REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Misc Civ Appli 764 of 2005

STEPHEN NDIBOI & 27 OTHERS…….PLAINTIFFS

versus

BROOKSIDE DAIRY LIMITED……DEFENDANT

RULING

On 17th October 2005, the Defendant/Applicant filed the Chamber Summons dated 12th October 2005 under order VI Rule 13 (1) (a) of the Civil Procedure Rules and S. 3 A Civil Procedure Act seeking an order that the Originating Summons dated 17th June 2005 be struck out and costs of the entire suit and the Chamber Summons be borne by the Plaintiff. The Chamber Summons is based on grounds inter alia;

(i) That the Originating Summons discloses no reasonable cause of action;

(ii) The application is scandalous frivolous and vexatious;

(iii) That the application is an abuse of the court process as it seeks to obtain a collateral advantage over the Defendant that is, declaring that they have no right to dismiss their current employees;

(iv) That the Applicants are maliciously seeking to regulate contractual obligations by masking the real issues as constitutional issues;

(v) The applicants are seeking to have the court declare that it is their constitutional right to work specifically for the defendant;

(vi) That the Applicants' remedy, if any lies in Civil Law (under the Employment Act Cap 226) and does not come within the province of the Constitution;

(vii) The alleged Constitutional violations as set out by the Applicants are imaginary, spurious and speculative;

(viii) That the Applicants have failed to place before the court any proper material upon which the court can exercise its discretion in favour of the Applicants;

(ix) That the Applicants have failed to specify or demonstrate how the provisions of Sections 70, 71, 74 and 80 of the Constitution have been infringed rendering the Application vexatious and embarrassing;

(x) That the Affidavit of Stephen Ndiboi dated 17th June 2005 is incompetent, bad in law as it offends Sections 34 and 35 of the Advocates' Act and should be struck out.

In the Originating Summons dated 17th June 2005 and filed in court on 20th June 2005, and which is sought to be struck out, the Plaintiffs sought 4 declaration as follows:-

1. A declaration that the Plaintiffs' fundamental rights to be deprived of their livelihood and accrued rights namely to work until retirement age has been breached in relation to each one of them in violation of Section 70 and 71 of the Constitution and the fundamental rights guaranteed therein contravemed in relation to the Plaintiffs;

2. A declaration that the Plaintiffs fundamental rights not to be denied their rights to collective bargaining to protect their interest as guaranteed by Section 80 of the Constitution has been breached in relation to each plaintiff has been breached, in relation to the Plaintiffs and each one of them;

3. An order consequential upon the above declaration that the Plaintiffs be paid damages for the breaches;

4. Any other order that the court deems appropriate to grant.

The Originating Summons was brought pursuant to Section 84 (1) and (2) of the Constitution of Kenya, Rules 9 and 11 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 and all other enabling provisions of law.

The Applicants contend that their fundamental rights under Sections 70, 71, 74 and 80 of the Constitution have been infringed.

S. 70 and 71 – the right not to be deprived of their livelihood and accrued rights namely right to work, until retirement age.

Section 74: Protection from inhuman and degrading treatment in regard to how the Applicants' contracts of employment were terminated.

Section 80: Protection of right to association collective bargaining to protect their interest.

The Plaintiffs are former employees of the Defendant, Brookside Dairy Ltd (the Defendant/Applicant). About 10th April 2005 the Plaintiffs held a peaceful procession along Kimathi Street in Nairobi to protest over dehumanizing working conditions, like working for 24 hours a day for 5 days in a week without compensation for overtime, sleeping in trucks and lorries with no night allowance, no house allowance, carrying large amounts of money without security, no security for salesmen on duty at night amongst other grievances. Despite an attempt at dialogue with the management their employment contracts were terminated on 11th April 2005 after a peaceful demonstration. The Applicants exhibited their letters of termination of employment.

