



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 632 of 2003

RAPHAEL FREDRICK KYULE KILONZO PLAINTIFF

VERSUS

INVESTMENTS & MORTGAGES BANK LTDDEFENDANT

RULING

The Plaintiff moved to this court by way of a plaint dated 24th June 2003 and filed the same date. The action was brought against the investments and mortgages bank. The salient features of the plaint are that:-

- (i) The plaintiff was an employee of Biashara Bank as a Cashier.
- (ii) On 31st December 2002, Biashara Bank transferred all its assets and liabilities to the defendant.
- (iii) That all the assets and liabilities of Biashara Bank now vest in and are binding on the defendant pursuant of Section 9 of the Banking Act Cap.488.
- (iv) That on 24th June 2002 Biashara Bank terminated the Plaintiffs services unlawfully without any sufficient cause.
- (v) The said termination was before the expiry of his term of service of the age of 60 years of age.
- (vi) That the defendant has refused to settle his benefits worked out as:
 - (i) Three months salary for every year worked.

3 x 3 ½ years x 119,500/=

Kshs.6,632,250.00

(ii) 3 years x ½ x 119,500

Kshs.179,250.00

The Plaintiff sought deposit of security for the said amount costs and interests at Court rates.

The defendants filed a defence dated 30th July 2003 and filed the same date. The salient feature of the same are:-

- (i)** That the defendant merged with Biashara Bank of Kenya Ltd on 31st December 2002.
- (ii)** That under the terms of the merger, it, the defendant, was exempted from liability in respect of particular claims, the plaintiffs, claim, inclusive and on this account aver that it is non-suited and on this account the Plaintiffs suit against it should be dismissed with costs.
- (iii)** Save that the plaintiff's employment with Biashara Bank of Kenya Ltd was terminated on 24th June 2002, the defendant denied the contents of paragraph 6 of the plaint and put the plaintiff to strict proof.
- (iv)** In response to paragraph 6 of the plaint, that he plaintiff's employment was terminated due to gross misconduct and or serious neglect of duty on his part.
- (v)** Denied particulars of the plaintiffs claim in paragraph 7 and 8 of the plaint and put him to strict proof. Further that the letter of appointment did not state that the plaintiff was entitled to any allowances, did not accord any benefits to the plaintiff and did not provide for a retirement age. That in view of the foregoing the provisions of the employment Act Cap.226 laws of Kenya are called in to play with regard to the provisions of one months notice payment of salary in lieu of notice which the defendant complied with by paying the plaintiff one months salary, in lieu of notice upon termination of his employment which fact was acknowledged by the Plaintiff vide his letter dated 25th July 2002 to the effect that he had been paid by the defendant in full and final settlement of all his terminal dues.
- (vi)** That in view of matters aforesaid in number (v) above, the plaint discloses no reasonable cause of action and it the defendant shall at an opportune time apply to have it struck out with costs.

The Plaintiff put in a reply to defence and its salient features are:-

- (i)** Denied that the defendant was exempted from liability by the terms of the merger.
- (ii)** Denied that the letter of appointment excluded any allowances, benefits and retirement age which terms were reviewed from time to time making the letter of appointment not being exclusive and has to be read with subsequent revision letters.
- (iii)** Even if he signed a letter acknowledging full settlement of terminal dues, that does not override the provisions of the law, and alternatively if any was signed the same was obtained by misrepresentation and or undue influence and or duress.

An agreed statement of issues dated 10.3.04 and filed the same date is on record. On 22nd April 2004 the Plaintiff complied with discovery by filing his list of documents dated 21.4.04.

Against the foregoing background, the defendant moved to this court and filed an application dated 30th January 2007 under order VI rule 13(1) (b) (c) and (d) of the Civil Procedure Rules, as well as Section 3 A of the Civil Procedure Act, and all other enabling provisions of the law. The application seeks the striking out and dismissal of the plaintiff's suit against the defendant with costs. The grounds in support are set out in the body of the application, supporting affidavit and written skeleton arguments, as well as case law. The major ones are:-

- (1)** The application is founded on the grounds that the suit is scandalous, frivolous or

vexatious and it may prejudice embarrass or delay the fair trial of the suit and that the suit is otherwise an abuse of the process of the court.

