



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1306 of 2002

MARY KOECH suing as the Administrator of The estate of

ARON MACHEGE KOECH (deceased).....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

RULING

The Plaintiffs initial plaint dated 31st July, 2002 was filed in Court on 15th August, 2002. On 21.2.2005 the Plaintiff filed an application under the relevant rules seeking leave to amend the plaint. The application is dated 14.2.2005. That application was granted by consent on 4.3.2005. Following those orders the plaint was amended on 21.3.2005 and filed the same date.

The averments in the plaint relevant to the Ruling are:-

1. The Plaintiff was an employee of the defendant by virtue of a contract of employment. He was employed as a senior driver at a salary of Kshs 17,411 per month plus leave, medical and house allowances plus other fringe benefits payable monthly. The employment was permanent and pensionable.
2. The said plaintiff was suspended from duty on 2nd April, 1998. He was later dismissed on 9.10.1998 and backdated for it to take effect from 2nd April, 1998. After a successful appeal by the plaintiff the defendant rescinded the decision to dismiss the plaintiff on 8.10.2001 and replaced the same with retirement in the Authority's interest backdated to 2nd April 1998. The plaintiff died on 6.3.2003 before attaining the retirement age of 55 years.
3. As a result of the acts complained of the plaintiff and after him his estate suffered loss of salary from 2nd April 1998 to 31st March 2003 the month when the late Aron Machege Koech died.
4. That the defendant has admitted that it unlawfully dismissed the late Aron Machege Koech from the employment which decision was rescinded by the defendant.
5. As a result of matters aforesaid the Plaintiff claim against the defendants for unpaid salaries and allowances during the entire period of suspension or dismissal until the end of the month when he died.

In consequence thereof the Plaintiff seeks the following reliefs from the defendant:

- (a) The sum of Kshs 1,044,660.000 being salary for the period between 2nd April 1998 to 31st March

2003.

(b) A declaration that the late Aron Machege Koech died on the 6th day of March 2003 before attaining retirement age of 55 years.

(c) A declaration that the late Aron Machege Koech was unlawfully dismissed from the defendants employment which decision was rescinded by the defendants after a successful appeal and accordingly the estate is entitled to unpaid salaries and allowance and any other benefits which the plaintiff ought to have been paid by the defendant during the unlawful suspension/dismissal up to the end of the month when the late Aron Machege Koech died.

(d) A declaration that the estate of the Plaintiff is entitled to refund of all contributions made to the Kenya Revenue Authority Pension Scheme with interest.

(e) Costs of the suit

(f) Interest on 1,2B and 5 in the plaint.

(g) Any other relief that this honourable court may deem fit and just to grant.

The defendant herein had filed a defence dated 26th September, 2002 and filed the same date. In the plaintiffs application dated 14th February, 2005 prayer 2 of that application had sought an order granting the defendant liberty to amend its defence within fourteen (14) days after service of the amended plaint. This liberty was granted to the defendant by the consent order of 4.3.2005. No amendment was effected to the defence and so it still stands. Its salient features are:-

(1) It suspended the Plaintiff after he was criminally charged in court for fraudulent sale of fake P.S.V. and driving licence.

(2). That the Plaintiff was dismissed in accordance with the terms, rules and conditions of the defendants' code of conduct and the Employment Act.

(3). That it retired the plaintiff in the Authorities interest in accordance with the terms, rules and conditions of the defendants code of conduct and he Employment Act.

(4) That its acts were lawful, justifiable and according to the defendants code of conduct and the Employment Act and therefore the Plaintiff has not suffered any great loss, mental anguish and damages as stated.

In his reply to defence the Plaintiff denied that he was suspended after he was criminally charged in court for fraudulent sale of fake P.S.V.S and driving licences and put the defendant to strict proof. He reiterated the averments in the Plaint and maintained that the defendant's action of dismissing the plaintiff from its employ was wrongful, illegal, and unjustifiable.

It is against the foregoing background information that the plaintiff has come to this court by way of Notice of Motion dated 26.4.2005 and filed on 27th April 2005. It is brought under Section 3A of the Civil Procedure Act, order VI rule 9, order XII rule 6, Order XXXV of the Civil Procedure Rules and all other enabling provisions of the law.

