



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

HCCC 10 of 2007

**BAKARI ALI OGADA & 245 OTHERS ..... PLAINTIFFS**

**VERSUS**

**UNILEVER KENYA LIMITED ..... DEFENDANT**

**RULING**

(1) This suit was instituted by 246 Plaintiffs on the 16<sup>th</sup> January 2007. In their Plaint dated the 12<sup>th</sup> January 2007, the Plaintiffs aver that at all material times, they were members of the Kenya Chemical and Allied Workers Union and employees of Unilever Kenya Ltd. (“**the Defendant**”) and claim from the Defendant the sum of Kshs.306,893,448/= on account of unpaid wages in contravention of a Collective Bargaining Agreement between the parties dated the 25<sup>th</sup> March 2004. The Plaint has since been amended on the 2<sup>nd</sup> March 2007.

With the Plaint, and pursuant to the provisions of Order I rule 12(2) of the Civil Procedure Rules, the Plaintiffs filed their written authority also dated the 12<sup>th</sup> January 2007 whereby they authorized, amongst others, Josphat Andalo Oburenyi to act on their behalf and to swear affidavits and participate in the proceedings unless otherwise ordered by the court and to liaise with the Plaintiffs’ Advocate on record.

(2) In the Chamber Summons dated and filed on the 7<sup>th</sup> March 2008, brought under Order VI rule 13(1) (c) and (d) of the said Rules, the Defendant asks the court to strike out the Plaint and to dismiss the Plaintiffs’ suit as against some thirty-two Plaintiffs who the Defendant contends do not wish to be parties to the suit/claim.

The Defendant relies on the supporting and further affidavits of Antoinette Absaloms respectively dated and filed on the 7<sup>th</sup> March 2008 and 29<sup>th</sup> May 2008. In paragraph 4 of his supporting affidavit dated 7<sup>th</sup> March 2008, Mr. Absaloms, the Company Secretary of the Defendant, says “**that by a letter dated 10<sup>th</sup> August 2006 representatives of some of the Plaintiffs informed the Defendant that they had unconditionally withdrawn from the suit.**” Paragraphs 3 and 4 of the said letter dated the 10<sup>th</sup> August 2006 read as follows:

**“We are aware that some of the casual employees have taken the company to court following the demonstration on 25/7/2006. We wish to state that we are not part of the group. May be our names could be in initial list which was presented to the lawyer, but as now we have categorically and unconditionally pulled out.**

**Attached please find the names of the former casual employees who have pulled out of the court case and we are asking to be considered for employment in the next contract.”**

The Defendant therefore argues that in light of this letter, the suit against the Defendant is an abuse of the process of the court as some of the Plaintiffs have clearly stated that they do not wish to take part in the action.

(3) The replying affidavit of Josphat Andalo Oburenyi dated the 20<sup>th</sup> May 2008 was filed on the 21<sup>st</sup> May 2008 in opposition to the application. He is one of the persons named in the Plaintiffs' written authority filed on the 16<sup>th</sup> January 2007 and states in paragraph 1 of his affidavit that he is duly authorized by the rest of the other Plaintiffs to swear the affidavit. Mr. Oburenyi challenges the application on the grounds that the Defendant has no *locus standi* to bring the application because the Defendant's defence to the Amended Plaint was struck out by Azangalala, J on the 18<sup>th</sup> October 2007 and further because the Plaintiffs alleged not to wish to be parties to the suit have not given any instructions to their Advocates on record to withdraw the suit.

(4) Having considered the application in light of the said affidavits and the respective submissions of both learned counsel, I have come to the conclusion that it must fail for a number of reasons.

Firstly, the said letter dated the 10<sup>th</sup> August 2006 states in material part that the writers thereof, being aware that some of the casual employees had taken the company (the Defendant) to court, had categorically and unconditionally pulled out of the court case and were offering themselves for employment in the next contract. As of the 10<sup>th</sup> August 2006, these proceedings had not been filed and there was therefore no suit then in existence from which the Plaintiffs concerned would have pulled out. Consequently, I find and hold that the letter cannot apply to this suit.

(5) As I have already noted earlier in this ruling, the Plaintiffs filed their written authority under Order I rule 12 of the Civil Procedure Rules on the 16<sup>th</sup> January 2007. Mrs. Esther Kinyenje, learned counsel for the Defendant, submitted that this notwithstanding, the thirty-two Plaintiffs concerned should either have sworn affidavits resiling their August 2006 decision not to participate in these proceedings or issued a fresh mandate to act in respect of this application.

With great respect, I am not so persuaded. Order I rule 12(1) allows the Plaintiffs to authorize any one or more of them to appear, plead or act for such other in any proceeding. Josphat Andalo Oburenyi was given that authority in writing on the 12<sup>th</sup> January 2007 and does not require any further authority to act for the Plaintiffs for the purposes of this application or generally in connection with the suit. Mr. Oburenyi at paragraph (4) of his affidavit states that none of the Plaintiffs has given him or the Plaintiffs' Advocate on record authority to withdraw the case on their behalf. Contrary to Ms. Kinyenje's submission, nothing would have been simpler than for the thirty-two Plaintiffs concerned to have instructed their Advocate to withdraw the suit if these proceedings had been brought against their wish. As the letter dated the 10<sup>th</sup> August 2006 precedes the suit, the Plaintiffs concerned must, *ipso facto*, be deemed to have withdrawn it unless the Defendant can establish otherwise.

(6) For the reasons I have given, the Defendant's Chamber Summons filed on the 7<sup>th</sup> March 2008 fails and it is hereby dismissed with costs to the Plaintiffs.

Those are my orders.

Dated and delivered at Nairobi this twentieth day of June 2008.

**P. Kihara Kariuki**

**Judge.**