REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(NAIROBI LAW COURTS)

Misc Appli 833 of 2004

STEPHEN KIMOTHO ……..…….….1ST APPLICANT

ESTER MUCHAI ..…….2ND APPLICANT

ANNE WAMBUI WAITHAKA……...……..…3RD APPLICANT

CHARLES NJUGI ……...……..4TH APPLICANT

AUDI LINCON ……5TH APPLICANT

REUBEN OKUSI……...…….6TH APPLICANT

NIMROD MACHARIA ……..…….7TH APPLICANT

JOHN KAGO ……..8TH APPLICANT

SALIM KIARIE ……..……..9TH APPLICANT

PATRICK KIMANI…….……10TH APPLICANT

Versus

THE ATTORNEY GENERAL ……..……...…….1ST RESPONDENT

JAMES OLUBAI…….2ND RESPONDENT

THE OFFICIAL RECEIVER ……....…….3RD RESPONDENT

KENYA NATIONAL ASSURANCE CO. (2001) LTD ….....……..4th RESPONDENT

JUDGMENT

The Originating Summons dated 29th June 2004 was brought by Stephen Kimotho, Esther Muchai, Anne Wambui Waithaka, Charles Nyingi, Audi Lincoln, Reuben Okusi, Nimrod Macharia, John Kago,

Salim Kiarie, Patrick Kimani hereinafter referred to as the 1st to 10th Plaintiffs, against the Attorney General, James Olubai; the Official Receiver and Kenya National Assurance Co. (2001) Ltd. hereinafter referred to as the 1st- 4th Defendants. The Originating Summons is expressed to have been brought under Sections 71, 74, 75, 77, 82 and 84 of the Constitution and Rule (11) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001.

The Plaintiffs who purported to bring this application on their own behalf and on behalf of other employees of the Kenya National Assurance Co. (2001) Ltd., were former employees of the Kenya National Assurance Company Ltd. (KNAC) (in liquidation). They seek the following declarations and orders:

1. A declaration that the Plaintiffs and other former employees of the Kenya National Assurance Company Ltd. (in liquidation) were in July 1996, Public servants to whom the Government owed a duty of care to ensure that their terminal dues and pensions were paid within three months or reasonable period after the KNAC Ltd. was placed in liquidation;

2. A declaration that the Government of Kenya through the first defendant is under a duty under S. 71 of the Constitution to pay its employees after it terminates their services;

3. A declaration that the Plaintiffs right to life under Section 71 of the Constitution includes the right to live in dignity, shelter and protection of one's family and means of livelihood;

4. A declaration that the Defendants have jointly and severally contravened the rights of the Plaintiffs and other former employees of KNAC Ltd. (in liquidation) under Sections 71 and 75 of the Constitution to be paid their terminal dues and pensions within a reasonable time;

5. A declaration that the rights of the Plaintiffs and other former employees of the KNAC Ltd. (in liquidation) to be paid their full terminal dues and pension benefits are property rights within the meaning of S. 75 of the Constitution;

6. An order that the Defendants do pay to the 1,031 Plaintiffs Kshs.657,972,932/= being the balance of their terminal dues as of 1st January 2004;

7. An order that the Defendant do pay the 1,031 Plaintiffs Kshs.350,105,307/= being the balance of their pension benefits as of 1st January, 2004;

8. An order that the Defendants do pay to the 1,031 Plaintiffs interest on 6 and 7 above at 16% per annum;

9. an order that the Defendants do pay the 1031 Plaintiffs general damages;

10. An order that the Defendants do pay the costs of this suit.

The Originating Summons was supported by the following documents;

1. A 77 paragraphed affidavit sworn by Anne Wambui Waithaka (3rd Plaintiff) dated 8th June 2004;

2. A supplementary affidavit sworn by Audi Lincoln, Reuben Okusi and Patrick Kimani (5th, 6th and 10th Plaintiffs) undated but filed in court on 16th October 2006;

3. Submissions filed on 28th April 2006 and supplementary submissions filed on 3rd December 2008;

4. Lists of authorities dated 28th April 2006 and 3rd December 2008.

The Originating Summons was opposed by the 1st and 4th Defendants who relied on,

1. An Affidavit sworn by Agnes Ndirangu, dated 23rd June 2006;

2. Submissions filed in court on 28th April 2006;

3. An affidavit sworn by Alice Nzioka dated 22nd September 2005;

4. Lists of authorities filed in court on 28th April 2006.

The 2nd and 3rd Defendants also opposed the Originating Summons and relied on the following documents;

1. Affidavit of James Israel Olubai dated 10th June 2005 the 2nd Defendant;

2. An affidavit sworn by S.M. Ndisya dated 17th June 2005 on behalf of the 3rd Defendant;

3. List of authorities dated 19th April 2006 and filed in court on 20th April 2006;

4. Skeleton arguments filed in court on 12th September 2007.

This Originating Summons was urged by Dr. Kuria on behalf of the Plaintiffs. Mr. Ombwayo from Attorney General's office represented the 1st and 4th Defendants while Mr. Mungla Advocate, appeared for the 2nd and 3rd Defendants.

