



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

**Civil Case 460 of 2007**

**EDWIN ASARA MAYANI & 2 OTHERS.....PLAINTIFF**

**VERSUS**

**TELKOM KENYA LIMITED.....DEFENDANT**

**RULING NO.2**

The Plaintiffs in the first instance had come to this Court vide an application by way of Notice of Motion dated 29<sup>th</sup> January 2007. Parties were duly heard on the same substantively. In the course of writing of the ruling the Court discovered that the authority of the second and the 3<sup>rd</sup> Plaintiff authorizing the first Plaintiff to appear on their behalf in Court and also depone the verifying affidavit as well as the supporting affidavit on their behalf was missing.

In the interests of justice, the Court, struck out that application with leave to the Plaintiffs to file the requisite authorities and present another one. The authorities were dated on 24.1.08 and filed on 25.1.08. These were filed simultaneously with the application by way of Notice of Motion dated 24.1.08 and filed on 25.1.08. The reliefs sought are same in material particulars as the previous one namely.

- (1) Summary Judgment be entered in favour of the Plaintiffs against the defendants as prayed for in the plaint.
- (2) The costs of the application be provided for.
- (3) Such other and/or further orders be made as this honourable court may deem fit and just.

On 20.02.08 both Counsels, consented, authorizing this court to adopt the written skeleton arguments, case law and oral submissions in Court both for and against the earlier application and adopt them to operate for the current application.

In the said earlier ruling the Court had already set out the salient features of the pleadings, and submissions which will be summarized here below as:-

The Plaintiff were employees of the defendant a successor company of the defunct Kenya Posts and Telecommunications corporation. The first plaintiff was employed in May 1971, the second Plaintiff in September, 1977 and the 3<sup>rd</sup> in January 1980.

As at the time events leading to these proceedings were set in motion, the first plaintiff was a general manager in charge of operations, the second a general manager in charge of sales and marketing, and the 3<sup>rd</sup> a general manager in charge of human resources.

(2) The defendant in the course of repositioning the company with a view to achieving higher levels of efficiency, decided to reduce its managers to four and in the process offered the plaintiffs an early retirement package before attaining the mandatory retirement age of 55 years. The package comprised the following:-

- (a) 3 months consolidated salary in lieu of notice.
- (b) Golden handshake of Kshs 300,000.00.
- (c) Three months basic salary for every year worked up to a maximum of 10 years.
- (d) Resettlement allowance equivalent to three (3) months salary.
- (e) Transport of Kshs 20,000.00

(3) The retirement entitlement was worked out as follows:-

(a) In favour of the first plaintiff who was aged 52 years 7 months and who had put in 32 years and 2 months service, his entitlement came to Kshs 6,452,060.00.

(b) The second plaintiff who was aged 50 years of age and had put in 25 years and 8 months serviced was found to be entitled to Kshs 5,520,380.00.

(c) The 3<sup>rd</sup> Plaintiff who was aged 53 and 7 months and had put in 27 years and 5 months of service was found to be entitled to Kshs 5,520,380.00.

(4) After due considerations, of the defendants offer, the Plaintiffs separately and individually accepted the package, following the said acceptance they were duly sent on leave on 20<sup>th</sup> May 2003 pending the early retirement and processing the retirement package.

(5) In furtherance of the matters aforesaid in number 4 above the defendant wrote to the Permanent Secretary to the Cabinet and Head of Civil Service seeking tax exemption of the said retirement package being paid to the plaintiffs.

(6) It is on record from the pleadings neither was the tax exemption sought granted or the agreed retirement package. Instead they were retired normally.

(7) Matters aforesaid in number 6 above grieved the plaintiffs who moved to this court seeking the reliefs sought, arguing that the action of the defendant was illegal, unconstitutional, malicious, without justification and contrary to the rules of natural justice.

Justification for saying so is because the defendant acted unilaterally without giving the plaintiff an opportunity of being heard before backing out on the early retirement package.

The defendants responded to the Plaintiffs pleading by averring that.

(1) Indeed the alleged retirement package was offered to the Plaintiffs, but the same was subject to approval by the government in accordance with the relevant regulations applicable to the plaintiff's employment.

(2) That the government was entitled to opt out of the said agreed retirement benefit and instead paid

the plaintiff their retirement benefit in accordance with the terms of the employment. That since the contract of employment provided for termination, the plaintiff cannot claim a right to work till the retirement age of 55 years.

