



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

**CIVIL CASE 1268 OF 2004**

**BEATRICE EVERLYN ATIENO ABONG'O .....PLAINTIFF**

**V E R S U S**

**NATIONAL OIL CORPORATION .....DEFENDANT**

**R U L I N G**

This is an application (by chamber summons dated 20<sup>th</sup> June, 2007) by the Defendant for an order to strike out the Plaintiff's suit under Order VI, rule 13 (1)(b), (c) & (d) of the Civil Procedure Rules (the Rules). Under those provisions, the court may, at any stage of the proceedings, order to be struck out or amended any pleading on the grounds that it is scandalous, frivolous or vexatious; or that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the process of the court.

There is a supporting affidavit sworn by one LOIS A. ALLELA, a legal officer of the Defendant. She depones that the Plaintiff's suit is based on her contract of employment, and that therefore her remedies lie in private and not public law. She further depones:-

- (i) that no constitutional issues arise in the suit;
- (ii) that general damages cannot be awarded where there is a specific and definite contract which has specific and clearly spelt out contractual remedies;
- (iii) that in any case failure to enjoin the Attorney-General as a party in proceedings of a constitutional nature is a fatal defect that renders the suit incompetent and a nullity; and
- (iv) that the defects in the suit cannot be cured by amendment.

The Plaintiff has opposed the application as set out in her replying affidavit filed on 2<sup>nd</sup> October, 2007. The affidavit is to the effect:-

- (i) that the suit is properly before the court;
- (ii) that the Plaintiff's claims are not limited to breach of her contract of employment, and she should be heard on all those claims; and
- (iii) that the constitutional jurisdiction of the court is not discretionary and that the Plaintiff should thus be heard on all the constitutional issues she has pleaded.

I have considered the submissions of the learned counsels appearing, including the cases cited. The following main issues have been raised in this application:-

1. Whether the suit as pleaded is properly before the court?
2. Whether the non-joinder of the Attorney-General renders the suit incompetent?

The Plaintiff's claim is in three parts. Firstly, she claims damages for unlawful termination of her employment with the Defendant. Secondly, she alleges that by that termination her fundamental rights and freedoms were violated, and she seeks damages. Thirdly, she has pleaded that by the letter that summarily dismissed her, the Defendant defamed her. She seeks damages for that as well.

It was submitted for the Defendant first, that by not specifying the sums claimed for the alleged breach of her contract of employment, the plaint offends Order VII, rule 2(1) of the Rules. That rule provides:-

**“2.(1) Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed, except where the plaintiff sues for *mesne profits*, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant.”**

Indeed, damages recoverable upon a contract of employment are special damages that must be specifically and particularly pleaded and proved. General damages will not ordinarily be recoverable under a contract of employment. But failure to specifically and particularly plead special damages should not of itself defeat a suit. This is a short-coming that can be cured by an appropriate amendment before or at the hearing.

It was also submitted for the Defendants that the Plaintiff's claim pertaining to violation of her fundamental rights and freedoms is not properly pleaded in that it ought to have been separately brought under section 84 of the constitution and the rules made under subsection (6) thereof. It is to be noted that violation of her fundamental rights and freedoms is not the only claim that the Plaintiff has pleaded in this suit. That violation has been pleaded in connection with termination of her contract of employment. The issue is whether she was entitled to plead that violation in the present suit. It is really a matter of convenience and expediency. Would it have been expedient to bring separate proceedings in respect to the constitutional issues? I think not. It would have involved more in terms of time and expense. As was emphasised by the Court of Appeal at Nairobi recently, in the case of **PETER NG'ANG'A MUIRURI – vs - CREDIT BANK LIMITED & OTHERS**, CIVIL APPEAL NO. 203 OF 2006 (unreported), any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional issue. An order for damages may be made by the High Court under section 84 (2) of the constitution for the purpose of enforcing or securing the enforcement of fundamental rights and freedoms.

But, a person alleging that any of his fundamental rights and freedoms has been, is being or is likely to be contravened must necessarily specify what particular section of the constitution has been breached. See section 84(1) of the constitution. The Plaintiff has not done that in her plaint. However, I hold that that is not a fatal defect; it can be cured by amendment.

In regard to constitutional issues it was finally submitted for the Defendants that proceedings in that regard must enjoin the Attorney- General. The issue here is whether remedies for violation of fundamental rights and freedoms are available against private individuals, as opposed to the State, under section 84 of the constitution. No doubt there will be remedies in private law against any private individual violating any other person's fundamental rights and freedoms. But the availability of alternative remedies is no bar to proceedings under section 84 of the constitution. Subsection (1) of that section says so. I therefore see no reason why anyone should not be able to proceed against a private individual under section 84 of the constitution. For that reason I respectfully disagree with the principle enunciated in the Kiribati (Kiribati is a small island state in the South Pacific) case of **TEITIWNANG –vs- ARIONG & OTHERS [1987] LRC** const 517 that has been followed by some brother Judges of the High Court, to the effect that remedies for violation of fundamental rights are available only against the State and not against private persons..

It is now settled that striking out any pleading being such a drastic jurisdiction, it must be sparingly exercised, and only in clear, plain and obvious cases. Exercise of that jurisdiction is not about the merits of a plaintiff's claim or a defendant's defence. That must be determined at the trial. A litigant is entitled to this day in court, no matter how hopeless his claim or defence may seem, so long as some life can be injected into it by amendment.

Being guided by the above principles, I find no merit in the present application. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

**DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY, 2008**