The Defendant/Applicant seeks to have the Originating Summons struck out for disclosing no cause of action and being scandalous, frivolous and vexatious. The question is, this being a Constitutional Reference can the court grant such order? The Plaintiff/Respondent Counsel relied on the case of **RASHID ALOGGOH ODHIAMBO & OTHERS V HACO INDUSTRIES CA 110/01** in contending that the court cannot grant such an order as the court would need to enquire into the truthfulness of the allegations of violation or threatened violation and that therefore the matter would need to go to full hearing In the above case, the Court of Appeal held;

"The Applicants in our case were alleging that by keeping them in the state of casual employees for periods ranging between two or fifteen or seventeen years, the Respondent was, in effect depriving them of their right to join trade unions of their choice and that such treatment amounted to being in slavery or

servitude. We do not know anything about the correctness or otherwise of these contentions. But if the Applicants had been allowed to prove these allegations, then it would have clearly been the duty of the Constitutional court to determine whether or not the allegations, if proved, amounted to a contravention of the Constitutional provisions on which the Applicants relied. It is true that the Applicants could have invoked the ordinary civil jurisdiction of the High Court, it is equally true that they could have approached the Industrial court. But even if the Applicants had these alternatives, they are still entitled to invoke the jurisdiction of the High Court under S. 84 (1) of the Constitution. What should the Constitutional court have done? In our respectful view, it should first have considered whether or not the allegations made by the Applicants were true"

The Court of Appeal in the above case held that whenever one alleges violation or threatened violation of fundamental rights under S.84 (1) of the Constitution, the court is bound to enquire into and establish whether such contraventions are either admitted or proved and the Applicant should therefore be heard by the court. Whereas this may be true, there are Constitutional References which need not await to be determined at the full hearing. I have in mind the following instances;

1. Where one pleads Res judicata; – where a matter has been litigated in another court between the same parties and touching on the same issues, the court will not reopen the matter in a Constitutional Reference. Justice Nyamu held as much in the case of **BOOTH IRRIGATION V MOMBASA WATER PRODUCTS LTD. (BOOTH 2) HC MISC APPLICATION 1652/04.** the judge said

"I hold that Res judicata does apply to Constitutional matters and asking a Constitutional court to deliberate and determine the issues surrounding the unchallenged consent order is with respect the height of absurdity when our fundamental principles give avenue of challenge in a civil court"

2. A constitutional Application brought in violation of fundamental principles of law is incompetent and may be dismissed;

3. If the constitutional reference is an abuse of the court process; and

4. If there is non disclosure of material facts.

In my view the Court of appeal was giving guidelines on how the courts should approach Applications made under the Constitutional Provisions and the court made no hard and fast rules that all such Application should go to full hearing. It is my view that Constitutional Applications can be challenged for the above stated reasons amongst other reasons.

The Chamber Summons under consideration is brought pursuant to Order VI Rule 13 (1) (a) of Civil Procedure Rules and Section 3 A Civil Procedure Act. Under the order VI Rule 13 (1) (a) Civil Procedure Rules, as read with 13 (2) Civil Procedure Rules no evidence is required to be adduced. All that the court needs to look at the application; at is the grounds on which the Appliation is premised and the affidavit in support of the Petition Application to establish if it discloses any cause of action.

Does the Originating Summons raise any Constitutional questions?

Before I consider the various sections of the Constitution allegedly violated, I wish to point out that unless the contrary intention is shown, the Originating Summons proceeds on Affidavit evidence. The court will therefore consider the evidence contained in the Affidavit of Stephen Ndiboi on record, to establish whether any constitutional issues are raised.

The Petitioners seek enforcement of their fundamental rights and freedoms under S 84 (1) and (2) of the Constitution. It is the duty of the Petitioner to prove that the rights they seek to enforce do exist.

For the Applicants to seek to enforce these rights the Applicants should in their Application be precise and specific as to what the nature of their complaint is, the provision of the Constitution that is infringed and the manner in which it is infringed. This is to ensure that the Respondents know the case that they

will meet and prepare for it. The courts have repeatedly stated this proposition. In the case of ANARITA KARIMI NJERU V REP (1979) KLR 154 Trevelyan and Hancox JJ stated as follows (pg 156)

"we would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

In another case of CYPRIAN KUBAI V STANLEY KANYONGA NRB MISC APPLICATION 612/02, J. Khamoni had this to say;

"An Applicant moving the court by virtue of Section 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the Section, but also to the subsection and where applicable the paragraphs and subparagraph of the Section out of 70 and 83 allegedly contravened plus relevant act that contravention so that the Respondent knows the nature and extent of the case to enable the Respondent prepare accordingly and also to know the exact extent and nature of the case it is handling-"

There are several other authorities which have upheld that proposition. The sum total of these cases is that the Applicants case has to be very clear to enable the Respondent respond.

