REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 218 of 2003

STEPHEN B. NGUTHI……..……PLAINTIFF

VERSUS

DEL MONTE (K) LTD…….DEFENDANT

RULING

In the year 1986 following a successful interview, the Defendant/Applicant offered the Plaintiff/Respondent employment in their establishment as a Senior Department head in their Plantation with effect from February, 1987 vide their letter dated December, 18.l986 marked annexture NW 1A. As per the contents of the said letter the Plaintiff was expected to work for a six-month probationary period and after successfully completing it, he would be confirmed to permanent employment among other terms.

The Plaintiff accepted the offer vide his letter dated 24.12.1986 annexture NW 2 (b) on 2.2.87. A formal contract was executed between the disputants herein marked annexture NW 2A. The clauses relevant to this ruling are clauses 3 and 6 whose salient features are that:-

· The probationary period was six months

· Upon successful completion of the 6 months he would be confirmed in employment.

· There after the company would terminate his appointment by giving him three calendar months notice in writing or to pay his three months salary in lieu of notice plus any pro-rata leave due.

· Likewise if the Plaintiff wished to leave service of the company he had to give the company three months notice of his intention in writing

· In the event of disobedience, unlawful act, gross misconduct or habitual intemperance on his part the company would have the right to terminate his appointment without notice paying only such salary as may be due to him up to and including the day on which such appointment is terminated by the company in writing.

· Clause 6 required the Plaintiff during the pendence of his service with the company to abide by the company's policies Rules and Regulations as may be in force from time to time. Annexture No.3 were the ones in force as at the time the events leading to these proceedings were set in motion.

The clauses relevant to this ruling are those relating to termination and dismissals. The document defines

the various types of terminations at the option of the employer. In normal termination the services of an employee are terminated because his/her work is no longer useful or economic to the company by evaluating within one year, which depicts below average performance. No element of discipline is involved. It is simply a remedial action to remove an unsatisfactory employee only.

Dismissal for cause means the immediate dismissal of an employee for an act on his/her behalf that has exposed company personal property and money to serious danger, damage or loss. To have cause for termination the company must determine that the employee has committed serious offence such as civil conviction or for a criminal offence involving a prison sentence being evident to the company as stealing, making fraudulent records, false statement, fighting with company employees or causing bodily injury to another person while with the company, insubordination or conduct which violated common decency and morality.

Disciplinary termination means terminating the employment of a staff member when misconduct of a lesser degree has occurred on more than one occasion. In such cases the company wishes to exact a lesser penalty than immediate dismissal i.e. the issue of two warnings followed by termination. In all cases evidence is needed to show that the employee was given an opportunity to defend himself.

The staff policy also sets out how these forms of termination are to be administered. In normal termination whether applied to a probationer or a long service staff member, must be justified in writing such as through written notification in which the employee should be cautioned about below average or unsatisfactory performance, review reports completed over a specific period (minimum 3 months) prior to any formal decision being made in regard to termination. The employee concerned must be informed and notified of his/her unsatisfactory performance. At the same time it must be made perfectly clear that he/she will be under surveillance for a specific period and may be subjected to appraisal reports.

Disciplinary termination is carried out in cases of mis-conduct or misbehaviour of a lesser degree when the employee has been duly warned on more than one occasion. When a staff member is the subject of a warning for misconduct/misbehaviour, the subsequent formal interview, admonishment or reprimand must be confirmed in writing to the individual concerned and a copy placed in his/her personal file.

