REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Suit 112 of 2007

MUKUNA GITONGA & 39 OTHERS……PLAINTIFFS

VERSUS

KINORO TEA FACTORY CO. LTD……..……..DEFENDANT

: Preliminary Objection – may be raised at any time – Raises a pure

point of law – to determine and dispose the issue –

: Suit previously heard and determined between

RULING

By an undated Plaint filed on 16-10-2008, the forty (40) Plaintiffs sought the following orders against the Defendant –

(a) general damages as pleaded in paragraph 8 of the Plaint;

(b) costs of the suit with interest at Court rates on (a) above, and;

(c) any other relief the Court deems just and expedient to grant to meet end of justice;

In its statement of Defence which is also undated but filed on 30-11-2007 the Defendant – Kinoro Tea Factory Company Limited) state in paragraph 3 thereof as follows:-

"**3. The Defendant states that the Plaintiff's claim is misconceived, bad in law, does not disclose a cause of action and is incurably defective. The Defendant shall take the earliest possible opportunity to raise a preliminary objection on the competence of the same.**

The Defendant fulfilled its threat by a Notice of Preliminary Objection dated and filed on 11-06-2008 on the grounds following –

(1) that the Plaintiff's suit is bad in law as it raises no cause of action;

(2) that the Plaintiff's suit is an abuse of the Court process.

This Preliminary Objection was urged before me on 5th May 2009, by the respective parties' Counsel. Mr. Gathangu learned Counsel for the Defendant argued that the suit is bad in law. He based his entire argument on paragraphs 4, 6, and 8 of the Plaint, and the prayers sought. I have already set out the prayers at the beginning of this Ruling. Paragraph 4, 6 and 8 of the Plaint are historical pleadings and to appreciate that history, it is also necessary to include paragraphs 5 of the plaint. These provide as follows :-

(4) the Plaintiffs received retirement letters form the Defendant between the years 31st July 2002 to 31st January 2003.

(5) That the reason given in the letters of early retirement dated 31st July 2002, and 31ST January 2003 were that the Defendant was undergoing restructuring and re-engineering of the factor/unit and reduced crop intake among other reasons;

(6) That following the fore mentioned early retirement of the Plaintiffs, the High Court Nairobi in Nairobi Civil Suit No. 948 of 2003 ordered that the Plaintiffs be paid the dues (underlining added).

(7) That upon retirement, the Defendant failed to pay the Plaintiffs all their dues, and

(8) Sets out the Plaintiffs' respective claims erroneously called general damages) against the Defendant.

Mr. Gathangu learned Counsel for the Defendant puts two arguments before the Court. **Firstly** he argued that the Plaintiff' remedy is execution of the judgment in Nairobi HCCC No.948 of 2003, and not a fresh suit. The action is res judicata under Section of the Civil Procedure Act [Cap 21, Laws of Kenya].

Secondly, said counsel argued the action is bad in law as the Plaintiffs claim general damages in paragraph 8 in which they have quantified their respective claims, and yet in the prayer, claim for general damages as stated in paragraph of the Plaint. This is bad in law as no damages are payable in what is specified and as no special damages is pleaded, Counsel asked that the suit be struck out with costs to the Defendant.

As expected, Mr. Ayub Anampiu learned Counsel for the Plaintiffs opposed the Preliminary Objection on the grounds that it lacked merit and was intended to delay the hearing of the Plaintiffs' suit. On specific issues whether the suit was res judicata to succeed, the Defendant must show that the cause (i.e Nairobi HCC No.948 of 2003) was heard between the Plaintiffs and Defendants that is to say, these parties named in the Plaint, and judgment given. Counsel submitted that there was no affidavit to show that the Plaintiffs were either parties to that suit or that they were paid –

On the question of the prayer for damages, Mr. Anampiu submitted that this was not fatal to the case and could be cured by amendment. Counsel relied on the decision of my brother Hon. W. Ouko J. in the case of **KANJA MIRITI VS JAMES GITONGA (Meru H.C.C.A. No.44 of 2003**) in which the learned Judge relied on the Civil Appeal decision in D.T. DOBIE & Co. (K) LTD. VS MUCHINA [1982] K.l.R.I where Madan J. as he then was said **inter alia:**

"**The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of**

action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court is not usually informed so as to deal….."