The Applicant cited Section 70 and 71 of the Constitution generally without specific reference to any subsection or paragraph. S.70 consists of several rights in different paragraphs but none was specifically cited. It is left to the court to guess that since it was cited with S.71, it must refer to protection of right to life. S. 70 of the Constitution lays down the foundation of the Protections under Chapter V of the Constitution (Bill of Rights) in a general and summarized manner and it has to be read with another Section as the Applicants have set out. But apart from declaring the individual's rights and freedoms, the same Section limits the said rights and freedoms and subjects them to respect for the rights and freedoms of others and the public interest.

The Section reads;

"70 whereas every person in Kenya is entitled to the Fundamental Rights and Freedoms of the Individual that is to say, the right whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following;

(a) life, liberty, security of the person and protection of the law

(b) …….

(c) ……..

The provisions of this Chapter shall have the effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of these rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

In the case of GITHUNGURI V REP (1986) KLR 1 the Constitutional Court held;

"rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community."

The Defendants have rights too which are guaranteed under that Section and the Applicants rights have to be balanced against the rights of the Defendants.

Bearing the above in mind, have the Plaintiff's rights under S. 70 and 71 as alleged, been breached? It is

true that every Kenyan has a right to work and earn a livelihood but the Applicants have not demonstrated that there exists a right to work till retirement. They were working under contracts of employment with the Defendants which had terms which governed the contracts. Either party has a right to terminate the contract for the different reasons contained in their agreements. The Defendants did not guarantee the Applicants any right to work till retirement and I find and hold that there is no fundamental right of the Applicants which has been violated under those sections.

Was the Applicant's right to collective bargaining violated? S. 80 (1) stipulates as follows;

"80 (1) except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other association for the protection of his interest……"

All the Plaintiff's allege that the Defendant Company has 1300 permanent employed workers who are not unionized and the Defendant Company through its management has shown no willingness and intention to facilitate the same.

The Plaintiffs have not demonstrated that they tried to form a union and the Defendants have barred them from so doing. It is also upon the Plaintiffs to show that they do not fall within the proviso to Section 80 (2) of the Constitution where they are supposed to meet certain requirements in order to be registered as a union, for example, whether they have the minimum numbers required to form a union; there being in existence a union which is representative of their interests or part of their interests which disentitle the Plaintiffs from forming another such union. There is no evidence of any violation under the above section and I so hold.

Were the Plaintiffs treated inhumanely and in a degrading manner in the manner in which their contracts were terminated and was that treatment contrary to Section 74 of the Constitution?

S. 74 of the Constitution provides;

"74 No person shall be subject to torture or inhuman or degrading treatment punishment or other treatment."

What does inhuman or degrading treatment mean? The new Oxford English Dictionary on historical principles defines inhuman treatment as "an action that is barbarious, brutal and cruel" whereas degrading punishment is defined as "that which brings a person in dishonour or contempt."

Apart from the Plaintiffs stating that they received letters terminating their contracts after what they called a peaceful demonstration to protest the injustices committed against them by their employers, they have not specifically demonstrated how that termination was barbaric or brutal. I have seen the letters of termination of contracts exhibited on the affidavit in support of the Application. The said letters contain the reasons for termination, and they set out the Applicants' entitlements or final dues. It seems to me ordinary letters of termination of contract if it conforms with the terms of the contract. What is before the court is not a dispute over breach of terms of the contracts. And if such allegation were to be made, the Employment Act Cap 226 Laws of Kenya, which governs the employer, employee relationship would come into play.

After considering the above, I find nothing barbaric, or brutal that would amount to inhuman and degrading treatment under S. 74 of the Constitution and I find no violation of the Plaintiff's rights under the said Section.

After considering all the above allegations and evidence by the Applicants, there is no doubt and I do agree with the Defendant's submissions that the relationship between the Plaintiffs and Defendants is governed by the Employment Act Cap 226 Laws of Kenya. The preamble of that Act reads;

"An Act of Parliament to consolidate, with amendments, the law relating to employment, and for matters incidental thereto and connected therewith."