In the cause of the Plaintiffs employment tour, the plaintiff has encountered warnings or reprimands. These have been annexed as annexture NW5 in a bundle. Vide a letter dated 6.7.1988 the Plaintiff was addressed on the current procedure to be followed in the performance of his work. Vide a letter dated 25.8.89 the Plaintiff received a written warning on general performance of his work. Vide a letter dated April 15, 1992 he was informed that his work needed improvement, on 24th August 2001 he received a warning concerning his rebellious attitude and outright indiscipline against established authority. The last sentence of this letter reads "***please be warned that unless you stop this negative behaviour forthwith very severe disciplinary action will be taken against you"***

On 8th July 2002 the Defendant addressed a letter of termination of services of the Plaintiff's marked annexture NW4. The content of that letter is what sparked off these proceedings. They read "***on 26th June 2002, you authorized application of Diazinon in MF 36 knowing fully well, that the field has harvestable premature fruit.***

This in spite of the fact that you had received the recommendation NOT to spray the pesticide in the field signed by the Agricultural Research Management on 19th June 2002.

This action is consistent with previous actions by you for which you have been severally warned but it is evident the admonition has been falling on deaf ears.

This is to advise you therefore that the company has decided to terminate your services with immediate effect."

What transpired between the Plaintiff and the Defendant as regards the contents of that letter is not

exhibited. But on 23rd July 2002 the Plaintiff executed a terminal clearance certificate annexture NW 7. Of material to this ruling is clause 2 and 3 thereof. Clause 2 reads" ***I ……(name) …. (wn)having been cleared as stated above do hereby unreservedly acknowledge receipt of all my dues as here under acknowledged that I have no further claim against the company whatsoever."***

Clause 3 reads: ***I ……having been cleared by the company and paid as acknowledged above do hereby certify that my employment with the company has ceased and reasons herein have clearly been explained to me in a clear and simple language and have voluntarily accepted the company decision to terminate my services/dismiss me from employment. I accept my resignation as the case may be without any dispute or legal action against the company"***

On the same date 23.7.02 the Plaintiff acknowledged receipt of his staff retirement benefits vide annexture N.W.8.

Against the foregoing background information the Plaintiff moved to this Court and filed a plaint dated 7.3.2003 filed on 10.3.2003. The releifs he is seeking are set out in paragraph 23 of the Plaint namely compensation and for damages as prayed for in paragraph 19 hereof which is a claim for loss of salary and annual salary review from 8th July 2003 to the retirement age of 60, loss of benefit under the Retirement Benefits scheme, housing or housing allowance, medical aid and school fees assistance for which the Plaintiff is entitled to compensation and damages which the Plaintiffs claims, Damages for wrongful termination and dismissal from employment, costs of the suit, interest and any other or further relief this honourable court deems fit and just to grant.

The foregoing, reliefs are commented on the averments in the plaint. The Plaintiffs major complaint which is the basis of attack by the defence in their application for striking out is in paragraph 9, 15 and 16. Paragraph 11, 12, 13 and 14 are in effect responding to the contents of annexture NW 4 the letter of termination of employment. The complaint in paragraph 9 of the Plaint is that the Defendant wrongfully and in repudiation, breach of the staff policy terminated the Plaintiffs employment and wrongfully dismissed the Plaintiff there from. In paragraph 15 the Plaintiff complains that he did not receive two warning letters within one year as provided by staff policy to enable the Defendant to terminate the employment as a disciplinary termination. In paragraph 16 the complaint is that the defendant failed the disciplinary termination. In paragraph 16 the complaint is that the dependant failed to discuss the contents of termination under the staff policy thus denying the Plaintiff the right to know specifically what he was condemned and punished for.

The defendants have filed a defence to that claim whose stronghold against the Plaintiffs claim is paragraph 5,6 and 10 of the defence dated 10.5.2003 and filed on 20.5.2003. The central theme in those paragraphs is that the defendant acted within the contract and the Plaintiff has no valid claim against the Defendant. For this reason this Court has been moved under Order VI rules 13(1) (b) (c) and (d) and Rule 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all enabling provisions of the law seeking orders of this court to have the suit struck out with costs. The application is cemented on the pleadings of both sides, affidavit in support, annextures, oral submissions in Court and the Law.

