REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 56 & 57 of 2005 (Consolidated)

PETER WHITTON……..……..…..…..1ST PLAINTIFF

KATHERINE S B WHITTON….……...2ND PLAINTIFF

VERSUS

KENYA EDUCATIONAL TRUST LTD……..DEFENDANT

RULING

On 20th November, 2006 the defendant filed two identical application under **Order 13(1)(b) and (d)** of the **Civil Procedure Rules** and under the inherent powers of the court and sought the striking out of these suits on the grounds that the defendant having, prior to the institution of these suits, paid to the plaintiffs salaries in lieu of notice, and in view of the settled principles of law on employer/employee relationship, these suits are frivolous and vexatious and otherwise an abuse of the process of the court.

The applications are supported by the affidavits of Vanessa Evans, the chairman of the defendant company. In opposition to the applications the plaintiffs have also filed replying affidavits. Before I delve into facts of the cases and the merits of the applications, I wish to set out the principles of law upon which the court acts when dealing with applications such as these.

The object of the powers given to the court to strike out pleadings under **Order 6 Rule 13 of the Civil Procedure Rules,** sometimes referred to as the summary procedure, as was stated by Lord Buckley in **Carl- Zeiss- Stiftung Vs Rayner, [1969] 2 ALL ER 897 at p. 908**, is:

"…to ensure that the defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficulty to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. … The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation."

These powers are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court should exercise those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law—Lord Justice Fletcher Moulton in Dyson Vs AG [1911] 1 KB 410. The summary procedure under this provision should only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable or where the case is clear and beyond doubt unarguable. This caution has been given in many cases. In Dyson Vs Attorney General [1911] 1 KB 410 at page 419 Fletcher – Moulton L J said:

"To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat … without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

In Hubbuck and Sons Ltd Vs Wilkinson and Clark Ltd [1899] 1 QB 86, at p. 90-91 Lindley MR stated:

"Summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what it asks."

Our law reports are replete with authorities on this proposition. Suffice it to cite DT Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR 1 in which this caution was also explicitly stated. Waki J (as he then was) reiterated the caution in Bank of Credit & Commerce International (Overseas Limited) Vs Giorgi Fabrise & Another, Mombasa HCCC No. 711 of 1985 in the following words:-

"**In a matter that alleges that the suit is scandalous, frivolous and vexatious and otherwise an abuse of the court process, I must be satisfied that the suit has no substance or is fanciful or the plaintiff is trifling with the court, or [that] the suit is not capable of reasoned argument; it has no foundation, no chance of succeeding and is only brought merely for the purposes of annoyance or to gain fanciful advantage and will lead to no possible good."**

With this caution in mind it is, however, trite law that where a pleading has absolutely no substance and a party is only trifling with the court, it is the clear duty of the court to strike out such pleading and accordingly dismiss the action or enter judgment for the Plaintiff as the case may be. In the English case of **Anglo Italian Bank Vs Wells, 38 L.T. at page 201** Jessel, M.R. stated that:-

"**When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff**."

How do these principles apply to these cases? A brief statement of the facts of these cases is apposite.

PETER WHITTON (Peter) and **KATHERINE S B WHITTON (Katherine),** the plaintiffs in these suits are husband and wife. By an undated contract of service executed on 31st October 2002 Peter was employed by the defendant as the Headmaster of its school at Gilgil known as Pembroke House School Gilgil (the School) for a period of 4 years with effect from 1st September, 2003 on the terms and conditions therein stated. By another contract of service dated 20th March 2004 the defendant employed the wife (Katherine) as a teacher of Pembroke House Preparatory School for a period of 2 years from 1st September 2003 also on terms and conditions therein stated.

Each of those contracts of service has a termination clause. The relevant part of Peter's reads:

"**The Headmaster's employment hereunder shall terminate:**

(a)…….

(b)……

(c) If either party shall give to the other not less than 2 full terms notice in writing of intention to terminate this agreement."

And that of Katherine states:

"**(a)……**

(b) Either party may terminate this contract without cause by giving to the other not less than seven and a half month's notice in writing to expire on 31st August that year. If either party terminates this contract without cause under this sub-paragraph 8(b) on less than the requisite notice period then the party so terminating shall pay to the other, in the case of the Employer terminating, four month's salary in lieu of notice and in the case of the Teacher terminating, but only if so demanded by the Employer, an amount equal to four month's salary in lieu of notice."

By letters dated 27th June 2004 separately addressed to the plaintiffs the defendant terminated their said contracts of service with immediate effect. The one to Peter read as follows:

"**After lengthy deliberation Council has decided to terminate your employment with Kenya Educational Trust Ltd. with immediate effect in accordance with your contract dated 31st October 2002."**

You are required to relinquish your post immediately. Council have (sic) elected to pay your salary in lieu of you serving

your notice period."