(3) That the said termination was in line with government policies and procedures and was not illegal, unconstitutional, maliciously or in breach of the rules of natural justice.

In support and opposition to the application, each party relied on:

- (1) The pleadings filed herein by either side
- (2) Deponement in the supporting and replying affidavit by each side.
- (3) Annexures exhibited to each affidavit as exhibited.
- (4) Written skeleton arguments filed and exchanged.
- (5) Oral submissions in court.
- (6) Case law.

The court has considered these in their totality as set out in the earlier ruling and lifted out the following as factors not in dispute.

(1) It is not disputed that Plaintiffs were employees of the defendant. As at the time events leading to these proceedings were set in Motion they were holding managerial ranks. But each had not reached the retirement age of 55 years.

(2) Both parties are in agreement that they negotiated for an early retirement package for the Plaintiffs. The Plaintiffs accepted the early retirement package.

(3) Upon agreement as in number 2 above the plaintiffs took their early retirement leave. The defendants on the other hand took steps to seek exemption of tax on their behalf from the Permanent Secretary to the Cabinet and Head of the Civil Service who instead of granting the said exemption directed that the Plaintiffs be retired in the normal manner in accordance with their terms of employment which was done.

(4) There is no dispute that it is matters complained of in number 3 above which aggrieved the plaintiffs prompting them to file the current proceedings.

(5) It is argued by the Plaintiffs that since they negotiated the terms agreed upon by both parties and they altered their employment position as a result of the said terms of early retirement package, and as such the defendant should not be allowed to unilaterally back out of the said arrangement hence the need for this court to enforce their claim summarily.

(6) There is no dispute that the defence does not deny the said arrangement but says that the said negotiation was subjected to government approval which was not granted.

(7) That the government acted within its powers to decline the said agreed package and instead approved retirement under the 50 years rule.

(8) The Plaintiffs on the other hand have countered the defendants assertions in number 6 and 7 above by saying that the decisions to pay them the said packages were a government exercise and so they are within the principles governing the granting of the reliefs sought.

On case law the plaintiffs Counsel referred the Court to the case of **BANK OF UGANDA VERSUS**

## MASABA AND OTHERS [1999] E.A.2

(2). The brief facts are that the Respondents were employees of the Appellant Bank. In 1994 the governor of the appellant, wrote to all employees offering them a voluntary retirement scheme. The purposes of the scheme was to reduce the work force owing to the appellant's financial situation. The latter was intended to induce the employees to voluntarily retire and contained several items for payment and a clause indicating that the employees with house loans would have the loans registered as legal mortgages to be repaid over a period to be agreed between the appellant and the employee. The Respondents individually applied to retire under the scheme and their applications were approved. However the respondents were shocked when they received their terminal pay, the appellant had deducted from their terminal dues the amount each owed the bank in respect of house loans consequently what they received was very little.

The Respondents sued the appellant alleging they were induced to retire voluntarily by the representations made to them and which the appellant knew to be false or which were made recklessly not caring whether they were true or false. As a result of the appellants representations the Plaintiffs lost their employment, earnings, promotions and salary increments and investments from salaries were subjected to wrongful housing deductions.

The high Court ruled in the Respondents favour. On appeal it was held inter alia that the respondent's pleadings sufficiently complied with the requirements of orders 6 rule 2 of Civil Procedure Rules and paragraphs of the plaint which read together left no doubt that the plaintiffs case was founded on breach of contract and mis- representation.

(2) The appellant's misrepresentation was relied on by the Respondents with disastrous consequences on the respondents. The respondents had acted on the promise and suffered damage

(3) The appellants promise in the letter inviting the Respondents to retire was an offer which was accepted by the Respondents. By deducting the Respondents house loans from their voluntarily retirement benefits, the appellant was in breach of contract. The house loan deducted were ordered to be refunded to the respondents because the deductions was made against clear terms of the contract.

(4) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss as was at the time of the contract reasonably foreseeable as liable to result from the breach. Damages may however be awarded from disappointment arising out of the breach.

In the case of **CORPROATE INSURANCE COMPANY LTD VERSUS NYALI BEACH HOTEL LIMITED NAIROBI CA.A 270 OF 1996**, At page 4 of the judgment it is noted that the respondent had presented to the superior court an application for summary judgment against the appellant under Order XXXV of the Civil Procedure Rules. At page 7 of the judgment line 7 from the top the learned judge of the superior court had found that the appellant had not shown that it had any genuine defence to the respondents claim and gave an order for summary judgment.

