematic and organized looting by several people which was directed at the plaintiff bank, Kenya Commercial Bank. At this stage it would not be fair for anybody to point accusing fingers at any particular individual. However, it cannot be denied that the applicant namely Anne Kajuju Charles featured very prominently in the above matter. No doubt the amount of money which was involved was rather substantial and it was directed at a public institution which has many shareholders. It is therefore in the interest of justice and fair play that this court exercises caution while dealing with matters related to that particular case. In the final analysis, it would be in the interest of justice that this suit be stayed pending the hearing and final determination of HCCC No. 349 of 2009. It is on that basis that I hereby wish to concede to the application by the Defendant in this particular case in terms of prayer No. 2. The upshot is that I hereby dismiss the application dated 9th November 2009 which was filed by the current plaintiff, Anne Kajuju Charles since the same has no merits at all. Lastly, I hereby order that the applicant will bear the costs of this application.

Those are the orders of this court.

MUGA APONDI
JUDGE

Ruling read signed and delivered in open court in the presence of

Mungu - Applicant's Counsel

Mutua - Respondent's Counsel

MUGA APONDI
JUDGE

4TH FEBRUARY, 2011