In the RASHID ALOGGOH CASE, the Court of Appeal held that the existence of an alternative remedy is not a bar to an Applicant seeking Constitutional remedies. The question is whether what the plaintiffs seek are alternative remedies that can be awarded under Section 84 (2) of the Constitution. As already found above the allegations raised by the Applicants do not raise any constitutional issues. Remedies that would be awarded under S. 84 (2) of the Constitution would only be awarded after the court found that there were Constitutional issues raised or that the Applicants' rights were violated.

In the case of EPCO BUILDINGS LTD V ADAMS MARJAN ARBITRATORS AND ANOTHER Civil Appeal 298/05, Justice Githinji's decision was a minority decision and, it basically dealt with the question of the jurisdiction of the Constitutional Court. The majority decision of Bosire & Deverrel JJA turned on evidence under order VI of the Civil Procedure Rules and that is why the majority decision is distinguishable from the instant case. Justice Githinji adopted and endorsed the case of HARRIKISSON V A.G. OF TRINIDAD & TOBAGO (1980) AC 265. In that case, a teacher was transferred to another school without being given a 3 month's notice as required by the provisions of the Teaching Service Commission. He applied under Section 6(1) of their Constitution for redress and the Privy Council in rejecting his appeal had this to say: Pg 268 Paragraph B-C;

"The notion that whenever there is a failure by an organ of Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under S. 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of these rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an Originating appliction to the High Court under Section 6 (1), the mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous, or vexatious or abuse of the process of the court, as being made solely for the purpose of avoiding the necessity of applying in the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

Justice Githinji went on to find that though the Constitution is the supreme law, it enshrines the rule of law and has to be construed in harmony with other laws made by Parliament and not in a manner that is subversive or disruptive of the other laws and the administration of justice in general. He observed that the intention of the framers of S. 84 (1) of the Constitution cannot have intended that it supersedes or be used collaterally with the other laws and procedures in the other Acts of Parliament for resolution of disputes.

I am in total agreement with the judge's finding.

In the instant case, it cannot have been intended by the framers of S. 84 of the Constitution that the Constitutional provisions be used in place of the Employment Act.

Section 84 (1) of the Constitution should only be resorted to if there is violation or threatened violation of a right. In the instant case, there was no violation of the Plaintiffs' rights and the Plaintiffs remedy if any, lies under the Employment Act.

Does the Originating Summons disclose a reasonable cause of Action?

In COTTAR V AG FOR KENYA (1938) EACA 18 the East African Court of Appeal considered what constitutes a cause of action and held;

"What is important in considering whether a cause of action is revealed by the pleadings is the question as

to what right has been violated."

Again in AUTO GARAGE V MOTOKOV (NO 3) (1971) EA 519, Spry V.P. said;

"In addition, of course, the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable."

The above cases were adopted by J. Bosire in the EPCO case in trying to define what constitutes a cause of action.

In the instant case, I have found that no right was violated by the Defendants as alleged and therefore there was no cause of action disclosed as envisaged by Sections 70, 71, 74 and 80 of the Constitution.

Had the cause of action been disclosed would the right have been enforceable against the Defendants?

The Defendant's Counsel submitted generally that the rights even if violated would not have been enforceable as against the Defendants. Counsel did not expound on that submission. The Defendant is a Ltd liability Company, a private individual. Can the fundamental rights and freedoms which are guaranteed by the Government/State be enforced against the Defendant? The answer is No. It is the State which guarantees and secures the fundamental rights and freedoms of the individual under Chap V of the Constitution. It is only the Government against whom the said rights can be enforced. Justice Nyamu had occasion to consider this issue in the case of KENYA BUS LTD & OTHERS V AG & ATHORS HC MISC 413/05 where he made reliance on the case of TEITIWNNANG ARIONG & OTHERS (1987) LRC CONST 517 in which the court stated as follows:

"Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Constitution.

The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It follows therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the Governed. I am of the opinion that an individual or a group of individuals as in this case cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution."

Justice Nyamu endorsed this holding in the KBS CASE and the case of RICHARD NDUATI KARIUKI V THE HON. LEONARD NDUATI KARIUKI & ANOTHER H MISC APPLICATION 7/06 (O/S). In HON. MARTHA KARUA V RADIO AFRICA LTD t/a KISS F.M. STATION & OTHER Nyamu and Emukule JJ held that the failure to join the Attorney General to an Application under the fundamental rights and freedoms provisions is fatally defective. They held;

"In addition, the fundamental rights and freedoms apply vertically not horizontally and are secured, guaranteed and protected by the state and the Plaintiff as a person in the suit is articulating her individual right to a fair hearing and cannot under the constitution be liable to the Defendants for any violations of the Constitution."