At page 12 of the judgment of Gicheru JA quoting with approval the case of **HOME AND OVERSEAS ISNURANCE CO.LTD VERSUS MENTOR INSURANCE CO (UK) LTD (in liquidation) [1990] 1 W.K. 153** at page 158, Park L.J. was quoted to have said thus "*the purpose of an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendants only suggested defence is a point of law and the court can see at once that the point is misconceived, the plaintiff is entitled to judgment if at first sight the point appears to be agreeable but with a relatively short argument can be shown to be plainly unsustainable. The Plaintiff is also entitled to judgment. But proceedings for summary judgment should not be allowed to become a means for obtaining in effect an immediate trial of an action which will be the case if the Court leads itself to determining on (such) application points of law which may take hours or even days and the action of many authorities before the court as in opposition to arise at a final decision.*"

In the same case in the judgment of Pall JA (as he then was) page 11 line 7 from the bottom the

learned judge observed “It is rightly argued that under order 35 rule 2 of the Civil Procedure Rules the defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit .... He has to satisfy the court only that he should be given an opportunity to be heard as he might have something to say which might turn out to be a defence ..... The purpose of order 35 Civil Procedure Rules is to enable a Plaintiff obtain a summary judgment without trial”. At page 12 line 5 from the top “The defendant is bound to show that he has some reasonable or fairly arguable ground of defence to the action. The defendants affidavit must condescend upon particulars and must clearly and concisely state what the defence is and what facts are relied on supporting it ). Supreme Court practice para 14 (3-4/4) in all cases sufficient facts and particulars must be given to show that there is a bona fide defence and of course once a bona fide defence has been identified, the Court should refrain from resolving it on affidavit evidence. So far as a point of law is concerned leave should be given where a difficult point of law is raised. Nevertheless if the point is clear and the court is satisfied that it is really unarguable leave to defend will be refused.

Leave to defend will not be given merely because there are several allegations of fact or of law made in the defendant’s affidavit. The allegations are investigated in order to decide whether leave should be given. As a result of the investigation even if a simple defence is identified or found to be bona fide unconditional leave should be granted to the defendant.”

Reference was also made to this courts own decisions delivered on 4<sup>th</sup> May 2007 in the case of **DAVID ODHIAMBO OWINO VERSUS THE BOARD OF TRUSTEES NAIROBI HCCC NO. 1242 OF 2004**, on an application for summary judgment. Case law on the subject is discussed from page 7 second paragraph through to page 14. In summary from these the case of **TRANSNATIONAL BANK VERSUS MOGAKA [991]. KLR 389** where it was held inter alia that “summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the action. To do that is to usurp the position of the trial judge. The case of **ORBIT CHEMICAL INDUSTRIES LIMITED VERSUS MYTRADE LIMITED AND R.Y.K. VOHORA, NAIROBI MILIMANI COMEMRCIAL COU RT CIVIL CASE NO. 632 OF 1998**.

In which the gist of the holding is “that in an application for summary judgment under order 35 rule 1 Civil Procedure Rules the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. This duty is limited to showing prima facie the existence of bona fide triable issues or that he has an arguable case. Wherein a plaintiff who shows that the defence of the defendant is shadowy or a sham is entitled to summary judgment.

(2) The purposes of an application for summary judgment is to enable a plaintiff to obtain quick judgment where there is a plainly no defence to the claims. Where the defendant’s only suggested defence is a point of law and the court can see at once that the point of law is misconceived or if arguable can be shown to be plainly unsustainable the plaintiff will be entitled to judgment.

(3) The summary notice of the proceedings should not however be allowed to become a means of obtaining an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable”.

