REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(NAIROBI LAW COURTS)
Civil Case 1649 of 2001& 395 of 2001 (Consolidated)

JAMES NYANGIYE AND OTHERS…….…..PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL

OF THE REPUBLIC OF KENYA……DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT NO. 395 OF 2001

PETER BAIYE GICHOHI AND OTHERS ……PLAINTIFF

VERSUS

ATTORNEY GENERAL…….……DEFENDANT

RULING NO. 2 - 2009

The Plaintiff/Applicants herein came to this court by way of a notice of motion dated 18th day of June 2008 and filed on 19th day of June 2008. The same is brought under section 2, 3 and 3A of the CPA. Four prayers are sought namely:-

1. *That the honourable court, be pleased to determine the issue of liability in this suit basing on evidence obtaining and already on the court, record and issue of quantum be addressed later*.

2. That the honourable court, be pleased to allow the defendant if it so wish to call evidence on liability if any at this stage.

3. That consequently and upon determination of prayers 1 and 2 above the honourable court, be pleased to issue a preliminary decree.

4. *That the costs of the application be provided for*.

The grounds in support are set out in the body of the application, supporting affidavit, and oral submissions in court. The salient features of the same are as follows:-

- That the proceedings are a combination of two cases namely Nakuru HCCC No. 395 of 2001 and

- The proceedings herein is a class suit, comprising of numerous plaintiffs all being retrenches of the government of Kenya.

- That owing to the sheer numbers of the plaintiffs involved, it is not practically possible to have all the plaintiffs testify and give evidence before the court on liability as this will be merely repetitive as the background information leading to retrenchment is common to all.

- That a number of plaintiffs have given their testimony before the honourable court touching to all liability.

- That from the evidence one major issue arises namely:

(a) Whether the retrenchment was lawful or not in the first instance and in the second instance:-

(b) What each plaintiff is entitled to.

- That for the reasons given above, it is only fair that the court, do proceed to determine the issue of liability at this point, in time and at this stage of the proceedings. The major driving force behind this request being that, if this court, were to hold that the retrenchment was lawful, then it need not go further with the adduction of further evidence on the establishment of the individual claims.

- From the sheer number of plaintiffs and at the pace the proceedings have been moving, the case is going to take 22 years to be finalized and that will be a waste of judicial time hence the need for the court, to find a more simpler way of disposing off the matter speedily.

- That it is only proper and in the interest of justice to both parties that liability be established first before the evidence on quantum can be called by either side. This will quiken the process as each claimant will only be being called upon to present documentation to prove the quontum of his peculiar claim only, cross examined by the defence if need be, and then that will be it for each plaintiff.

- That if the action mentioned above is taken, the same will be in line with the provision of sections 3(2) of the Judicature Act cap 8 laws of Kenya which requires courts to decide cases without undue delay.

- This will also be inline with the provisions of section 2 of the CPA which makes provision that a decree may be preliminary or final.

- It is the applicants stand that, in making the above stated provisions, the legislature had in mind the arising of such cases or stuation.

- Adapting such a move, will not only assist in the management of this case but other cases as well.

- That since the letter is worded in similar words, and mode of identification for retrenchment was the same, it is proper that liability be established to enable the plaintiffs know whether their rights were breached or not.

The defendant moved to oppose the said application on the basis of grounds of opposition dated 16th September 2008 and filed on 6th October 2008. They are three in number namely:-

1. That the application is misconceived, incompetent and an abuse of the process of court, for reason:-

2. That this is not a class suit, as alleged by the applicant's, to the contrary,

(a) There is absence of commonality of issues of law and fact.

(b) The suit is premised on various and or different contracts of employment

(c) The contracts of employments were executed at different periods.

(d) The said contracts were premised on different terms and condition of service, the nature and terms thereof varies from plaintiff to plaintiff.

(e) The job descriptions, job grading and groups involved are not common to all the plaintiffs.

(f) The issues of law and fact disclosed on the face of the pleadings and from the evidence adduced in court, so far inevitably require thorough investigation and security by way of a proper trial.

3. That the Defendant/Respondent restate the following:

(a) Some plaintiffs gave notice to sue while others neglected to do so hence the need for a proper trial.

(b) Some plaintiffs came into the suit outside the limitation period.

In their oral high lights, counsel for the defence simply reiterated the grounds of opposition filed by them and then stressed the following points:-

- Contend that this is not a case where the issue of liability can be determined at this point, because it is not an issue of declaration alone, but issue of compliance with provisions of section 13A of the government proceedings Act, also comes into question. It is necessary for each plaintiff to establish that they have complied with that provision.

- They contend that similar issues arose before Ondeyo J as she then was, in Nakuru and it was ruled that each plaintiff has to establish existence of a contract between him and her with the government. This requires each of them to prove their case personally.

