REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 89 OF 2008

BENSON HUGO MWANGI & 40 OTHERS :::::::::::::::::::: PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD & 8 OTHERS :::::::::DEFENDANT

RULING

The Plaintiffs 41 in number have filed this suit against the defendant who are 9 in umber.

The Plaint is dated 18th March 2008 and filed the same date. Each Plaintiff has a distinct claim but anchored on the same common facts.

The common facts are that:-

1) The 1st defendant is a bank where as the 2nd to 9th defendants are being sued in their own behalf and as the Trustees of National Bank of Kenya Staff Retirement Benefits Scheme established under a trust deed dated 10th December, 1985.

2) That the scheme was and still is an irrevocable trust and established by the 1st defendant under the trust deed dated 10th December, 1985 as amended from time to time as a scheme to provide pension and other benefits to the employees of the said 1st defendant upon their retirement at a specified age and relief for the defendants of deceased employees.

3) The 1st to 41st Plaintiffs were at all material times to this suit employees of the 1st defendant and were also members of the defendants pensions scheme and therefore entitled to be paid their pensions under the provisions of the rules of the Scheme set out in the schedule to the Trust Deed as lawfully amended from time to time and or in accordance with the law.

4) They Plaintiffs state that on or about the year 2007, they caused an actuarial calculation to be done on their individual lump sum equivalents of their net accrued pension as at their dates of retirement and found out that the defendants had reduced the lump sum equivalent amounts due to them as a result of fraudulent misrepresentation, concealment and or non-disclosure of material facts, thereby resulting in the plaintiffs being paid reduced amounts, contrary to the trust deed and Rules which action is illegal null and void. The particulars of fraudulent misrepresentation concealment and non disclosure are given in paragraph 6 of the plaint.

5) The Plaintiffs went on in paragraphs 7,8,9,10,11,12,13,14,15,16,17 and 18 to aver that:-

(i) vide a circular titled Redundancy plan June 2001 the 1st defendant promised retirees that their pensions would be calculated and paid to them on leaving service but which promise the defendants failed to honour.

(ii) The pension statements sent out to them showed that their pension would be calculated in accordance with the Trust deed and Rules of the scheme and paid to them but which promise the defendant failed to honour.

(iii) The defendants move to pay union sable members their terminal dues and not pension less the employer's contribution towards their pension is not only illegal, null and void but also only lacks any basis in law.

(iv) That by using incorrect Actuarial factors in computing the pensions for the plaintiffs, the Trustees effectively reduced the cash values of the Plaintiffs that had accrued, which action they contend was in breach of their fiduciary duty to the claimants and was also a breach of the Trust Deed and the Rules as well as the law.

(v) They defendants never disclosed to the Plaintiffs the relevant provisions of the Trust Deed and rules of the scheme relied on in computing their pensions an act which was in breach of the 2nd to 9th defendants fiduciary duties and was also in breach of the trust deed and Rules and was illegal, null and void.

(vi) That they defendants, having published a booklet for the plaintiffs as members of the scheme in which actuarial factors were provided and further the defendants having sent out pension statements sheets to the plaintiffs who had retired under the Redundancy scheme, the defendants were thereafter estopped from denying the plaintiffs the correct cash equivalent value of their accrued pensions by not paying the retrenched plaintiffs their pension entitlements.

(vii) That on 30th June 2001 and on certain other specific dates the 2nd – 9th defendants offered to the plaintiffs to accept their terminal dues calculated in accordance with their letters of employment, their collective bargains agreement and the current Redundancy Laws but not pension which ought to have been calculated in accordance with the Trust deed and Rules and the law.

(viii) In breach of the Trust Deed and rules the 2nd to 9th defendants did not correctly calculate the interest of the Plaintiff who transferred to the new contributory scheme in or about the year 2005 and or calculate and advise them of their correct pension entitlements under the old defined benefits scheme.

(ix) That in failing to calculate their correct accrued pension or interest on the scheme from the defined benefits scheme to the defined contributory scheme the 2nd-9th defendants totally reduced their accrued pension and/or the transfer values which action was illegal, null and void.

(x) That the conversion of a section of a scheme from the defined benefit to a contributory section and the resultant reduction of their accrued pension was totally against the purposes, for which the scheme was established which was specifically for the provisions of retirement benefits for the plaintiffs and their dependants and the said amendment and/or restructuring having infringed the provisions in the reduction of the future benefits.

(xi) That as a consequence of the above breaches of the Trust deed, and Rules, as well as the law, the plaintiffs right, and entitlements, in the scheme have been severely prejudiced and reduced and specifically resulting in under payments and non-payment for them and inordinate low pensions being offered by the 2nd – 9 th Defendants and put the defendants to strict proof.

(xii) The 1st defendant as a sponsor of he scheme also guaranteed that the scheme will be funded to the extend that will be in a position to meet the pensions now accruing to the plaintiffs.

(xiii) The plaintiffs contend further that the defendants actions during the change over of the scheme from the defined benefits scheme to the contributory pensions scheme and in particular in not seeking the plaintiffs consent and or informing them about the details of the change have been in bad faith, tainted with illegalities unconscionable, and calculated at causing the plaintiffs substantial financial loss and damage and the said change was therefore illegal, null and void.

(xiv) They contend that as a result of the defendants, wrongful, illegal and fraudulent conduct stated above the plaintiffs interests in the defined benefits scheme have been wiped out and the plaintiffs have thereby suffered loss and damage and the plaintiffs claim damages for breach of the trust deed and rules as well as the law.

(xv) That unless restrained the defendants threaten to continue with their illegal acts and are likely to deal with the plaintiffs interests in the scheme in a manner that is prejudicial to the Plaintiffs interests. The Plaintiffs are also apprehensive that the defendants are likely in future to continue with their illegal and unlawful activities in breach of the Trust Deed and rules as well as Retirement Benefits Act and Rules unless restrained by this Honourable Court.

In consequence there of, the plaintiffs sought the following reliefs:-

(a) A declaration that the purported conversion of the scheme from a defined Benefits to a contributory scheme with effect from the 43rd October, 2001, vide the deed of amendment dated 24th September, 2001 was illegal, null and void.

(b) A declaration that the Plaintiffs benefits should be calculated in accordance with the Trust deed and Rules of the scheme.

(c) An injunction restraining the defendants, their servants and/or agents and each or any of them or howsoever from continuing with the operations of the new contributory pension scheme commenced on the 29th March 2005 until an investigation is carried out by an independent person authority to ascertain that the plaintiffs interests in the scheme are protected and that the plaintiffs have been paid the balances of their lump sum benefits as at retirement together with interest.

(d) An order directing the defendants to recalculate the plaintiffs benefits under the defined Benefits Scheme and payment to the Plaintiffs of any short fall, that may be found to be due to them.

(e) Special damages of Kshs 312,090,309.00 as prayed in the Plaint.

(f) Damages for breach of contract.

(g) Costs of the suit.

(h) Interest on (e) and (f) at the commercial rate of 20% per annum until payment in full.

(i)Any other or further relief as this honourable court may deem fit to grant.

Summons were taken out and served on the defendants who entered appearance dated 7.4.2008 on 8.04.2008 followed by the filing of a defence dated 23rd April, 2008. The salient features of the same are as follows:-

(1) They contend that the 2nd to 9t defendants cannot be sued in their individual capacity.

(2) Contend that the plaintiffs did not cause any actuarial calculation to be done, alternatively if such calculation was indeed done then the same was not done in a professional manner.

(3) That the Plaintiffs scheme benefits were calculated in accordance with the Rules of the scheme

prevailing before the Plaintiffs left the 1st defendants employment prior to attaining retirement age and as such were treated as withdrawal cases. These rules were available to the plaintiff's at all material times and were further summarized in a booklet provided to each of the plaintiffs.

(4) That the 2nd to 9th defendants as trustees exercised their powers to invest properly and to the standards expected, which scheme was previously administered by Kenya National Assurance Limited before its collapse but none of the Plaintiffs lost their entitlement.