It seeks 3 orders namely:-

1. That there be a summary judgment for the plaintiff in the sum of Kshs 1,040,660/= as prayed for in the plaint.

2. That further or in the alternative judgment on admission be entered for the Plaintiffs as prayed for in

the Amended Plaintiff.

3. That the costs be provided for.

The grounds in support are set out in the body of the application, supporting affidavit, annexures and oral submissions in court. The major ones are that:-

- (1) They reiterate the averments in the Amended plaintiff and state that the defendants suspended the plaintiff, then dismissed him but later rescinded that decision and reinstated him back to his employment and then retired him with full benefits.
- (2) The Plaintiff amended its plaintiff and in the absence of an amended defence to controvert the allegations in the amended plaintiff the allegations in the Amended plaintiff are deemed to have been admitted and so summary judgment would issue.
- (3) That since the plaintiff was retired, he is also entitled to retirement benefits.
- (4) That the defendant have paid Kshs 403,315.80 being three months salary in lieu of notice plus some terminal benefits which is an admission that they owe the plaintiff money. It is also clear evidence that there is nothing to go to trial.
- (5) They are in agreement that the amount paid is to be deducted from the total sum that is being claimed.
- (6) They maintain that there is nothing to go to trial.

The defence has opposed that application on the basis of the grounds in the Replying affidavit, annexures, oral submission in court and case law cited. The major ones are:-

1. That the defence on record raises triable issues and the matter should go to full trial.
2. There is no admission since there is a defence on record. Failure to amend the defence does not absolve the plaintiff from proving her claim since there is an averment in the defence on the record that save what is admitted the rest of the claim is denied and the plaintiff is put to strict proof.
3. That the amended plaintiff is not properly on record as it was supposed to be filed within 14 days from the date of the order but it was filed 17 days later and it is substantially different from the plaintiff which had been presented to the court when seeking leave to amend and on this ground it should be struck out.

For the reasons given, counsel for the defence urged the court to dismiss the application with costs and allow the defendant to defend.

In response to the defence submissions Counsel for the plaintiff reiterated his earlier submission that once the defendants have admitted that the dismissal letter was rescinded there is nothing to go to trial.

- (b) That Counsel can not move to fault a plaintiff from the bar. He should have moved the court by way of a Preliminary Objection or an application to have the plaintiff struck out.
- (c) The authorities relied on by the defence favour the Plaintiff.
- (d) That the Plaintiff has satisfied this court that she is entitled to the reliefs sought.

On the law both Counsels relied on the provisions of the law cited and legal authorities cited by the defence.

On the courts assessment of the facts herein it is clear that the following facts are undisputed.

§ That the Plaintiff was employed by the defendants.

§ That in the course of being so employed he was accused of being involved in criminal activities to the detriment of the defendant. He was asked to defend himself on those allegations. He did defend himself. The defence was not accepted and so he was suspended from duty with no salary.

- He was thereafter dismissed from the employment
- He appealed against that dismissal.
- The Defendants rescinded the dismissal and converted it into a retirement in the defendants interest back dated it do the date of suspension.
- The letter rescinding the dismissal is dated 8th October 2001.
- The Plaintiff filed his initial suit in court on 1.8.2002.
- No dispute that the defendant has made part payment of Kshs 403,315.80 to the Plaintiff.
- The defendant filed a defence to the Plaintiffs claim on 26.9.2002 which is still on record.
- The original plaintiff died on 6.3.2003 and was substituted by the current plaintiff through a court order on record.
- The Plaintiff applied on 21.2.2005 to amend his plaint; leave to amend was granted on 4.3.2005. No time frame within which to file the Amended plaint was prayed for nor was it indicated in the order granting leave to amend.
- The defendant was granted 14 days to amend the defence but filed no amended defence thus leaving the original defence as the operative defence.
- The amended plaint was filed in Court on 21.3.2005.
- The application for summary judgment and or judgment on admission was filed on 27.4.2005.
- Replying affidavit in opposition to the application was filed on 16.5.2005.
- The parties share common annexures namely MJK 2,3,4,5,6 and 7 for the plaintiff and SA 1,2,4,5,6,8 and 9 on the point of the defence. The other exhibits not shown in common nonetheless are relevant to the arguments of both sides namely: MJK 2, and 8 for the plaintiff and SA 3,6, MJK 2 is the Plaintiffs letter of employment while 8 is a copy of his pay slip while SA 3 and 6 are internal decisions on the Plaintiffs disciplinary matter.