The defence on the other hand on case law referred the court to the case or **VALWIN LIMITED VERSUS RASIKBHALLMANIBHAI PATEL, NAIROBI C.A. 248 OF 1999** decided on 30<sup>th</sup> June 2000. At page 4 of the judgment quoting with approval the decision in **GUPTA VERSUS CONTINENTAL BULDERS LTD [1978] KLR 83** the C.A. stated that in the quoted case the CA had defined what must be satisfied before summary judgment is granted as follows:-

“If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand if no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the Court forthwith to enter summary judgment. For it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily”

On the same page quoted the case of C.A. PATEL VERSUS E.A. CARGO HANDLING SERVICES [1974] E.A. 75 “*The main concern of the court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules ....*”

At page 5 reaffirming the decision on Order 35 in **VISRAM HALAK LALJI MUJI PATEL (trading as “VAKCEP BUILDING CONTRACTORS A FIRM VERSUS CAROUSEL LIMITED CA. NO. 11 OF [1986] (UR) AND BAIDEV RAJ AGGARWAL VERSUS KAMEL KISHORE AGGARWAL CA. 48/85 (UR)** stated thus:

*“This Court will resist with as much fortitude as it can command any attempt to weaken the effect of order 35. At the same time, we shall remain vigilant to ensure that no defendant with a reasonable or arguable defence who comes to court is deprived of an opportunity to put it forward. It is in our view more unjust to shut out a defendant with a good defence than to require a plaintiff to wait a little longer and prove his claims against a defendant on the merits.*

*Summary Judgment is a draconian measure and should be given in only the clearest of cases and a trial must be ordered if a triable issue is found to exist or one which is fairly arguable. The Court should avoid the temptation to anticipate the ultimate result of the trial”.*

On the Courts assessment of the facts herein as observed by this court in its own ruling in the case of **DAVID ODHIAMBO OWINO VERSUS BOARD OF TRUSTEES (SUPRA)** at page 11, the guiding principles are that in order to succeed the applicant has to satisfy the ingredients. In order 35 rule 1(i) (a) (b). where as in order to oust the Plaintiffs claim to summary judgment, the defendant has to satisfy the ingredients in Order 35 rule 2(1) (2).

Order 35 rule 1(1) (a) Civil Procedure Rules reads “*in all suits whereof the plaintiff seeks judgment for*

*(a) a liquidated demand with or without interest .... Where a defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof and interest.....”*

Order 35 rule 2(1) on the other hand provides “*the defendant May show either by affidavit or by oral evidence or otherwise that he should have leave to defend”.*

*The guiding tips that the Court has to apply in the assessment of the facts on such an application as extracted from case law in the DAVID ODHIAMBO OWINO VERSUS THE BOARD OF TRUSTEES CASE (SURPA) are set out at page 15 of that ruling. Being home made this court will adopt the same and apply them in the current assessment.*

- (1) The summary procedure should be applied if the court is satisfied that the defendant has no defence to that claim.
- (2) The Court has guard against invoking the procedure with a view to obtaining what is in effect an immediate trial for the action.
- (3) The defence pleadings should be looked at to determine whether these raise any triable issues on which the defendant can be allowed to defend.
- (4) When deciding whether summary judgment is to issue or not to issue this court is not to exercise that discretion by a minute and protracted examination of the documents and facts of the action.
- (5) Should the court arrive at a conclusion that the defendant should be allowed to defend them it has to decide whether to allow the defendant to defend conditionally or unconditionally.

Additional guidance from case law can also be found in own ruling decided at Nairobi on the 15<sup>th</sup> day of June 2007 pages 8-10, namely the case of CITY PRINTING WORKS (KENYA) LTD VERSUS

BARCLAYS [1977] KLR 85 in which the holding is that *where on an application to sign a summary judgment under the Civil Procedure Rules the defendant advances a defence which is reasonable or plausible and bona fide the judge must allow him un conditional leave to defend. Where however the judge regards the proposed grounds of defence as a sham, then he has a discretion if he grants leave to defend to impose conditions on the defendant*".

In the case of **UNITED INSURANCE CO. LTD VERSUS WARUINGE AND 2 OTHERS [2003] KLR 629**, where it was held inter alia that "*on an application for summary judgment under order 35 Civil Procedure Rules the grant of the same is depend on the understanding that that defendant has no defence to the counter claim.*

(2) *Rule 2(1) of Order XXV requires the defendant to show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.*

(3) *The defendant must go further and show that the defence is genuine or arguable or raises triable issues.*

(4) *In order to decide whether there is an arguable defence the court must look at the whole of the respondents defence and replying affidavit.*

(5) *If there is one triable issue contained in the affidavit supporting the application for leave to appear and defend, then, the appellants is entitled to have leave to appear and defend unconditionally.*

The facts that the foregoing principle are to be applied to as stated earlier or herein are clear and straight forward. These are what the plaintiff is using as demonstration entitling them a relief by way of summary procedure. They are the facts that the defendant is using a demonstration to show that the relief of summary judgment is not available to the plaintiffs in the circumstances of this case.