(5) They admit sending to the Plaintiffs the Redundancy circular and scheme benefits statements but denied that it made any promise as alleged or at all, and put each of the plaintiffs to strict proof.

(6) That the 1st defendant's pension was paid at the same time as the computed benefits for the plaintiffs.

(7) With the exception of the 31st – 35th and 41st plaintiffs none of the other plaintiffs were retirees, as at the time of leaving the 1st defendants employment to whom the actuarial factors applicable for the computation of pension benefits would have applied. The computation of benefits for the 31st, 35th and 41st plaintiffs was done in accordance with the Trust Deed and scheme rules.

(8) Maintain all amounts were calculated in accordance with Trust Deed.

(9) That in service members of the scheme as at 1.7.2004 were offered the option to convert their benefits to a defined contribution basis with effect from that date, by which date the plaintiffs had left the services of the 1st defendant and had received their scheme benefits in full calculated in accordance with the Trust deed. That the benefits having been settled, the issue of interest did not and does not arise.

(10) Content that the conversion referred to in paragraph 14 of the Plaint did not lead to the contention referred to therein.

(11) Contend that the 1st defendant is not under any obligation to grant the plaintiffs disputed claims.

(12) They made no admission to the specific claims as put by the 1st to 41st plaintiffs running from paragraph 19 of the plaint through to 229 and put each of the plaintiffs in so far as its peculiar claims were concerned to strict proof.

(13) Maintain that the conversion was carried out in accordance with the powers conferred upon the Trustees by the original Trust deed, the existing rules and all other enabling powers conferred upon the 2nd to 9th defendants in their capacity as the Trustees.

(14) Contend that the amended scheme has been in place since 1st July 2004 and yet the plaintiffs took no action and as such the plaintiffs claims are fictitious, frivolous and based on distorted actuarial calculation.

(15) Also contend that the claims are time barred and as such no reasonable cause of action has been disclosed.

Against the afore set out background information, the plaintiffs have moved to this court, vide an application by way of chamber summons brought under Order VI rules 13 and 16 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law. It is dated 8th may 2008 and filed on 9th May 2008. It seeks 3 prayers namely:-

(1) That the defence filed herein be struck out.

(2) That judgment be entered as prayed for in the plaint.

(3) That costs be awarded to the Plaintiffs applicant.

The grounds in support are set out in the body of the application, supporting affidavit, written skeleton arguments as well as case law. The major ones are as follows:-

(1) That the Plaintiff as per their pleading in the plaint vide paragraph 4 and 5 of the plaintiff thereof, they have asserted that they are former employees of the 1st defendant and by virtue of that ,they are also members of the 1st defendants pension scheme in accordance with the Trust deed and rules of the scheme.

(2) They assert that at paragraph 3 of the defence the defendant has admitted paragraph 4 and 5 of the plaint and by reason of this fact of admission there is no dispute as to whether the plaintiffs were entitled to be paid their pension or not.

(3) That having admitted as stated in number 2 above the plaintiff's content that the only issue left for determination is how much the plaintiffs are entitled to as lump sum.

(4) It is their stand that what they as plaintiffs are entitle to is what is contained in their averments as respects each plaintiffs distinct claims as averred in the plaint which amounts have been calculated by an independent actuarial services company.

(ii) the sums are set out in the Actuarial report PCM 3 which has detailed the evaluation methodology.

(5) They contend that the defendant has not stated any amount it deems were payable to the plaintiffs either in their defence or replying affidavit. As such the only reasonable conditions to be drawn from the surrounding circumstances stated above is that the only correct amounts claimable by the plaintiffs and payable by the defendants is the amount calculated for the plaintiffs which amounts are claimed in the plaint.

(6) That since there is no actuary report, produced by the defendants, to controvert, that produced by the actuary, on behalf of the plaintiffs, the courts, is invited to hold that the only sums that should be adjudged payable by the defendant is the amounts calculated by the plaintiffs actuary and the court, is called upon to ignore the defence lawyers assertion to the contrary.

(7) They assert that the plaintiffs have asserted that their pension's entitlement was never paid to them. In contract the defendants have alleged in their paragraph 6 and 9 of the defence that they paid the plaintiffs their pensions but they have not specified how much was paid to the plaintiffs by the defendant as their pensions entitlement. Neither has the defence annexed to their replying affidavit proof of any such payments. As such there is no triable issue raised by the defence on this issue as the defence on this issue should be taken as a mere denial of liability without any reason.

(8) They also contend that the defence is contradictory because in paragraph 3 of the defence the defendant admits the plaintiffs were employees of the 1st defendant and then proceeds to deny in paragraph 16 – 59 the plaintiff's claims of employment with the 1st defendants as well as the plaintiffs computation of their pension. The Plaintiffs have responded to those claims by annexing to the supporting affidavit vide annextures PCM8 – pcm 49, copies of their certificates of servicewith the defendant their pay slips, letter of employment and promotional certificates from the 1st defendant which go to show that the defendants denials contained in paragraphs 6 – 69 of the defence are no defence but a mere sham more so when the said documentations by the plaintiffs has not been controverted by the defendants replying affidavit.

(9) They assert that the defendants defence in paragraph 16 – 69 offend the provisions of order Vi rule 4 civil Procedure Rules in that the defendant having pleaded that they paid the plaintiffs their pensions they defendants should have gone ahead to give particulars of the amount of pension paid to each plaintiff.

(10) They state that paragraph 62 of the defence has been faulted in that it simply states that the claim is statute barred but have not pleaded the particular statute they have relied upon.

(ii) Even if it were true that any statute of limitation is applicable, the same would be void to the extend that a period of limitation does not operate to defeat existence of a Trust. The defendants have admitted herein that their relationship with the plaintiffs is based on Trust ship.

(11) In addition to the foregoing the plaintiffs contend that their plea for the court to strike out the defence is further fortified by their assertions that:

(i) paragraphs 3 of the defence is an admission.

(ii) Paragraphs 4, 5, 9, 11,12,13,14,15 are bare denials.

(iii) Paragraphs 6 does not state the relevant rule of the scheme they relief upon in computing the plaintiffs pension, whose amounts have not even been stated.

(iv) Paragraphs 7 is a mere statement of facts.

(v) Where as paragraph 8 is contradictory in that items 4 of the Redundancy circular pcm4 which the defendant admits to have sent to the plaintiffs read:-

"*pension final payments calculated in accordance with the pension scheme Rules in force from the time being"* which in their opinion amount to a promise to pay the plaintiffs pension. This renders the defendants liability to pay contradictory and warrant being struck out.

(vi) The actuarial computation put forward by them is in line with rule 5 (b) of the rules of the scheme.

The defendants have opposed the application on the grounds set out in the replying affidavit, written skeleton arguments, and case law. The replying affidavit is sworn by one AL Noor Ismail on 23rd May 2008 and filed the same date. The salient features of the same is that it is deponed by the deponent in his capacity as an employee of the first defendant, as a general manager. Human Resources. He is also one of the trustees of the second defendant. He is conversant with matters pertaining to the suit and he has authority from the defendants to make the said affidavit. The authority to so depone is not annexed.

(2). He has been advised by their counsel on record to the effect that the applicants application is misconceived, bad in law and ought to be dismissed because;-

- the defence discloses triable issues.

- they make no liability on the quantum claimed by the plaintiffs.

- no reply to defence has been made by the plaintiffs

- The law does not permit the trial of a suit such as the one presented to court by way of affidavit.

3. They contend that as per advice from their counsel on record their defence is not a sham as claimed by the plaintiffs and the trial should proceed so that the plaintiffs can prove their claim as required by the law.

4. They also contend that as per advise from their counsel the plaintiffs application is an abuse of the process of court, the same is incompetent and it is intended to embarrass the defence hence their plea that the same be dismissed with costs to them.

In their written skeleton arguments they simply reiterated principles of law on the subject as derived

from case law cited.

On case law the plaintiffs rely on the case of **KASSAM VERSUS BANK OF BARODA [2002] 1 KLR 294** decided by Kuloba J. (as he then was) on December 10, 2002 inter alia that:-

(a) The power to strike out a pleading is a discretion are power to be exercised along sound judicial principles.