From the foregoing undisputed facts this court has drawn up about three major points for determination namely:-

- (1) Whether objection to the plaintiffs amended plaint to the effect that it is unprocedural and it should be struck out from the bar through the defence lawyer is to be upheld or not.
- (2) Whether there are grounds for entering judgment in favour of the plaintiff on admission or alternatively whether on the facts before this court the plaintiff is entitled to judgment on admission.
- (3) If judgment on admission cannot issue, is the plaintiff entitled to summary judgment on the facts presented herein.

As regards the irregularity of the amended plaint it is on record and it is not disputed, by the defence that

no time frame was prayed for and none was given as regards the time for filing of the amended plaint. This Court has no alternative but to turn to the provisions of the law to determine whether the plaint is to stand or not. Order 6A rule 6 of the Civil Procedure Rules states “*where the court has made an order giving any party leave to amend unless that party amends within the period specified or if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period*”

Applying that provisions to the facts herein it is clear that whether specified or not an amendment order has a life span of 14 days. The amendment order subject of these proceedings was made on 4.3.2005. Fourteen 14 days from 4.3.2005 would run up to 18.3.2005. This means that the Amended plaint should have been filed on or before 18.3.2005. It is undisputed that it was filed on 21.3.2005 a period of 3 days later. Counsel for the plaintiff has submitted that order 49 on computation of time is to be called into play to save the situation. This court has noted that order 6A rule 6 itself gives the Court power to extend the time. It does not say upon formal application which means that even an oral application can suffice. Order 49 rule 7 excludes the first day while rule 2 and 3 exclude Sundays and public holidays. If the last day is excluded, that leaves two days to be accounted for. 14 days comprising 2 weeks, it is doubtful whether two Sundays can miss from that computation and these would take care of the remaining 2 days with the net result being that the Amended plaint was filed in time.

As submitted by the Plaintiffs Counsel proper computation of time would have been done had this been raised as a preliminary objection or as a ground in the replying affidavit. This would have enabled the court to revisit the relevant calendars and diaries for verification. That notwithstanding the computation done here by this court saves the situation. The situation herein is distinguishable from the prevailing circumstances in the cited case of **GICHUIYA VERSUS WYETH. SA PTY LTD** Milimani Commercial High Court case number 488 of 2000. In this case the order to amend the plaint was granted on 19.9.2000 while the amended plaint was filed on 24.5.2001 a period of 8 months later. Ombija J. after revisiting the provisions of Order VIA rule 6 found that the Amended plaint was unprocedurally on record and ordered it to be struck out. It should be noted that the court in the cited case was moved formally. Applying that to this case, the court finds that the objections by the defence has to fail because it was not raised as a preliminary objection or formally by application. Further even if it had been raised as such this court doubts whether it could have gone to fault the Amended plaint in view of the computation of the time done by this court herein. On that account the court finds that the Amended plaint is not irregular and suit is properly on record and it can form a basis for the granting of the reliefs sought.

The next issue is whether judgment on admission is to issue or not. Order 12 rule 6 Civil Procedure Rule states “*Any party may at any stage of a suit where admission of facts has been made either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties and the court may upon such application make such order or give such judgment as the court, may think just*”. The admission attributed to the defence arises from their failure to file an amended defence to the amended plaint. This being the case Order XII rule 6 has therefore to be read together with provisions dealing with failure to file a pleading in response to a pleading already filed. This provision is none other than order 6 rule 9 of the Civil Procedure Rules which states “9(1) subject to sub rule (4) any allegation of fact made by a party on his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.

- (2) A traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication.
- (3) Subject to sub rule (4) every allegation of fact made in a plaint or counter claim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counter claim, and a general denial of such allegations or a general statement of non-admission of them, shall not be a sufficient traverse of them.
- (4) Any allegation that a party has suffered a damage and any allegation as to the amount of damages

shall be deemed to have been traversed unless admitted”

