



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 1612 of 2005

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE CONSTITUTION OF KENYA FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF ARTICLES 4,5, AND 23 OF UNIVERSAL DECLARATIONS OF HUMAN RIGHTS

AND IN THE MATTER OF COMPANIES ACT

BETWEEN

JOHN GAKURE KARURI AND 148 OTHERS EMPLOYEES OF DAWA

PHUARMACEUTICALS LTD WHOSE NAMES AND SIGNATURES APPEARS IN

THE WRITTEN AUTHORITY given under order 1 rule 12 of the Civil Procedure rules

filed herewith APPLICANTS

VERSUS

1. DAWA PHARMACEUTICALS CO. LTD 1ST RESPONDENT

2. INDUSTRIAL & COMMERCIAL DEVELOPMENT

CORPORTION2ND RESPONDENT

3. NATIONAL BANK OF KENYA LTD 3RD RESPONDENT

4. KAMOTHO WAIGANJO ADVOCATE 4TH RESPONDENT

5. ENG. GAKURU KANYANJA 5TH RESPONDENT

6. WILFRED NGOI 6TH RESPONDENT

7. **ENG. GEORGE NYAGISERE** 7TH RESPONDENT
8. **THE HON. ATTORNEY GENERAL** 8TH RESPONDENT
9. **INSURANCE CO. OF EAST AFRICA LTD**1ST INTERESTED PARTY
10. **NATIONAL SOCIAL SECURITY FUND**..... 2ND INTERESTED PARTY
11. **NATIONAL HOSPITAL INSURANCE FUND**.....3RD INTERESTED PARTY

RULING/JUDGMENT

By a Chamber Summons dated 26th January 2006 the 2nd Interested Party M/s National Social Security Fund applied to have the Originating Summons dated 9th November, 2005 struck out with costs and gave the following reasons:

- (1) The Originating Summons dated 9th November 2005 is a constitutional abuse of process
- (2) The Originating Summons dated 9th November 2005 raises no constitutional issues
- (3) The applicants have other available mechanisms for redress
- (4) It is not pleaded with clarity how the applicants' right under S 70, 73, 74 and 82 of the Constitution have been infringed.

Counsels representing the parties agreed to have the application filed heard on the basis of the written skeleton arguments with lists of authorities and the oral submissions of counsels.

The Originating Summons is filed against at least four private limited liability companies namely Dawa Pharmaceuticals Ltd, ICDC, National Bank of Kenya Ltd and I.C.E.A. It is also directed at four individuals the Attorney General and two parastatals namely the National Social Security Fund and the National Hospital Insurance Fund. The significance of these descriptions will shortly become apparent. As against the Attorney General it has not been alleged with any particularity or at all how he has violated any of the constitutional provisions relied on. The Attorney General is the right person to sue in respect of any Chapter 5 violations because he represents the Government. In relation to the private companies and the individuals the Chapter 5 of the fundamental rights and freedoms are only guaranteed by the Government and not by them. Even where such companies and individuals are capable of violating any such rights and freedoms the liability against them can only be enforced under private law by invoking any of the common law reliefs or by expanding them where there is no recognized cause of action. This can either be done by the courts under the common law or by Parliament through appropriate legislation. Similarly the parastatals have the capacity of suing and being sued pursuant to the relevant Acts which create them. The liability against them is based on statute except in the rare cases where they can be said to be agents of the State ie. by virtue of the principle of Instrumentality of State. This is not the contention here. Moreover there is no nexus between the Applicants claim as framed and the Government and it is quite apparent that all the claims are wholly premised in private law and not public law.

This court has ruled in many past decisions that the liability and the guarantees in respect of the Chapter 5 of the Constitution fundamental rights and freedoms are vertical not horizontal and it is not necessary now to repeat the principles except setting out some of the cases::

- (1) ***KENYA BUS SERVICES LTD & 2 OTHERS v THE ATTORNEY GENERAL & OTHERS***
HCCC NO. 415 of 2005 at pages 15-16 unreported
- (2) ***RICHARD NDUATI KARIUKI v THE HON LEONARD NDUATI KARIUKI & ANOTHER***

HC Misc No. 7 of 2006 at page 18 unreported

Parties have no right to merely allege any manner of violations that are not contemplated under Chapter 5 or purport to join parties not covered under the Chapter and expect a full hearing on merit because any such claim constitutes an abuse of the court process. This court has the power to frown upon such abuse and to stop it when it happens by striking out any such claims. In the case of ***THAKUR PERSAD JAROO v ATTORNEY GENERAL (2002) 5 LRC 258 at 260*** the Privy Council (Trinidad Tobago) held as follows:

“(3) Where there was an alternative remedy the right to apply to the High Court which S 14(1) of the Constitution provided was to be exercised only in exceptional circumstances. The Originating motion procedure under S 14(1) was appropriate for use in cases where the facts were not in dispute and questions of law only were at issue. The appropriateness or otherwise of the use of the procedure afforded by S 14(1) had to be capable of being tested at the outset when a person applied by way of originating motion to the High Court. All the court had before it at that stage was the allegation. The answer to the question whether or not the allegation could be established lay in the future. The value of the important and valuable safeguard that was provided by S 14(1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures were available. The need for vigilance would be deprived of much of its value... if another such procedure was available, resort to the procedure by way of originating motion would be inappropriate and it would be an abuse of the process to resort to it.”