(b) The power to strike out pleadings for disclosing no reasonable cause of action should be invoked only in absolute clear cases and exercised with extreme caution.

(c) The court has inherent as well as a statutory jurisdiction to strike out a pleading which is an abuse of the process of the court. However it is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases.

The case of **SELF AND OTHERS VERSUS FOX AND *OTHERS [2005] 3 AER 693*** *where it was held inter alia that "the principle was that where a trustee acted under a discretion given to him by the terms of the Trust but the effect of the exercise was different from that which he intended, the court, would interfere with his action if it was clear that he would not have acted as he did had he not feared to take into account considerations which he ought to have taken into account or taken into account considerations which he ought not to have taken into account. Fiscal consequences could be relevant considerations which the trustee ought to take into account and a material difference between the intended and actual final consequences could be sufficient to bring the principle into play.*

The case of **SPENCER VERSUS ATTORNEY GENRAL [1999] 3 LRCI** where it was held inter alia that "the failure on the part of the appellant to give any particulars in respect of these allegations offends the rule requiring particularization. It followed that no cause of action was disclosed and that the pleadings would be struck out accordingly (the decision interpreted that jurisdiction order 18 rule 19 Kenya equivalent of order VI rule 4 Civil Procedure Rules0.

The case of **CARION INVESTMENTS LTD VERSUS WRONG AND OTHERS [1987] LRC 794** which contained an action by a beneficiary to receive trust property or the proceeds representing that property. It was held inter alia that the "*defendants as directors were fiduciaries in the nature of constructive trustees and the account requested was simply the machinery by which the beneficiary discovered Trust first property should be accounted for.*

(2) The case dealt with equitable relief for which there was no limitation period.

(3) The defendants were in a fiduciary position and broke their duties by using their special position for profit.

The case of **BUSINESS IMAGING SYSTEMS VERSUS CO-OPERATIVE BANK OF KENYA LTD, NAIROBI MILIMANI COMMERCIAL COURT CASE NO. HCCC NO. 36 OF 2005** decided by Fred Ochieng on the 26th day of January 2006. On an application to strike out the defence the learned judge made findings that "*the defendant having admitted that the plaintiff was entitled to some payment for services rendered, it failed to prove that it did effect payment, therefore it had failed to provide any material from which it could be proved that it had paid such money as the plaintiff has claimed. It followed that the only way that the court could ensure that justice is done was to decline to strike out the defence but grant a conditional leave to defend the suit by depositing the amount claimed in an interest earning account in the joint names of counsels of both parties.*

The case of **SAFARICOM LIMTED VERSU ITNET EAST AFARICA LIMITED MILIMAN8I COMEMRCIAL COURT HCCC NO. 557 OF 2006** decided by M.A. Warsame J. on 28th day of June 2007. It concerned an application to strike out the defence entry of judgment in favour of the plaintiff thereof in the alternative that summary judgment be entered for the plaintiff as prayed. At page 5 line 2 from the bottom the learned judge made observations that the plaintiffs claim in that case was for a

liquidated sum supported by entire documentary evidence.

At page 8 line 3 from the bottom the learned judge went on to state thus:- "*The law is that a defendant faced with the kind of application like the one before me, must show a reasonable ground of defence or a bona fide defence or facts which can constitute a plausible defence".*

At page 9 line 9 from the top, the learned judge continued:- "*in my humble opinion a mere denial or general traverse in a defence is not sufficient and effectual to enable a defendant to defeat the case of summary procedure. A defendant must specifically and in a straight forward manner deny the assertions, allegations and or claim of the plaintiff as contained in the plaint. A move or bare denial is not a sufficient or valid ground to enable such a party to revisit a summary judgment application.*

The case of ***TREAD SETTERS TYRES LIMITED VERSUS A.A. KAWIR MILIMANI HCCC NO. 245 OF 2005*** *decided by Kasango J. on 1st December,2005 who struck out the defence because as observed at page 3 line 3 from the top, the learned judge, found the defence frivolous and vexatious because with one breath it pleads that the defendant has been wrongly sued, with the other it pleads that the defendant paid the plaintiff to the extent of undisputed claim, … the defence claim through its counsel having filed a memo of appearance not under protest had accepted that he was rightly sued. The allegation that he was wrongly sued can only be termed as an act of nit – planning to create triable issues".*

Halisburys Laws of England Volume 28, 4th Edition re issue page 530 paragraph 1037 where it is stated inter alia that "*No period of limitation prescribed by the limitation Act l980 applies to an action by a beneficiary under a trust…".*

Lastly there is the case of **ACHOLA AND ANOTHER VERSUS HONGO AND ANOTHER [2004] KLR 462** a Court of appeal decision decided on April 30,2004. The brief facts are that the appellant had filed suit against the respondent alleging among other things the tort of fraudulent misrepresentation. The second respondent, the municipal council of Kisumu, which was named as the second defendant raised a preliminary objection that the suit against it was time barred, since the alleged tort, was said to have been committed in l994 and the original plaint was duly filed in l997.

A defence which had been previously filed by the second respondent, neither pleaded the defence of limitation, nor specifically pleaded that the claim was time barred under the Public Authorities Limitation Act.

The High Court allowed the issue of limitation, upheld the preliminary objection, thereby terminating the appellants claim. The appellant appealed. On appeal it was held inter alia that:-

(a) *the provisions of the Civil Procedure Rules Order Vl rule 4(1) (2) required the second respondent to specifically pleaded the statute on whose provisions he relied in seeking to defeat the appellants claim. The respondents were obligated to specifically plead limitation, based on the statute before being allowed to sue it as the basis of the preliminary objection.*

(2) The second respondent having failed to plead limitation in its defence, it was not entitled to rely on that issue and base a preliminary objection on it, and it was not entitled to rely on that defence during the trial of the suit unless it amended its defence.

(3) The High Court was not right in allowing the issue of limitation to be raised when it had not been pleaded and in upholding the preliminary objection of the second respondent based on the issue of limitation.

The defence on the other hand relied on the case of **DT DOBIE AND COMPANY (K) LTD VERSU S MUCHINA [1982] KLR 1** where the court of appeal held inter alia that:-

(1) The power to strike out a pleading is exercised without the court, being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.

(2) The application was incompetent as it sought for the suit to be struck out on the ground that it disclosed no cause of action where as the rules provided for striking out on the ground that it discloses no reasonable cause of action. The application was further incompetent for failure to comply with the requirements of sub rule (2) by not stating concisely the grounds upon which it is made.

(3) The power to strike out should be exercised only after the Court has considered all facts but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings no opinions should be expressed as thus would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

The case of **KUNDANLAL RESTAURANT VERSUS DEVSHI AND COMPANY [1952] 19 EACA 77** where it was held inter alia that there were triable issues disclosed in the affidavits and it was not possible to form an opinion on the merits at the time of the order.

At page 79 line 14 from the top Sir Newnham Worley (V.P) as he then was, citing with approval **HASMANI VERSUS BANQUE DO CONGO BELGE [1938] 5 E.ACA 89** being a decision of Sherridan C.J. observed thus "*if there is one triable issue contained in the affidavit supporting the application for leave, to appear and defend,then the appellant is entitled to have leave to appear and defend unconditionally …. (at line 27 from the top the court, continued).* The principle on which the court, acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition…. (citing with approval the case of **JACOBS VERSUS BOOTHS DISTILLERY CO. [1991] 85 L.J. 262 H.C.** continued thus :-

A condition of payment into court, ought not to be imposed where a reasonable ground of defence is set up.