The major grounds in summary are that the Plaintiff was an employee of the Defendant, he misconducted himself by spraying a pesticide in one of the Defendants fields against instructions and he was therefore dismissed in accordance with staff policy and regulations, that the Plaintiff pleaded for an honourable exit which was granted and the summary dismissal was converted into a normal termination whereby the Plaintiff was fully paid his dues less applicable taxes, that the Plaintiff fully signed for his dues which facts are not disputed and for this reason the Plaintiff has no further claim against the Defendant, more so when he has not averred that he was coerced or induced into singing of the said documents. They argue further that the initial termination was improper as the Plaintiff was subsequently properly terminated. Further that the Plaintiff is bound by the contract and it is not true that he was entitled to work till the age of 60.

The Plaintiff/Respondent has opposed that application on the basis of the ground set out in their replying affidavit, annextures and oral submissions in Court and points of law raised. The main argument

is that the proper procedure was not followed to have the Plaintiff's services with the defendant terminated, that all authorities cited by the parties show that wrongful termination of employment is actionable, that this Court can only strike out the suit if it is hopeless, and cannot be amended, that even if no damages are payable to the Plaintiff he is entitled to a ruling as to whether his contract was lawfully terminated or not.

In reply Counsel for the Applicant reiterated his earlier submission that the Plaintiff has no claim against the defendant and the plaint should be struck out.

This Court has power under the provisions of law cited to strike out a pleading but in doing so it has to ensure that the correct principles of law have been applied to the facts of this case and the pleadings found not worthy to be saved. This Court is guided by the principles in the case of **DT DOBIE COMPANY (KENYA) LTD VERSUS MUCHINA (1982)KLR 2** and pg.2 where at holding(a) Madan JA as he then was observed that "*a suit should only be struck out if it is so weak, that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment it should not be struck out. The redemptability and curability of a suit are determined by looking at the cause of action or the major complaint of the Plaintiff and determining whether that* complaint on the facts before the Court is maintainable or not.

Holding 1, 2 and 3 of the case quoted above sheds light on what this court should be looking for when deciding whether the Plaintiff has a reasonable cause of action or has a sustainable cause of action. "*A reasonable cause of action" means "action*" with some chance of success. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. On the other hand "***a cause of action"*** means an act on the part of the defendant which gives the Plaintiff his cause of complaint.

Further caution is that "***since the power to strike out pleadings 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 cautionally."***

This court has applied the foregoing principles to the facts of this application and it is of the opinion that both sides are agreed that the issues revolve around a contract of employment.

The first point to be considered is the nature of this contract what is the plaintiff's complaint about the nature of his contract with the defendant? The Plaintiff's complaint on the nature of the contract is found in paragraph 4, 10 and 19 of the plaint. In paragraph 4 the Plaintiff avers that he was employed in 1987 by the defendant as a permanent staff. In paragraph 10 he avers that he was 42 years old when his services were terminated and in paragraph 19 he avers that retirement age was 60.

The contract document has been exhibited as annexture NW 2A executed by both parties on 29.2.88. Paragraph 2 of clause 3 simply assures the Plaintiff that upon successful completion of his probationary period he was to be confirmed in his employment. The clause goes further to state that at any time after the completion of his probationary service the company would be entitled to terminate the appointment by giving three calendar months notice in writing or to pay him three months salary in lieu of notice. The presence of this clause in the contract robes the Plaintiff the right to plead permanent employment till age of 60 years. It therefore follows that the contract document annexture NW 2 allowed either party to bring that relationship to an end in accordance with the terms set out there in and the staff policy. The law recognizes this to be the correct position and that is in chitty on contracts page 780 paragraphs 37 – 108 it is stated that "***a provision for"*** permanent employment or pensionable employment does not normally mean for life or even until the normal age of retirement. This proposition has been followed and applied by this Court in the cases cited to this court there is no need to emplore it.

