



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 223 OF 2003

ROSA A. MUNYWOKI.....1ST PLAINTIFF/RESPONDENT
ALFRED O. MWITA.....2ND PLAINTIFF/RESPONDENT
AISHA R. ABDULLA.....3RD PLAINTIFF/RESPONDENT
MICAH ROTICH.....4TH PLAINTIFF/RESPONDENT
SALOME N. MUNYUI.....5TH PLAINTIFF/RESPONDENT
ERASTUS MURIUKI.....6TH PLAINTIFF/RESPONDENT
FRANCIS NYAGA.....7TH PLAINTIFF/RESPONDENT
ALEX G. THABUKU.....8TH PLAINTIFF/RESPONDENT
SOPHIA ODONGO.....9TH PLAINTIFF/RESPONDENT
IGNATIUS CHERWON.....10TH PLAINTIFF/RESPONDENT
MARGARET W. MBUGUA.....11TH PLAINTIFF/RESPONDENT
JAPHETH K. KASANGA.....12TH PLAINTIFF/RESPONDENT
ANTHONY M. KIBUE.....13TH PLAINTIFF/RESPONDENT
DOMINIC M. MARACHA.....14TH PLAINTIFF/RESPONDENT
MUNANO A. NJUKI.....15TH PLAINTIFF/RESPONDENT
SAMSON NGUGI MWAURA.....16TH PLAINTIFF/RESPONDENT
MATILDA WUGHANGA WADIA.....17TH PLAINTIFF/RESPONDENT
ANGELO PEREIRA.....18TH PLAINTIFF/RESPONDENT

-VERSUS-

INVESTMENTS AND MORTGAGES

BANK LIMITED.....1ST DEFENDANT/APPLICANT

HON. THE ATTORNEY-GENERAL.....2ND DEFENDANT

RULING

The Plaintiffs' suit herein is for certain declarations and for payment of overtime and "loss of service". In the alternative "compensation for loss of service and gratuity" is sought in respect to their employment with a certain entity called **Biashara Bank of Kenya Limited** (hereinafter called **Biashara Bank**), which employment was declared redundant by the said Biashara Bank.

It is pleaded that Biashara Bank subsequently merged with the 1st Defendant with effect from 1st January, 2003, and that all its assets and liabilities were "deemed" to have been transferred to the 1st Defendant upon that merger.

A declaration is also sought that **section 71(b)** of the **Finance Act, No. 6 of 1994** (which amended **section 4(5)** of the **Trade Disputes Act, Cap 234** (since repealed)) was unconstitutional.

The 1st Defendant filed defence denying liability. It is not clear from the court record if the 2nd Defendant filed defence.

By **notice of motion dated 23rd January, 2004** brought under **Order X, rule 13** of the old **Civil Procedure Rules** (the **Rules**) the Plaintiffs sought these two main orders:-

1. That the 1st Defendant be ordered to produce in court "the **time-sheets** maintained by Biashara Bank of Kenya Ltd."
2. That the 1st Defendant be ordered to supply each of the Plaintiffs with such **time-sheets** respecting him or her.

This application is the subject of this ruling.

The application is made upon the following grounds appearing on the face thereof:-

1. That the Plaintiffs are entitled in law to the said **time-sheets** "which they require for the prosecution of their case and an application dated 12th June, 2003. By that application the Plaintiffs sought summary judgment under Order XXV, rules 1, 2 and 8 of the Rules.
2. That the Plaintiffs require the said **time-sheets** in order to comply with the 1st Defendant's request for particulars dated 10th July, 2003.
3. That it is fair and just that the 1st Defendant be ordered to supply the **time-sheets**.

The application is supported by the affidavit of the 2nd Plaintiff. The salient points deponed to in the

supporting affidavit are:-

1. That the Plaintiffs, in the course of their employment with Biashara Bank, worked overtime.
2. That the Plaintiffs used to sign daily attendance to work on **time-sheets** which were maintained and kept by Biashara Bank.
3. That as the 1st Defendant has disputed the overtime claimed, the Plaintiffs require the said **time-sheets** to prove their claims.
4. That the particulars sought by the 1st Defendant in its request dated 10th July, 2003 are contained in the said **time-sheets** in the 1st Defendant's possession, and that therefore the Plaintiffs need them in order to supply the particulars sought.

On 11th February, 2004 the 1st Defendant filed grounds of objection to the application dated 23rd January, 2004. It contains only one ground, to wit, that the application is not known to law.

On 2nd March, 2004 the 1st Defendant applied by chamber summons of the same date for the Plaintiffs' suit as against it to be struck out. That application is yet to be disposed of.

At some point the Plaintiffs' application dated 23rd January, 2004 was dismissed. But it was reinstated upon application. That explains the lapse of some time in filing replying affidavit by the 1st Defendant on 10th November, 2006.