Before the hearing commenced Dr. Kuria applied to abandon prayer 6 of the Originating Summons, prayers 7 and 8 were amended to read 1,031 Plaintiffs and prayer 8 was amended in terms of paragraph 27 of the affidavit of Audi Lincoln and 2 others. Prayer 8 therefore reads as follows:

"8. an order that the Defendants do pay to the 1,031 Plaintiffs interest on the above at 16% per annum as calculated per the table referred as "ARP4" in Paragraph 27 of the affidavit of Audi Lincoln, Reuben Okusi and Patrick Kimani sworn on 13th October 2005."

The salient facts of this case are:

That KNAC Ltd was a company established by the Government of Kenya to insure its Government businesses and Parastatals. Due to poor management, the company started experiencing financial losses and as a result, the Government through the Commissioner of Insurance placed it under statutory management and subsequently under liquidation (AM 1). In 1996, the High Court issued an order appointing the interim liquidator. The 2nd Defendant was appointed the special manager long term Business of the company to assist the interim liquidator who took over in terms of the court order of 16th July 1996. Olubai and Ndisya the official receiver deponed that they discharged their duties and Ndisya added that vide gazette No. 5259 of 9th August 2002 they were released of their responsibilities.

It is the Plaintiffs case that upon the 4th Defendant being wound up, the Plaintiffs and Government agreed no the terminal benefits that were to be paid as per memorandum of agreement (JWW 6) in the letter dated 19th July 1996 where the employees were paid terminal benefits but the pension remained outstanding. That the pension was not paid until February 2003. The Plaintiffs also contend that the calculation of their pension is faulty. As a result, Audi Lincoln and Patrick Kimani who were executive Assistants, Pensions Department and who were conversant with the calculation of pension have made their calculations as per paragraph 27 of their affidavit 'ARP 4' and the total pension due is Kshs.1,196,401,391 which they now claim. It is the Plaintiffs' contention therefore that they have been denied their property within the meaning of S. 75 of the Constitution and that the Government has

unjustly enriched itself having delayed to pay them and that is why they should be paid the pension with compound interest. That if the money had been in a bank it would have earned interest. The Plaintiffs relied on the case of SEMPRA METALS LTD. V COMMISSIONERS OF INLAND REVENUE (2007) UKHL 34 where the House of Lords considered the question of interest payable where the sums were wrongly withheld and the court allowed compound interest to be paid thereon.

Counsel submitted that the Plaintiffs are entitled to pension under their contracts of employment and it was incorrect for Ms. Ndirangu to contend that the Government made ex gratia payments to the Plaintiffs. Counsel made reliance on the case of BAIRD V PSC (2003) LRC 41 where it was held that terminal benefits of a public servant was his property and SHAH V AG (1970) CA 524 where it was held that money paid to a person in a judgment is property.

On the question of whether this is a representative suit, Counsel relied on the case of KENYA BANKERS ASSOCIATION V MINISTER OF FINANCE (2002) KLR 61 where a Constitutional Application was filed by an association for all other Bankers and that court considered circumstances when a representative suit can be filed. He urged that since all Plaintiffs have a common interest in the matter they have the necessary locus standi and this will help save the court's time and avoid multiplicity of suits. Counsel urged the court to avoid technical objections at the expense of justice and instead take a liberal interpretation of the term and allow the 10 Plaintiffs to represent the 1031 others.