The agreed facts common to both sides as already set out herein and to which the principles of law set out herein are to be married in order to find a resolution to the problem as gathered from the pleadings from either side, deponements as well as annexures are that:

(1) The Plaintiffs were employees of the defendants.

(2) As per their terms of employment they were entitled to work up to the age of 55 years despite there being provision in those contracts for either the employer or employee to bring the contract to an within the terms set out therein.

(3) There was also an optional clause whereby the plaintiffs could opt to retire under the 50 years rule.

(4) As at the time events leading to these proceedings were set in motion the first plaintiff was aged 52 years 7 months, the second 50 years and the 3<sup>rd</sup> 53 years 7 months.

(5) None of the Plaintiffs opted to retire at the age of 50 years hence they did not exercise their option to opt to retire under the 50 year rule.

(6) At no time did the defendant request the plaintiffs either to retire under the 50 years rule nor give an indication of a desire to retire them under the said 50 years rule for whatever reasons.

(7) There is no dispute that the Plaintiffs assertions that they were willing to work till the retirement age of 55 years is un controverted.

(8) It is the defendant who came up with a policy of restructuring its establishment and un the process decided to reduce the number of its managers from 5 to 2.

(9) It is in disputed that it is the defendant which approached the plaintiffs with a view to having them

retire under an early retirement scheme. It is evident from documentations from both sides that this early retirement scheme was not molded along the lines of that which is applicable under the 50 year rule. But it was a special scheme peculiar to itself.

(10) The terms of what this scheme should contain and look like were negotiated and the same are outside the ones applicable to the 50 year rule

(11) There is no dispute that when the Plaintiffs voluntarily agreed to retire, the terms they were agreeing to retire on, were those specially molded for them and not those applicable to the 50 year rule.

(12) It is not disputed that the, tax exemption application was not part of the approved special package for early retirement. The communication to the p/s of Wednesday June 18, 2003 does not mention it and it therefore appears to have been on routine undertaking on the part of the defendant.

(13) It is evident that what the Permanent Secretary was asked to do in the communication mentioned in number 11 and 12 above was not asking the Permanent Secretary concerned to review the terms of the negotiated special package but to recommend application of or tax exemption.

(14) It is also evident from the documentation exhibited that the communication from Amb. Francis K. Muthaura on the subject dated 23<sup>rd</sup> October 2003 ref. OP/CAB/9/8/C mentioned circular No. OP.13/19A of 7<sup>th</sup> November, 1995 and 23<sup>rd</sup> June 2000 which none of the documentation exhibited herein refer to. It is therefore apparent that the content of those circulars were not brought to the attention of the Plaintiffs either in the cause of the negotiations or after for consideration before the same was implemented.

(15) It is evident from the content of the documentation in no 14 above, that what is given therein by the Author is a directive but not a request to have the advice put to the Plaintiffs to reconsider their position and opt to retire under the 50 year rule.

(16) It is evident from the communications emanating from the defendant to the Plaintiffs dated 5<sup>th</sup> November, 2003 that the defendant implemented what had been directed in the letter mentioned in number 14 and 15 above without rescinding the special package mentioned in no. 11 and 14 – above as set out.

(17) It is also evident that the plaintiffs were not asked to accept or not to accept the revised terms.

(18) It is evident that the plaintiffs rejected the revised terms and that is why they moved to court.

(19) There is no dispute that the tabulation of what the Plaintiffs are claiming as their entitlement is not what they would have been entitled to under the special early retirement scheme.

Having set out the undisputed facts of the case, the duty of this court is now to determine whether on those facts:-

(a) The Plaintiffs have made out a clear case for summary judgment.

(b) Whether even if the Plaintiff have made out a clear case for summary judgment, nonetheless the defendant has raised triable issues against the same and if so what are these triable issues.

(c) That if the Court is inclined to allow the defendant to defend the claim on the triable issues raised, is this defence conditional or unconditional?.

(4) Where a conditional defence is opted for what are the terms of this conditional defence.

