



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

Civil Case 715 of 2006

MICHAEL MUNYI.....PLAINTIFF

VERSUS

HOTEL INTERCONTINENTAL NAIROBI.....DEFENDANT

RULING

The plaintiff moved to this court vide a plaint dated 23rd June 2006 and filed on 6th July 2006.

The key averments in the same relevant to the ruling are that the plaintiff is a long standing employee of the defendant having served the defendant faithfully for fifteen (15) years. On 10th January 2006 him plaintiff received a letter purporting to dismiss him summarily for gross misconduct arising out of allegedly procuring improper parts and receiving a bribe from the proprietor of Jesten Gas Electricals which dismissal was contested and in consequence thereof, the plaintiff avers that he is entitled to the special damages specified in paragraph 15 of the plaint.

In the prayers in the plaint the plaintiff seeks the following reliefs:-

- (a) A declaration that the termination of the plaintiff is that of redundancy and cannot be summary dismissal under the plaintiffs' contract of employment.
- (b) A declaration that the plaintiff is entitled to redundancy pay of 18 days for every year of service, notice pay, leave pay, salaries for January 2006, house allowance for January 2006, travel allowance for January 2006.
- (c) A declaration that the plaintiff is entitled to overtime pay.
- (d) Reversal of the plaintiffs dismissal to a normal termination on account of redundancy and a letter of recommendation and a certificate of service issued by the defendant.
- (e) General damages for libel.
- (f) Costs of this suit and interest on (b) and (c) from the date of judgment until payment in full.

Summons to enter appearance were taken out and served on the defendants. The defendants responded by filing a defence dated 21st day of July 2006 and filed the same date. The salient features relevant to this ruling are:-

- (1) That defendant ordered second hand parts instead of ordering new ones and when told that the parts were found not to be proper by the engineer, the plaintiff instead of returning them to the supplier asked the engineer to order some more which to them appeared to be a clear case of collusion with the supplier.
- (2) Denied unlawful dismissal as there was evidence that the plaintiff had grossly misconducted himself and had breached the defendants' code of ethics by receiving financial favour from the supplier.
- (3) The plaintiffs' dismissal was summary. Denied that the same was as a result of redundancy and denied that the plaintiff was entitled to redundancy dues, denied that the plaintiff had worked overtime, denied entitlement to the sum of Kshs.5,330,608.33, denied that the letter of dismissal contained words that caused aspersions on to the plaintiff, the dismissal letter was never published, denied injuring the plaintiff in his character, reputation and dignity. In consequence of the above prayed for the suit to be dismissed with costs.

On 24th August 2006 the plaintiff filed an application dated 22nd August 2006 brought by way of notice of motion brought under Order 50 rule 3, Order 35 rules 1, 2, 5 and 8 and Section 3 A of the Civil Procedure Act. The application seeks one prayer namely that judgment be entered against the defendant Hotel Intercontinental for the sum of Kshs.86,858.33.

The application is premised on the grounds in the body of the application, supporting affidavit, annexures and oral submissions in court and the major ones are:-

1. A reiteration of the content of the plaint.
2. Insistence that the defendant was obligated to pay the dues tabulated in paragraph 15 of the plaint which should have been paid even before his services were terminated.
3. Maintains that the said dues are due and payable to the plaintiff and they should have been paid upon termination.
4. That they have satisfied the ingredients for the granting of summary judgment.

The defendant/respondent opposed that application on the basis of grounds of opposition dated 23rd October 2006 and filed on 24th November 2006, and oral submissions in court on the same. The major ones are that:-

- (1) Summary judgment is only available on the clearest of cases and the current one is not one of them.
- (2) There is no specific prayer for the amount claimed.
- (3) The application seeks to amend the plaint to introduce a claim which is not claimed in the prayers in the plaint and the plaintiff is bound by the general principle of pleading to the effect that a party is bound by its pleadings.
- (4) The defendant will be prejudiced if summary judgement is granted as he will have been deprived of a right to respond to that claim had it been included in the prayers.
- (5) Since the plaint seeks declaratory orders, the court has to make a determination of these claims before the plaintiffs claim can crystallize. If summary judgment is given in pursuance to this application and the trial court declines to grant the declaratory reliefs, the proceedings will be embarrassed as they will contain the conflicting decisions over the same subject matter. For this reason it is better to await the main trial before any orders are made in favour of the plaintiff.
- (6) They deny that their letter MM4 contain any admissions as to liability to pay the alleged sum claimed.

- (7)** The plaintiff/applicant has not shown how the sums claimed have been worked out which calls for aduction of evidence.
- (8)** The applicant cannot rely on an alleged admission of the claim to support his plea for summary judgement. What he should have applied for should have been judgment on admission.
- (9)** That the authorities relied upon by the applicant are distinguishable as they were based on liquidated claim.