The one to Katherine read:

"I would advise that Council has decided to terminate your employment with Kenya Educational Trust Ltd. with immediate effect in accordance with your current teaching contract.

You are required to relinquish your post immediately. Council have (sic) elected to pay your salary in lieu of you serving your notice period."

The plaintiffs were not amused by those letters. On 10th March 2005 they filed these suits. Katherine filed HCCC No. 56 of 2005 and Peter HCCC No. 57 of 2005.

In her plaint Katherine averred that in the year 2003 she accepted the defendant's offer and took employment with the defendant as a teacher in Pembroke House School in Gilgil for an initial period of 2 years. The terms of that employment were contained in a contract of service dated 20th March 2004 but intended to take effect from 1st September 2003. She averred that it was a fundamental term of that contract that the plaintiff being on contract for a fixed period of time she was entitled to serve the defendant until the end of that period subject, however, to termination as provided in that agreement. By a letter dated 27th June 2004, the defendant wrongfully and maliciously terminated the plaintiff's employment without due regard to the provisions of the contract by purporting to pay to the plaintiff salary equivalent to 4 months in lieu of notice. She gave the particulars of malice as failure to give the plaintiff notice and the timing the letter of termination to deprive the plaintiff of other emoluments she was entitled to under the contract. As a result of the wrongful termination of the plaintiff's employment she claims to have suffered loss and damage and loss of opportunity to have the contract renewed as contemplated in the contract. She claims as special damages payment of all the emoluments she was entitled to in lieu of notice to expire in August 2005. She also claims exemplary and or aggravated damages for wrongful termination together with costs and interest.

Upon being served the defendant filed a defence in which it denied wrongfully and/or maliciously terminating the plaintiff's contract of employment and stated that it lawfully terminated the contract in accordance with clause 8 of the contract by paying to her Kshs.824,104/- being 4 months' salary in lieu of notice as stated in that clause. It further stated that all the other emoluments and benefits under the contract were only to be enjoyed by the plaintiff when she was in employment. In the circumstances, the defence concluded, the plaintiff's claim is frivolous, vexatious and otherwise an abuse of the process of the court.

Peter made a slightly different claim. In his plaint, he averred that in the year 2002 he accepted the defendant's offer of employment as Headmaster of Pembroke School in Gilgil for an initial period of 4 years subject nevertheless to the determination as provided for in the contract of service signed by the parties on the 31st October 2002. He further claimed that pending the drawing of the said contract, the defendant in order to induce the plaintiff to relocate to Kenya from the United Kingdom, authored to the plaintiff a letter of appointment dated 25th July 2002 stating, *inter alia*, that the defendant would allocate to the plaintiff a sum of USD 5,000 in respect of airfares. He has in paragraph 7 of the plaint enumerated the other terms of service. He also averred that it was a fundamental term of the said contract that the plaintiff was entitled to serve the defendant until the end of the fixed period of contract, subject to the determination as therein stated.

Peter went on to state that by a letter dated 27th June 2004, the defendant wrongfully and maliciously terminated his employment without due regard to the provisions of the contract. He has given the particulars of malice as being the timing of the letter of termination and failure to issue notice as intended to deprive him of other emoluments he was otherwise entitled to under the contract and the defendant's deliberate failure to serve him with notice as contemplated in the contract. The particulars of special damage he claims are basically payment of all his emoluments and benefits under the contract of service amounting to GBP 61,976 which he claims with interest. He further claims exemplary and or aggravated damages as well as interest and costs.

With minor discrepancies the defence to Peter's claim was more or less the same as the one filed in Katherine's case. In addition the defendant denied that the contents of the letter of 25th July 2002 formed part of the contract of service. It also denied having wrongfully and/or maliciously terminated the plaintiff's employment and averred that the same was terminated in accordance with clause 10 of the contract. It further stated that save for the basic salary the plaintiff was not entitled to payment in lieu of notice of all the other benefits under the contract of service as those were only to be enjoyed by the plaintiff while he was in employment. Having paid the plaintiff salary in lieu of notice the defendant averred that the plaintiff's claim is frivolous, vexatious and otherwise an abuse of the process of the court.

It is clear from these facts that three main issues arise in these cases for determination. They are whether or not the

defendant's letter of 20th July, 2002 formed part of Peter's contract; whether or not the plaintiffs' services were lawfully terminated; and whether or not the payments in lieu of notice should have included all the plaintiffs' other emoluments.