In response to this Counsel for the defence has submitted that judgment on admission cannot issue as that issues only in clearer and in ambiguous cases firstly and secondly it cannot issue because they have a defence on record. They rely on the case of **MICHORI VERSUS COFFEE RESEARCH FOUNDATION, NAIROBI HCCC NO.1147/01**. In this case the plaintiff filed suit. The defendants filed their defence and counter claim admitting the contract of employment but denied wrongful dismissal. By way of counter claim they accused the plaintiff of negligence but denied wrongful dismissal and counter claimed damages. The defence and counter claim were served but there was neither reply to the defence nor defence to counter claim. On application to Registrar interlocutory judgment was entered, decree issued and move made to execute. On an application for setting aside, at page 2 of the judgment Waki J. as he then was (now JA.) had this to say “*Even where the subject matter in distinct and divisible, a party who has appeared but is on default of pleading should not be debarred from defending if he can indicate the existence of a defence which is not potently frivolous and which he wishes to put forward*”. At page 3 the learned Judge stated “*I have looked at the draft defence to the counterclaim and in my view it joins issues with the counter claim and is a fair answer to it. It is not as contended*”. On the basis of the foregoing findings the court allowed the plaintiff to defend the counter claim.

In the case of **AGRICULTURAL FINANCE CORPORATION VERSUS KENYA NATIONAL ASURANCE CO.LTD NAIROBI C.A. 271/91**, at page 6 of the judgment the Court of Appeal had this to say “order 12 rule 6 empowers the court to pass judgment and decree in respect of admitted claims pending disposal of disputed claims in a suit. Final judgment ought not to be passed on admission unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right , rather it is a matter of discretion of the court and where a defendant has raised objection which go to the very root of the case, it would not be proper to exercise this discretion”. In the case of **CHOITRAM VERSUS NAZARI [1982] LLR 38 (CAK) Madan JA.** (as he then was) said at pages 441 to 442:-

“For the purposes of O.XII r.6 admissions have to be plain and obvious as plain as a pike staff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not even if the situation arguable, even if there is a substantial argument it is an ingredient of jurisprudence provided that a plain and obvious case is established upon admission by analysis” In this case it was held inter alia that:-

(i) A court is empowered under Order XII, rule 6 to pass judgment and decree respecting admitted claims pending disposal of disputed claim in a suit

(ii) A judgment on admission is a matter of the courts discretion to be entered only when the admissions are plain and obvious on their fact. Where a defendant raised objections going to the very root of the case, it is not proper to exercise this discretion.

In another court of appeal decision **CASSAM AND ANOTHER VERSUS SACHANCA AND ANOTHER NAIROBI C.A. 63/81. Porter JA** (as he then was) at page 3 of the judgment the 3rd line from the bottom observed thus “*it is well established on the authorities that admissions of fact must be clear and sufficient before they will entitle a plaintiff to judgment. See ELLIS VERSUS ALLAN [1914] 1CH.D904, TECHNISTUDY LIMITED VERSUS KELLAND [1976] 3 AER 632) RANKINE VERSUS GALTON 2AER 1185.* At page 4 of the judgment line two from the bottom it is stated “*But summary determinations are for plain cases, both as regards the facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial*”

When these principles are applied to the facts herein it is clear that the admission the plaintiff seeks to rely on is not based on an admission in the defence but on default or failure to respond to an Amended plaint. They already have a defence on the record which this court is enjoined to look at. As per principle

in the case of **MICHORI VERSUS COFFEE RESEARCH FOUNDATION NAIROBI HCCC 1147/01** a party who has appeared but is in default of pleading should not be debarred from defending if he can indicate the existence of a defence which is potentially not frivolous and which he wishes to put forward. The plaintiff's claim is partly liquidated and partly declaratory. The defence filed on 26.9.2002 denies each and every allegation contained in the plaint as if the same were herein set out verbatim and traversed serially in paragraph 10 thereof. This has to be read in conjunction with order 6 rule 9 (4) which provides that on allegation that a party has suffered damage and any allegation as to the amount of damages shall be deemed to have been traversed unless specifically admitted. Applying this to the application herein it means then so long as the defence on record stands the plaintiff's allegation of loss and damage suffered which were not admitted by the defendant remain traversed. The only way the plaintiff can go over that hurdle is by asking the court to strike out that defence. There is no such a prayer. It therefore follows that judgment on admissibility can not issue in favour of the plaintiff/applicant.

This leads me to the consideration of the main prayer for summary judgment. This is laid under Order XXXV(1) of the Civil Procedure Rules. It states in part 1(1) "*In all suits where a plaintiff seeks judgment for a liquidated claim with or without interest where the defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest*".

