ROSALINDA NYACHOMBA & 39 OTHERS…….....PLAINTIFFS

Versus

NYERI FARMERS SACCO LTD……1ST DEFENDANT

TAIFA SACCO SOCIETY LTD.....2ND DEFENDANT

R U L I N G

On 26th February, 2007, the plaintiffs filed the instant suit against the defendants claiming the sum of Ksh.28,707,953/=, general damages for misrepresentation and costs of the suit. Their claims were founded on the fact that the 1st defendant was the last employer of the plaintiffs while the 2nd defendant was the successor to the 1st defendant. The plaintiffs were employees of the 1st defendant which had previously taken over employment contracts from Nyeri District Co-operative Union. The 1st to the 25th plaintiffs sued the 1st defendant in Nyeri HCCC No.170 of 2001 and the 26th to 40th plaintiffs sued the 1st defendant in Nyeri HCCC No.145 of 2002 in which all the plaintiffs jointly sought prayers:-

(i) Severance pay for redundancy

(ii) Unpaid leave arrears for the years worked

(iii) costs and interest

The above two suits were subsequently consolidated and heard on 27th July, 2006. Prior to the hearing aforesaid and unknown to the plaintiffs the 1st defendant secretary changed its name to Taifa Sacco Society Limited from Nyeri Farmers Sacco Limited. It had done so in breach of principles of law and good faith as it failed to notify the court of the change aforesaid and misrepresented itself as having not changed its name and proceeded with the hearing of the cases. Subsequent thereto **Khamoni J**. delivered judgment in the consolidated cases in favour of the plaintiffs as prayed for in the plaint. The plaintiffs claimed that the 1st defendant having failed to satisfy the judgment and having changed its name, and having assets under it and or 2nd defendant's name, it was only fair and sitting that judgment be entered jointly and severally against the 1st and the 2nd defendants.

The suit was met by joint statement of defence filed by the defendants through **Messrs Sichangi & Company Advocates**. In the main the defendants denied all the plaintiffs' allegations, they also that there was a misjoinder of parties and the suit was incompetent to that extend. The defendants further pleaded that the matters in issue before court were also directly and substantially in issue in the two cases presided over by **Khamoni J.** Accordingly this suit was res judicata.

On 18th May, 2007, the plaintiffs filed an application to amend their plaint. That application was subsequently allowed by this court. On 3rd March, 2008, the plaintiffs filed an application. Seeking courts leave to have the suit heard on priority basis which application was also allowed on 30th

September, 2008. On 23rd May, 2008, the defendants filed a notice of preliminary objection to the hearing of the plaintiffs' application dated 3rd March, 2008 on the grounds that the application flew in the fact of *order X rule 11A* of the Civil Procedure Rules. Two, and as pleaded in paragraph 20 of the defendants' statement of defence dated 19th March, 2007, this suit was bad in law, misconceived and incompetent; it was res judicata and offended *section 7* of the Civil Procedure Rules. Finally, the defendants stated that the suit was still bad in law, misconceived, incompetent and flew in the face of *order II rule 1(2)* of the civil Procedure Rules. The defendants therefore sought that the application dated 3rd March, 2008 be dismissed with costs and that indeed the entire suit be dismissed with costs.

On 13th March, 2009, the matter was placed before **Kasango J.** who directed that the plaintiffs serves the defendants with the amended plaint. Upon such service, the defendants shall be at liberty to file amended defence within 7 days. Thereafter the parties would come back to court on 27th April, 2009 for the hearing of all interlocutory applications by way of written submissions. Come that interlocutory application as previously ordered as she was on transfer to the High Court of Kenya at Meru. The judge thereafter directed that the matter be mentioned before me for further directions. When the matter came up for directions as aforesaid before me on 8th June, 2009 parties agreed to abide by the directions earlier issued by **Kasango J.** Indeed by then the defendants had already filed their written submissions and annexed several authorities. Subsequent thereto the plaintiffs too filed their written submissions. They also brought to the fore several relevant authorities. I have carefully read and considered the said written submissions and the authorities cited. I am grateful to the industry exhibited by learned counsel in unearthing the several authorities cited in their written submissions. I might not refer to each one of them but that is not because I have not read and considered each one of them.

From the record, the application dated 3rd march, 2008 was for this suit to be listed for hearing on priority basis and be heard and determined in the early part of the year 2008. That application as I have already stated was determined on 30th September, 2008. There were therefore no pending interlocutory applications to be heard subsequently. In so far as the Notice of Preliminary Objection makes reference to the application dated 3rd March, 2008, it has been overtaken by events. However the issue we must grapple with is whether this suit is res judicata and also filed in breach of *order II rule 1(2)* of the Civil Procedure Rules.

It's the defendants' contention that the two suits previously adjudicated upon by **Kahmoni J**, involved the plaintiffs herein and the 1st defendant. This suit like the former suits are between the same parties and are also litigating under the same title. The suits seeks the same and or similar relief's. Accordingly the matters in issue herein and in the former suits are directly and substantially the same. For all these reasons, this suit is res judicata.