The case of **JOSEPH GITAU, ISAAC NJUGUNA MBURU AND CECILIA WANJIRU (SUING ON BEHALF OF 100 OTHERS AS MEMBERS OF MILIMANI MITUMBA WOMEN GROUP VERSUS UKAY ESTATE LIMITED NAIROBI HCCC NO. 813 OF 2004** decided by Ojwang J. on 22nd July 2005 *where at page 4 – 5 the learned judge set out what is meant by a pleading being scandalous, frivolous and vexatious. Allegations in a pleading are scandalous if they state matters which are indecent, or offensive or are made for mere purpose of abusing or prejudicing the opposite party. More over any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party, or make any charge* of misconduct or bad faith against him or any one else"

A pleading is frivolous when it is without substance or unarguable

(a) When a party is trifling with the court or

(b) When to put it forward would be wasting the time of the court; or

(c) When it is not capable of reasoned argument or

(d) It is without foundation; or

(e) Where it cannot possibly succeed; or

(f) *Where the action is brought or the defence is raised only for annoyance; or*

(g) to gain some forceful advantage; or

(h) where when it can really lead to no possible good

Where as a pleading or an action is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense".

From the above cited case law it is apparent that the defence is relying purely on points of law in opposing the plaintiff/ Applicant's application, which points of law have been summarized in their skeleton arguments as follows:-

(i) the rule is that the remedy of striking out is to be acted upon in plain and obvious cases.

(ii) The jurisdiction of striking out pleadings is to be exercised with extreme caution.

(iii) The necessity for caution arises from the fact that although it is a very strong power, indeed, if wrongly exercised, it can cause grave injustice.

(iv) Since the power is so strong, it should be exercised in cases which are not only clear, but which are also beyond all doubt which means that the court, has a duty to ensure that the defendant has no claim at all either as disclosed in the statement of claim or defence or in such affidavits as he may file.

(v) It is trite law that the court, has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. However there is a fetter attached to it namely that it should be exercised sparingly and only in exceptional cases.

(vi) It is not to be exercised by (a) minute and protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action or not. The reason for this precaution is because to do that (minute scrutiny of documents) would be tantamount to usurping the role of the trial judge. The judge would be trying the suit on the basis of affidavit evidence without discovery and without oral evidence, tested by cross examination in the ordinary way. Such an action would be nothing but an abuse of the inherent power of the court, and not a proper exercise of that power.

(vii) The court, is further cautioned and enjoined to act cautiously and carefully and warned to note that it has to consider all the relevant facts of the case without embarking upon a trial. The court, is to take note that at this stage, it is not to deal with the merits of the case which is a function reserved solely for the trial judge.

(viii) The court, is called upon not to express any opinions on the application which are likely to prejudice the fair trial of the matter, or make it uncomfortable or restrict the freedom of the trial judge should the court, fail to uphold the summary procedure.

(ix) If an action is explainable such as in cases which are not plain and obvious by considering itself bound to summarily dismiss the action.

(x) The court, is enjoined to note that a court, of justice should aim at sustaining a suit rather than terminating it by summary dismissal.

(xi) The court, also to note that a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment.

On the facts of the application the defence stressed the following, also set out in their written skeleton arguments. They urge the court to find that the action filed here in is not a proper candidate for a summary procedure because of the following reasons:-

(a) It is a complex matter evidenced by the fact that it took 233 paragraphs for the plaintiffs to explain their claim and 246 paragraphs for them to explain their application. From its set out the action is not a class action but though comprised in one plaint, each individual plaintiff has a distinct claim which the court, needs to analyze before determining the claim.

(ii) it is the defences' stand that if this court, were to embark on the scrutiny of how each plaintiffs claim is affected by the rules alleged to have been breached, this would call for the minute scrutiny and analysis of the Trust deed and the rules of the Trust Fund, the redundancy plan, the various terminations

letters, correspondences, and salary slips of each plaintiff. It is their contention that such a detailed examination of facts and documents which is likely to be long and protracted, is likely to render nonsense the very essence of summary procedure intended by the application. For this reason the court, is urged to make findings to the effect that this is a matter which calls for a fully flegged hearing. The court, is desuaded from resorting to trial of the matter through affidavit.

(b) The defence contends that contrary to what is asserted by the plaintiffs there are numerous issues for trial. The court is urged to be guided by the authorities cited to the effect that where the defendant demonstrates even one triable issue he should be allowed to defend the action unconditional.

(c) The court is invited to find that the following are triable issues raised by the defence on record namely:

(i). Whether the second to the 9th defendants can lawfully and properly be sued in their own behalf as individuals. In their view this is a point of law which goes to jurisdiction, which in law has to be determined before anything else can be proceded with i.e the merits of the case. This calls for an in depth analysis of the documents on record, instruments relied upon and even calls for adduction of evidence.

(ii). Issues as to whether, the plaintiff caused an actuarial calculation to be done and whether the same was done professionally is a triable issue as the plaintiffs will be required not only to prove the existence of the documents but also its authenticity. Where as the defendant will be required to show that the report does not meet the required standard for such reports as they contend that it is of poor support of the plaintiffs' case. More so when the plaintiff has been put to strict proofs of the same.

(iii). Issues also arises as to whether the alleged fraudulent misrepresentation, concealment and non disclosure really exists. The plaintiff will be required to demonstrate that there was an intention to defraud. As such the plaintiff will be required to produce the state of the mind inclusive of malafedes which goes beyond mere proof of entries in a record. They will also be required to prove the intention to mislead or defraud. None of these elements can be implied. They require adduction of evidence.

(iv). The defendants will require to call evidence to prove that they are in capable of concealment of the trust deed and pension rules. They will demonstrate that these have all along been within reach of the plaintiffs from the date of their joining the 1st defendants' employment.

(v). Further that since the plaintiffs have not filed a reply to the defendants' defence, the parties have now joined issue with the plaintiff, making it mandatory for issues raised by both sides, triable. The said joining of the issue, requires the plaintiff to prove that, their pensions were not calculated in accordance with the rules, that they were not aware of the rules that the said rules were not provided to them in a booklet, that the trustees failed to invest the money properly. That the Redundancy plan made any promises to the plaintiffs', as regards their pension, that the plaintiffs' pension was not paid in time, who among the plaintiffs were retirees, at the date of leaving the 1st defendants' employment, and who among them left under the redundancy arrangement.

(vi). It is also a triable issue, whether the only point in issue in this case is whether payments of the pension was made to the plaintiff or not and how the subject amounts were calculated. They contend that the issues involved go beyond being viewed as matters of purely arithmetic. They contend it is not the business of the court, to embark on a laborious calculation of the plaintiffs' entitlement without each of them being called upon to prove their individual claims. The court is urged not to accept the figures given as the entire truth. The truth can only be established by allowing the defendant the right to access exercise the plaintiff on the truthfulness of their allegation.

(d) They find nothing in their defence which can be termed as being scandalous, frivolous and or vexations as the plaintiff were not demonstrated existence of matter.

(i). Which are indecent or offers are raise made for the more purpose of abusing or prejudicing the opposite party. Nothing has been shown to have been stated properly for the purpose of abusing or

prejudicing the opposite party neither there a charge of misconduct or bad faith against him or any one else.

(ii). It has not been demonstrated how their defence is frivolous as the defendants were moved to court to defend the plaintiff claims on salary note and are not trifling with the plaintiff.

(iii). On the same tone they were not come to court to vex the plaintiff but to defend the negation leveled against the 1st defendant and call upon the plaintiff to give on account of not only the geniuses, but also proof of the truthfulness of their claim. They have no intention to cause the plaintiff unnecessary anxiety trouble and or expense more so when it is it their who have brought the defendant to court and the defendant is simply responding to the plaintiff claims on the basis of the a fore said assertion the defendant urged the court not to shit moment of these proceeding at this interlocutory stage. But they should allow the defendant to call upon the plaintiff to give an account of their claim against the defendant. If there are any short coming up in the defence then the same can be cured by an amendment. They still maintain that the defence advice is strong and sound, which the court can only cost after scrutiny of all the documents, relied upon by both sides.