In opposing the Originating Summons, Agnes Ndirangu the General Manager of KNAC Ltd. (2001) agreed with the contents of the affidavits of James Israel Olubai, the 2nd Defendant Mr. Ndisya, 3rd Defendant and Alice Nzioka dated 22nd September 2005 and replied to the affidavit of Anne Wambui Waithaka. She also set out the history of KNAC Ltd. She recalled that on 18th June 1996, the Commissioner of Insurance appointed Cooper and Lybrand to be the statutory manager of KNAC with instructions to restructure it within a month with a view to transferring the business. The Company did not pick up and the statutory manager recommended that the company be wound up and the Commissioner of Insurance filed a winding up Petition 18/1996 on 11th July 1996. The court appointed an official receiver as interim liquidator on 16th July 1996. Upon the appointment of the Official Receiver, a letter was addressed to all employees of the company terminating their services (AN 4). Final dues were paid out of public funds and that was in tune with the agreement between the Minister for Finance and Union Representatives of KNAC on 4th July 1996. That upon payment of terminal dues each employee acknowledged receipt by signing a discharge voucher. That the pensions due to the Plaintiffs were not paid. According to her, the payment of dues to the Plaintiffs was an ex gratia payment as the Government had no obligation to pay terminal benefits. The General Business of the company was separated from long term Business and the Official Receiver attempted to dispose of the closed Life Fund but failed to get a buyer and in an attempt to salvage the closed Life Fund of KNAC Ltd, the company incorporated a new company known as KNAC (2001) Ltd. on 26th October 2001 and applied to the court to have the closed Life Fund transferred to the new company. That upon the transfer of the closed life fund scheme to the new company, the Pension due to the plaintiffs and other staff was computed and loaded with interest of 8% as at 30th June 1997, and payment of the Pension was made. Vide the letter of 19th April 2003 (A.N 11) the minister exempted pension from tax. That the staff were paid their full claims due and that no interest was payable after June 1997 when the company went under as the company had stopped trading. Agnes Ndirangu further deponed that Alice W. Waithaka did not disclose in her affidavit what was paid. She denied the sum claimed by the Plaintiffs as being far exaggerated and denied that the Plaintiffs' rights were infringed under Sections 71 or 75 of the Constitution or any other section. She contends that the claim for pension is baseless as the staff were fully paid. In addition to the above, Mr. Ombwayo, Counsel for the 1st and 4th Defendants submitted that the Originating Summons is incompetent as it contravenes S. 84 of the Constitution, which provides that a person can only enforce his personal rights but not the rights of others. That the 10 Plaintiffs cannot bring this Constitutional application on behalf of the 1031 others as they purport to. He also submitted that this is not a dispute for this court to decide whether or not to pay pension. That under the Pensions Act Cap 189 Laws of Kenya, Section 5 provides that pension is not an absolute right, while Section 6 provides that one is only entitled to pension upon retirement otherwise if it is a dismissal, one can be dismissed without pension. That the Plaintiffs should have filed a suit so as to prove how the Pension could be computed. Counsel urged that

the Plaintiffs were paid all their dues and have not demonstrated breach of their rights to life or deprivation of property. That the claim of 567,000,000 is denied by the Defendants and what has been put before court is mere figures which do not show how they were computed nor is the tabulation of dues signed by the author.

Mr. Mungla, Counsel for 2nd and 3rd Defendants opposed the Originating Summons. He submitted that this application is only in respect of the 10 Plaintiffs listed therein because this court on 24th November 2006, laid to rest the issue of representation and ruled that the 10 plaintiffs cannot represent others, and that if the Plaintiffs did not agree with that ruling they should have appealed.

He also urged that the application is incurably defective. That it was brought under the Chunga Rules 2001. That it should have been brought by an Originating Summons under Rule 9 of the Rules but that the said Rule 9 was not invoked. That an Originating Summons is a suit, but that what we have before this court is a Miscellaneous Application. Counsel relied on the two decisions of SPEAKER OF NATIONAL ASSEMBLY V NJENGA KARUME 92/1992 where the court held that procedure provided by a statute should be followed. In R V COMMISSIONER OF POLICE ex parte KARIA the court held that the court has to be properly moved under the proscribed rules of procedure.

Mr. Mungla also submitted that the Plaintiffs have failed to particularize the alleged violations under Sections 71, 74, 75, 83 and 84 and it is not clear which rights have been violated. Counsel submitted that the 2nd and 3rd Defendants were released from liability once their release was Gazetted on 9th August 2002 under gazette Notice 5259. That S. 247 (3) provides that once the Official Receiver is released from liability no claim can be made against him and that there is no application to revoke the said release. Counsel also submitted that the Plaintiffs have failed to demonstrate that their rights under S. 71, 74 75, 77 & 82 have been breached. That S. 75, envisages there having been physical possession or an interest and the Plaintiffs have not demonstrated that they have been deprived of pension nor have they shown an interest which they were compulsorily divested of. That the plaintiffs' allegation is that their Pension has not been paid. That evidence has to be adduced to prove that fact otherwise it remains a mere allegation. Counsel distinguished this case from SHAH V AG (supra) that was relied upon. In the Shah case, the Plaintiff had a decree from a judgment which the court held to be property. The Plaintiffs do not have such property or interest in this case as they are yet to prove it.

Lastly, Mr. Mungla submitted that Constitutional applications should not be used as a substitute for the normal procedures in law of contract or winding up under the Companies Act where there is procedure for creditors to lodge their claims.

