



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

Civil Case 35 & 12 of 2007

- 1. MUNAI ISAACK OPONDO**
- 2. PETER MWANGI WALTER ONYIMBO**
- 3. WALTER ONYIMBO**
- 4. THOMAS R. GETANGITA**
- 5. SOPHIE MWIKALI MUSYOKI**
- 6. DENNIS K. CHERUIYOT**
- 7. JULIUS L. JAIKA**
- 8. MAURICE OLAGO and MANY OTHERS
....PLAINTIFFS**

V E R S U S

**KENYA RAILWAYS CORPORATION.....1ST
DEFENDANT**

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME.....2ND
DEFENDANT**

R U L I N G

The named plaintiffs, that is, **MUNGAI ISAACK OPONDO, PETER MWANGI and GETANGITA, SOPHIE MWIKALI MUSYOKI, DENNIS K. CHERUIYOT, JULIUS L. JAIKA and MAURICE OLAGE** (in Nakuru HCCC NO. 12 of 2007) filed these two suits against **KENYA RAILWAYS CORPORATION** seeking various reliefs. Subsequently **KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME** was added as 2nd Defendant. The plaint in the Nairobi case was amended on 2nd February, 2007). The reliefs sought therein are:-

(In effect)

(i) A declaration that the transfer of the Plaintiffs’ services from the Defendant to Rift Valley Railways was null and void *ab initio*.

(ii) An order that the 1st Defendant do pay to the Plaintiffs any and all terminal and other benefits owed

to them.

There is also sought what amounts to a prayer for temporary (though stated to be permanent) injunction to restrain the 1st Defendant from changing its status or winding up its operations and to restrain the 2nd Defendant from evicting the Plaintiffs from, or increasing the monthly rents payable for, the houses currently occupied by the Plaintiffs until the final determination of the suit, or until the further order of the court.

There has not been any amendment of the plaint in the Nakuru case. The reliefs sought there are:-

- (i) A declaration that the transfer of the Plaintiffs' services from the Defendant to Rift Valley Railways without payment of their terminal benefits is null and void *ab initio*.
- (ii) A declaration that the notices of increase of rents issued by the 1st Defendant for the houses occupied by the Plaintiffs is null and void *ab initio*.
- (iii) An order that the 1st Defendant do pay all the terminal benefits owing to the Plaintiffs as stipulated in paragraph 15 of the plaint plus one month salary in lieu of notice.

In the Nairobi case it is stated that the Plaintiffs have sued for and on behalf of "all ex-employees of Kenya

ays Corporation handed over to Rift Valley Railways on 1st November, 2006". In the Nakuru case it is stated that the Plaintiffs have sued for and on behalf of "562 ex-employees of Kenya Railways Corporation later employed by Rift Valley Railways on 1st November, 2006".

On 13th February, 2007 it was ordered in the Nakuru case that the same be consolidated with the Nairobi case and transferred to this registry.

There are various applications that are the subject of this ruling. They are:-

- (i) Chamber summons dated 16th January, 2007 filed in the Nairobi case and amended on 2nd February, 2007. It seeks a temporary injunction pending final determination of the suit, or until further orders of the court, to restrain the Defendants from evicting the Plaintiffs from the houses occupied by them, or from increasing the monthly rent payable, and for an order for the Plaintiffs to continue paying the rents obtaining prior to 1st November, 2006. A temporary injunction is also sought to restrain the 1st Defendant from formally winding up its affairs until final determination of all issues raised in this suit.
- (ii) Chamber summons dated 6th February, 2007 filed on the same date in the Nairobi case. Apart from seeking the same temporary prohibitory order, it seeks also a mandatory injunction to compel the Defendants to forthwith reinstate any of the Plaintiffs that may have already been evicted pending hearing and determination of the application. No particulars of the persons evicted and the houses they were evicted from have been given. Further, this prayer for mandatory injunction was not urged at the hearing. I consider it abandoned.
- (iii) Chamber summons dated 25th January, 2007 filed the same day in the Nakuru case. It seeks the main orders that the Defendants be restrained pending hearing and determination of the suit from increasing rents payable by the Plaintiffs and for them to continue paying current rents.
- (iv) Chamber summons dated 19th and filed on 23rd February, 2007 in the Nakuru case seeking the main orders that the Defendants be restrained from evicting the Plaintiffs from the houses occupied by them and for them to continue paying the current rents pending hearing and disposal of the suit.

As can be seen, all these applications basically seek to restrain the Defendants from increasing rents for

the houses occupied by the Plaintiffs and from evicting the Plaintiffs from the houses pending hearing and determination of the suit. They also seek to restrain the 1st Defendant from winding up its affairs pending disposal of the suit.