In the court assessment of the rival arguments of both sides, there appear to be presented or put formed question for determination. These have been set out by the plaintiff counsel in their written skeleton arguments. These are namely:-

1. Whether the plaintiff were employees of the suit defendant.

2. Whether there is a dispute as to the amounts demand by each individual plaintiff.

3. whether the plaintiff were paid their pensions by the defendants to support their question 1 the plaintiff here issued this court to go by their pleading in paragraph 4 and five of the plaint behold to be the core of their cause of action against the defence. These two paragraph read:- " 94) at all material this relevant to this suit the scheme was and is on irrevocable first and established by the 1st defendant under the first deed dated 10th December 1985 as amended from time to time as a scheme to provide pension and other benefits to the employees of the said 1st defendants upon their retirements at a specified age and relief from the defendant of deceased employees. The first 41st plaintiff were at all material times to this suit employees of the 1st defendant and have also members of the defendants pension scheme and therefore entitled to be paid their pensions under the provisions of the rules of the scheme set out in the schedule to the trust deed as lawfully considered from time to time and or in accordance with the law " this court constitution of these two paragraph or its understanding of the message that the plaintiff intend to put ground to the court is that.

(i). That there is an existence a scheme forming the basis for the existence of un irrevocable trust.

(ii). That the said irrevocable trust is evidenced by the existence of a trust deed dated 10th December 1985.

(iii). That the said trust deed has been a subject of amendment from time to time.

(iv). The purpose of the said scheme is to provide pension and other benefits to the employees of the said 1st defendant.

(v). The benefits provided by the said scheme are to be exercised by the employees of the said first defendant.

(vi). The qualification for accessing this is retirement upon attaining a certain age and or as a relief for the dependants of deceased employees vide paragraph 5 thereof.

(vii). The 15th to the 41st plaintiff against have been employees of the first defendant.

(viii). The assert that they were members of the defendant pension scheme

(ix). They were also assert that by virtue of their employment with the first defendant, they were entitled to be paid their pension under the provision of the scheme set out in the schedule to the trust deed as lawfully amended from time to time and or in accordance with the law.

The stand of the plaintiff on these two paragraph is that what they have put foreword is clear and obvious and need no further elaboration. They have gone further to contend that in fact the defendant was admitted the same in their paragraph 3 of the defence.

Paragraph 3 of the defendant defence read: - *"paragraph 4 and 5 of the plaint are admitted"* this court constitution of that averment is that it states plainly what it says that it is admitting paragraph 4 and 5 of the plaint. The effect of this admission is that the defendant admitting the assertion of the plaintiff as set out above in number i-ix which in this court opinion amounts to the following.

(a) The first defendant is admitting that the 1st to the 41st plaintiff were at the material time relevant to this suit employees of the two defendant.

(b) That in their capacity as such employees they were entitled to benefit from pension benefit following from the first defendant to the said 41 plaintiff.

(c) That these pension benefits were to be collected interns of the provision of the trust deed mentioned.

(d) That indeed there is a trust deed in place which governs the pension offers between the first defendant as the employer and the 1st to the 41st plaintiff as employees having ruled that indeed the defendant has admitted paragraph 4 and 5 of the plaint the court moves to consider the nearest question namely whether there is a dispute as regards the question of the amenities of the provision that the plaintiff are entitled to form the first defendant grievances as regards the pension payable to them as gathered from the grounds in the plaint and the dependants in the affidavit is that the 1st defendant omitted this provision entitlement. It is further arrived and moved nationally in paragraph 6 of the plaint that this miscalculation resulting as in underpayment to them amounts to a fraudulent misrepresentation and concealment and non disclosure of the correct entitlement of provision payable to them. This fraudulent misrepresentation, concealment and non disclosure prompted them to engage the service of an actuarist with instruction to calculate and work the plaintiff connect pension payable to them. The amount worked out is what from the …….claims pleaded in the plaint. It is their assertion that the figures arrived at by the activist here by them are the correct figures from in their entitlement as the same were worked out by the said activist using the content of the trust deed annexture PCM2 as well as the applicable rules. They therefore content that the actuarial report PCM3 is a correct representation of their pension entitlement from the 1st defendant. That the said report goes daisy way to report the defendant earlier annexture PCM4 as well as the bundle of cases pendence that the 1st defendant sent to the plaintiff asking them to accept to have their pension to be calculated in accordance with their letters of employment annexture PCM6 that they were not missing to accept the under payment, they felt the defendant action was in breach of the law as well as the provision of the trust deed and the pension which action had severely prejudiced and relied this entitlement were their justification in coming to court.

By reasons of the afore set out assertion the plaintiff assert that they were entitled to move to this court to seek the striking out the defendant defence in the manner presented. The reason for saying so is that the defendant have not conferred the amounts worked out by the actuarist either in their defence or in the replying affidavit. It is their contention that a better way of countering their claim should have been demonstrated by the defendants showing in their defence how the plaintiffs disputed pension amounts were arrived at or alternatively something to controvert their figures. They defendants should also have gone ahead and displayed their documentations in their replying affidavit.

A perusal of the plaint reveals that the individual claims of the Plaintiffs containing the figures of what is believed to be their correct pension entitlement are contained in paragraphs 19 – 227 of the

plaint. The amounts attributable to each have been specified.

The defendant's response to those paragraphs is found in paragraphs 18 – 58. The response to all those paragraphs is that the defendants makes no admission of the content of the paragraphs specifying the particular claim of each plaintiff and then it is followed by a denial of the paragraphs showing how the individual claim is worked out and then all rounded up with a plea that the plaintiffs are put to strict proof of their claims.

When it came to their application for striking out the defence the plaintiffs want to great lengths explaining their case and gave reasons as to why they felt that the defendants defence does not answer their claim and why, the same should be struck out. They went further to annex the actual report, a cop of the Trust deed copy of the pension's rules, offending circulars on the basis of which the defendant allegedly based the reduction of their pension entitlement.

The defendants response to that application is contained in a very brunet replying affidavit sworn by one Ali Noor Ismael sworn on 23rd May 2008 and filed the same date. Of reference herein is paragraphs 1,3 and 4 and there is no harm in setting them out. They read:-

"(1) *That I am employed by the first defendant as general manager human resources. I am also one of the Trustees of the Second defendant. I am conversant with the matters arising in this suit. I am authorized by both defendants to make this affidavit.*

3. That I am advised by Mr. Fred Ojiambo, Senior Counsel and a partner with the defendant advocates on record which advise I verily belief to be correct that he plaintiffs application is misconceived, bad in law and ought to be dismissed on the ground that:

(a) the defence disclosed triable issues

(b) No admissions have been made on liability or quantum

(c) No reply to the defence was made by the plaintiffs.

(d) The law does not permit the trial of suit such as the present by way of affidavit evidence.

4. That I am further advised by Mr. Fred Ojiambo which advice I verily believe to be correct, that the defence is not a sham as alleged by the plaintiffs. The defendants are under no obligation to begin a mini trial of the suit in the manner done by the plaintiffs. The burden of proof lies with the plaintiffs to be discharged at the hearing should the plaintiffs take the necessary steps as required by the court rules".

The stand of the plaintiffs as regards that response is that it does not answer their assertions in the application that the same has been ousted, that the same is incompetent and as such they still entitled to their pea for striking out. The Court will deal with the issue of the competence first. Although it is not elaborated by the plaintiffs submissions this court has no doubt that this arises as a result of the deponent in paragraph 1 of the said replying affidavit to the effect that the same has been deponed by the deponent in authority from the defendants.

The first defendant is a corporate body, the court has judicial notice of how such a body gives its authority. In the case of **WAITHAKA VERSUS INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION [2001] KLR 374**, it was held inter alia that an affidavit sworn on behalf of a corporation must identify the capacity of the deponent in the corporation without identifying the deponent, it is impossible for the court to accept that any matter deponed to is within the deponemetns knowledge".

Herein the deponement has identified the capacity in which he has deponed namely as a general manager human resources, what he has to prove next is the authority to so deponing.

The mode of authority required to depone has been settled by the court of appeal in the case of **RESEARCH INTERNATION VERSUS JULIUS ARISI AND 213 OTHERS NAIROBI C.A. 321 OF 2003.** At page 9 of the judgment lien 9 form the bottom the law lords of the Court of Appeal made the following observations.