We have carefully considered the Originating Summons, the affidavits in support, and in opposition, all submissions by Counsel on record and authorities cited. We are of the view that the issues we should address will be:

1) whether the Originating Summons is a representative suit;

2) whether the Application is competent ;

3) whether the Plaintiffs were fully paid their pension;

4) whether the Originating Summons discloses a cause of action and whether there has been a breach of the Plaintiffs fundamental rights.

5) whether the Plaintiffs are entitled to the orders sought.

6) who pays the costs of this Originating Summons.

<u>Whether the Originating Summons is a representative Suit</u>

On 17/10/06, Dr. Kuria sought directions from this court on whether a representative suit available in a

suit for enforcement of constitutional rights. Then Wendoh and Emukule JJ were seized of this matter. The court delivered its ruling on 24/11/06 in which it observed that under Section 84(1) of the Constitution, an application for enforcement of Constitutional rights can only be made by the person whose rights are infringed or likely to be infringed or by another person on behalf of a person who is in detention and that there seemed to be no provision for a representative suit under that Section. Though the court ruled so, and there has been no appeal against that ruling, at the commencement of the hearing, the Plaintiffs' counsel still maintained that the prayers sought were for the 10 Plaintiffs and 1031 others. We need to revisit the issue briefly again by first setting out Section 84(1) of the Constitution for better appreciation; It reads,

"Subject to Sub Section (6), if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person) then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress"

The language is plain. The only person who can bring an application under that Section is the person whose rights are likely to be violated or one whose rights have been violated. The second category is that somebody else can bring an application for violation of Constitutional rights on behalf of a person who is detained. In the ruling on the issue of representation, Wendoh and Emukule JJ considered the fact that this case can not be a representative suit because by its very nature, each Plaintiff would need to adduce evidence and specifically prove that she/he was an employee of KNAC Ltd, what he earned and what was due to him/her as final dues, that would form part of the global sum claimed in the Originating Summons. Since the claim for benefits is withdrawn, the Plaintiffs would still need to prove what each person earned, what each contributed towards the pension scheme and what each is entitled to as pension. It can not be brought as a representative suit and the case of KENYA BANKERS ASSOCIATION VS. MINISTER FOR FINANCE (No. 4) (2002) 1 KLR 61 would not be relevant.

In the above case, the court held that the Kenya Bankers Association had the Locus standi to challenge the impugned Act on behalf of its members and that the relief sought did not require individual participation (holding 5 (c)). The above case also differs from the instant one in that it was a public interest case and therefore not relevant. We find and hold that this Originating Summons can only be brought by the 10 Plaintiffs who are before this court in their individual capacities and it cannot be brought as a representative suit.

Whether the Originating Summons is incompetent

It is Counsel for the 2nd & 3rd Defendants who raised the issue of the Originating Summons, as filed being incompetent as the proper provisions of law were not invoked. That the Originating Summons offends Rule 9 of legal Notice No. 133 of 2001 and Order 36 Rules 7 and 8 of the Civil Procedure Rules. It is true that this Originating Summons is expressed to be brought under Sections 71, 74, 75, 77, 82 and 84 of the Constitution and Rule 11 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001. Rule 11(a) provides that Applications under Rules 5 and 9 shall be made by Originating Summons and the procedure laid down under Order 36 of the Civil Procedure Rules as far as possible will apply. Rule 9 then provides that applications for alleged contravention of fundamental rights, alleged otherwise than in the course of proceedings in a subordinate court or the High Court, shall be made directly to the High Court. In the instant case, the allegation of breach did not arise during proceedings in any court and the application was rightly made directly to this court.

The 2nd and 3rd Defendants however contend that Rule 9 being the substantive provision on how the application should have been brought, it should have been invoked. We do agree that Rule 9 should have been invoked being the substantive rule on the bringing of such applications. The other quarrel that the 2nd and 3rd Defendants have with the Originating Summons is that it offends Order 36 of the Civil Procedure Rules. Order 36 R.7 provides that an Originating Summons shall be in form 13 or No. 13 A of Appendix B with the necessary variations. Rule 8 then provides that the Originating Summons when

filed should be entered in the Register as a suit with the letter 'O.S' placed after the serial number to distinguish it from an ordinary plaint. That is not what happened in this case. The title of the Originating summons is that it is a Miscellenous Application not a suit. It did not conform to Rule 8. We do agree that the Originating Summons is grossly defective but since that was not raised before the commencement of the hearing of this Originating summons, we shall go ahead and consider the whole Originating Summons on its merits because the 2nd and 3rd Defendant have not demonstrated that they will or have suffered any prejudice as a result of the defect in the title and form of the Originating Summons.