In response counsel for the applicant submitted that:-

- 1.** Since the respondents are relying on grounds of opposition and not a replying affidavit they cannot be allowed to attack the facts that the applicant has relied upon and presented to this court.
- 2.** That counsel for the respondent has mixed issues because it is special damages which need to be pleaded and proved and not sums forming a claim for summary judgement.
- 3.** They have shown how the figures have been arrived at both in paragraph 15 of the plaint and the affidavit and if the applicant wanted to fault these figures they should have put in a replying affidavit.
- 4.** They contend that their claim for summary judgment can be severed and be allowed leaving the rest of the reliefs do go for trial.
- 5.** They maintain that annexure MM 4 is a proper basis for their claim.
- 6.** The defendant has not produced any authority to show that a declaration has to be dealt with first before any summary judgment can be entered in favour of the plaintiff before the declarations have been determined.
- 7.** They still maintain that if the defendant wanted to attack the content of the plaint and supporting affidavit they should have put in a replying affidavit.
- 8.** Lastly that the defendant is not a stranger to the amounts being sought as they are aware that these dues are compulsorily payable under the Employment Act and the court is urged not to condone flagrant breach of the Employment Act.

The court has heard both sides on the application for summary judgment. It is clear from the arguments advanced by the plaintiffs' counsel that their stand is that they are within the ambit of ingredients for granting of the relief of summary judgment.

- (2)** That they have presented sufficient material on the basis of which the said relief can be granted.
- (3)** That the relief is properly anchored on the plaint filed.
- (4)** That the defendant has not presented any material sufficient enough to warrant the said claim for summary judgment being declined.

The stand of the defence is that the claim is not within the ambit of the provision of Order 35 Civil Procedure Rules as it is anchored on a declaratory relief firstly, and secondly that the merits of the same have not been satisfied.

There is therefore a technical objection and merit objection to the said application.

In its assessment the court will deal with the technical objection first. This is so because if the

application is knocked out on a technicality there will be no need for the court to go into the merits of the application.

As regards the technical objection, all that this court has to do is to determine that the same is within the ingredients set or required by the provisions of Order 35 Civil Procedure Rules. This provision states “35 (1), (1) in all suits where a plaintiff seeks judgment for:-

(a) *a liquidated demand with or without interest or*

(b) *the recovery of land with or without a claim for rent or mesne profits, by a land lord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser.*

Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest or for recovery of the land and rent or mesne profits.

(2) *The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the causes of action and any amount claimed.*

(3) *Sufficient notice of the motion shall be given to the defendant which notice shall in no case be less than seven days.*

2(1) *The defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.*

(2) *Any set-off or counter claim may entitle a defendant to depend to the extent of such set – off or counter claim”.*

When these provisions are applied to the facts herein the court makes findings that:-

(1) The applicant complied with Order 35 rule (1), (2) by presenting the application by way of notice of motion.

(2) He also complied with the requirements of Order 35 rule (1), (3) by giving the defendant sufficient notice enabling the defendant to participate in the application proceedings by filing grounds of opposition to the said application and participation in the arguments on the application. What is required next is for the court to be satisfied that the applicant is within the requirements of sub rule (1) (a) or (b).

In order to satisfy sub rule (1), (a) one has to show that the claim is for a liquidated demand with or without interest. Where as under sub rule (1) (b) the claim must be for the recovery of land. Herein we are not dealing with the recovery of land. So it is sub rule 1 (a) which applies to us. In order for the plaintiffs plea to be covered, it has to be shown that the amount claimed is Liquidated. Blacks Law Dictionary Eighth Edition page 949 defines liquidated as “*liquidated (of amount or debt) settled or determined, especially by agreement (2) of an asset or assets) converted into cash.*”

By virtue of this definition, liquidated means, determined. The claim should be determined.

In deed the plaintiffs’ plea has a determined amount in paragraph 15 thereof. However this figure did not find its way into the reliefs paragraph. The court has judicial notice of the fact that a liquidated claim is one which is pronounced in figures and forming part of the reliefs sought. It also has judicial notice that reliefs are availed to a claimant via the reliefs sought but not via the averments in the body of the plea. The purpose of the averments in the body of the plea is to demonstrate or show the basis of

the reliefs sought. The body therefore acts as an anchor for the reliefs set out in the relief section.

This being the case it therefore means that in order for the plaintiffs claim to be deemed to be a liquidated claim, the amount stated in paragraph 15 should have formed one of the reliefs in the reliefs section.

What the court notes to be contained in the relief section are declarations. As submitted by the defence counsel these are not covered under Order 35 Civil Procedure Rules.

The plaintiffs' applications therefore fails on this point of technicality. Having failed the technical test, there is no need to go into the merits of the application. The application dated 22nd day of April 2006 be and is hereby struck out for being incompetent. The door of justice is not closed, to the plaintiff by that striking out. He is at liberty to amend the plaint if he so wishes to include the liquidated claim in the relief section and then start all over again.

(2) The defendant will have costs of the struck out application.

DATED, READ AND DELIVERED AT NARIOBI THIS 25th DAY OF APRIL 2008.

R. N. NAMBUYE

JUDGE