"*In our respectful view learned judge overlooked rule 12(2) of Order 1 Civil Procedure Rules which require that authority if granted should be in writing and signed by the person giving it and further that such written authority should be filed in the case"*.

Order 1 rule 12(2) Civil Procedure Rules referred to by the Court of Appeal reads:-

"*The authority shall be in writing signed by the party giving it and shall be filed in the case"*.

The mode of sanctioning of that authority by a body corporate is now trite law. Njagi J. in the case of AFFORDABLE HOMES AFRICA LTD VERSUS IAN HANDERSON, SUPERIOR HOMES KENY ALTD AND MICHAEL KIESH, MILIMANI HCCC NO. 524 OF 2004, *ruled that in the resolution sanctioning of this action by the company, the company is not before Court at all. For that reason the learned judge struck out the suit with costs being ordered to be bone by the advocates"*.

Applying that trite position to the respondents replying affidavit it is clear that the deponent required two authorities to be filed in court namely; one endorsed by either a board of director's resolutions or share holders resolutions in the AGM authorizing both the defence of the suit and the deponing of the replying affidavit.

The second authority should have come from the trustees who were also burdened on board. A perusal of the record does not yield any authority in writing filed by the deponement from either of the defendants. As such other the defence filed as well as the replying affidavit have been faulted and they qualify to be struck out. However only the replying affidavit qualifies to be struck out. The defence cannot be struck out because the defence was presented by Counsel and as such the Counsels. Authority to get on behalf of the client is unquestionable in terms of the provisions of order III of the Civil Procedure Rules. The defendants should have borrowed a leaf from the Plaintiffs who have filed to authorities both for the main suit and the supporting affidavit giving authority to one of them to act for them. The attributes are in writing and dated 8th May 2008 and filed on 9th May 2008. One copy is contained in the main file which. The other accompanied the application.

The striking out of the respondents replying affidavit does not give the plaintiff a clear bill of succession its application since the application was not struck out before argument. It has been struck out after the defendants have filed written skeleton arguments. These cannot be ignored or nullified. Instead the provisions of order 50 rule 16 (3) Civil Procedure Rules is called into play to shield them. These reads: - If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be hard exparte". The general practice that this has judicial notice of is that such a party is allowed to address the court on points of law only. This being the case the striking out of the respondents replying affidavit has not prejudiced the defendants as the points of law raised by them will be considered more so when most of the issues raised by them were mainly points of law.

Having ruled that despite striking out of the replying affidavit the defence still stands and that the defence is still entitled to be heard on points of law raised, leads this court to consider if these points of law have ousted the plaintiffs assertion in the application. These have already been set out in the body of the ruling and so the court will proceed to exercise them one by one.

(1) The defendant has relied on the case of **KINDANIA RESTAURANT VERSUS DEVSHIR COMPANY [1952] EA CA 77** in which it is stated at page 4 and 5 of the defence skeleton arguments. In this case the EACA had quoted with approval the decision in **HASMANI VERSUS BANQUE COGO BEIGE [1938] 5 EACA 88** and the case of **JACOBS VERSUS BOOTHS DISTILLERS CO. [1901] 85.L.T. 262 HC**. The central theme in all the said decisions is stated to be:-

"*if there is one bonafide triable issue contained in the affidavit supporting the application for leave to appear and defend he should be allowed to defend unconditionally*". Applying that to the defendant/respondents affidavit, the court makes findings to the effect that there is no bonafide replying affidavit in favour of the respondent as the same has been struck out. That aside the key deponement in the said struck out affidavit have been displayed herein. Apart from mention of legal points of law none of the deponents demonstrated any issues on the basis of which they could seek a right to be heard.

(2) The second issue that the defendant has put forward as a triable issue is their stand that there is issue as to whether the second to the ninth defendants can be sued on their own behalf as individuals. Paragraph 3 of the plaint reads:- "*3. The 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants are adults of sound mind residing and working for gain in Nairobi within the Republic of Kenya and are being sued on their own behalf and as the Trustees of National Bank of Kenya, Staff Retirement Benefits Scheme established under a Trust Deed dated 10th December 1985*." Indeed a reading of the said paragraph reveals that indeed they are sued in their personal capacity and as trustees. This courts observations I that there is no deponement in the affidavit protesting the joinder of the 2nd to the 9th defendants. The appearance and defence on record were not filed under protests as regards those defendants. There is no move on their part to apply to have their powers struck out from the suit as being improperly joined to the proceedings. This being the case the counsels statement from the bar which cannot be sued to alter any parties of a pleading.

Secondly even if this court were to hold otherwise, the trust deed has been annexed to the supporting affidavit which was served on the defendants. They haven not put in a corresponding affidavit pointing out any clause in the said Trust Deed with negatives the manner in which the 2nd to 9th defendants are sued. Although counsel has submitted that that issue needs to be interrogated at the hearing, he has not pointed out what issues need to be interrogated at the hearing which tends to negative the manner in which the 2nd to the 9th defendants are sued.

Thirdly clause 19 (c) of the Trust Deed which deals with the powers of Trustees provides thus:- "in consultation with the Bank and with the consent of the Commissioner and the Authority in writing to waive the strict enforcement of the provisions of this deed or the rules". There is a discretion to be exercised under this clause. It requires the exercise of that power has to be done within the required regulations. Anything outside that becomes individual exercise of authority and becomes individual exercise of authority and invites liability for damages. The plaintiffs were therefore right to sue them in both their individual and official capacity.

The third issue put forward is the issue of the actuarial report. It is submitted by the defence that it needs to be interrogated whether it was professionally done. This interrogation is to resolve the interplay between paragraph 6 of the pliant and paragraph 4 of the defence. These read:- "*(Paragraph 6 of the plaint) The plaintiffs state that on or about the year, they caused an actuarial calculation to be done on their individual lump sum equivalents of their net accrued pensions a set their dates of retirement and found at that the defendants had reduced the lump sum equivalent amounts due to then as a result of fraudulent misrepresentations, concedement and or non disclosure of material facts thereby resulting in the plaintiffs being paid reduced amounts contrary to the Trust Deed and rules, which action is illegal, null and void (particulars of fraudulent misrepresentation, concedement and non-disclosure*)"

"*(Paragraph 4 of the defence) In reply to paragraph 6 of the plaint, it is not admitted hat the plaintiffs caused an actuarial calculation to be done or, that if such an actuarial calculation was indeed done it was in a professional manner*."

The plaintiffs countered that pleading by annexing the actuarial report with details, of the qualification of the actuarist. The defends had an opportunity to put in a deponement to show that the acturaist is either not qualified or an impostor. In the absence of a deponement that the actuarist hired is an impostor and or outlining a proper procedure on how such actuarist can be appointed there is nothing to show that the method used was unprofessional. In this courts opinion a matter averred to in a pleading and deponed to in an affidavit cannot be faulted by a submission. As submitted by the plaintiffs counsel one would have

expected an averment in the defence that the calculation sought to be faulted was professionally done and annex one to a deponement on how these were arrived at.

As regards the assertion that allegations of fraudulent misrepresentation, concedement and non-disclosure of material facts averred in paragraph 6 of the plaint. The plaintiffs demonstrated in their supporting affidavit and annexed documents relied upon to support their allegation annextures PCM 3, 4 5, 6, 7 and 8. There is no deponement on the part of defendants to controvert the genuineness, truthfulness of the said documents. in the absence of a deponement countering that of the plaintiffs or a challenge of those documents there is no basis upon which this court can rule that indeed there is anything to be interrogated as regards those documents.

The 4th issue raised as a triable issue is the fact that since the plaintiffs did not file a reply to defence it means that they have joined issue with the defendants and so this calls for a trial for all the issues raised by both pleadings.