(2) They maintain that the defendant is not a proper party to the suit as he plaintiff has admitted in its plaint at paragraph 3 there of that it is Biashara Bank of Kenya limited that employed him and not the defendant.

(ii) It has also been admitted by the Plaintiff that it is Biashara Bank of Kenya Limited that employed him and not the defendant.

(iii) It is also alleged that the suit is based on the fact that the suit is based on an alleged unlawful termination of his employment by Biashara Bank of Kenya Ltd on 24th June 2002.

(3) They contend that the fact that the Plaintiff is aware that the applicant was not a party to his employment contract it but none the less went ahead to file the suit herein clearly demonstrates that the plaintiff was out to abuse the process of this honourable court. The Plaintiff ought to have ascertained who the proper party to the suit was before filing the same.

(4) That the Plaintiff was all along aware that Biashara Bank is in existence, it is a separate legal entity and it should have been sued as such.

(5) They contend the defendant has been forced to defend a suit to which it is obvious that it should not have been enjoined, hence the meriting of the orders sought.

On case law learned Counsel referred the Court to the case of JOSEPH GITAU AND OTHERS VERSUS U KAY ESTATES LTD NAIROBI H CCC NO. 813 OF 2004 decided by J.B. Ojwang on 22nd day of July 2005 upholding the applicant's plea that the suit was scandalous, frivolous, vexatious and an abuse of the process of the court . At page 4-5 of the ruling the learned Judge analyzed what is meant by the words scandalous, frivolous, vexatious and abuse of the process of the Court. (emphasis on).

At line 10 from the top at page 4 quoting with approval Sir John Jacob in his work, pleadings principles and practice (LONDON SWELT & MAXWELL 1990) p.221. Stated thus "*Allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party. Moreover any un necessary or immaterial allegations will be struck out as being scandalous if they contain an imputation on the opposite parity or make any charge of misconduct or bad faith against him or any one else*".

At line 6 from the bottom still on page 4 "*a pleading or an action is frivolous when it is without substance or un arguable when:*

- (a)** *a party is ruffling with the court or*
- (b)** *when to put it forward would be wasting the time of the court; or*
- (c)** *when it is not capable of reasoned argument or*
- (d)** *It is without foundation; or*
- (e)** *Where it cannot possibly succeed, or*
- (f)** *Where the action is brought or the defence is raised only for annoyance; or*
- (g)** *To gain some fanciful advantage; or*
- (h)** *When it can really lead to no possible good"*

At line 8 from the top on page 5 of the ruling “a pleading or an action is vexatious when it lacks bona fides and hopeless or oppressive and tend to cause the opposite party unnecessary anxiety, trouble and expense.”

In the case of **MURRI VERSUS MURR AND ANOTHER [1999] 1 E.A. 212** where the appellant company applied to striking out a winding up petition for abuse of the court process. At page 216 paragraph (b) line 5 from top Lakha J.A as he then was restated the principle on striking out thus “.....it was said that the power to strike out was one which should be exercised only in plain and obvious cases. In my judgment the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the process of the court or that it is in arguable. It has nothing to do with a case being complex or difficult or that it requires a minute or protracted examination of the documents and the facts of the case.however difficult the point of law is once it is understood and the court is satisfied that it is really in arguable it will give final judgment” The foregoing 3 reasoning gave rise to the principle that a summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in same way an abuse of the court process or is inarguable. It has nothing to do with a case being complex or difficult. (emphasis own).

The court was also referred to Halisburys Laws of England Forth edition, reissue volume 9 page 492 paragraph 748 on privity of contract. It is stated that “*The general rule on the doctrine of privity of contract, is that as a general rule at common law a contract cannot confer rights or impose obligations on strangers to it, that is persons who are not parties to it. The parties to a contract are those persons who reach agreement and whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties*”. At page 496 paragraph 750 it is stated “*the general rule at common law is that a contract cannot impose burdens on anybody who is not a party to it*”.

The case of **AGRICULTURAL FINANCE CORPORATION VERSUS LENGETIA LIMITED [1985] KLR 765** where it was held inter alia that as a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.

(2) That there existed no contract between the first respondent and the appellant and so the first respondent had no cause of action against the appellant.