Applying these provisions to the application it is clear that there is jurisdiction to apply for summary judgment where the defendant has appeared or even filed defence like in this case. So the Plaintiff's prayer 1 is well laid. What this court is required to take note of as far as that defence is concerned is found in order 35 rule 2(1) which states "*The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit*". The defendant herein has shown his wish to defend the suit firstly by virtue of the defence already on the file and secondly by virtue of the intended Amended defence which has been appended on to the replying affidavit. The Court says that it is appended because it has not been commissioned. It therefore offends rule 9 of the Oaths and Statutory Declarations Act Cap.15 Laws of Kenya which states. "*All exhibits to affidavits shall be securely sealed there to under the seal of the commissioner, and shall be marked with serial letters of identification.*" This has not been so marked and so in judicial practice language it is a piece of paper. On the other side of the coin there was leave for an Amended defence to be filed within 14 days from the date of service upon them of the Amended plaint. There is no plea in the replying affidavit that the date of 16.5.2005 corresponds to the 14th day from the date of service. Since it is the same date as the date stamp on the replying affidavit, it is not yet a pleading and not being an annexure it cannot be looked at. This being the case it means that the defendant's right to defend in opposition can only be derived from the original defence on record.

The guiding principles that this court is to apply are well settled in numerous authorities. In the case of **GUPTA VERSUS CONTINENTAL BUILDERS [1978] KLR 83**, at page 93, paragraph G-H Law J.A. as he then was quoting. Spry J.A. as he then was in **CAMMILLE VERSUS MERALI [1966] E.A 411, 419** stated "*The general rule is, that leave to defend should be given unconditionally unless there is good ground for thinking that the defences put forward are no more than a sham.*"

The case of **MUGAMBI VERSUS GATURURU [1967] E.A.196**. At page 197 paragraph B Madan J. as he then was stated the principle as "*on an application for summary judgment made under order 35 rule 2 unless the defendant by affidavit, by his own viva voce evidence or otherwise satisfies the court that he has a good defence on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the court may pronounce judgment against him.*"

In the case of **GURBAKSH SINGH AND SONS LTD VERSUS NJIRU EMPORIUM LTD [1984] K.L.R. 695** it was held inter alia that an application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure.

In the case of **KENYA HORTICULTURAL EXPORTERS [1973] LTD VERSUS PAPE TRADING AS OSIRUA ESTATE [1986] KLR 705** it was held inter alia that as a general rule, in order for a defendant to be granted leave to defend all that he has to show is that there is a triable issue of fact or of law and leave

to defend will normally be given unconditionally except where a judge considers that there is a ground for believing that the defence is a sham in which case he may exercise his discretion to impose conditions.

This court should not also lose sight of two valuable authorities cited to the court by the defence. In the case of **GICIEM CONSTRUCTION COMPANY VERSUS AMALGMATED TRADES SERVICES MSA C.A. 1783 at page 3** Hancox J.A. as he then was set out the principles at paragraph 3 and I quote “*The proper principles to be considered in a case such as the present were set out in the locus classicus in East Africa on this subject namely ZOLA VERSUS RALLI BROS, 1969, E.A. P.691* in which Sir Charles Newbold P. said at p.694:

“Order 35 is intended to enable a Plaintiff with a liquidated claim, to which there is clearly no good defence and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment. The more right of the defendant to be indemnified by or have a claim nor against a third party in respect of the defendant’s liability to the plaintiff or to recover from a third party or from the plaintiff by way of counterclaim, a sum of money which does not directly reduce the liability of the defendant to prevent the plaintiff from obtaining a summary judgment. Normally a defendant who wishes to resist the entry of summary judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defence. This is clear from the words of order 35 rule 2 which states. “The court may thereupon unless the defendant by Affidavit, or by his own viva voce evidence or otherwise shall satisfy it that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, pronounce judgment accordingly””

In the case of **STEEL AFRICA LIMITED VERSUS SULTANA HARDWARE LIMITED MSA HCCC NO.104/99 Sersan J.** reiterated the principles at page 2 of the ruling and I quote “*The principles applicable in applications for summary judgment under order XXXV rule 1 of the Civil Procedure Rules are well settled. It was stated by the Court of Appeal in the case of NAIROBI GOLD HOTELS LIMITED VERSUS LALJI BHIMJI SANGHANI BUILDERS AND CONTRACTORS CIVIL APPEAL No. 5 of 1997 (CA) that:-*