Joinder of issue is provided for under Order VI Rule 10 Civil Procedure Rules. It reads:-

"***10 (1)*** *If there is n reply to a defence there is a joinder of issue on the defence.*

(2) *Subject to sub rule (3) :-*

(a) *There is at the close of pleadings a joinder of issue on the pleading last filed; and*

(b) *A party may in his pleading expressly join issue on the immediately preceding pleading.*

(3) *There can be no joinder of issues on a plaint or counter claim.*

(4) *A joinder of issue operates as a denial of every material allegation of fact made it he pleading on which there is a joinder of issue unless, in the case of an express joinder of issue any such allegation is excepted from the joinder and is stated to be admitted in which case the express joinder of issue operates as a denial of every other such allegations."*

A reading of the aforeset out provision of Order VI Rule 10 Civil Procedure Rules it is indeed correct as submitted by the defence that failure to file a reply to defence operates as a joinder of issues. However, sub rule 4 rules out the defence assertion that whether there is a joinder of issue then both pleadings must go to full trial. That such a pleading cannot faulted by the aggrieved party within the rules. In fact, sub rule 3 provides a resolution in that it provides reprieve to only two types of pleadings that is a plaint and counter claim.

Going back sub rule 4 it states clearly that where there is no express joinder of issue then the implied joinder operates as a denial of all the allegations in the pleading to which issue has been joined. There is no reprieve provided that such a pleading cannot be attacked and faulted in accordance with the rules. It therefore follows that this alone can not be used as a grand for serving the defence and make an order that the defence be served for full trial.

The fifth issue alleged to be a triable issue is the assertion that the plaintiffs claims needs to be proved which proof necessitates the sustenance of the defence for the trial. The question to be asked by this court is whether if the defence is struck out then the plaintiffs will have a clean bill of success.

This court has judicial notice of the fact that where a defence is struck out the plaintiff does not have a clean bill of success unless the rules under which the claim is presented so permits. Where the rules do not permit, the plaintiff is required to prove the claim in what is particularly known as a formal proof. Case law has now settled the issue of the standard of proof. There is the case of **BACHU VERSUS WAINAINA [1982] KLR 108** it was held inter alia that at the exparte hearing the plaintiff was under a legal duty to prove his case against both the defendants.

(2) That the burden of formal proof is the same as that required in any civil case. Also in the case of **KARUGI AND ANOTHER VERSUS KABIYA AND 3 OTHERS KLR 347** also a court of appeal decision, it was held inter alia that:- "*the burden on a plaintiff to prove his case remain the same throughout the*

Proceeding even though the burden become easier to discharge where the matter is not validity defended. The burden of proof is in no way less because the case is heard by way of a formal proof.

Further to the above stated, it is clear that the plaintiff claims fells into the category of what is probably reponed in law as special damages. This court has filled notice of the fact that special rule is govern proof of the claim. The late chief justice Chesoni had question to resist the subject on the case of Ouma versus Nairobi city council (1976) KCR 297. This court cited this decision among others in this ruling delivered on 3rd August 2007. In the case of Superior homes (IC) limited versus East Africa (EA) limited and another Nairobi HCCC no 381 of 2007. The discussion on the subject runs from page 8 line 6 from the bottom it is observed. "*The terms general and special damages are used with different meaning. They refer firstly to liability, secondly to proof, thirdly to pleadings and fourthly to the meaning of special damage only…….. Here it is simply means that for special damages to be awarded they must be pleaded and proved."*

At page 9 line 4 from the top it is observed " *general damages as understand the term, are such as the on will presence to be the direct natural/or probable consequences of the act complement of special damages on the other hand are such as the law will not in for form the nature of the act. They do not follow in ordinary course. Therefore they must be claimed specially and proved strictly"*

Implying the afore set out principles show that whether the defence struck out or sustained the plaintiffs will be required to prove their claims.

The 6th issues dealt with the provisions of law under which the plaintiff have moved in their attempt to face the defence . It is alleged that the ingredients have not been satisfied and a such the defence cannot be faulted.

The application is brought under order vi, rules 13 and 16 of the CPR, section 3 and 3A of the CPA and all other enabling provisions of law order vi rule 13 reads. "*13(i) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that:-*

(a) It discloses no reasonable cause of action or defence, or

(b) It is scandalous from law or vebetious; or

(c) It may prejudice embarrass or delay the fair trial of the action, or

(d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgement to be entered accordingly as the case may be"

In their submissions the defence singned out the ground in order vine 13(i) (b) dealing with scandalous, from laws and vexation. At page 8 of their written skeleton arguments the defence cited case on to demonstrate that their pleading does not fell into that category. Indeed applying the constitution of ingredients on case law cited off does not fir any of the amounts in the defence. However the use of the word "*or"* from one ground to another in this own means that either one or a combination of any of the grounds cited of proved can be applied by the court to fault a pleadings. Herein the defence beside, seeking order vi rule 13 (i) (b) may and not comment on sub rule, 1(a) (c) and (d). it therefore follows that is sub rule (b) does not apply to the plaintiff application can fall back on sub rules 13(i) (a) (c) and to achieve their and subject to proof of course.

Further argument in support of the applicant assertion that there is no valid defence against their claim they have put ground the following assertions set out in their skeleton arguments.

(i). The regarding dispute as to the amount payable to the plaintiff, they court and the defence has no valid defence against the content of the actions report filed because they were not stated the amount they claims were payable to the plaintiff either in the defence or replying affidavit.

(ii). As regards non payments of the plaintiff pension, the plaintiffs contend that paragraph 6 and 9 of the defence has been counseled because these two paragraphs do not state how much was paid to the plaintiff. These reads:- ***" (Defence) 6 The defendant further state that the plaintiffs scheme benefits were calculated in accordance with the rules of the scheme prevailing before the plaintiff left the 1st defendants employment prior to attaining retirement age and as such, were seeked as withdrawal case. The rules were available to the plaintiff at all material times and were further summarized in a book let provided to each of the plaintiff (9) paragraph 9 of the plaint is denied the 1st defendants portion was paid at the same e time as the computed scheme benefits for the plaintiff"***

Paragraph 9 of the plaint on the other hand reads:- " 9 the plaintiff state that the defendant sentient statement sheets to the plaintiff showing that ……..members were entitled to retirement of their terminal dues (not pension) less the employer contribution towards their pensions, and the plaintiff state that such an act which is not are alleged, null and void but also lucks any basis on law" when paragraph 9 of the plaint is compared to paragraph 9,10 of the defence are would have exparte that of a better response to it would have been a particularization of the a verreal correct amount paid to the plaint in those paragraphs. Then the defendant would have gone further and annexed payment by way of documentary proof to the replying affidavit in the absence of such a move on the part of the defendant. There is nothing to cost the plaintiff claim that they were not paid. A time able issue would have exhibited the documentary proof which would have lead to the cost handing that in the work of being contented of contrasting documents from opposite side the best way to resolve the issue is to hear both parties or their documents and then rule which of the sets apply t the case and which one does not.

Issue was also raised about the defence being contradiction. This has arisen because the plaintiff have asserted that where as the defendant and null in paragraph 3 of their defence that the plaintiff were the employees of the first defendant and were entitle to be paid their pensions, may defendant have gone ahead and denied this in their paragraphs 16-59 which have been countered by production of their documentary proof marked PCM 8 – PCM 49 which the defendant have not countered. This court had really set out the content of paragraph 37 of the defence herein. It has also set out in note form the component of the content of paragraph 16-59 the defence in this court opinion indeed a comparison of the two give an impression of this being inexistence of condition in that one cannot admit that the documents were employees and then go further to put this to struck proof of their allegation.

Proper pleadings on the part of the defendants would have been from them to seek consistence in their admission that the plaintiffs were their employees but that not withstanding according to this defence the employees entitlement is such and everything averred by the plaintiff which is contrary to what the defence has laid out invites strict proof on the part of the plaintiff as pension asserting or alleging the control.

Issue was also raised about the defence offending the provision of order vi rule 13 CPR. This court has already stated that a party seeking to fault others pleading can rely on one or any combination of the grounds specified in that rule. The court has gone further to state that the defence sought out the provision of order vi rule 13(i) 9b0 and submitted that their pleadings does not answer to these grounds. However a concerned earlier failure of the defence pleading to answer to the grounds in order vi rule 13 9i) does not rule out the plaintiff relying in order VI rule 13(i) (a),(b) and (d) which were not submitted upon by the defence.

