



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 264 OF 2007

BERNARD KARIUKI WATHARI & OTHERSPLAINTIFFS

VERSUS

THE REGISTERED TRUSTEES OF
TELEPOSTA PENSION SCHEME..... DEFENDANT

RULING

This is an application by way of Chamber Summons dated 6th and filed 7th September, 2010 Under Order VI Rule 13 (1) (b) and (d), Order VII Rule 1 (2) and (3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act brought by the defendant for the following orders.

1. That the plaintiffs' amended plaint dated 2nd April, 2007 and filed on 2nd April, 2007 be struck out.
2. That the plaint dated 13th March, 2007 and filed on 13th March, 2007 be struck out in so far as it is filed by the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th plaintiffs respectively.
3. That the costs of defending this suit and of prosecuting this application be borne by the plaintiffs.

The application is supported by an affidavit sworn by Lucy Barno who is said to be the legal advisor to the defendant and also the grounds set out in the application which are,

- a) That the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th plaintiffs have not verified the contents of the amended plaint and the original plaint as required by the mandatory provisions of Order VII Rule 1(2) of the Civil Procedure Rules.
- b) That the amended plaint and the original plaint are fatally defective as they do not comply with the mandatory provisions of Order VII Rule 1(2) of the Civil Procedure Rules.
- c) That is not sufficient for the 1st plaintiff alone to swear the verifying affidavit in the original plaint and or the amended plaint or at all.
- d) The amended plaint is bad in law for want of compliance with the mandatory provisions of Order 1 Rule 12 of the Civil Procedure Rules.

- e) That the amended plaint is not signed contrary to the provisions of Order VI Rule 14 of the Civil Procedure Rules.
- f) That the amended plaint is not date stamped contrary to the mandatory provision of Order IV Rule 2 of the Civil Procedure Rules.
- g) That in view of the foregoing the amended plaint and the Original Plaint are bad in law, incurably defective and are otherwise an abuse of the court process.
- h) That subsequent pleadings filed pursuant to the amended plaint and orders granted therein are a nullity in law and are of no legal consequences.

The application is opposed and there is a replying affidavit sworn by Benard Kariuki Wataari who is the 1st plaintiff herein. Both learned counsel have also filed written submissions which I have on record. Order VII Rule 1 (2) and (3) read as follows,

“(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.

(3) The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with subrule (2) of this rule”.

The records shows that the defendants filed another application earlier on by way of Chamber summons dated 5th October, 2007 under the same provisions of law and based on more or less the same grounds. That application was supported by an affidavit of Paul B. Jilani who was the then Legal Advisor to the defendant. On 13th November, 2007 Khamoni J, recorded a consent order in respect of that earlier application to the effect that the application was adjourned to another date to be taken by the parties or any of them in the court registry. Thereafter there is no indication that the said application was ever prosecuted.

On 16th September, 2008 the learned counsel for the parties herein recorded consent to the effect that the plaintiffs do comply with discovery at least three days before the hearing of the case among other orders. It would appear that as at that stage, the defendants had abandoned their application dated 5th October, 2007. Be that as it may, the present application dated 6th September, 2010 was filed by the defendant seeking similar orders. Both learned counsel have filed written submissions to address the said application.

The record also shows that the plaintiffs filed an application dated 30th September, 2008 wherein they sought orders that the amended plaint and verifying affidavit dated and filed 2nd April, 2007 be received by the court registry and date stamped and the same be deemed to be properly filed and served. That application was heard and dismissed by M. Muya, Senior Deputy Registrar on 6th November, 2007. This would mean that the only plaint on record is the original one filed by the plaintiffs herein on 13th March, 2007.

That being the case, the plaintiffs herein are right to submit that the prayer for striking out the amended plaint if *res judicata*. The principle of *res judicata* applies in equal measure to both plaints and applications. With respect therefore, I find that to the extent that some prayers relate to the amended plaint allegedly filed herein, the same cannot be sustained.

It has been said that the plaint should be struck out because the 2nd to the 11th plaintiffs did not file any verifying affidavits in terms of the provisions of Order VII Rule 1 (2) of the Civil Procedure Rules.

The plaintiffs have owned to that error and in so doing cured that omission by filing an authority on 12th November, 2007. In any case the verifying affidavit by the 1st plaintiff sworn on 15th March, 2007 stated

that he was verifying the contents of the plaint on his own behalf and on behalf of the other plaintiffs who gave him the authority to do so. Above all, I have seen no prejudice neither has any been alleged by the defendants that, any shall befall upon them if the plaint is not verified by all the plaintiffs.

Where there is no verifying affidavit the court may by its own motion or on the application of the defendant order to be struck out any plaint which does not comply with this rule. The power to do so is discretionary hence the use of the word “may” in Order VII Rule 1(3) and therefore, whereas the word “shall” is used in Order VII Rule 1 (2) it would appear the requirement of an affidavit to verify the correctness of the averment contained in the plaint is directive as opposed to mandatory. In that case, where one is lacking the court may allow a party to regularize the same.

The striking out of any pleading is a drastic measure and courts have ordinarily tilted in favour of sustaining a suit rather than striking it out, “unless of course it is so weak that it is beyond redemption and incurable by an amendment” – see **DT Dobie (K) Limited versus Muchina (1982) KLR 3**. To strike out a pleading before a hearing drives out a party from the judgment seat without a hearing.

I have looked at the pleadings herein and I believe that, the plaintiff’s suit is not that weak to be determined by the summary nature or procedure being invoked by the defendants at this stage. In effect, there are serious triable issues that can only be determined at the time of trial. Indeed, at some stage as I have observed herein above, the parties had reached the stage of filing documents to prepare for the main hearing.

In the end the application dated 6th September, 2010 is hereby dismissed with costs to the plaintiffs. I note from the record that the pleadings were closed quite some time ago. The new Civil Procedure Rules require that parties file the names of the witnesses, their statements, documents to be used during the trial and issues for determination.

To expedite the conclusion of this dispute the parties shall comply with Order 11 of the Civil Procedure Rules within 30 days of today.

Orders accordingly.

Dated, signed and delivered at Nairobi this 5th Day of July, 2011

**A. MBOGHOLI MSAGHA
JUDGE**

In the presence of