The plaintiffs however take a different path. They proclaim that the parties in the previous suits are not the same as the instant suit has a new defendant, Taifa Sacco Society Lit, that the matters that are res judicata must have been alleged in the former suit by one party and denied by another which was not the case here. Indeed there are entirely new averments in the instant suit. Finally they contended that the reliefs being sought are not the same.

Section 7 of the Civil Procedure Act deals with res judicata. It provides interlia;

"**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same tile, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

The probation against hearing a matter or issue which is considered to be res judicata is in absolute terms as stated by the court of appeal in the case of **Benjah Amalgamated Ltd & Anor. V Kenya Commercial Bank Ltd, Civil Appeal No.239 of 2004 (UR)**. The court went on to observe that the

section gives various explanations as to the meaning of *section 7* and ventured to quote some of those explanations.

"**Explanation (1) The express ion 'former suit' means a suit which has been decided before the suit in question whether or not, it was instituted before it.**

Explanation (3) The matter above referred to (in explanation 1) must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly, by either,

Explanation (4) Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such judgment"

These explanations are on all fours with the circumstances obtaining in the circumstances. Considering the record so far, it is indeed hard to resist the defendants' preliminary objection.

The plaintiffs have admitted that they had previously filed two suits against the 1st defendant. These were Nyeri HCC No.170 of 2001 and 145 of 2002, respectively. The instant suit with the former suits is between the same parties only that the 1st defendant has since changed its name and now goes by the name of the 2nd defendant. I deally therefore the parties are litigating under the same title, much as in company law, the 2nd defendant is a separate legal entity. I am unable to agree with the plaintiffs' submissions that the parties are not the same in both suits though. That this suit has a new defendant, Taifa Sacco society Ltd, which takes away an essential ingredient of Res judicata, i.e. that the parties are the same. **See Aggrey Peter Thande V Co-operative Bank of Kenya (200)e KLR.** The plaintiffs themselves have conceded in their plaint that the defendants are one and the same entity. All that the 1st defendant did was to change its name from Nyeri Farmers Sacco Limited to Taifa Sacco Society Limited. In the ordinary course of events, such make over entails the assumption of the assets and liabilities from the previous entity by the incoming entity. That being the case it cannot be said that Taifa Sacco society Limited is entirely new party to the suit. If that was so, why then did the plaintiffs deem it fit to enjoin the 1st defendant in the suit? Infact the issue of change of names was raised by **Mr. Orowe** after the judgment by **Khamoni J**. had been delivered. **Mr. Orawe** stated;

"…..**I wish to draw to the attention of this court, which has just delivered the judgment now, that the defendant is in the process of changing its name to 'TAIFA SACCO SOCIETY LTD' and to request that even if there is such a change, which his coming after plaintiffs had sued the defendant, the defendant under the new name should still be made to comply with this judgment. It should remain liable in the execution of the decree……..**"

Mr. Mandi, learned counsel then acting for the defendant respondent;

"…..**I have very limited information. In any case there are very elaborate procedures in execution where such an issue can be dealt with. Right now I cannot say what exactly the position is….**"

Mr. Orowe then responded;

"….**In the circumstances I would like a mention date where it will be indicated how the judgment is going to be satisfied whether by the Nyeri Farmers Sacco Ltd or the new outfit…….**"

The court's take was

"**That granted and I hope. We are not going to engage ourselves into another lengthy hearing. For that purposes therefore mention on 27th November, morning before me….**"

The fear expressed by the learned judge has come to pass. However there is no denying that as at that

time, the plaintiffs knew that plans were afoot to effect changes in the 1st defendant's name. Yet they took no pre-emptive action to prevent such an eventuality. There is therefore no denying that the defendants are one and the same save for the changes in the names and the issue of change of name that has necessitated this suit was also raised in the earlier suits.

The reliefs sought in this suit would appear to be the same and or similar to those sought in the two earlier suits. In the two further suits, the plaintiffs' sought;

(a) Severance pay for redundancy pursuant to clause 20 of the terms and conditions of service.

(b) Unpaid leave arrears based on the last salary earned.

(c) **Costs and interest at court rates on (b) and (c) from July 2001 until payment in full.**

The 1st defendant's defence in the former suit's was to deny that the plaintiffs were its employees for the period of service set out in paragraph 3 of the plaint, though admitting to termination of the plaintiffs' employment, it however denied that such termination amounted to redundancy. Rather the plaintiffs' employment was terminated in accordance with the terms of the contract of employment stated by each plaintiff individually and separately commencing on the 1st October, 1998.

The reliefs sought in the instant suit is Ksh.28,707,953 as at February, 2007 being the computation of redundancy dues and unpaid leave arrears awarded by Justice Khamoni on 7th November, 2006. That being the case this relief is the same as those sought in the earlier suits save for the details and or computation redundancy dues aforesaid. The plaintiffs too have sought general damages for misrepresentation. This is perhaps the only new relief introduced in the instant suit. It was not sought in the earlier suits. However this relief is predicated upon events that occurred during the pendency of the earlier suits. The plaintiffs claim that prior to the hearing of the earlier suits and unknown to the court, the plaintiffs and or their advocates, the 1st defendant secretly changed its name to Taifa Sacco Society Ltd. S that this relief is directly substantially and or intrinsically connected to the earlier suits.

