



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC CIV APPLI 276 OF 2003 (OS)
DOCKWORKERS UNION.....PLAINTIFF

VERSUS
KENYA PORTS AUTHORITYRESPONDENT

R U L I N G

The dispute before this court is expressed in the originating summons (O.S.) dated 10th April 2003 taken out by Dock Workers Union hereinafter referred to as the 'Union' against Kenya Ports Authority hereinafter referred to as 'K.P.A.' The Originating Summons is supported by the affidavit of Joseph Kennedy Kiliku sworn on 10th April 2003. When served with the Originating Summons K.P.A. resisted the same by filing the replying affidavit of George Dulu, its then corporation Secretary sworn on 13.5.2003. K.P.A. also filed a Chamber Summons dated 7th May 2003 in which it sought to have the entire Origination Summons struck out for the reasons set out in the summons and on the facts deponed on the supporting affidavit of 6th May 2003 sworn also by George Dulu. The advocates appearing for the parties to this dispute did not refer to aforesaid summons. However when the originating summons came up for hearing all the issues raised therein were substantially argued. I will take it to mean that the parties intended to have the summons dated 7th May 2003 argued together with the originating summons but they inadvertently forgot to draw the court's attention to that. My inference is founded on the fact that the pendency of the summons will serve no useful purpose at the end of this matter.

The originating summons is said to be taken out pursuant to Order XXXVI rules 1, 5(a), 8(a), 10 and 12 of the Civil Procedure Rules. The Union seeks for the following orders:

- (a) An order of declaration that K.P.A. has wrongly and irregularly allowed the staff pension scheme sponsored by the defendant in favour of its employees of whom 80% are members of the union to incur a huge deficit and that the union members have been prejudiced in that they are unable to enjoy the full benefits of the staff pension scheme.
- (b) An order directing K.P.A. to pay to the Kenya Ports Authority Staff Pension Scheme all monies withheld and or all monies in deficit.
- (c) Costs of the suit.

Before dealing with the issues raised for and against the

Originating Summons, let be set out the background of facts leading to this dispute. The Kenya Ports Authority Staff Pension Scheme was established by a Trust Deed dated 1st April 1998, and came into operation on the 1st day of January 1998. The Scheme was registered under the Income Tax (Retirement Benefits) rules. The Scheme is run and managed by a body of Trustees appointed under the aforesaid Trust Deed. The Trustees also comprise of 3 members elected by the workers of K.P.A. It would appear sometimes in the year 2002, a dispute arose between the union and K.P.A. which gave rise to the filing of Industrial cause No. 52 of 2002. Part of the matters in dispute included those issues relating to pensions. This court was not told the position of that dispute pending before the Industrial Court. Mr. Joseph Kennedy Kiliku has averred in his affidavit he swore in support of the originating summons that when he was elected the Secretary General of the Union he discovered that there was a huge deficit in the Staff Pension Scheme operated by K.P.A. to the tune of Kshs.6.9 billion. Mr. Kiliku has not expressly deponed on his affidavit that the Union prompted the Industrial Court to appoint Joseph N. Macharia, an Economist with the Ministry of Labour and Manpower Development to investigate the dispute inter alia and present his report to the Industrial Court. Mr. Joseph Macharia's report which is dated 17.1.2003 and annexed to the affidavit of Joseph Kennedy Kiliku is addressed to the Judge, Industrial court, meaning it is a document for the Industrial Court. While that dispute is pending before that court, the union filed this originating summons agitating for the same reliefs. Let me now turn back to the dispute.

It is the submission of Mr. Gikandi Advocate for the union that K.P.A. should be ordered to pay the deficit of Kshs.6.9 billion due and payable to the union disclosed in the report of Joseph N. Macharia. It is the submission of Mr. Gikandi that K.P.A. has not accounted for the union members' deductions which according to the learned advocate were illegal.

Mr. Kassim Shah, learned advocate for K.P.A. attacked the Union's arguments on various fronts. It is argued that the union should not have taken an originating summons in a matter which was complex and substantive. This court was urged to strike out the entire suit on this ground. In response to this ground, Mr. Gikandi is of the view that the union's claim can only be argued under Order XXXVI of the Civil Procedure Rules as cestui que Trust. I have carefully considered the arguments made for and against the appropriateness of using an originating summons in this dispute. The court of appeal settled this issue in the case of **Kenya Commercial Ltd =vs= Osebe [1982] K.L.R. 296 where it held inter alia:**

- (I) The procedure Originating Summons is intended for simple matters and enables the court settle them without the expenses of bringing an action. The procedure is not intended for determination of matters that involve a serious question. The procedure should not be used for the purpose of determining disputed questions of fact.
- (ii) The procedure of Originating Summons is designed for the summary or ad hoc determination of points of law, construction or certain specific facts or for obtaining of specific directions of the court such as trustees, administrators or the court's execution officers.
- (iii) There is no power conferred on a judge to award damages on a originating summons.

A critical consideration of the dispute reveals that the same is not simple and straightforward the way the union portrays. The matter is complex in the sense that the union had to seek the services of an

independent Economist to analyze its claim. The expert report prepared by Joseph N. Macharia, a Senior Economist with the Ministry of Labour and Manpower Development and annexed to the affidavit of Joseph Kennedy Kiliku cannot be said to be simple. The issues raised therein are complex and can only be probed in an action where the expert will have to be cross-examined. The basis of the aforesaid report are documents which were not availed to this court. I do not intend to over stress the issue here. It suffices to state that the issue as to whether the deficit in question of Kshs.6.9 billion is actuarial or an actual deficit is a matter which can substantively be answered by experts in the actuarial industry who use Mathematical Skills to define, analyze and solve business and social problems.

The other serious preliminary issue raised against the Originating Summons is to the effect that the union should have referred the dispute for Arbitration as per Clause 34 of the Trust Deed which established the Pension Scheme. Again, this argument can only be established in an action where oral evidence will be tendered to prove whether or not the dispute at hand falls within Clause 34 of the Trust Deed. In the end I am in agreement with the submissions of the K.P.A.'s Advocate that the dispute is complex with disputed matters of fact. The court of Appeal was more emphatic in the case of **Wakf Commissioners =vs= Mohammed Bin Umeya Bin Abdulmaji Bin Mwijabu [1984] K.L.R. 346 in which it held interalia:**

- (i) That Originating Summons procedure is intended for settling simple matters without the expense of a full trial and not for serious complex issues.
- (ii) That where complex issues are raised and disputed in an application made by way of originating summons the court should dismiss the summons and leave the parties to pursue their claims by way of an ordinary suit.

In the final analysis and for the above reasons I hereby dismiss the Originating Summons with costs to the defendant. I have intentionally avoided making a finding on the merits of the matter lest I prejudice the rights of the parties if they choose to file an action later.

Dated and delivered at Mombasa this 9th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. K. Shah for the Respondent and Mr. Were h/b Gikandi for the Applicant.