The Court has accordingly given due consideration of the questions identified for determination by

the Court in the light of the undisputed facts on the records and the principles of law applicable to the subject of inquiry herein and makes the following findings in respect of those questions. In doing so the court stands guided by case law cited that it is not supposed to usurp the role of the trial judge. Neither is it to engage itself in minute scrutiny of the documentation relied upon by the parties.

Regarding the first question of whether the Plaintiffs have made out a clear case for summary judgment, the answer is in the Affirmative (yes). The reasons for saying so are:-

- (1) They negotiated for a special early retirement package which was agreed upon.
- (2) They altered their position of employment with the defendant because of the agreed terms of the specially negotiated early retirement packages.
- (3) At no time did they on their own volunteer or on the request of the defendant opt to retire under the 50 year rule and be paid in accordance with provisions applicable under that rule.
- (4) The decision to renege on the specially negotiated early retirement package was taken unilaterally by Amb. Muthaura and acquiesced to by the defendant without consultation from the Plaintiffs.
- (5) In terms of the decision in the case of **BANK OF UGANDA VERSUS MASABA AND OTHERS [1999] 1 E.A. 2**, the negotiation and acceptance of the negotiations results, comprised in the special early retirement package comprise an enforceable contract between the Plaintiffs and the defendants.
- (6) The success of Plaintiffs case is straight forward. It can only be faulted if proved that the alteration was done in accordance with the law which both disputants were aware of and ought to have taken note of in the course of the negotiations. And as such the permanent secretary was entitled to bring it to the attention of the disputants and then give directive that it be applied.
- (7) It will also depend on it being faulted on the ground that the action taken by the Permanent Secretary is capable of being defended successfully.

As regards the second question as to whether despite holding that the plaintiffs have made out a clear case for summary judgment the defendant has raised triable issues, the court's answer to this is the affirmative (yes). There are triable issues raised.

- (1) Whether the negotiated special early retirement scheme ousted and or overrides the earlier agreed upon terms of employment. Including optional early retirement under the attainment of the 50 years rule and the normal retirement age of 55 years.
- (2) Whether the defendant acting on the advise from Amb. Muthaura could unilaterally back out of the specially negotiated early retirement package to the detriment of the plaintiffs.
- (3) Whether the said Amb. Muthaura was justified, had the power and authority to alter those specially negotiated early retirement package.
- (4) Whether the defendant was obligated to act on that directive.
- (5) Whether the plaintiffs should have been allowed an opportunity to comment on the directive, reconsider their position before the same is implemented.
- (6) Whether Amb. Muthaura and defendant acted within the law applicable to the Plaintiffs contract of employment with the defendants.
- (7) Whether the plaintiffs are within the law applicable to their contract of employment with the

defendant in insisting on the negotiated special early retirement package.

(8) Any other

Having determined the plaintiff have made out.

Case for summary judgment, but that notwithstanding the defence raises triable issues, the next question is whether the defendant is to be given a conditional or unconditional right to defend.

In this Courts considered opinion this is a proper case for a conditional right to defend because:-

(1) The Plaintiffs are not responsible for what made the defendant back out of the specially negotiated early retirement package.

(2) There is a heavier responsibility on the defence to justify their action in the first instance and then bring it within the law.

(3) The Plaintiffs had gone ahead as a result of these negotiations and altered their positions of employment with the defendant.

(4) They were not consulted on the change of terms before the same were implemented.

The final question now is to determine the conditions for the defence. In this courts opinion, interests of justice demands that the defendant be given a right to defend on condition that he complies with the conditions to be set by this court.

The conditions set are:

(1) The defendant do and is hereby given a right to defend the plaintiffs claims on condition that he deposits the amount claimed by each plaintiff in prayer (a) of the plaint into interest earning accounts in the joint names of counsels of both parties within 90 days from the date of the date of the reading of this ruling.

(2) Each specific claim is to form a subject of a separate interest earning account in favour of each plaintiff.

(3) In default of No.1 above the order which is hereby given for summary judgement in favour of the Plaintiffs as prayed for in prayer (a) of the plaint together with interest thereof as well as costs of the suit as prayed for in prayer (b) of the said plaint shall take effect and have force from the date of such default.

(4) Upon taking such effect and force as in number 3 above, the parties will be at liberty to proceed according to law as regards execution of the said resultant summary judgment in default.

(5) The Plaintiff will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup>

DAY OF APRIL 2008.

R.N. NAMBUYE

JUDGE