Having arrived at the conclusion that the Plaintiff's contract was not permanent to the extent that would have allowed him to work up to the retirement age of 60 years, the question that follows is whether that contract was unlawfully brought to an end giving rise to a cause of action in favour of the Plaintiff? As submitted by the Defendants counsel following **MUTHUURI –V- NATIONAL INDUSTRIAL**

CREDIT BANK LTD (2003) KLR 145 holding 3 thereof in determining the lawfulness or otherwise termination of employment whose terms and conditions have been reduced to contract the only test was whether the said termination was in accordance with the contract itself.

Herein the offending letter of termination is the letter dated 8.7.2002. The contents show that this was disciplinary termination. In order for it to be effective it had to comply with the procedure laid out in the staff policy. In order for them to be invoked (1) the officer must have been warned on more than one occasion. Annexture NW 5 show that vide a letter dated 25.8.89 and 24.8.2001 the plaintiff had received two previous warnings. Warnings falling outside one year to the subject under consideration were to be disregarded.

2) Any staff member facing disciplinary action must be given the opportunity to defend himself/herself both verbally and/or in writing. 3) Thereafter a termination letter could only be issued after registration of two warnings.

Applying the foregoing provisions to the facts of this application in the light of annexture NW 4, it is clear that the Plaintiff was not given an opportunity to defend himself on those contents before the services were terminated as the letter leaves no room for either written or oral defence. In fact that is why the Plaintiff purports to answer those allegations in paragraph Nos 11,12,13 and 14 of the plaint. It is therefore the finding of this court that the defendant's letter of 8.7.2002 violated the provisions of the contract executed by the disputants herein annexture NW 2 and the staff policy annexture N.W.3 as the correct procedure was not followed to bring the plaintiffs services with the defendant to an end.

The next question that flows from the above is what options did the parties have as far as that contract was concerned.? As at that date having found that the procedure followed was wrong the parties position was restored to the position they were in before the writing of that letter. It means that either party then could avail himself/herself of the options under annexture NW 2 and NW 3 under annexture N.W.2 the employer can terminate the contract by paying three months salary in lieu of notice. Under the staff policy Regulations any staff member facing disciplinary action must be given the opportunity to defend himself/herself both verbally and in writing. From the contents of annexture N.W.4, the Plaintiff was facing a disciplinary action. It is not known what transpired between the parties after annexture 4 was written in terms of defence. No written explanation is given. An oral explanation cannot therefore be ruled out.

The Court has on record annexture SBN 5 whose date is not given. The defence say it was written before payments were made whereas the Plaintiff says it was written after payments had been made to him. A reading of the same shows that the subject was wrongful terminations of employment. It out lines events leading to that termination. The last paragraph is of material to this ruling. It states "***on a personal level I would like to request you to do justice to me by either restoring me to employment or by giving me a dignified exit in the form of a retrenchment package of 3 months pay per year worked and revoking my termination and replacement it with a letter of commendation so that I can continue providing for my family while looking for a job"***

The above communication does not mention that any payment had been effected to the Plaintiff in terms of the contract. It recognizes the fact that there were options that the parties could resort to, to bring the contract to an end. No document has been exhibited to show that a retrenchment option was open to the employer. It therefore follows that since no mention of payment of dues having been made in that communication, a proper inference to be drawn from the contents is that it gave the employer leeway to consider the options under the contract and that is why he came up with the option of payment of the three months salary in lieu of notice. This is the only probable explanation as to why in the same month of July 2002 annexture NW 6, 7 and 8 were executed by the parties and payment of dues due to the plaintiff paid out to him.

The payments were made in July 2002. The Plaintiffs plaint dated 7.3.2003 and filed on 10.3.2003 acknowledges this in paragraph 18 of the plaint. He however qualifies that by a vering that he would have been entitled to that payment had the dismissal on termination been proper and not wrongful.