- They also contend that global liability does not a rise as the plaintiffs were in different job groups, and as such they cannot be treated uniformly.

- They contend that the defendants intend to raise the issue of limitation as the plaintiffs came on board at different stages of the proceedings, and so they will need to satisfy the court, that they complied with all the procedures required for presenting a suit against the state.

- They contend that the plaintiff/applicants should have sought directions on the mode of procedure before commencement of trial. By them seeking them at this point in time, it means that all the applicants want is simply to delay the finalization of this matter.

- Add that the relief the Plaintiffs/Applicants seek, is not available to them as this is not a representative suit, where only few plaintiffs need to testify on behalf of the others and then the court, can proceed to determine liability.

- On case law cited counsels, for the state submitted that none of them is relevant to the issues raised by the applicants.

- Lastly that the defence raises triable issues that need to be canvassed.

The other plaintiffs appearing in person as well as counsel for the other plaintiffs in HCCC 1649/2001 supported the application.

In response to the respondents' opposition to the application, counsel for the plaintiff in HCCC 1649/01 stated that although the respondent is opposing the application, they have not attempted to assist the court, on the way forward on how to resolve the matter speedily, in view of the large numbers of the

plaintiffs. They should offer an alternative for the speedy disposal of the matter.

Where as the counsel for plaintiff in HCCC 395/01 who is applying stated that, the defence counsel has simply dwelt on technicalities instead of addressing issues of substantial justice. They maintain that, the establishment of liability before proceeding to conclude the rest of the evidence is a form of declaration and their request is perfectly in order. They still maintain that establishment of liability first will quicken the proceedings as the court, will only be required to go into the issue of quontum. They agree that each plaintiff has his/her claim, but, that not withstanding the court, cannot loose sight of the fact that they share common facts on how their grievances arose which need not be repeated whenever each plaintiff takes the stand to testify. They lastly contend that directions on the mode of procedure can be taken at any stage of the proceedings as it will be unreasonable to prosecute a case for over 22 years.

On the courts assessment of the facts herein, it is clear that:-

- It is common ground that the two consolidated suits carry a large number of plaintiffs.

- That there is no dispute that all these plaintiffs have common averments in the plaint forming the back ground information to their cause of action or their grievances. They have not each presented individual plaints which have been declared to be consolidated together.

- It is also common ground that the defendant has not filed separate defences to each individual claim, but a common defence to the common claim presented communally by the plaintiffs.

- It is also common ground that the consolidated suits, arise from the retrenchment exercise that the Kenya government carried out against the plaintiffs among others after they were ellegally and unjustifiably identified for retrenchment.

- It is also common ground, that the format used to identify the plaintiffs for retrenchment was the same and the wording of the retrenchment contract was the same.

It is on record that on 18/9/2007 when the hearing of the case commenced, issue was raised about the mode of procedure, in view of the large number of plaintiffs involved, whom the law requires that each should testify in support of his/her case. This court heard representations of each sides', counsels, and then gave the following directions summarized here under as follows:-

1. Issues: It was noted that issues had not been agreed on. This court, gave directions that, since no agreement has been reached on the issues, each side could file its own failing which the court, could frame its own at the time of drafting judgement.

2. Documents: It was discovered that, discovery of documents had not been done by either side, and in view of the history of the matter, the court, ordered the case to proceed in the condition in which it was, and gave liberty for discovery to be done piece weal as each witness proceeded to tender evidence, and in the event of any objection being raised, against any documents, then the same to be canvassed and ruled upon as the case proceeds.

3. Deconsolidation: As regards deconsolidation, the court, ruled that deconsolidation would prolong the trial hence the matter was ordered to proceed as previously consolidated. It was decided that those selected to give evidence in HCCC 1649/01 will be fielded first followed by those in HCCC 395/01. But when either side is giving evidence the counsels and plaintiffs of the waiting side were at liberty to participate in those proceedings.

4. History of the matter: On the basis of the history of the matter, it was decided that the trial should proceed in the manner in which it was.

5. Representation: It was decided that although the matter was not a representative suit, the common background information was going to be laid by a few witnesses which has been done.

It is clear from the above outline of the content of the earlier directions, taken herein, that the issue of determination of liability before determination of quontum was not gone into. This is what the plaintiff/applicants want this court, to make a pronouncement on the same. The empowering sections relied upon are sections 2,3, 3A and order 50 rule 1 of the CPR. Order 50 rule is simply an empowering provision specifying the procedures to be followed when presenting an application which is either by way of chamber summons or notice of motion. The mode invoked by the applicant is a notice of motion.