Does the fact that the claims of the individual plaintiffs having been qualified in the present suit provide the plaintiffs with the escape route from the doctrine of res judicata? I do not think so. A closer look at the plaint and defences filed in all the suits show that the averments of the plaintiff were expressly denied. The only departure being the particulars of the plaintiffs' claim I t he present suit. In those circumstances explanation (3) and (4) pursuant to *section 7* of the Civil Procedure Act are applicable. Further it is my view that the plaintiffs having realized that it was almost impossible to execute the judgment of Khamoni J. have cleverly filed this suit in abide to rectify the omission and oversight in not pleading their case as one of special damages in the earlier suits. As stated in the case of **Hayward and another V Pullinger and partners Ltd (1950 1 ALL E.R 581** in cases for damages for wrongful dismissal, such damages complained of were special damages and as it had not been specifically pleaded, the statement of claim was defective. That is the situation that obtained in the earlier suits by the plaintiffs. Having realized that defective, they have sought to rectify the same by lodging in the instant suit. The plaintiffs ought to have pleaded their special damages arising from the redundancy dues and leave arrears in the former suits. Having failed to do so they cannot be allowed to mount this suit in order to do so. They are no doubt got up by the doctrine of Res judicata.

It is also a requirement of law that parties are not permitted to bring fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be proper apprehension by the court of the legal position. This is the essence of *order 11 rule 1(2)* of the Civil Procedure Rules. That rule is emphatic that where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished. The plaintiffs in their former suits omitted and or relinquished the special damages portion by not pleading the same in their plaints. They cannot or now be allowed to sue for the same in his suit. In the case of **POP-IN (KENYA) LTD & OTHERS V HABIB BANK ALI ZURICH CIV.APPL NO.80 OF 1985** (UR). The court had this to say;

"…..**The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of facts:…parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this is permitted litigation would have no end…It is a principle of law that this cannot be permitted…"**

Yet again in the case of **YAT TUNG INVESTMENT CO. LTD V DAO HENG BANK LTD & ANOTHER (1975) A.C. 581**, the court observed:

"……**where a given matter becomes the subject of litigation in, and or adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in content, but which was not brought forward…The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounced judgment but to every point which properly belonged to the subject of litigation…."**

This is the situation obtaining in the current suit particulars of damages due to each plaintiff which have been brought out in the current suit ought to have been pleaded in the previous suits. Similarly, the issue of the 1st defendant suddenly changing its name, ought to have been addressed in the previous suit. Afterall the plaintiffs' counsel raised the issue in those suits. Fundamentally therefore what is raised in this action could very well have been raised and ventilated in the previous suits.

In the instant case, the plaintiffs at paragraph 13 of their plain have pleaded thus;

"…..**and the plaintiffs claim that the 1st defendant having failed to satisfy the judgment and having changed its name, and having asserts under the 1st and or the 2nd defendant name, that it is only fair and fitting that judgment be entered jointly and severally against the 1st and the 2nd defendants"**

It appears to me from the foregoing that this suit has been brought purposely to execute the judgment and decree passed in the previous suits. On this account, I agree with **Mr. Liko**, counsel for the defendants when he submits that;

"…**this suit has been brought to execute the judgment in the former suits, as pointed out, the former suits were benefit of any pleading in respect of special damages hence the attempts to "plead and execute" through this suit…."**

In the case of **B.F. EAST AFRICA LIMITED V FUELEX KENYA LIMITED HCCC NO.613 OF 2005 at Milimani Commercial Court,** (UR), **Ochieng J.** considered at length *section 34 (1)* of the Civil Procedure Act. That section is to the effect that

"…**All questions arising between the parties to the suit in which the decree was passed or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit…."**

Ochieng J. took the vie wand which I wholly agree with that;

"…..**If we were to allow people to challenge execution processes through separate suits, the end result could be two or more inconsistent decisions, by courts of concurrent jurisdiction…."**

If the plaintiffs had difficulties in executing the decree, nothing stopped them from going back to the

judge who passed the decree with an appropriate application to enable them execute the same. It was not necessary for them to bring a fresh suit in the form of the current suit. A party who brings for the decision of the court matters which have already been dealt with and determined elsewhere can surely be said to be abusing the process of this court. This suit no doubt falls in this category.

In the upshot I find merit in the preliminary objection raised by the defendant. The suit is res judicata and is filed in breach of *order 11 rule 1 (2)* of the Civil Procedure Rules as well as *section 34 (1)* of the civil Procedure Act. Accordingly it is struck out with costs to the defendants.

Dated and delivered at Nyeri this 17th day of September, 2009.

M.S.A. MAKHANDIA

JUDGE