Issues was also raised about paragraph 62 of the defence. It reads:- " the defendant further state that the claims are time barred and are no reasonable cause of action has been disclosed in this plaint" as submitted by the plaintiff it was necessary for the defendant to specify which statute they were relying on both in the defence and the replying affidavit. In the absence of such

specification the pleadings raised in above assertion which has been urged and which does not require a more to prove or disprove it.

There was also issue raised about certain paragraph failure to meet the standard of pleading relied by the provision of order vi CPR in that they are more denials. The paragraph mentioned by the plaintiff are paragraph 5,9,10,11,12 13,14 and 15 pleading generally is geared by the provision of order VI CPA . rule 4 and 9 93) mentioned by the plaintiff specific what should be contained in a joined pleading. These reads in part.

" Order vi 4(i) A party social in any pleading subsequent to a plaint plead specifically any matter for example performance, release, payments, trends, inevitable accident act of god any relevant statute of limitation or any fact should directly:-

9 (3) subject to sub rule94) every allegation of fact made in a plaint or counter claim which the party on whom it is served does not intend to admit shall be specifically to raise by him in his defence or defence to counter claim and a general that of such allegation to a general statement of non admission of them shall not be sufficient the use of them"

Applying these to the paragraphs alleged by the plaintiff to be move denies, the court is in agreement with the plaintiff counsel assertion because in this court opinion these paragraphs would have satisfied that requirement of among others.

(i). The statute of limitation would have been specified.

(ii). Particular of amount paid to plaintiff were specified.

(iii). Particulars of the correct entitlement of pension seek plaintiff was given.

(iv). Particulars of which plaintiff is entitled to pension and why.

(v). Particulars of which plaintiff is not entitled to pension and why. It therefore for this that the alleged more denies are not sufficient. Invitation to the opposite party to participate in their investigation in this interparties trial.

Having done the above figures to the pleadings the question that also for this court to determine is whether there are to be taken as gospel truth in trying to sent the defendant defence. The answer is "NO" because case concited and relied upon by both sides enjoin the court to exercise certain precaution before deciding whether the axe is to fact on to the defence or not. There is a summary from are:-

There is no doubt that the remedy of striking out exist and is a available to a dealing caught but when exercising it the court has to ensure the case in which it is sought to be exercised is.

(i). Clear plain and obvious and does not require much scrutiny to establish it.

(ii). The pleadings sought to be faulted must be such that it is so hopeless that it cannot be cared by an amendment.

(iii). If a defendant demonstrates even one single trouble issue in the affidavit in which he seeks leave to defend he should, allowed to defend in conditions

(iv). In-depth amend of issue the giving of 9 provisions on issues is prohibited as these may prejudice the act cause of fair trial should the matter proceed to trial.

(v). Courts of law are advised to keep formal disposing of disputes on their matters opposed to their being disposed off an points of technicalities or as it has become perpetual known an opposed

to their being filled in their contrary etc.

(vi). This court has applied these precaution to the rural arguments herein and for the reasons given in the assessment the court is inclined to allow prayer (a) of the plaintiff/applicants application dated 8th May 2008 and strike out the defendants defence dated 23rd April 2008 and filed the same date for the following reasons:-

(1) The Court agrees with the defendants submission on case law in their favour that whereas defendant demonstration even one triable issue in his affidavit for seeing leave to defend he should be allowed leave to defend unconditionally. However in this courts opinion this reprieve is not available to the defendant because there is no affidavit in place in which the defendant herein has demonstrated a triable issue to warrant them being given an conditional leave to defend as the one relied upon by them was struck out fro failure to annex the authority, to depone the same. Further even if it had not been struck out, the same would not have assisted the defence as apart from points of law raised, there was no triable issue demonstrated therein which would have entitled the court to allow the defendants to defend the suit unconditionally.

2. Objection raised by the defence that it is a triable issue does not hold because:-

(i) There is no affidavit filed by any of them on his/her own behalf or on behalf of any or all of the protesting wrongful joinder to the proceedings.

(ii) Both the memo of appearance and defence was not entered and filed on their behalf under protest.

(iii) There is no more mode on their part to file an application to strike out their names from the proceedings.

(iv) The protest has come from the bar and as such it cannot be used to fault a pleading.

(v) The defence cause did not point out any clause in the trust deed which needs to be interrogated.

(vi) Clause 19(c) of the trust deed that denotes the powers of the trustees has an inbuilt exercise of discretion init.

It follows that where it is proved that the Trustees exercise of that discretion was outside the powers denoted by the trust deed or that it was exercised outside those powers then such excuse of that power becomes un protected by the immunities in built in the trust deed. It becomes a matter for individual responsibility. It follows that the 2nd to the 9th defendants were rightly sued both in their individual capacities as well as their capacity as trustees.

3. As regards the actuarist report relied upon and exhibited by the Plaintiffs raising triable issues that does not arise because the defendants have not demonstrated by affidavit how that report was done unprofessional, provisions of law or rules relied upon to support that. It therefore becomes a mere allegation. More so when they defendants have not countered that report with one of their done in the professional manner.

4. As regards proof of allegations of Fraudulent misrepresentation, concealment and new disclosure. This court agrees that indeed there need to be proved. But holds that such proof is not hinged on the existence of a defence against them. They can still be proved in a formal proof should the defence be struck out.

(ii) A perusal of the defence and the struck out replying affidavit does not yield any deponement or document to counter those allegation. In the absence of such a demonstrated there is no justification on the part of the defence to allege that there need to be interrogated in another

parties trial and not a formal proof.

5. Failure to file a reply to the defence by the Plaintiffs does not raise a triable issue because sub rule 3 of the relevant order only provides reprieve to the plaint and counter claims. By implication on other pleading can be attacked and fault

ed in accordance with the rules.

Sub rule 4 on the other hand is clear that where there is no express joinder of issues the implied joinder operates as a denial of all the allegations in the pleadings whose issues have been joined. There is nothing to show that such a pleading whose entire contract has been denied cannot be attacked and faulted. The Plaintiffs were therefore right to move in the manner they did to attack the defence even before filing a reply to it.

(6. Indeed the Court agrees with the submissions of the defence that the plaintiffs will be required to prove their claims. The Court is however not in agreement with the defence assertion that such proof can only be achieved in a joint trial. With the participation of the defence with their defence on record. In this courts opinion such a proof can be achieved in a formal proof with or without the participation of the defence and without the defence on record.

7. The fact that grounds put forward by the Plaintiffs in their attempt to fault the defence failed in so far as order VI rule 13 (1) (b) is concerned, does not rule out the possibility of the same pleading being faulted under order VI rule 13(1) (a) (l) and (d) since the Plaintiffs relied on all of them.

8. Indeed as mentioned by this court as regards the caution that the court needs to exercise when dealing with such an application in noted that a pleading which can be served through an awardment should not be struck out.

Indeed the defence the defence have submitted that their pleadings can be served thro ugh in amendment

It is on record that the Plaintiffs have laid out their entire case both in the Plaint and application. The defendant has taken note of the same. But the defendants were not pointed out what areas of their defence can be served through an amendment. In the absence of such a demonstration their assertion remain an allegation. On draft amended a defence has been exhibited.

9. The defendants right participate in the proceedings is not pegged on their defence being sustained they can still participate in the proceedings and calls the plaintiffs to court on their plaint even when their defence is struck out t.

10. Plea that statute of limitation is available to the defendants does not rise an issue as the defendants have not complied with the relevant rules by specifying the particular statute of limitation which has been breached.

11. As regards existence as to the amount payable. Issue would have arisen in favour of the defendants if they had particularilized in their defence and annexed documentary proof in their affidavit in reply as to what they think as per then records is the correct amounts to be claimed by plaintiff.

12. Prayer 2 of the application is declined because the plaintiffs claim fails into the category of special claims which the law requires that they be particularized and proved. The Plaintiffs have particularized the same and so what remains for their to do is to prove them through formal proof with or without the participation of the defendants.

13. The Plaintiffs will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2008.

R.N. NAMBUYE

JUDGE