



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1369 of 2005

ALFRED GEKONGE OKONGO PLAINTIFF

VERSUS

KENYATTA UNIVERSITY DEFENDANT

RULING

The Plaintiff herein filed this suit against the defendant vide his plaint dated 14.11.2005 and filed the same date. The salient features of the claim are that the plaintiff is a graduate of Kenya

iversity, the defendants sent him to the United Kingdom to do his Masters Degree in the field of communication skills. After his studies in the United Kingdom he was employed as a graduate assistant by the defendant on the 22nd day of November 1990. In the year 1991 he was promoted to the teaching position of a Tutorial fellow performing the duties of teaching as well as doing his doctoral degree. In the year 1992 he was appointed a lecturer. In 1999 he was promoted and appointed the chairman of communication skills department hence a member of the senate. He took leave on the 7th day of June to go to the United States to join his family but he was unable to proceed on commencement of his leave due to visa clearance problems and only managed to get to the states on 29th August 2000 where as his leave was due to expire on 31st august 2000 leaving him with only two days to be in the states. This necessitated him to seek an extension of leave and he followed the correct channels for the same through the Dean, Registrar, Vice-Chancellor, Ministry of Education and office of the President. Upon reaching the United State he was admitted to the States University of New York for a Doctorate degree. He Plaintiff duly applied for study leave from the defendants who did not respond but latter wrote to the plaintiff on 25th January, 2001 asking the plaintiff to appear before the senior staff disciplinary committee to answer charges of absconding duty on 16.2.2001 at 9.00 a.m. The said letter gave the Plaintiff only two days to travel to Kenya and appear before the disciplinary committee. He Plaintiff wrote back explaining difficulties in meeting the dateline. On 28.3.2001, the defendant wrote back to the Plaintiff that since he failed to appear before the disciplinary committee, his case had been considered in his absence and he was found guilty and was dismissed forthwith summarily with loss of benefits.

Following that dismissal the plaintiff appealed to the Senior Staff Disciplinary Committee. They responded to the appeal vide a letter dated 30th June 2003 addressed to the Communication Skills Department in Kenya instead of it being forwarded to him at his address in the United states. Despite the short notice the Plaintiff attended the said meeting. During the meeting, the plaintiff was asked only two questions not relevant to the proceedings and thereafter he received communication that the said disciplinary committee had confirmed his summary dismissal for absconding duty with an order that after completion of his PH. Degree he can reapply to the defendant for considerations for reappointment as a

lecturer.

In consequence of the aforesaid matters the Plaintiff suffered damages as particularized in paragraph 30, that the action of the defendant amounted to wrongful dismissal. The Plaintiff sought an order revoking the decision of the defendant dismissing the Plaintiff summarily with loss of his entire terminal benefits and substituting the same with one of reinstating the Plaintiff with all his terminal benefits. In the alternative orders compelling the defendant to pay the plaintiff all his terminal benefits with damages for wrongful termination and interest thereof.

The defendant was served and they entered appearance and filed a defence dated 16.1.2006 and filed the same date. Key averments relevant to this ruling are that they agree the plaintiff was appointed to tutorial fellow lecturer on 1.7.1992, he was suspended from duty with effect from 1.12.94 on account of professional misconduct, admitted allegations relating to annual leave approved from 7.6.00 to 31.8.200 with instructions to resume duty on 1.9.00, that the application for study leave was incompetent as the Vice-Chancellor had no powers to grant such leave. They admit the plaintiff was invited to appear before the disciplinary committee by giving adequate notice. They denied particulars of bad faith attributed to it, denied loss suffered and damage, denied any wrong doing in dismissing the plaintiff on account of absconding. That the prayer for reinstatement cannot hold as it will amount to enslaving parties into a contract of service and no claim of damages can lie as the plaintiff had breached the contract. They content the suit is time barred as it was not brought in accordance with the provisions of order 53 Civil Procedure Rules.