“It is trite law that in an application for summary judgment under Order XXXV rule 1 of the Civil Procedure Rules the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing, prima facie the existence of bona fide triable issues or that he has an arguable case. On the other hand, it follows that a plaintiff is able to show that a defence raised by a defendant in an action falling within the provisions of ORDER XXXV is shadowy or a sham is entitled to summary judgment. The Court of Appeal also restated the holding. In the case of CONTINENTAL BUTCHERY LIMITED VERSUS SAMSON MUSILA NTHIWA CIVIL APPEAL NUMBER 35 OF 1997 (C.A) in which Madan J.A. (as he then was) stated that with a view to eliminate delay on the administration of justice which would keep litigants out of their just dues or enjoyment of the property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided by Order XXXV subject to there being no triable issues which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case which the court feels justified in maintaining that the defence, raised are a sham”

The principles established by the above quoted cases both by the High Court and the Court of Appeal are that:-

- (1) Jurisdiction to grant summary judgment exists both in law and in practice.
- (2) When dealing with such an application the court should not and cannot ignore to look at the defence on record whether invited or uninvited.
- (3) Where such an application is made a duty is placed on the defendant to demonstrate to the court that he has a defence with triable issues and he should be given a chance to defend.

When these principles are applied to the facts herein they are considered against the background information that the issues of suspension and dismissal that were pleaded by the defence no longer count. The issue that counts here is the issue of the plaintiff's retirement and retirement benefits payable. The authority for this is annexure S.A. 9 and MJK 7.

It reads:

"Ref. Cont/79/36933 8th October 2001

Mr. Aron M. Koech

P.O.Box 30440,

NAIROBI.

Dear Sir,

RE: RETIREMENT IN AUTHORITYS INTEREST

The Authority has carefully considered your appeal letter dated 19th October, 1998 and decided to rescind its earlier decision to dismiss you as communicated to you vide a letter dated 9th October 1998.

Please note that your dismissal has now been replaced with retirement in the Authorities interest with effect from 2nd April 1998. Upon this retirement you shall be refunded all your contributions made towards KRA Staff Pensions Scheme and be paid three months salary in lieu of notice upon completion of the attached clearance certificate.

Your pension for the period served under the Government will be paid to you by the Ministry of Finance and you are therefore advised to follow up your benefits with their office.

Yours faithfully

Chief Human Resources and Administration Manager.

cc. P/S Treasury

Registrar of Motor vehicles"

The contents do not state retirement under the 50 year rule or under the 55 year rule. It is further back dated to the date of suspension. Paragraph 6 of the defence reads *"In reply to paragraph 7 of the plaint the defendant avers that its action were lawful, justifiable and according to the defendants code of conduct and the employment Act and therefore the Plaintiff has not suffered any great loss, mental anguish and damages as stated"*

Against this averment the plaintiff has pleaded the sum of Kshs 1,044,660 being the salary of the deceased from second April 1998 to 31st March 2003 when he died at the rate of shs 17,411 per month. Further plea is for other benefits which the late Aron Machege Koech ought to have been paid during the said alleged unlawful suspension and dismissal period, are fund of all contributions made to the Kenya Revenue Authority Pensions Scheme with interest.

In order to succeed on their claim for summary judgment on all heads the Plaintiffs have to demonstrate that:-

(1) The defendant was not entitled to back date the retirement date up to the date of the alleged unlawful suspension.

- (2) That the deceased was entitled to full pay for the period from the alleged suspension to the date of the letter for retirement.
- (3) That the defendant is obliged to pay other terminal benefits inclusive of pension and interest.
- (4) That the Plaintiff is entitled to full salary from the date of the retirement letter up to the date he died.

On the other hand in order for the defence to resist summary judgment, they have to demonstrate that they acted within the code of conduct regulations and the relevant law governing employee/employer relationship.

The contract document between the parties is the letter of appointment annexure JMK2. It is silent about back dating of retirement date in a situation where suspension and dismissal have been rescinded.