This court does not see any relevance of section 2 of the CPA section to the application save that it makes provision for what is meant by a preliminary decree. The explanation given of a preliminary decree is as follows:-

" *A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed off. It is final when such adjudication completely dispose off the suit. It may be partly preliminary and partly final"*

The existence of this definition in the CPA, in the opinion of this court, is sufficient proof that what the applicant is seeking herein is not a lieR to the civil procedure process. It is something that can be granted by the court, and accessed by a litigant to the civil process. What remains for determination is the avenue through which the preliminary decree can be accessed. The applicant has chosen the provisions of sections 3 and 3A of the CPA. These read:-

"3*In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force"*. This courts', construction of this section is that it protects power and or procedure for accessing reliefs, by litigants not catered for by the CPA and the CPR, but which are catered for by other laws and procedures. It simply means that, the court, is at liberty to apply those other donated powers and procedures, to the particular situation, and finally determine the issues before it. Herein, this section does not help the applicant much as what the applicants is relying on is the CPA, and not any other specially donated powers and procedures under any other law.

The elimination of section 3 leaves section 3A in the arena. This section provides:-

" *Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."* Section 3A is therefore just a statement. The yard stick that the court, is required to apply in order to ensure that ends of justice are met to both parties is not in built. This has been provided by case law emanating from the CA and as dutifully followed by the superior court.

There is the case of WANJAU VERSUS MURAYA (1983) KLR 276 in which Kneller JA as he then was held inter alia that:

" *Section 3A of the CPA cap 21 although saving the inherent powers of the court, to make such orders as may be necessary for the ends of justice to both parties and to prevent the abuse of the power of the court, should not be cited where there is an appropriate section or order and or rule to cover the relief sought.*

The case of MEDITERENEAN SHIPPING CAMPANY S.A VERSUS INTERNATIONAL AGRICULTURE ENTERPRISES LIMITED (1990) KLR 183 where it was also held inter alia that:-

" *It is now trite law, that the inherent jurisdiction of the court, should not be invoked where there is specific statutory provision which would meet the necessities of the case.*

(2) Section 3A of the CPA ought to be called into the aid of a litigant in all situations not specifically legislated for. It all depends on the circumstances of each case."

Lastly the case of TANGUS VERSUS ROITEL (1968) EA 618. Where it was also held inter alia that:-

" *The courts', inherent jurisdiction should not be invoked where there was a specific statutory provision to meet the case"*

The fore set out case law is proof, that there is jurisdiction on the part of this court, to do justice to the parties even where no other provisions of law or case has provided an avenue. This assertion by this court, is fortified by the decision of Bosire J as he then was (now JA) in the case of MUCHIRI VERSUS A TTORNEY GENERAL AND 3 OTHERS (19910 KLR 516 where his lordship held inter alia that:-

" *The inherent jurisdiction is invoked where either there are no clear provisions upon which the relief sought may be anchored, or where the invocation of rules of procedure will work in justice.*

As mentioned earlier on, there is no provision of law, cited as a basis for anchoring such an application, leaving the court, with no alternative but to fell back on to the inherent jurisdiction of the court.

The next for the court, to determine is whether there is any judicial pronouncement on the issue of a preliminary decree. There is the case of MUTHIKE VERSUS KENYA FIIM CORPORATION (1989) KLR 499, a court of appeal decision. The brief facts of the case are that the defendants defence was struck out. Later on the matter proceeded to hearing and on assessment of damages done by a judge other than the judge who struck out the defence, the judge who did the assessment however made some observations about the striking out order. The applicant who was the beneficiary of the striking out order appealed against the assessment of damages. The Respondent attempted to cross appeal against the appeal and introduced grounds touching on the order for striking out the defence. The CA held inter alia that:-

1. A preliminary decree conclusively determines the rights of the parties on some issue or issues though further proceedings must be taken before the suit, can be completely disposed off, while interlocutory decrees are seen as having the effect of merely regulating procedures and do not decide the right of the parties.

2. Consequently Patel JSs' decision resulted in a preliminary decree which could not be the subject of a mere cross appeal. It should have attracted its own appeal.

This courts construction of this decision is that:-

(a) Indeed room exists for a court of law to make a pronouncement which pronouncement can lead to what in law can be termed as a preliminary decree and that is why a definition of the same exists in section 2 of the CPA.

(b) Such a pronouncement when made does not finally adjudicate and determine the rights of the parties. But its purpose is merely regularatory in that it tends to regulate the mode of procedure, that is to follow in order to finally determine the rights of the parties.

(c) Like in the cited case a determination of liability was made following an application to strike out the defence. When the defence was finally struck out, liability against the defendant was established which establishment did not determine the dispute between the disputants finally, but merely regulated that procedure that was to be followed namely formal proof.