Counsel for the Plaintiff concluded that there is disclosed of a reasonable cause of action and prayed that the preliminary objection be disallowed and the suit proceed on its merits.

I entirely agree with the submission by Mr. Anampiu learned Counsel for the Plaintiffs and the decision of Madan J A (as he then was) in the case of **D.T. Dobie & Co. Ltd Vs Muchina (Supra**) that a court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. I further agree with Mr. Anampiu's submission that the Defendant has not filed an Affidavit showing that the Plaintiffs were parties to Nairobi H.C.C.C. No. 946 of 2003, or that their claims were settled in that suit; and that therefore the issue of resjudicata. I further agree that any defect in pleadings can be cured by way of an amendment.

However, each case must be decided upon its peculiar facts. Firstly on the question of res judicata (as set out in Section 7 of the Civil Procedure Act) the matter in question herein has been directly and substantially been in issue in a former suit between these Plaintiffs and the Defendant in Nairobi **HCCC No.948 of 2003**. There is no need for the defendant to file an Affidavit to say so. The Plaintiffs' Plaint, paragraph 6 which I repeat here –

"**6. That following the aforesaid early retirement of the Plaintiffs, the High Court in Nairobi Civil Suit no. 948 of 2003 ordered the Plaintiffs be paid all their dues"**

In the Verifying Affidavit of Mukuna Gitonga (the first Plaintiff) sworn on his own and on behalf of the other 39 Plaintiffs, sworn (on 11th January 2003) the, Plaintiff swore that all the facts contained in paragraph 1-12 of the Plaint are true and within the First Plaintiff's and the knowledge of the other 39 Plaintiffs. The Plaintiffs' Counsel is therefore estopped from demanding any Affidavit from the Defendants when the Plaintiffs themselves already confirm in their own pleadings (by which they are bound out) that they were parties in the former suit. The court is bound by the express provisions of Section 7 of he Civil Procedure Act, not to entertain any suit in which the matter in issue has directly and substantially been in issue between the some parties, and thatthe matter has been finally determined by a Court of competent jurisdiction. The Preliminary objection therefore succeeds on the question of res judicata and should be struck out.

Having arrived at the above conclusion, it is strictly not necessary reasons to consider the question of whether or not the claim is bad in law, and discloses no reasonable cause of action. Although a pleading can be cured by amendment, in this particular case, I think that in order I wish to avoid and discourage discplicity and multiplicity of suits, suit should be struck out.

In law special this damages are two types; general damages, and special or particular damages. General damages are damages which the law presumes follow from the type of wrong complained in contract or tort. General damages are not specifically claimed. On the other hand special damages. often shortened to "**specials"**, are damages that are alleged to have been sustained in the circumstances of a particular wrong, and to be awardable, special damages must be specifically claimed and proved.

In this case the claim in paragraph 8 and in the prayer for specials which the Plaintiffs swear in the verifying Affidavit are the sums, they were each awarded as stated in paragraph 6 of the Plaint.

It is public policy that there should be in no multiplicity of suits, and that is why for instance why there is section 6 of the Civil Procedure Act, for stay of suits (pending the determination of the pending suits, and Section 7 of the said Act, prohibiting the entertainment of suits which have previously been determined between the same parties.

In this matter therefore the defendant having been ordered to pay the Plaintiffs their dues as per

paragraphs 6 and 8 of the Plaint, the proper cause of action is to seek execution of the orders in Nairobi **HCCC No.948 of 2003**, and I so order.

In the meantime, and for reasons given above, the Defendants' Preliminary objection succeeds, and the Plaintiffs Plaint file on 16th October 2007 is struck out with costs to the Defendant.

There shall be orders accordingly.

Dated, delivered and signed at Meru this 5th day of June 2009

M.J. ANYARA EMUKULE

(JUDGE)