S 14(1) is the equivalent of our S 84(1) of the Constitution upon which this claim is brought. I fully endorse the ***THAKUR*** case above.

On the other hand this court’s attention has been drawn to the majority and the dissenting judgments in the Court of Appeal judgment in the case of ***EPCO BUILDERS LTD v ADAM S. MARTIN, ARBITRATOR & 2 OTHERS C.A. NO. 248 OF 2005*** unreported.

I agree with the 4th Respondent Counsel’s submission that the majority decision only touched on the High Courts consideration of evidentiary matter contrary to O VI Rule 13(2) of the Civil Procedure Rules. It is certainly distinguishable in that nothing can take the court’s inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are plainly frivolous or vexatious or elevate them to a Constitutional status when they are in fact plainly an abuse of the courts process. The court’s view is that Civil Procedure Rules only apply to Constitutional matters when they are not inconsistent with the letter and the spirit of the Constitution.

The same reasoning goes as regards ***RASHID ODHIAMBO ALOGGOH & 245 OTHERS v HACO INDUSTRIES LTD C.A. 110 OF 2001*** which touched on O 36 of the Civil Procedure Rules and how a Constitutional hearing should be handled. The case in my view does not take away the courts jurisdiction to strike out Constitutional applications in all situations. The case does not also define the principle of Constitutional mandate.

Nothing for example can take away the Court’s inherent power to prevent its process being abused or trivialized.

Comparable jurisdictions clearly vindicate the view taken that the court’s power is intact and it may strike Constitutional references in deserving cases. The Constitutional Court of South Africa case of ***PHILIPS & OTHERS v NATIONAL DIRECTOR OF PUBLIC prosecution cc 7/55/04 [2005] ZACC 4(7 Oct 2005)*** re-affirms the view taken herein in this words at page 10:

“The inherent power of the Courts to protect and regulate their own process in the interest of justice is recognised”

And in the case of ***DIRECTOR OF PUBLIC PROSECUTIONS v MOHAMED & OTHERS***

(CC744/02) 2003 (1) SACR 561/03 (5) BCLR 476(2003) ZACC 4 (3A PM/2003 at page 10 the same court reaffirms the same powers as follows:

“It would certainly expose a grave defect in our system of justice if it were to be found that in the circumstances such as these the court were powerless to act.”

While still on comparables the holding by the Supreme Court of Bahamas in the case *BAHAMAS ENTERTAIN... LTD v KOLL & OTHERS (1996) 2 LRC* at 46 is on the point as under:

“(1) Litigants were prima facie entitled to have access to the court to determine the existence or extent of their civil rights and obligations but that right has never been absolute ... However, the right of access to the Supreme Court was subject to certain limitations, for example, the cause of action was not to be frivolous or vexatious ...”

A Constitutional court must guard its jurisdiction among other things to ensure that it sticks to its Constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything. It must at the outset reject anything that undermines or trivializes or abuses its jurisdiction or plainly lacks a cause of action.

Again on this point the Privy Council in the case of *HARIKISOON v ATTORNEY GENERAL [1979] 3 WLR 63* has stated:

“The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law this necessarily entails the contravention of some human right for 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 those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an Originating application to the High Court under Section 6(1) the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of 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 an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms”

“What the appellant was entitled to under the paragraph was the right to apply to a court of justice for such remedy (if any) as the law gives him. There is nothing in the material before the High Court to give any colour to the suggestion that he was deprived of the remedy which the law gave him. On the contrary he deliberately chose not to avail himself of it.”

In the case before this court quite apart from the applicant seeking reliefs which do not lie against such parties, common law and statute law has provided for the institution of the claims and the seeking of accompanying remedies in all the situations described namely retirement benefits and the interest thereon, accountability of an advocate and payment of general damages. All these matters are dealt by other laws and remedies provided. A Constitutional court does recognise the existence of those other laws (i.e. the Public interest) except where they are inconsistent with the Constitution and it cannot usurp the jurisdiction of the other courts exercising the other jurisdictions vested in them by law. A Constitutional Court must rigidly stick to its mandate. In relation to S 84 of the Constitution enforcements the following requirements must be met even at the threshold stage:-

- (i) The applicant must be the person defined in the Section or the other person in the case of Habeous Corpus. If not he has no standing
- (ii) The threatened contravention or actual contravention must be against any of the Chapter 5

fundamental rights and freedoms. The enforcement of any other right takes him outside the purview of section 84.

(iii) The unfettered power to the court to give any deserving reliefs and remedies capable of securing the rights and freedoms can be invoked only in cases where requirements (i) and (ii) have been met by the applicant and not otherwise. This in turn means only one action is contemplated by the section because it is possible to give all suitable reliefs and remedies both under the common law and public law.

To conclude it is quite apparent from the pleadings and the written submissions and oral submissions of counsel all of which I have taken into account including the above analysis of the law that the institution of the Originating Summons is outside S 84 of the Constitution and is both incompetent and abuse of the court process and therefore this court does have inherent power to strike out the Originating Summons dated 9th November 2005.

The same is accordingly struck out with costs.

DATED and delivered at Nairobi this 2nd day of March 2007.

J.G. NYAMU

JUDGE