Applying this principle to the facts under review herein the court, is satisfied that it s properly seized of this application and it can make a pronouncement on the same. The above finding not withstanding, the court, has not been referred to any decision by the superior courts, and or the CA on similar circumstances as those prevailing herein. This is peculiar in that the court, is being asked to determine liability first on the basis of pleadings of both parties on record. Unlike the situation of the CA case cited above, and many others that this court has judicial notice of, where the court is usually called upon to determine liability by striking out one sides pleadings.

This scenario qualifies to what Nyamu J as he then was (now JA) referred to as new challenges, in his

lordships decision in the case of REPUBLIC VERSUS THE BUSINESS PREMISES TIBUNAL LEO INVESTMENTS LIMITED AND SAMIMA INVESTMENTS LIMITED NAIROBI MISC APPLICATION. 562 OF 2007 decided on the 6th day of June 2007.

At page 9 of the said ruling the learned judge made the following observations at line 11 from the bottom. It reads:-

" *I have no doubt that this is a very unique case and calls for new thinking because of the special circumstances as described above.*

The fact that the situation is novel is no good reason for me to fold my hands or seek to perch on the nearest fence and do nothing. The facts of each case that comes before the court, cry out in a special way for justice to be done. Some of the past situations have clear guide lines and in most cases the courts, do justice in accordance with those guide lines. However, if laws are applied too strictly and mechanically, law ceases to keep pace with social innovation and societal needs. If there is an entirely new situation, as I have encountered on the basis of the unique facts in this case, such a situation calls for individual justice, hence the development of equity. The new facts demands dynamism and growth in the law, to meet the new situation.

Law regulates behaviour either to reinforce existing social expectations, or to encourage constructive change, and laws are most likely to be effective when they are consistent with the most generally accepted societal norms and reflected collective morality of society.

I derive great comfort in the thought that the pathways of justice are infinite and every generation of judges will always find the pathways to follow if they are to look out of the window of their chamber or the court room"

Indeed this is a decision of a court of concurrent jurisdiction and therefore learned judges observations or thoughts are binding on this court. However upon careful pondering by this court over the content of the said observation this court, agrees entirely with the same. The justification for the agreement, is that has there been no anticipation of new challenges arising for the courts, to determine, the legislature would not have found it fit to make provision for the invocation of the inherent jurisdiction of the court. Failure to meet such challenges would retard the growth of the law, and jurisprudence and the art of judicial making would simply become a mere routine and tasteless.

This court, in a ruling of it own in the case of KAMLESJH MANSUKHALAI DAMJI PATTNI VERSUS KETAN SOMAIA AND OTHERS NAIROBI HCCC NO. 878/01 as consolidated with NAIROBI HCCC 879/01, 880/01, 881/01 decided on 30th day of March 2009 approved the learned judges reasoning. In this own cited ruling, this court, was faced with a challenge in that it was called upon to determine the locus standi of an official Receiver who had been joined to the proceedings by an order of the court. Issue arose as to whether he had any legal status to participate in the proceedings without channeling his grievances either through the plaintiff or the defendant. After due consideration, this court ruled that "*the official Receiver once enjoined by a court, of laws order, gains a legal status from the court order and participates in the proceedings in his won right without going through either the defendant or the plaintiff."*

The court, applies the above reasoning to the Rival arguments herein and the court makes a finding that it is inclined to allow the plaintiffs/applicants application dated 18 day of June and filed on the 19th day of June 2008 for the following reasons.

1. There is jurisdiction vested in this court, to invoke its inherent jurisdiction enshrined in section 3A of the CPA to order a determination of liability before proceeding on to determine the issue of quontum after hearing both parties on the issue of liability.

2. The determination of liability will not fore close rights of the litigants but will merely determine the form of procedure to be adopted thereafter.

3. It is this courts', finding that should the court, take 22 years to determine the dispute, and in the end rule that there was no case against the defendant, the court would have rendered injustice to both sides and not justice.

(b) The court, would have punished the plaintiffs represented with huge bills of legal fees which could have been avoided.

4. Judicial time and efforts will be saved in that if the court, determines that liability has not been established, that will be the end of the litigation, and both sides would have saved on costs.

5. The defence will not loose their right to agitate the defence of limitation and failure to serve he statutory notice as they will be given an opportunity to call evidence.

6. Allowing parties to run the full length of trial for 22 years, the move would be too tortuous, punitive, imprudent and unreasonable and would defeat the principle that justice should be dispensed speedily where possible. It will also be an exercise in futility.

7. For the reason of the findings in number 1, 2, 3, 4, 5, and 6 above, parties are at liberty to proceed to fix the matter for hearing of the defence evidence on liability. There after submission will be made, and then the court will rule on the matter conclusively and provide the way forward.

8. Since the application simply seeks the way forward costs of the application will be in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2009**.**

R.N. NAMBUYE

JUDGE