The plaintiff Respondent has opposed the said application on the grounds set out in the replying affidavit, written skeleton arguments and case law. The major ones are:-

(1) That the suit is not a proper candidate for summary dismissal because it raises triable issues as to

(a) Whether all the liabilities of Biashara Bank now vest in and are binding on the defendant pursuant to the provisions of Section 9 of the Banking Act Cap.488.

(b) Whether Biashara Bank terminated the Plaintiffs Services unlawfully without any sufficient cause, whether plaintiff's terminations was before expiry of his term of service which was 60 years of age.

(2) The suit is not a proper candidate for summary dismissal because it is not hopeless, it does not plainly and obviously fail to disclose a reasonable cause of action and it is not so weak that it is not beyond redemption.

On case law, the learned Counsel for the Plaintiff urged the court to be guided by the principles in the case of **STARLINE GENERAL SUPPLIES LTD VERSUS DISCOUNT CASH AND**

CARRY LTD NAIROBI MILIMANI COMMERCIAL COURT, HCCC No. 710 of 2005 decided on 31st day of March 2006 by Fred A. Ochieng. At page 3 of the ruling line 8 from the bottom the learned Judge observed *“in order to establish whether or not there were any triable issues arising from any case, the court would ordinarily give due consideration to the contents of the plaint and the defence as well as other pleadings including affidavits”*

The case of the Registered Trustee of the Diocese of MT. KENYA SOUTH ANGLICAN CHURCH OF KENYA VERSUS CHARLES WACHIRA NGUNDA NAIROBI MILIMANI COMMERCIAL COURTS HCCC NUMBER 456 OF 2004 also decided by Fred A. Ochieng on 27th day of July 2005. At page 5 of the ruling the learned judge made observations at line 1 from the top *“in the light of all the material before the court, I now need to ascertain if the defence put forward raised any triable issues. If I should come to the conclusion that the said defence raises at least one triable issue, I would then be obliged to grant the defendant unconditional leave to defend. But in the event that the defence is held not to give rise to any triable issues, the court would then grant summary judgment in favour of the plaintiff”*.

Lastly the case of **DT DOBIE & COMPANY (KENYA) LTD VERSUS MUCHINA [1982] KLR 1**, in which it was held inter alia that as the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously. Further by way of obiter (Madan JA) that (i) *“the power to strike out should be exercised only after the court has considered all facts but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application for striking out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case (ii) The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.*

On the courts assessment of the facts herein, it is clear that the principles on when and when not to strike out a pleading are now well settled. Both sides have provided guidance to the court on this aspect. The ingredients to be satisfied in law are also spelt out clearly by the provisions under which the application has been presented. The pleadings of each side are on record. The salient features of each have already been set out earlier on in this ruling. However, for purposes of considering the same in the light of legal principles set out above, there is no harm in resetting them out again briefly. These are that the Plaintiff contends that he had been an employee of Biashara Bank until 24th June 2002 when his services were terminated without paying him terminal benefits, which termination was before the expiry of the retirement age of 60 years. By virtue of the aforesaid matters the plaintiff became aggrieved but could not proceed against Biashara Bank because it Biashara Bank merged with the defendant which defendant assumed liability of the said Biashara Bank and as such it is the proper party to be sued.

The defendants response in summary is that they agree that the Plaintiffs services with Biashara Bank lawfully terminated, but contend they were lawfully terminated, that the said plaintiff was fully paid his terminal dues and signed a letter to that effect, despite the fact that the plaintiffs letter of employment made no provisions for any allowances, conceded that indeed it the defendant had merged with Biashara Bank, but it has been exempt from certain liabilities inclusive of that of the plaintiff.

In response thereto the Plaintiff denies the exemption denies signing a letter of full and final settlement of his terminal dues, and alleges duress.

