



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

Civil Suit 378 of 2005

WILLIAM KIMANI RICHO.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....DEFENDANT

RULING

The Applicant is the Defendant newspaper which seeks to have the plaint filed herein struck out and the suit dismissed under Order VI Rule 13(1)(a) of Civil Procedure Rules and Section 3A of Civil Procedure Act.

There are six grounds cited for this application as follows:-

- (a) The plaint discloses no reasonable cause of action against the defendant.**
- (b) The Plaintiff's claim is not maintainable in law and paragraph 14 of the plaint relates to future earnings contrary to the provisions of the Employment Act (cap 26 of the Laws of Kenya the principle set out in the case of Githinji vs Mumias Sugar Co. Limited (1995-1998)1EALR68**
- (c) The Plaintiff cannot be entitled to General damages for breach of contract of employment as these are not available for a claim for terminal dues which the Plaintiff herein has not claimed.**
- (d) The Plaintiff's employment was legally terminated as per the terms of the contract of employment and as such the Plaintiff is not entitled to make the claims in the plaint.
- (e) It is fair and in the interest of justice that the plaint herein be struck out and the suit be dismissed.
- (f) That leave to file the suit herein was granted in CMCC No. 323 of 2004 where the subordinate court therein had no jurisdiction to entertain the application or issue the orders.

The application is opposed. The Respondent has filed grounds of opposition raising six grounds, I will consider this alongside the arguments by both counsels to this application.

Mr. Gitonga argued the application on behalf of the Defendant/Applicant while Mr. Gachie opposed it on behalf of the Respondent/Applicant.

Mr. Gitonga's first ground was that the claim was not maintainable in law as the issues set out in paragraph 14 of the plaint related to future earnings and that the only amount payable to Plaintiff was payment in lieu of notice. For this Mr. Gitonga relied on the court of Appeal case of **GITHINJI VS MUMIAS SUGAR LTD. (1995-1998) IEA 81.**

Mr. Gachie, in answer to this ground submitted that the Applicant was being vexatious and was on a path of frivolous pursuit in bringing this application because the matters conversed in the application were matters of evidence touching on the issue of emoluments payable to Plaintiff, which could not be considered in an interlocutory application. In any case, Mr. Gachie submitted that the Plaintiff was relying on numerous documents to elaborate his claim which the court needed to consider during the hearing of the suit in order to determine the nature the dismissal of the plaintiff from the Defendant's employment took and to determine the remedies available.

The Plaintiff claims special damages in the form of loss of earnings, leave, traveling allowance, house allowance and refund on medical expenses and general damages or damages for breach of contract together with the costs of the suit and interest. His claim is based on a contract of employment and summary dismissal from employment which particulars the Defendant admitted in its statement of defence. The case upon which Mr. Gitonga relies, **Githinji case**, Supra, nowhere states that a court of law can dismiss a suit in a preliminary application on grounds that the claim pleaded is not maintainable in law. All the case does is to set out what the Plaintiff was entitled to under the contract of employment on which his suit was based. The holding in that suit was in the following terms.

“The appellant was only entitled to all that was due to him under and in accordance with his contract of service, which was two months’ salary in lieu of notice (Rift Valley Textiles Ltd v Oganda [1992] LLR 308 (CAK) and Ombaya v Gailey and Roberts Limited [1974] EA 522 followed).

Appeal dismissed

Per curiam – Where a contract of service is for an indefinite period with an element of permanency and a degree of security of tenure in that it does not provide for its termination by the giving of notice or payment of salary in lieu thereof what the employee who is wrongfully dismissed will be entitled to, is that which is reasonable in the given circumstance (Kyobe V East African Airways[1972] EA 403 and East African Airways vs Knight [1975] EA 166 followed).

At page 83 in the body of the same judgment the court expressed its view concerning certain contracts of service thus:-

“Our view is that where a contract of service, unlike that of the appellant, is “for an indefinite period with an element of permanency and a degree of security of tenure” in that it does not provide for its termination by the giving of notice or payment of salary in lieu thereof, what the employee who is wrongfully dismissed will be entitled to is that which is reasonable in the given circumstance. (see Kyobe v East African Airways [1972] EA 403 and East African Airways v Knight [1975] EA 166.) But what if like that of the appellant, the contract of service contains specific provisions for notice for the termination of service. In the case Ombaya v Gailey and Roberts Ltd [1974] EA 522 at 524, Muli J as he then was, applying the common law, had this to say: “ I think it is established that where a person is employed and one of his terms of employment include a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been correct”

These are principles, which the Court of Appeal stated were necessary to consider in order to determine whether what a Plaintiff was claiming under a contract of employment he was entitled to and whether the claim was affected by statute. All these principles are to be considered during the full trial of the case. They cannot be considered in an interlocutory application. A full consideration of the terms of the contract is necessary to determine the emoluments a claimant claiming under a contract of employment was entitled to and thus can only be possible at the full hearing of the case. The terms of contract is both a matter of law and a question of fact and these can only fully be ventilated at a full trial. It would not be right to engage in a protracted examination of documents and facts of the case in order to determine

whether the Plaintiff's claim can be sustained under the terms of contract entered into between him and the Defendant see.

The striking out of pleadings and the suit is a drastic measure which could only be done in plain and obvious cases as no party should be driven out of the judgment seat otherwise as that would result to miscarriage of justice.

YAYA TOWERS LTD V TRADE BANK LTD (In liquidation) Civil Appeal No. 35 of 2000. In Lakha J's judgment an appropriate guide is given in dealing with application of this nature.

“Applicant is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or otherwise objectionable as an abuse of the process of the court it must be allowed to proceed to trial.”

In this case the Applicant has sought to demonstrate that the Plaintiffs case is objectionable for not being sustainable in law, on the grounds that the Plaintiff's claim for general damages could only be awarded if the Plaintiff was claiming for terminal dues which he was claiming in this case.

As I have already stated the issue whether the claim is sustainable can only be determined by the trial court. I believe that on this ground alone the application ought to fail. However I will comment on the other ground argued by the Applicant very briefly. Mr. Gitonga has challenged the jurisdiction of the subordinate court in CMCC 323/2004 in which an application by the Plaintiff to file suit as a prayer was granted.

Mr. Gachie did not think that the Applicant was justified to raise this issue before this court. Mr. Gachie submitted that the Applicant was a party in the suit and was served with the application before it was heard and subsequently granted. Mr. Gachie submitted that such an issue could only be raised in an appeal.

I agree with Mr. Gachie. The Applicant has a right to appeal against the decision of the subordinate court and such appeal is not the matter before this court. It was not open, in the circumstances, for the Applicant to try to have the suit struck out on such ground.

Having come to the conclusion I have in this matter I find that the application lacks in merit and ought to be dismissed with costs to the Respondent, which I do.

Dated at Nairobi this 21st day of September, 2007

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Miss Munyasi holding brief Gitonga for Applicant

N/A for Respondent

LESIIT, J.

JUDGE

COURT On Applicants request leave is granted to the Applicant to appeal against this court's ruling.

LESIIT, J.

JUDGE