That replying affidavit is sworn by **Paul Ndungi**, the Legal Counsel of the 1st Defendant. The salient averments in the affidavit are that the application is defective and does not lie in law as it ought to be against Biashara Bank which is not a party to the present suit; that it is not true that Biashara Bank merged with the 1st Defendant; that the 1st Defendant merely purchased some assets of Biashara Bank; that the **sale and purchase agreement dated 20th November, 2002** between Biashara Bank and the 1st Defendant specifically excluded employment contracts and collective bargaining agreements from transfer to the 1st Defendant; that the 1st Defendant does not have in its possession the **time-sheets** in issue; and that in any event, as particulars are sought in respect of the Plaintiffs' claims as set out in their plaint, the 1st Defendant cannot be compelled to provide evidence to support the Plaintiffs' case. The aforesaid sale agreement is annexed to the replying affidavit.

With leave of the court the Plaintiffs filed a supplementary affidavit (wrongly called "further" affidavit) on 12th March, 2007. It is sworn by the 1st Plaintiff. There are correspondences and other documents annexed to this affidavit that leave little doubt that the arrangement between the 1st Defendant and Biashara Bank was indeed a merger: the former purchased the assets of the latter and assumed some of its liabilities within the framework of the sale and purchase agreement dated 20th November, 2002.

In the course of hearing of the application dated 23rd January, 2004 the court directed that the Plaintiffs do carry out a search of Biashara Bank at the Companies Registry. Subsequently the court granted leave for the Plaintiffs to file a supplementary affidavit to show the relationship between Biashara Bank and the 1st Defendant. The 1st Defendant was granted leave to respond by way of further replying affidavit if necessary.

The Plaintiffs filed supplementary affidavit on 12th January, 2009. The same is sworn by the 2nd Plaintiff. The affidavit depones, *inter alia*, that Biashara Bank changed its name on 19th June, 2003 to **Biashara Securities Limited**; and that pursuant to the sale and purchase agreement dated 20th November, 2002 the 1st Defendant purchased the assets of Biashara Bank for valuable consideration paid for partly by shares in the 1st Defendant and partly by cash.

I have considered the submissions of the learned counsels appearing, including the cases filed. I have also perused the sale and purchase agreement dated 20th November, 2002 between the parties.

There are comprehensive definitions of the terms “**Liabilities**” and “**Assets**” given in the interpretation section of the agreement. Under the agreement,

“*Liabilities*” means without duplication the burden, obligations, commitments and liabilities of the seller (Biashara Bank) under or relating to:

- (a) the Deposits;
- (b) the Borrowings;
- (c) the Supplier Contracts;
- (d) the Foreign Exchange Contracts;
- (e) the Leases;
- (f) the Contingent Liabilities;
- (g) the Trade Creditors;
- (h) the Sundry Liabilities
- (i) the Documents; and
- (j) all such other liabilities and obligations (other than those excluded and excepted under clause 3) assumed or incurred by the seller in relation to the Business between the Accounts Date and the Effective Time and which are in the nature of those liabilities and obligations listed above.’

Contracts of employment and collective bargaining agreements between Biashara Bank and its unionized employees are not included in the definition of “**Contingent Liabilities.**” The two are in fact specifically excluded in **Clause 3(e) and (f)** of the sale and purchase agreement in the following words:-

“3. RETENTION OF ALL OTHER ASSETS AND LIABILITIES

For avoidance of doubt, nothing in this agreement shall operate to transfer any assets, rights or liabilities of the Seller or any member of the Seller’s Group) other than those specifically referred to in the definitions of Assets and Liabilities, and without limiting the generality of the foregoing, there shall be expressly excluded and excepted from the sale and purchase, and nothing in this agreement shall operate to transfer:

(a)
.....

(e) the Employment Contracts; or

(f) the Collective Bargaining Agreements between the Vendor and unionized employees.”

It is thus clear that all liabilities there may have been relating to Biashara Bank’s employees’ contracts of service, or any collective bargaining agreements entered into with their trade unions, were not transferred to the 1st Defendant. Those liabilities were specifically and particularly excluded by the sale and purchase agreement of 20th November, 2002 as seen above.

The *time-sheets* sought in the present application relate to the contracts of employment between Biashara Bank and its erstwhile employees. Any liabilities attaching upon those contracts of employment were not transferred to the 1st Defendant under the sale and purchase agreement. Thus the *time-sheets* cannot possibly be in the 1st Defendant's possession. They can only be in the possession of Biashara Bank. Biashara Bank, the material now before the court shows, is still in existence, notwithstanding that it has since changed its name. Change of name did not alter its legal capacity and character.

It also matters not that Biashara Bank (in its changed name or otherwise) is now a shareholder of the 1st Defendant, or even that both companies may have some common directors. Both companies still retain their separate legal personalities and capacities.

In the event, I find no merit in the application by notice of motion dated 23rd January, 2004. The same is hereby dismissed with costs to the 1st Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF AUGUST 2011.

H.P.G. WAWERU
JUDGE

DELIVERED THIS 26TH DAY OF AUGUST 2011.