Whether the Plaintiffs are entitled to payment of pension

The onus is on the Plaintiffs to demonstrate that they have a cause of action against the Defendants for any orders to issue. In the affidavit of Anne Wambui, the Plaintiffs describe the Defendants and why they are enjoined to this suit as such. At paragraph 13, Ann Wambui depones that the 1st Defendant, the Attorney General is sued on behalf of the Ministry of Finance in which the said KNAC Ltd was placed in the Government Organization and also on behalf of the other arms of the state to wit, the Official Receiver, KNAC Limited, 2001. At paragraph 14, she then describes the 2nd Defendant as James Olubayi who served as a special manager of the closed Life Fund Business until 2002, the 3rd Defendant is the Official Receiver who has been in charge of liquidation of the said company under both the Companies Act and the Insurance Act and lastly the 4th Defendant is a private limited liability company in which the Government of Kenya is the sole shareholder. Since the Attorney General is sued for and on behalf of the Arms of the Government of Kenya, we find that it is a misjoinder of parties to enjoin the 2nd and 3rd Defendants to these proceedings.

Further to the above, the 2nd and 3rd Defendants contend that they were released upon gazettement on 9th August 2002 under Gazzette Notice 5259 (SM 2) annexed to Ndisya's Affidavit.

Section 247 of the Companies Act provides for release of a liquidator involved in winding up of a company once he has realized all the property for distribution to the creditors and made a final return as required of him under that Act. Under Section 247 (3), an order releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him with the administration of the affairs of the company. He can only be held liable for his acts if the said order is revoked upon proof that he acted fraudulently or suppressed or concealed any material facts. At no time did the Plaintiffs challenge the Official Receiver/liquidators release and have it revoked in winding up cause No. 18/96. Furthermore section 242 (5) of the Companies Act does provide a remedy to a person aggrieved by any act or decision of the liquidator. It reads "S. 242 (5) if any person is aggrieved by any act or decision of the liquidator, that person may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order in the premises as it thinks just."

As seen above, the Plaintiffs had adequate remedies provided for under the companies Act and no explanation has been given as to why they did not pursue them and instead turned such complaints into a Constitutional application. Besides the Attorney General having been sued on behalf of the Ministry of Finance and on behalf of the other arms of Government, personal liability of the 2nd and 3rd Defendants is indeed misconceived and can not lie. In any event, no orders can be enforced against the 2nd Defendant who is sued in his private capacity. It is trite law that it is the Government that guarantees the rights of individuals and the Attorney General having been sued, James Olubai could not have been sued in his individual capacity. This has been decided in various decisions. In KBS LIMITED VS. ATTORNEY GENERAL HCMISC 413/05 Nyamu J. cited the Kiribati case of TEITWINNANG VS. ARIONG & OTHERS (1987) LRC Const 517 where Maxwell C.J. expressed the same view, that a Private Individual can not owe a duty to another individual for breach of fundamental rights under the fundamental rights provisions. That position represents our law in Kenya. It is only the Government which guarantees the rights of individuals and against whom such rights can be enforced. No orders can lie as against the 2nd Defendant in any event.

Whereas the Plaintiffs claim that their pension was not fully paid, the Defendants contend otherwise, that they have fully paid the pension. The Plaintiffs purportedly produced as ARP 3, which is exhibited to the

affidavit of Audi Lincoln and 2 others, at paragraph 19 thereof. It is deponed that Audi Lincoln was a senior clerk and shop steward who used to negotiate salaries for the unionisable members of staff and used to instruct the KNAC Ltd on how to do calculations for the employees. The source of the exhibited schedule is unknown. That schedule is not supported by any documentary evidence and it is not signed by anybody to authenticate it. The duty rests upon the Plaintiffs to prove the claim but not the Defendant to do so for them or fill in the gaps. It was upto the Plaintiffs to prove their specific entitlements of pension if any. That is why we are of the view that the Plaintiffs needed to approach a civil court that can take evidence to ascertain what their entitlements are.

It is the Defendants contention that the Petitioners were not entitled to pension as a matter of right because then they could have been dismissed without any. Section 5 of the Pensions Act provides as follows:

"5 (1) No officer shall have an absolute right to compensation for past services or to pension, gratuity or other allowances, nor shall anything in this Act affect the right of the Government to dismiss any officer at any time and without compensation.

(2) Under Section 5(2) those guilty of negligence Or any irregularity and other misconduct can be dismissed without any pension or gratuity."

Section 6 of the Act then provides that pension will only be paid upon retirement. The exceptions to that rule are contained at paragraph 6 (a) – (h) as to circumstances when pension may be paid to a public officer except at retirement. Some of the circumstances include abolition of office, compulsory retirement, upon medical evidence of infirmity and inability to perform duty etc.