- (ii) It is silent about payment of salary either half or full in respect of the same period.
- (iii) It is silent about payment of three months notice in lieu of notice.
- (iv) It is silent about payment of salary either full or half from the date of the letter of retirement where the officer is retired prematurely in the authorities interest up to the date of attainment of the retirement age of 55 years. Clause 3 of the said MJK2 simply states “*You will abide by the Kenya Revenue Authority Code of Conduct and all rules and Regulations governing employees of the Authority*”. In paragraph 7 of the defence on record the defendants aver that they acted in accordance with the Code of Conduct and the Employment Act.

Section 21 of the Kenya Revenue Authority Act Cap.469 Laws of Kenya stipulates “*The board may make regulations for the carrying into effect of the provisions of this Act and in particular but without prejudice to the foregoing make regulations:-*

- (a) *respecting the terms and conditions of service including pensions, gratuities and other retirement benefits of all members of staff of the Authority.*
- (b) *Prescribing the procedure for the appointment of all members of the staff of the authority.*
- (c) *Prescribing the Code of Conduct and discipline.*
- (d) *Respecting the administration and management of the funds of the authority.*
- (e) *Respecting the performance targets of the Authority”.*

Section 21 is proof that there is authority to make regulations. None are attached to the Act. None have been exhibited herein. This being the situation the court has to look to some other regulations for assistance.

The court has perused the Pensions act Cap.189, Laws of Kenya and the windows and Children’s Pensions Act Cap.195 Laws of Kenya. Section 8 of Cap.189 Laws of Kenya offers some assistance. Its central theme is that where an officer has been retired in the public interest the president has power to authorize payment of pension to him. The Court also perused the Regulation of Wages and Conditions of Employment Act Cap.229 Laws of Kenya but found nothing of significance to this application.

Next to be perused is the Employment Act Cap.226 Laws of Kenya. The heading of this Act states “*An Act of Parliament to consolidate with amendments the law relating to employment and for matters incidental there to and connected thereto*”.

Section 4(1) of the said Act provides partly that the entire amount of the wages earned by or payable to an employee in respect of work done by him in pursuance of a contract of service shall be paid to him

directly in the currency of Kenya. Section 5 (2) (d) of the said Act makes provision that an employee employed for an indefinite period is entitled to monthly payments. Section 5(4) (a) provides that upon the termination of any contract by effluxion of time, it shall be the duty of the employer and not of the employee to ensure that the employee is paid the entire amount of the wages earned or payable to him and of allowances due to him as have not hitherto been paid. Section 16 of the Act provides that either party may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned or paid by that other party for the period of the notice required.

When the foregoing provisions of law are applied to the facts herein, it is clear that:-

(1) no provision exists that permits or authorizes the defendant to back date the retirement date to the date of suspension or dismissal. That being the case then it means that the Plaintiff is entitled to receive full wages for the period from 2.4.98 to 8.10.2001. From the provisions of the employment Act an employee is entitled to a salary in two situations:-

(a) for work done

(b) when found to have been unlawfully prevented from working. Here in while on the alleged suspension and subsequent dismissal which were eventually rescinded the plaintiff was entitled to full pay upon rescission of the said suspension and dismissal.

It is on record that on 11.5.2006 a total of Kshs 403,315/80 was paid to the plaintiff being half pay for the period of 2.4.98 to 8.10.2001, inclusive of the period for 3 months pay. The Plaintiff was earning Kshs 17,411 per month. Three (3) months salary would give an amount of Kshs 52,233.00 when this figure is deducted from Kshs 403,315.80 it leaves a balance of Kshs 352,082.80 to cover the half salary withheld by the defendants. By rescinding the suspension and dismissal and opting for retirement for whatever reasons the defendant was in effect acknowledging the unlawful withholding of the Plaintiff's salary. The retirement date was meant to circumvent the plaintiff's claim, which action this court cannot protect in the absence of evidence of a rule allowing the defendant to do so. It is therefore the finding of this court that to that extent there is no valid defence to resist the plaintiff's claim for summary judgment. The defendant has already paid half. Annexure SA9 and JMK 7 does not mention half salary and so the defendant is bound.