In the instant case, the Attorney General is not joined to these proceedings as a party. Even if the court were to find that any rights were violated, they could not have been enforced against the Defendant who is a private individual.

The last ground of objection to the Originating Summons is that the Affidavit of the Petitioner, Stephen Ndiboi dated 17th June 2005 is defective in that it offends S. 34 and 35 of the Advocates Act Cap 16 Laws of Kenya and should be struck out. Section 34 of the Advocates Act Prohibits any unqualified person from preparing certain documents or instruments whereas Section 35 provides that instruments

should be endorsed with the name and address of the drawer. I have seen the Affidavit sworn by the Applicant. Apart from the stamp of David Nyaga Kaboro Advocate before whom the Affidavit was sworn, or who commissioned it, there is another signature which I believe is by the deponent.

There is no endorsement by the drawer of the affidavit or his name nor is there an address.

Section 35 of the Advocates Act stipulates as follows;

"35 Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in S 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or fine not exceeding five hundred shillings in the case of an advocate; provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be name and address of such advocate or firm.

(2)The Registrar, the Registrar of Titles, the Principal Registrar of Government Lands, the Registrar-General, the Registrar of Companies and any other registering authority shall refuse to accept or recognize any document or instrument referred to in Section 34 (1) unless such document or instrument is endorsed in accordance with this section."

In the case of APIDI V SHABIR & ANOR (2003) KLR 591 the court found that failure to endorse the drawer of the affidavit rendered the Affidavit fatally defective and the court struck it off.

Mr. Imanyara, Counsel for the Plaintiff, in reply said that the Advocates Act is not superior to the Constitution and any provision that undermines the Constitution is null and void. S.35 is couched in mandatory terms. I believe that the two sections, 34 & 35 were supposed to ensure that unqualified Advocates or other persons did not sign such documents which have serious legal implications and consequences. But if drawn by Advocates who are qualified, there had to be evidence to that effect by the Advocate endorsing on the Affidavit.

No doubt the Constitution is the supreme law of the land but the Constitution has to be construed in harmony with other laws made by Parliament and should not be construed in a manner disruptive of the other laws and administration of justice in general. Otherwise the other statutes will be rendered superfluous.

The provisions of – S. 34 and 35 of the Advocates Act are to ensure that minimum standards of good advocacy and practice are maintained. As it is, the court has no idea who drew the Affidavit in support of the Originating Summons, and whether the drawer is qualified or not. It cannot just be presumed that it is Counsel for the Applicant who drew it. Section 34 and 35 are couched in mandatory terms and to maintain minimum standards of good advocacy, this court will not hesitate to strike out that affidavit as being incompetent. Knowing the seriousness of the case at hand, Counsel should take the greatest interest and care that the document forming the basis of the claim is properly before the court. I find that the Affidavit dated 17th June 2007 is incompetent, bad in law and is hereby struck out. It means that the Notice of Motion remains bare and is untenable.

From the foregoing, I am satisfied that no breach of any Constitutional right has been disclosed. I further find that the Application does not disclose any cause of action and is an abuse of the court process as the Plaintiffs would have pursued their rights if any, under the Employment Act in the ordinary Civil Courts I did not make any finding as whether or not the Application was frivolous or vexatious because the court was not moved under Order VI Rule 13 (1) (b) Civil Procedure Rules. Further the affidavit in support of the Application was incompetent and defective and there is therefore no evidence in support of the Constitutional Application.

In the result, I allow the Defendants Chamber Application dated 12th October 2005 and strike out the

Originating Summons dated 17th June 2005. Bearing in mind that the Applicants have since lost their jobs, I order that each party bears their own costs.

Dated and delivered this 23rd day of March, 2007.

R.P.V. WENDOH

JUDGE

Present:

Mr. Marete - defendant

Mr. Marangu

Mr. Imanyara – plaintiff

Daniel: Court Clerk

R.P.V. WENDOH

JUDGE