It would have been important for the Plaintiffs to bring their services under one of those exceptions to the general rule and demonstrate that they are entitled to pension which would then be computed. They did not make any effort to do that. The 2nd Defendant Olubai, who is in an actuary, knowledgeable in Insurance and Pension matters, deponed that the trustees of the pension scheme are responsible for all aspects of management of the scheme in accordance with the Trust Deed, and Bills and that as per the Trust Deed, it is not automatic that a member whose employment is terminated is entitled to pension and that a procedure is set out in the rules regarding payment of the pension benefits and that none of the Plaintiffs have followed the said procedure. Obviously, the parties are not agreed on how, if at all, the pension would be paid, the procedure to be adopted, or how pension would be calculated. In addition this court has not had the benefit of seeing the Trust Deed as its existence was not denied by the Plaintiffs and yet the Plaintiffs never alluded to it. This buttresses our view that this is not the proper forum for the Plaintiffs to bring their claim for Pension as it would require proof by adducing of evidence. The best forum would be the ordinary Civil Courts. This court's mandate is limited to consider violations of fundamental rights and freedoms but not consider whether or not one is entitled to pension and how much is due to each.

<u>Whether the Originating Summons discloses any Cause of Action and whether the Plaintiff's rights were violated</u>

The courts have repeatedly said that in constitutional applications such as this, there is need for the person alleging breach of his rights to plead with precision or particularity under what section, subsection or even paragraph under the Bill of Rights, he alleges threat of breach or actual breach of his rights, his complaint and manner and extent of breach. There is now a host of authority on that issue.

In the case of ANARITA KARIMI NJERU V. REPUBLIC (No. 1) 1979 KLR 159 Trevelyan and Hancox JJ had this to say "we would however again stress that if a person is seeking redress from the High Court on a matter which is involving a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains the provision said to be infringed and the manner in which they are alleged to be infringed."

Again in CYPRIAN KUBAI VS. STANLEY KANYONGA MWENDA HCC 612/02, Khamoni, J went further and said; "An Plaintiff moving the court by virtue of Section 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the Section but also to the subsection and where applicable the paragraph or Sub-paragraph of the Section out of 71 to 83, allegedly contravened plus the relevant act of that contravention so that the Defendant knows the nature and extent of the case to respond to enable the Defendant prepare accordingly and also to know the exact extent and nature of the case it is handling….."

We consider the above decisions to represent the correct position in our law. The pleadings should be specific and precise in order for the Defendants to be able to know and respond to challenge. We shall later consider each allegation as pleaded and consider whether they satisfy the above prerequisites.

The Plaintiffs complain of contravention of their rights as hereunder;

Section 71 Protection of right to life;

Section 74 protection against torture or inhuman or degrading treatment or other punishment.

Section 75 protection against compulsory acquisition of property

Section 82 Protection against discrimination.

Of Contravention under Section 71

The Plaintiffs allege that the Government of Kenya through the 1st Defendant is well advised under Section 71 to pay its employees after it terminates their services and that the court should declare that the plaintiffs' right to life includes right to live in dignity, shelter, protection of one's family and means of livelihood. As pointed out earlier, the Defendants are of a different view. That they do not owe the Plaintiff's anything as all dues were paid.

Section 71 of the Constitution reads:

"no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."

2……."

That right is not absolute. The limitations thereto are found in Sections 71(2) which provides that one will not be regarded as having been deprived of his life if he dies as a result of the use of force to such an extent as is reasonably justifiable in the circumstances of each case. According to the plaintiffs, the guarantee to life extends to the protection of the dignity of every individual, their means of livelihood and prevention of damage to their lives and those of their families. No submissions were made by the Plaintiffs in regard to this claim but Mr. Mungla Counsel for the 2nd and 3rd Defendants submitted that the provision is clear, that nobody should be deprived of his or her life or killed intentionally except in execution of a lawful sentence of a court. Sub-section 2 does express the above content because it refers to a person dying as a result of use of force that is justifiable or if a person dies as a result of an act of war. The Section does not refer to life as meaning livelihood. In the case of BAITSOKOLI & ANOTHER VS. MASERU CITY COUNCIL a case from Lesotho, C.A. 4 of 2005, the court in considering a provision similar to our S. 71 ruled that demolition of traders' stalls did not amount to breach of fundamental rights to life. The court said,

3. "It is a well established principle that a constitutionally entrenched fundamental right in a justifiable Bill of Rights should be given a generous interpretation. At the same time, the language of the Constitution must be respected and not ignored in favour of a general resort to "values' leading not to interpretation but divination, Rather it is in context which should determine the ambit of a provision.

4. Caution must also be exercised in making reference to authorities from other jurisdictions which, although frequently of value and sometimes of importance can result in blithe adoption of alien concepts or in opposite precedents.