The last question to be answered is whether after the Plaintiff has admitted that he received some payment as a result of that wrongful dismissal there is anything else that he is entitled to from the defendant which this court can enforce through the proceedings. In other words does he have any reasonable cause of action against the Defendant evident in the plaint– which this Court can use to sustain the plaint and save it from being struck out?. The answer is no for the following reasons.

(1) The relationship between disputants is an employment contract relationship governed by the terms of the contract namely annexture NW 2 and 3. It is on record herein as found by this Court that annexture NW 4 went contrary to annexture NW 2 and 3. It is also on record as found herein that, that did not deter the Defendant from reconsidering his position and options to act within the said contract. In fact in the absence of any document to the contrary subsequent execution of annexture 6, 7 and 8 is evidence of this reconsideration, a matter accepted by the Plaintiff. The acceptance was not on a without prejudice basis and so the Plaintiff is bound by his action. He can only be allowed to move to Court and claim that which was due to him over and above what he got. Paragraph 18 does not say that the claim is over and above what was paid and which should have been paid to him.

(2) The court is not empowered by the contract documents to rewrite the contract as between the parties. Paragraph 9 of the plaint recognizes the fact that the contract executed vide annexture NW 2 was brought to an end though unlawfully on 8.7.2002. This Court can only move and resuscitate it in terms of paragraph 19 of the Plaint if the contract document gives it power to do so. The contract document annexture NW 2 contains a notice clause where by either party could bring that relationship to an end by giving the notice or pay 3 months salary in lieu of notice. The Defendant on second thoughts availed itself of that clause and fully paid the Plaintiff. That being the case this Court has no power to remove the notice clause and replace it with a clause for a permanent employment till retirement age of 60 years.

Authorities cited to the court namely **MUTHUURI –V- NATIONAL INDUSTRIAL CREDIT BANK LTD (2003) KLR 145,** and **EAST AFRICAN AIRWAYS –V- KNIGHT (1971) E of 165** all go to show that where there is a provision of giving of a notice the business of the Court is to determine whether it was followed or not. Where there is no provision of a notice the business of the court is to determine what a reasonable notice would be in the circumstances of each case. What matters is not whether the master gave the servant a hearing but whether the facts emerging on the record prove breach of the contract.

Here in the master at first breached the contract but on second thoughts took an option of paying in lieu of notice. This was proper and will be enforced by the Court.

3. The 3rd reason is that the reliefs being sought are incapable of being granted by the Court. Prayer (i) which seeks compensation and or damages as prayed for in paragraph 19 seeks to rewrite annexture NW 2 and introduce a mandatory retirement age of 60 years and payment of salary for that period which terms can not be read in annexture NW 2.

Prayer (ii) is incapable of being awarded as it is now trite law that the compensation that a servant wrongfully terminated is entitled to is the value of the notice he was entitled to. The value of the notice that the Plaintiff was entitled to was 3 months salary paid vide annexture NW 6 and any other terminal benefits that he was entitled to which were paid to hi m vide annexture N.W8.

As for any other relief or further relief that this honourable court deem fit and just to grant, it must be a relief capable of being awarded by the court recognized as arising from the contract. Counsel for the Plaintiff submitted that even if compensation is not awardable the Plaintiff is entitled to a determination that he was wrongfully dismissed. Indeed the Court has found that annexture NW 4 amounted to a wrongful termination. But the defendant wriggled out of that by opting to act within the contract. It therefore follows that such a determination will not serve any useful purpose as there is no prayer for a decision to be made simply for its jurisprudential value. More so when the plaintiff himself in exhibit SBN 5 asked for a hounourable exit. Termination on notice or payment in lieu of notice is a honourable exit.

For the reasons given the defendant's application dated 21.4.2006 has merit. The same is allowed. The Plaintiffs suit dated 7.3.2003 and filed on 10.3.2003 be and is hereby ordered to be dismissed with costs to the Defendant.

DATED READ AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH 2007.

R. NAMBUYE

JUDGE