The main grounds for the applications are:-

1. That the 1st Defendant has not paid to the Plaintiffs their due terminal benefits upon unlawfully terminating their services with the 1st Defendant and transferring them to Rift Valley Railways.
2. That if the Defendants are allowed to increase the rents or evict the Plaintiffs they shall be rendered homeless and thereby suffer irreparable loss.
3. That the 1st Defendant intimidated the Plaintiffs into accepting to be transferred to Rift Valley Railways by threat of dismissal without terminal benefits.
4. That if the 1st Defendant relinquishes its operations to Rift Valley Railways and winds up its affairs the Plaintiffs' suits will be defeated before it is heard.

There are various affidavits filed in support of the applications. I have read them all.

The Defendants have opposed the applications. There are various affidavits filed in reply. I have also read them all. The main grounds of opposition are:-

1. That the Plaintiffs are non-suited.
2. That the suit is fatally defective for want of compliance with section 87 of the Kenya Railways Corporation Act, Cap.487.
3. That the Plaintiffs are guilty of non-disclosure of material facts and therefore not deserving of equitable relief.
4. That the Plaintiffs willingly transferred their services to Rift Valley Railways and cannot now be heard to say that they were coerced into it.
5. That the Plaintiffs are at liberty to seek housing elsewhere if they are not prepared to pay market rents as they are not obliged to live in the Defendants' houses.
6. That the Plaintiffs' are not entitled to any terminal benefits yet as they are still in the employ of the 1st Defendant, their services having only been transferred for some time.
7. That the 1st Defendant is not about to wind up its affairs as it has only concessioned some of its operations to Rift Valley Railways and continues to have responsibility over its non-concessioned assets.
8. That the Plaintiffs have not satisfied the principles for the grant of the orders sought.

I have considered the submissions of the learned counsels appearing, including the many cases cited. A little background will be useful. By authority of the Kenya Railways Corporation (Amendment) Act, No. 5 of 2005 the 1st Defendant concessioned some of its operations to a third party called **RIFT VALLEY RAILWAYS**. The third party recruited its employees from among the staff of the 1st Defendant. It appears that the 1st Defendant retained some employees and retired those not required either by itself or the third party. It is the Plaintiffs' case that their employment with the 1st Defendant was terminated and they were employed afresh by the third party. It appears to be the 1st Defendant's case on the other hand that the Plaintiffs' employment with it was not terminated, and that they were merely transferred to the third party. This is an issue that cannot be decided now. It will require oral evidence and interpretation

of various important documents that have not, at this stage, been properly produced in evidence.

The 1st Defendant established the 2nd Defendant which was duly registered with the Retirement Benefits Authority under the provisions of the Retirement Benefits Act. The 1st Defendant then transferred to and vested in the Trustees of the 2nd Defendant some of its various of its properties on which stand residential houses. This was by **Legal Notice No. 169 of 7th September, 2006**; the transfer and vestment was said to be done under powers conferred by Section 13 (h) of the Kenya Railways Corporation Act. The 1st Defendant then permitted the staff “transferred” to the third party to live in the houses free of any rent for three months until 31st January 2007. As from 1st February, 2007 they were supposed to enter into lease agreements with the 1st Defendant and pay rent if they wished to continue living in the houses. In the meantime the 1st Defendant obtained valuations for rent and assigned rents for the various categories of houses. The Plaintiffs then came to court and filed the applications now under consideration.

At this stage I am not required to determine any issue, whether of fact or law, with finality; indeed, these being interlocutory applications, I should do nothing of the sort.

These are applications for temporary injunction pending disposal of the suit. The principles to guide me are now well-established. The Plaintiffs must first demonstrate a *prima facie* case with a probability of success. They then must show that they stand to suffer irreparable loss, that is loss that cannot be made good by an award of damages, if the temporary injunctions sought are not granted. Finally, if the material before the court is not such as to enable it to determine the application upon these two principles, the matter will be decided upon a balance of convenience; that is to say, looking at all the circumstances of the case as now disclosed by the material placed before the court, would it be more injurious to the Defendants to grant the injunctions or more injurious to the Plaintiffs to deny the injunctions?

Have the Plaintiffs demonstrated a *prima facie* case with a probability of success?

Their case as laid out in the amended plaint is that the transfer of their services to Rift Valley Railways is null and void, that their services with the 1st Defendant were in fact terminated and that therefore they are entitled to terminal benefits. It is their further case that the 1st Defendant should not be allowed to wind-up its operations, or the 2nd Defendant to evict the Plaintiffs from the houses they occupy, before payment of their terminal benefits by the 1st Defendant. As already pointed out, the 1st Defendant contends that the Plaintiffs are still its employees, their services having only been transferred to the third party for the period of the concessioning.

There are issues here to go to trial:

- 1. What is the status of those employees of the 1st Defendant whom the third party took on? Are they still the employees of the 1st Defendant, or were their services with the 1st Defendant terminated?**
- 2. Were they employed afresh by the third party or were their services merely temporarily transferred from the 1st Defendant to the third party?**
- 3. If their employment with the 1st Defendant was terminated, what terminal dues are due to them, and when and how were they supposed to be paid?**
- 4. Are the Plaintiffs entitled to live in the Defendants’ houses until their terminal benefits are paid?**

Proper answers to all these issues are well beyond the scope of this ruling. These are issues that must await trial of the action, at least, as will be seen, as far as the 1st Defendant is concerned.