As regards payment of salary in lieu of notice. JMK2 is silent on this. However, since the defence pleaded application of the Employment Act, Section 16 of the said Act is called into play to provide for payment of salary in lieu of notice. In fact this is mentioned in exhibit SA 9 and JMK 7. The offer made was 3 months salary in lieu of notice. This amount has already been paid in the figure paid on 11.5.2006. The defence has no defence to that or no triable issue to raise on that as the same is in line with case law on the subject. In the case of **MUTHUURI VERSUS NATIONAL INDUSTRIAL CREDIT BANK LTD (2003) KLR 145** and **EAST AFRICAN AIRWAYS VERSUS KNIGHT (1971) E.A.165** all go to show that where there is a provision of giving 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. In the **EAST AFRICAN AIRWAYS** case the court ruled that three months salary in lieu of notice has reasonable. Herein the defendant's offer of 3 months salary in lieu of notice which has already been paid is found reasonable. There is nothing to go to trial on that. Request for summary judgment in respect of the same is just a formality.

As for payment of pensions and other retirement benefits annexure SA 9 and JMK7 are clear on this. The law allows payment of the same as outlined above and the defendant offered to pay the same. There is nothing that can go to trial on this save for formal proof, to determine the figures payable. The Employment Act as outlined above places the duty on the defendant to ensure payment of the same.

As for the salary from 8.10.01 to 6.3.003 when the deceased died pending attainment of retirement age, the circumstances under which salary is due to an employee are set out in section 5 of the employment Act Cap. 469 Laws of Kenya. It is specifically for work done or for the salary wrong fully withheld.

Section 5 when read with Section 16 of the same Act go to show that an employer as well as an employee has a right to bring a contract of employment to an end by offering to pay salary in lieu of notice. When an employer or employee acts within the law, he cannot be faulted. Provision of a safety valve like Section 16 is evidence that a contract of employment is not for an indefinite period. The defendant herein exercised his rights under Section 16 of the Act. In order for the Plaintiff to resist this, he has to show that he has a terms of the contract of employment or regulation or provisions of law which allow him to draw salary while out of work until death or until he attains the age of 55 years. The letter of appointment MJK 2 does not specify so. No other proof exists to oust the effectiveness of Annexure SA9 and JMK 7 and the operation of Section 16 of the employment Act. Once that process was undertaken and effected it effectively brought to an end the Plaintiffs employment and its end came the end of payment of salary crowned with payment of three months salary in lieu of notice. The finding that the plaintiff is not entitled to salary between 8.10.2001 and 6.3.03 does not entitle the defence to a right to trial because what was being claimed for that period can be reduced from the total amount due to the plaintiff.

The last point to be dealt with is that if the plea of summary judgment is to be upheld then what is to happen to the defence on record. The correct position on this is what was taken by the court of appeal in two cases namely **KENYA HORTICULTURAL EXPORTERS [1977] LTD VERSUS PAPE TRADING AS OSIRUA ESTATE [1986] KLR 705 AND TITUS MUIRURI DOGE VERSUS KENYA CANNERS LTD [1982-88] 1 KAR 859**, in which applicants had sought summary judgment and in the alternative striking out of the defence. The Court of Appeal upheld the High Courts decision to proceed with the prayer for summary judgment and make no findings on the second limb of striking out the defence. Applying that principle to the facts herein it means that it is proper for this court to proceed and make an order for summary judgment. If the conditions for the same have been met and leave it at that without making a pronouncement on the defence on record and that will be perfectly in order.

In conclusion this court has considered the totality of the facts, arguments and principles of case law placed before it for and against the applications for summary judgment and or judgment on admission and on the basis of the reasoning given herein above makes the following findings:-

- 1). Amended plaint has not been faulted as computation of time allowed by law ends as the day was filed and so the same was filed within time.
- 2). Prayer 2 of the application dated 26.4.2005 for judgment on admission has been refused on the ground that the defendants un amended defence on record cannot be ignored.
- 3). For the reasons given judgment for the salary for the period ranging from 8.10.2001 to 30.3.03 is refused.
- 4). Summary Judgment for the withheld half salary for the period 2.4.98 to 8.10.2001 to the time of Kshs 351,082.80. is allowed
- 5). Summary Judgment will also issue for an order for payment of other dues such as leave and medical allowances for the period 2.4.98 – 8.10.01 as well as pension and other terminal benefits due to the plaintiff to be assessed during a formal proof.
- 6). Summary Judgment will issue for payment of costs and interest on the sum ordered in 4 and 5 above at court rates.
- 7). The Plaintiff applicant will have costs of the application to be paid to her by the defendant.

DATED, READ AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2007.

R.NAMBUYE

JUDGE