Against the foregoing information the defendant applicant has come to this court vide a chamber summons dated 28.7.2006 and filed the same date brought under Section 3A Civil Procedure Act and order 6 rule 3 and 13 (a) and (d) Civil Procedure Rules and all other enabling provisions of law seeking orders that the honourable court be pleased to strike out the plaintiffs' plaint dated 14.11.2005 with costs to the defendant and that costs of the application be provided for. The application is supported by the grounds in the body of the application, supporting affidavit and oral submissions in court. The Respondent was served and he filed a replying affidavit. He was notified of the hearing date but failed to show up and the court being, satisfied that he had due notice allowed the applicant to proceed ex parte though the court will not ignore the replying affidavit on record.

The grounds in support of the application are that:-

- The Plaintiff lacks clarity and precision
- It contravenes order 6 rule 3 which requires a pleading to be concise and brief.
- It contains conversations.
- The Plaintiff is seeking orders against himself.
- The prayers he is seeking should be in an application for judicial review for seeking orders to question the decision of the disciplinary committee.
- The prayers he is seeking are incapable of being granted as the relationship between the parties was one of employer/employee and there is no way this court can force it on an unwilling party.
- No general damages are payable in such a contract as his entitlement is what was due to him upon termination of the contract.

As noted earlier on in this application, there is a replying affidavit on record which this court has to consider as required by law. The salient features of the same are that:-

- The application is an abuse of the due process of the law

- It offends the provisions of law under which it is made.
- It is trite law that a party is bound by his own pleading and no where in the defence does the defendant plead that the plaint as pleaded offends a cardinal principle of law.
- That the defendant has not pleaded that the plaint does not disclose any cause of action, it is scandalous or an abuse of the process of the law.
- That a triable issue arises as to whether the plaintiff absconded duty and whether summary dismissal was justified.
- Denies that the plaint offends the provisions of order 6 rule 3 Civil Procedure Rules.
- Maintains that the plaint is crystal clear and precise.
- That this court has a duty to hear and determine the issue of summary dismissal and determine whether the contract of employment had been breached or not.
- The issue of payment of damages is a triable issue.
- That the application is intended to delay the cause of justice.

On the courts assessment of the facts herein it is clear that the intention of the defendant is to kill the suit in its infancy for non conformity with the provision of the law and principles governing pleading generally as laid down by decided cases by courts of sister jurisdiction or binding jurisdiction. The relevant provisions of law are those set out in the heading of the application. Section 3A Civil Procedure Act is simply a saving

Section which empowers the court firstly to invokes its inherent powers to do justice to a litigant whose ingress and egress avenues in the proceedings are blocked by enabling such a litigant access such avenues and secondly to prevent abuse of the due process of the court. It is used sparingly in circumstances where provision of law do not cover that particular situation.

Order VI Rule 3 deals with the format of a pleading namely a plaint in this case. The material elements in order 6 Rule 3 (1) are that *“every pleading shall contain, and contain only a statement in summary form of the material facts on which a party pleading relies for his claim or defence but not the evidence by which those facts are to be proved and the statements shall be as brief as the nature of the case admits”*.

Order VII rule 2 requires that *“where the plaintiff seeks the recovery of money the plaint shall state the precise amount claimed, except where the plaintiff sues for mesne profits or for an amount which will be found due to him on taking un settled accounts between him and the defendant”*. Order 6 rule 13(a) states *“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-*

- (a) *It discloses no reasonable cause of action or defence*
- (d) *It is otherwise an abuse of the process of the court”*

Turning to decided cases the relevant cases to this application are those dealing with contract employment in particular pleading of the terms of the contract. In the case of **HABIB ZURICH FINANCE (K) LTD AND ANOTHER [2002] 1 E.A.71** it was held that *“general damages cannot be awarded for a breach of contract because damages arising from a breach of contract are usually quantified and are not at large”* Two principles emerge from the case of **COAST PROJECTS VERSUS MR. SHAH CONSTRUCTION (K) LTD [2004] 2 KLR 118** namely:-

- Striking out a pleading is to be resorted to in very clear, plain and obvious cases.
- It is a summary procedure and by virtue of that it is a radical remedy and a court of law should be slow in resorting to this procedure.