5. Section 5 (1) states the right to life is both positive and negative from recognizing both an inherent right and a prohibition on arbitrary deprivation whilst the further provisions make clear that the protection afforded by Section 5 relates to life in the sense of ordinary human existence.

6. In particular the strict limitations elaborated by Section 5 (2) are hardly consistent with an interpretation of the right to life as encompassing the right to a livelihood. The limitations are both exclusive and specific and nowhere do they authorize curtailment in any circumstances, however pressing, of a right to livelihood….."

The Constitutional Provision on the right to life in the Lesotho Constitution is similar to the Kenyan one and the above decision represents, in our view, the correct interpretation of that Section. This court cannot ignore the plain language of the Constitution on the right to life (S 71) and bring in a wide interpretation that is not envisaged. If this court were to adopt the liberal interpretation that life under that Section means right to livelihood and right to live in dignity, then our courts would be flooded with applications from all Kenyans who live in deploring conditions in the slums; the jobless and many others. We adopt the plain meaning of that Section and find that it refers to human existence and prohibits taking away of life of another and it does not extent to right to livelihood or right to live in dignity. We find that the Plaintiffs have not demonstrated that their rights to life were infringed in any way.

<u>Of Contravention under Section 74.</u>

That Section reads:

"74 (1) no person shall be subject to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of Kenyan Law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Kenya on 11/12/1963"

The Plaintiffs have not attempted to demonstrate how they were tortured or subjected to inhuman or degrading punishment or treatment.

The Concise Oxford English Dictionary defines torture as

"the action or practice of inflicting severe pain as a punishment or a forcible means of persuasion; great suffering or anxiety. "

Inhuman means

"Lacking positive human qualities, cruel and barbaric not human in nature or character.

Degrade means

"cause to suffer a severe loss, of dignity, or respect, demeanor, however the character or quality of…."

Punish means "inflict a penalty or a retribution for an offence. Inflict a penalty on someone for an offence, treat harshly."

The plaintiffs have not demonstrated that they were ever tortured, treated in an inhuman manner or suffered any degrading punishment.

Delay or failure to pay pension cannot amount to inhuman or degrading punishment. Besides, Section 74

(2) provides a limitation under the Section so that any action authorized by law cannot be said to be torture, inhuman treatment or degrading punishment. The plaintiffs have failed to prove any contravention under that section. All they have done is make unsubstantiated allegations.

Of Contravention under Section 75

It is the Plaintiffs contention that their pension was paid after 7 years and the Government therefore unjustly enriched itself and has continued to do so. The Plaintiffs allege that the action by the Defendants was a deprivation of their property and are therefore entitled to the balance of the pension plus compound interest. Counsel submitted that the Plaintiffs benefits are property under Section 75 of the Constitution and that property include money, land, choses in action. Section 75 reads as follows:

"Section 75(1) no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied……."

Again the protection under Section 75 is not absolute because compulsory acquisition may be done in the interests of defence, public health, town and country planning. We do agree with Mr. Mungla's submission that Section 75(1) has two kinds of property envisaged. "No property of any description shall be compulsorily taken possession of" secondly 'No interest or right over property of any description shall be compulsory acquired.

Black's Law Dictionary defines property as being "the right to possess, use or enjoy a determinate thing"

The first limb of section 75(1) would therefore mean a person who is in actual possession of a property which he is compulsorily dispossessed of. The Plaintiffs have not demonstrated that they were in possession of any property from which they were dispossessed of. As we pointed out earlier, it is important that the Plaintiffs plead with precision what their complaints were under S. 75 so that the Defendant and the court could not be left guessing which particular provision the Plaintiff is moving the court under ie was it the 1st or 2nd limb of S. 75(1)

In the 2nd limb of Section 75(1), it was upto the plaintiffs to demonstrate that they have a legal interest in the property claimed, that and that it has been compulsorily taken away from them. Since the Defendants deny that they owe any pension, the Plaintiffs claim is a contingent asset. It needs proof and is recoverable as a civil debt in a civil court. It is not a definite asset like a decree of a court that is certain that could be recoverable under that Section. See SHAH V AG (supra). Otherwise we would agree with the submission that pension is property envisaged under S. 75 (1), of the 2nd limb, if the Plaintiffs had proved that they were entitled to it. In the instant case, the Plaintiffs cannot be entitled as of right without the necessary proof and we want to emphasis that this is the wrong forum for them to establish that right. It is only in the ordinary civil courts that they can establish that claim.

Of Contravention under Section 77

Even though the plaintiffs cited the above section of the Constitution, no prayer has been sought in respect thereof nor has any specific allegation been made in respect thereof. The plaintiffs did not specify which particular subsection of the 15 subsections, they intended to seek redress. Section 77 (2) relates to a fair hearing before a criminal court while Section 77(9) relates to fair hearing before a civil court. As pleaded, the Defendants would not have known how to respond to the complaints under that section and that claim must fail.