This court has considered the foregoing salient features as against the ingredients put forward as supporting the plea for striking, out aside the it makes the following findings:-

1) This court finds nothing indecent offensive, abusive or imputing misconduct and bad faith

in a plaint intended to be used as a vehicle for justice for such an employee seeking redress for wrongs done or alleged to have been done to such an employee as a result of the said contract of employment. This court takes judicial notice of the fact that in employment contracts, in instance where termination has occurred, in circumstances other than these arising from retirement, issues of lawfulness or unlawfulness may arise. When they so arise, like in this case, and there is no amicable settlement of the same, the only other proper forum for resolution would be either arbitration or court, process. Where the Court, process is resorted to it is meant to adjudicate over the issues in controversy. Such a resolution cannot be termed indecent, offensive or abusive as such disputes are not un common. They do occur in real life and they too get adjudicated upon and resolution given.

2) Likewise when such issues arise it cannot be said to be trifling, time wasting, incapable of reasoned argument, without foundation, incapable of succeeding, raised only for annoyance or for purposes of fanciful advantage and that It can lead to no good. In such a dispute the litigant usually seeks a determination as to whether his rights have been infringed in so far as the employment contract is concerned. And where infringement is proved to exist, then the quantum of damages payable as compensation.

3) There is nothing vexatious in such a pleading that can make it lack bona fides, or make it hopeless or oppressive and likely to cause the other party unnecessary anxiety, trouble or expense. The court takes judicial notice that when such an action arises the bone of contest is usually the lawfulness or unlawfulness of the action taken. Courts are never called upon to determine the bona fides, hopelessness or oppressiveness of the action but the wrongfulness or rightfulness of the action undertaken.

For the reasons given above the court rules that the plaintiffs claim is not scandalous, frivolous or vexatious. It is within the law to submit such a claim to a court of law for adjudication.

As regards abuse of the due process of the court the plaintiffs plaint can only be termed so if found not to be raising any triable issue. This court has considered the salient features of the same in the light of the salient features of the defence and reply to the defence and find that there are triable issues raised for determination by a court of law namely:-

- (1)** What were the terms of employment between the plaintiff and Biashara Bank.
- (2)** Whether the said employment was lawfully terminated
- (3)** What were the rights duties and obligations of either party under the said contract in so far as termination was concerned.
- (4)** Whether the said Biashara bank fulfilled its part of the bargain.
- (5)** If the answer to number 5 above is in the negative, whether the plaintiff is left remediless, or can turn to the defendant for redness.
- (6)** Since the merger of the Biashara bank with the defendant is conceded what are the terms of the merger in relation to the proceedings herein.
- (7)** If it is true that the Plaintiffs claim is one of the liabilities that the defendant is exempt from, what is the implication of that exemption to the plaintiff. Is he to be left remediless or is he capable of being construed as not being affected by the exemption.

All the foregoing show that there are triable issues arising from the pleading presented to court. The Plaintiff therefore can be said to have come to court on a serious note and not abusive of the court process.

Issue was raised about privity of contract. It is correctly submitted and as shown by case law that indeed the correct position in law is that only parties to a contract can sue upon it. It is indeed correctly submitted that there is no signed contract of employment between the plaintiff and the defendant. The plaintiff bases his claim on the merger as the basis of assumption of liability. That is a triable issue. Should the court find that assumption of liability exists then the privity of contract will arise as a result of the defendant inheriting the liability from Biashara Bank and not as a result of direct contract making but through inheritance which is a matter to be determined by the Court.

Issue was raised to the effect that Biashara Bank is still a legal entity and it should have been sued as such. The Plaintiff has pleaded that the defendant was sued as such because of the merger and assumption of liability. The defendant has conceded the merger in his defence. It has also annexed the merger agreement to the application as anenxture MNM1. There is however no anenxture to show the legal status of the said Biashara Bank. Further nothing has prevented the defendant from instituting 3rd party proceedings against the said Biashara Bank. In view of the foregoing, the court is of the opinion that conceding of the merger and failure to annex a document to show the legal status of the Biashara Bank and the defendant, pleading to matters that only Biashara Bank could plead, to such as that the defendant was fully paid upon termination, that termination was for lawful cause and that the letter of employment had no provision for allowances, provides sufficient nexus or link between the disputants to anchor the plaintiffs claim against the defendant.

For the reasons given the Court finds no merit in the defendants application dated 30th January 2007 and filed on 31.1.07. The same is dismissed with costs to the plaintiff.

DATE, READ AND DELIVERED AT NAIROBI THIS 22nd DAY OF February 2008.

R.N. NAMBUYE

JUDGE