The case of **DT DOBIE COMPANY (K) LIMITED VERSUS MUCHINA [1982] KLR 2**. It laid down the following principles:-

1. 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.
2. A reasonable cause of action means action with some chance of success. It must state such facts as to support the claim/prayer. It is an act on the part of the defendant which gives the plaintiff his cause of action.
3. Since the power of striking out 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.

The court was referred to the case of **HORKAN INVESTMENT LTD VERSUS NAMAYUK SELF HELP GROUP. NAIROBI HCCC NO. 2185/2001** which was dealing with an application for striking out under order 6 rule 13 (1) (b) (c) and (d). A perusal of the ruling shows that it analyzed implication of order 6 rule 13(1) (b) (c) which have no application to the application herein laid under order 6 rule 13 (a) and (d).

When the principles of law quoted herein as well as the principles in the decided cases are applied to the facts of the application it is clear that reliance has been placed on section 3A of the Civil Procedure Act which this court has ruled severally that this provision is a saving clause. It is invoked where no provision of law cover that particular situation firstly and secondly to prevent abuse of the due process of the court.

Turning to order VI rule 13 (a) and (d) it is invoked to fault the Plaintiffs' pleadings because it does not comply with the format set by the provisions of law governing the framing of a pleading. The relationship between the disputants is that of an employer/employee relationship governed by a contract of employment. The law of pleading expects the plaintiff to plead the following:-

- (a) The exact date of the contract of employment.
- (b) The nature of the said contract of employment i.e. was it for a specified period of years or was it to last until the retirement age and if the same was to run till the retirement age, state the retirement age.
- (c) Since the plaintiff alleges unlawful termination of the contract, the plaintiff is required to specify the exact terms of termination of the contract. If there is provision for a notice state who was to give notice and the duration of the said notice. Also to state whether any payment of money was to be paid in lieu of notice.
- (d) Since the plaintiff complains of financial loss it was necessary for him to state what was his monthly salary.
 - (i) Incremental date and the rate of increment.
 - (ii) Exact financial loss as a result of the alleged unlawful termination of employment. This is so because it is now trite law that no general damages is to be pleaded for breach of a contract of employment. The pleading does not comply with the requirement of order 7 rule 2 Civil Procedure Rules by

virtue of failure to specify this special claim.

(e) The Plaintiff has also sought reinstatement back into his former position. It was necessary for him to plead whether it was a term of the contract that in the event of breach of contract in the event of unlawful termination the contract empowers the court to award a relief of reinstatement.

(f) The plaintiff has also complained of having been wrongfully dismissed or wrong fully terminated from employment. It was necessary for him to state briefly the correct procedure of termination under the contract which the defendant allegedly breached.

The question to be paused here at this juncture is whether the Plaintiff's plaint can be cured by way of amendment or through provision of particulars. Indeed amendment and request for particulars is a method of injecting life into a hopeless pleading, since the principles of law applicable to striking out of pleadings requires that efforts be made to save pleadings and have matters decided on merit as opposed to ending proceedings on points of technicality. This court has given serious consideration of the issue of possibility of saving the plaint attacked but finds that the defects do not only go to the root of the pleading but offends rules of proper pleading and allowing the pleading to stand would be an abuse of the due process of the law.

The last consideration is whether it was necessary for the defendant to plead the grounds of seeking to have the plaint struck out in the defence before seeking to rely on them in the application for striking out of the plaint. A reading of order 6 rule 13 Civil Procedure Rules does not put as a condition precedent that these grounds be contained in the defence. Where raised, it is the duty of the court to relate them to the pleading attacked to determine whether they are satisfied or not. A defence is required to contain facts seeking to oust the facts of the plaint and not necessarily law although law may be pleaded.

For the reasons given the applicants' application dated 28th day of July 2006 has merit and the same is allowed with costs to the applicant. Since this is not a determination on merit the plaintiff suffers no harm as he is merely sent back to the drawing board to come up with a proper plaint capable of being used by him to vindicate his rights if any. Courts are courts of justice and not sympathy. No doubt the plaintiff drew the plaint without proper skill but where a party takes upon himself not to hire skilled labour by trusting his own, then he has to display the standard set by the law with no exception if he is to succeed.

Application dated 28.6.2006 be and is hereby allowed with costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2007.

R. NAMBUYE

JUDGE