Before I attempt to answer any of these issues, the question I should ask myself at this stage is whether they can fairly and satisfactorily be disposed of in this application. If they cannot then I should dismiss this application and let the cases go to hearing. If, however, they can be resolved, then the application should be allowed.

Clause 12 of Peter's contract disposes of the first issue. It reads:

"This agreement sets out the entire terms and conditions of the Headmaster's employment to the exclusion of any other promises, warranties or representations whatsoever, whether oral or written."

There is therefore nothing to take to hearing on this issue.

The second issue is whether or not the plaintiffs' services were lawfully terminated. It is trite law that a contract of service must be terminated by notice—Paramount Bank Ltd Vs Mohamed G. Qureishi & Another [2005] eKLR (Civil Appeal No. 239 of 2001 (CA)). If therefore an employer terminates the services of his employee without giving him notice or unlawfully dismisses him, the court will always award him damages. It is also well established that the measure of damages payable to such an employee is dependant on the terms of the contract of employment.

Where a contract of service provides for its termination upon notice and none is given the measure of damages the court will award is payment of salary equivalent to the length of the notice provided for. Once again our law reports are replete with authorities on this point. Suffice it to cite **Ombaya Vs Gailey & Roberts Ltd [1974] E.A. 166, Rift Valley Textiles Limited Vs Edward Onyango Ogada Civil Appeal No. 27 of 1992** and **Dalmas B. Ogoye Vs K.N.T.C. Ltd Civil appeal No. 125 of 1996.**

If on the other hand, the contract is silent on the termination notice or its length the courts will not construe that as meaning that no notice is required - **Payzu Vs Hannafore, [1918] 2 K.B. 345.** Notice is always required and its length in such case will be determined by usage - **Hamilton Vs Bryant 30 T.L.R. 408**. If there is no usage, then the court will determine the reasonable notice required to be given in the circumstances of each case. See **Crediton Gas Company Vs Crediton U.D.C. [1928] Ch. 174** and **Ombaya Vs Gailey & Roberts Ltd [1974] EA 522.**

In these cases as I have said the contracts contain termination clauses. Katherine's provided for service of termination notice or payment of salary in lieu of notice. She was paid salary in lieu of notice. Thus far there is clearly no dispute that her services were lawfully terminated. Peter's provided for only service of notice but he was also paid salary in lieu of notice.

Mr. Chacha Odera, counsel for the plaintiffs, contended that Peter's contract could only be terminated by notice and that payment of salary equivalent to the notice period could do. With respect I cannot accept this contention. Employment is not servitude. It is impossible to force the services of an employee onto an employer when the latter has lost all confidence and trust in the employee--Okongo Vs AG [1998] KLR742. That is why the law makes provision for damages where there is wrongful termination or unlawful dismissal even in contracts with no termination clauses. In the circumstance I find and hold that the determination of the plaintiffs' contracts was lawful.

That brings me to the last issue which is whether or not the payments in lieu of notice should have included all the plaintiffs' emoluments. Counsel for the plaintiffs cited paragraph 307 of 16 Halsbury's Laws of England, 4th Edition and contended that they should have been included. Having perused the paragraph I am satisfied that their inclusion is discretionary. Besides this that is an authority from another jurisdiction, which is not binding on me. The law in this country is as was stated by the Court of Appeal in Kenya Ports Authority Vs Edward Otieno, Msa Civ. Appl. No. 120 of 1997 that other than the basic salary all the other emoluments are only enjoyed by those in actual employment and are never included in the payment of salary in lieu of notice. Bosire J (as he then was) said in George Kang'ethe Kimani Vs Associated Steel Ltd, HCCC No. 775 of 1987 that some of such emoluments are not paid for services rendered but as a means of enabling an employee to perform his services.

In the light of these local authorities I hold that only basic salary is paid in lieu of notice. In the circumstances the plaintiffs' additional claims have no basis in law. That being my view of the matter I find that the plaintiffs' claims in these cases lack seriousness. A pleading that lacks seriousness is frivolous and vexatious-- Dr. Murry Watson –Vs- Rent –A- Plane Ltd & 2 Others. NRB HCCC No. 2180 of 1994 and Mpaka Road Development Ltd Vs Kana [2000] LLR 1011 (HCK). A pleading that is frivolous and or vexatious is also and abuse of the process of court.

There is therefore nothing left in either of the two cases to take to hearing. Consequently I find that the plaints in these suits are frivolous, vexatious and otherwise an abuse of the process of the court and I accordingly strike them out with

costs including the costs of the applications to the defendant.

DATED and delivered this 16th day of October, 2008.

D.K. MARAGA

JUDGE.