It has been argued for the Defendants that the Plaintiffs are non-suited and that therefore there is no cause

of action disclosed against the Defendants. It appears to me to be clear that these two suits are representative suits under Order I, rule 8 of the Civil Procedure Rules. They are all pursuing a common interest in the suit in that they all have a common grievance and the reliefs sought would be beneficial to all of them. There are numerous persons having the same interest in the suit as plaintiffs. Because of their sheer numbers the Plaintiffs' pleadings are not as neat as they should be. I am not persuaded that the written authority required under rule 12 (2) of Order I is necessary in a representative suit instituted under rule 8 of the same Order. That written authority is necessary where there are more plaintiffs or defendants than one who have sued or have been sued in their individual (not representative) capacities under rule 1 or rule 3 of Order 1 as the case might be, and any one or more of them is authorised by any other of them to appear, plead or act for such other in the proceedings. In any event, whatever shortcomings there may be in the Plaintiffs' pleadings, they can be appropriately rectified before trial of the action. I do not find that the Plaintiffs are non-suited.

It has also been argued that the 2nd Defendant is non-suited as it should have been sued through its Trustees. This may well be so. But again this is a defect that can be easily cured by amendment and should not defeat the Plaintiffs' suit at this stage.

It has been further argued for the Defendants that the suits are bad for want of statutory notice required by section 87 of the Kenya Railways Corporation Act, Cap 397. Paragraph (a) of that section provides that no action or legal proceeding may be commenced against the 1st Defendant for any act done in pursuance or execution, or intended execution, of the Act, until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the managing director by the plaintiff or his agent. Such notice was given on 29th November 2006. Both suits herein were commenced well after one month had passed since the giving of the notice. Rule 3A of Order 49 of the Civil Procedure Rules has no application here; it applies only to computation of time under the Civil Procedure Rules or any order of the court. It cannot apply to time set by some other statute.

I find that the Plaintiffs have demonstrated a *prima facie* case with a probability of success against the 1st Defendant. With regard to the 2nd Defendant, it was never the Plaintiffs' employer. It is now the owner of more than 80% of the houses in question. It appears that it was sued merely because of its ownership of the houses which are occupied by some of the Plaintiffs. I do not see any clear cause of action disclosed against the 2nd Defendant. There is no *prima facie* case with a probability of success made out against it. It will be noted that the only relief in the amended plaint in the Nairobi case in respect to the houses (a permanent injunction) is sought against the 2nd Defendant only. No such relief is sought in the plaint in the Nakuru case.

Do the Plaintiffs stand to suffer irreparable loss?

The worst that can happen to the Plaintiffs is to lose their dwelling houses. They do not own these houses. Most of the houses, as has pleaded by the Plaintiffs themselves (paragraph 26 of the amended plaint), are now owned by the 2nd Defendant. The Plaintiffs have not demonstrated a *prima facie* case with a probability of success against the 2nd Defendant. The Plaintiffs' loss of their dwelling houses cannot occasion them irreparable loss. They can find alternative accommodation. It is to be noted that they are prepared to pay up to 40% of the rent demanded by the Defendants. They can find alternative accommodation for those rents. The Plaintiffs are not claiming, and cannot claim, any proprietary interests in the houses. I do not find that they stand to suffer any irreparable loss.

There is the issue of the alleged winding-up of the 1st Defendant. I have perused the concessioning agreement with the third party annexed to one of the replying affidavits. The 1st Defendant has concessioned only some of its operations and assets. It remains a very substantial land and property owner, even excluding the properties transferred to and vested in the 2nd Defendant. It is still very much a state corporation duly established by Act of Parliament. No repeal of its mother Act has been brought to the attention of the court. I find that the 1st Defendant is not in the process of winding-up or in

preparation to wind-up its operations.

Finally, even on a balance of convenience, I would have refused the application. It appears that the properties transferred to and vested in the 2nd Defendant by the 1st Defendant were so transferred and vested for the main purpose of raising revenue by way of rents for the 1st Defendant's staff retirement benefits scheme, of which the Plaintiffs are, or will be beneficiaries. A temporary injunction as sought would greatly prejudice the intended purpose of establishing the 2nd Defendant and transfer to and vesting in it of the houses in question. This would in turn cause great hardship to the

beneficiaries of the retirement benefits scheme (including the Plaintiffs) that far outweighs the inconvenience of the Plaintiffs having to pay the rents demanded by the Defendants or finding alternative accommodation.

It is also apparent that should the Plaintiffs lose the suit the Defendants would have great difficulty in recovering arrears of rent, given the sheer numbers of the Plaintiffs and the fact that they are scattered all over Kenya.

In the result, I must refuse all the applications under consideration. They are hereby dismissed with costs to the Defendants. Orders accordingly.

DATED AT NAIROBI THIS 5TH DAY OF JULY 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 6TH DAY OF JULY 2007