We have already considered in this judgment that in an application under Sections 71 to 83 of the Constitution, the Plaintiff has to specifically plead under what section, subsection or paragraph of a particular section has been or is likely to be contravened. We refer to the cases of ANARITA KARIMI; CYPRIAN KUBAI (supra) and MATIBA V. A.G. MISC. APP. 666/1990 where the different courts have repeatedly held that the provisions of law under Section 71-83 be specifically pleaded so that the Defendant can know what challenge to meet and respond to which is part and parcel of the principle of

fair hearing. In this case, the Plaintiffs failed to specify whether their complaint is under Section 77(2) or 77 (9) and no orders could issue.

Of Contravention under S. 82

The section reads in part:

"Section 82(1) Subject to Sections (4) (5) and (8) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) subject to the subsection (6), (8), (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public officer or a public authority.

(3) In this Section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, or residence or other local connection, political opinions, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) ……"

The Plaintiffs have neither alleged nor proved any breach or threatened breach under the above section and there is no order/declaration sought in respect thereof. The section was merely cited and that was all. The plaintiffs never endeavored to categorise the manner of discriminatory treatment accorded to them. Section 82(3) is specific and lists the various categories of discrimination that one has to come under one or more of those categories ie were they discriminated against on account of sex, creed, political opinions, or any other local connexion. In addition the Plaintiff's never demonstrated that any other person was accorded special treatment, privileges, or advantages that they were denied.

We do find that the failure or delay in paying of pension to the plaintiffs does not fall under any of the categories under Section 82(3). Some employees were not paid and they were left out because the Plaintiffs claim that all the KNAC employees are yet to be paid. The plaintiffs have totally failed to demonstrate with evidence that they are entitled to any declaration or order under Section 82 of the Constitution.

Conclusion

After considering all the evidence submissions, authorities cited in this case, we find that although Section 84(1) of the Constitution allows anybody whose rights have been or are likely to be contravened to approach the court for redress, and the court is enjoined to make any orders, issues such writs and give such directions as it may consider appropriate for purposes of securing and enforcing the individual rights, Yet one who approaches the court must have a cause of action. The allegation must not be frivolous or vexatious. We are of the considered view that the Plaintiffs had no cause of action since they have totally failed to prove any contravention of their rights. The Plaintiffs have approached the Constitutional court with claims which would have been best dealt with in the ordinary civil courts being complaints arising from contracts of employment. We find that the filing of this suit in this court amounts to an abuse of the court process. We are in agreement with the court's decision in HARRIKISSON V. THE A.G. of TRINIDAD AND TOBAGO (1979) 3 WLR. In that case a teacher was transferred to another school without being given 3 months' notice as required by the provisions of the Teachers Service Commission. He applied under S.6(1) of their Constitution for redress. S. 6(1) is equivalent to our S. 84 (1). The Privy Council rejected his appeal and at page 64 the Privy Council said;

"the Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action where infringement of rights can found a claim under substantive law. The proper

cause is to bring the claim under that law and not under the Constitution.

….The notion that whenever there is failure by an organ of Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental

freedom guaranteed to individuals by Chapter I (our Chapter V) of the Constitution is fallacious. The right to apply to the High Court under Section 6 (our Section 84) of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.

In an originating application to the High Court under Section 6 (1), the mere allegation that a human right or fundamental freedom of the Plaintiff has been or is likely to be contravened is not of itself sufficient to entitle the Plaintiff to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous and vexatious or an abuse of the process of the court, as being made solely for the purposes of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."

We are in agreement with and do adopt the above decision and hold that the plaintiff's Originating Summons is vexatious and frivolous and amounts to an abuse of the court process. If the Plaintiffs had any remedy, it lies in civil courts. We also reiterate what the court of appeal said in SPEAKER OF NATIONAL ASSEMBLY V NJENGA KARUME CA 92/1992; that where the Constitution or an Act of Parliament provides a clear procedure for redress of any grievance, that procedure must be adhered to. In the instant case instead of the plaintiffs filing a Constitutional application they should have adhered to the normal procedures available in claims arising out of contract or procedure in their Trust Deed or they should have pursued their claims in Winding Up Cause No. 18/1996.

For all the reasons given in this Judgment, we are of the view that the plaintiffs have totally failed to convince this court that they are entitled to any of the orders/declarations and damages sought in this Originating Summons. There was not even an attempt to justify the grant of damages. We therefore dismiss the Originating Summons. Due to the nature of this application we are of the view that each party bear their own costs.

Dated and delivered this 28th day of May 2009.

R.P.V. WENDOH

JUDGE

G.A. DULU

JUDGE