



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

Misc Civil Appli 70 of 2004

IN THE MATTER OF: THE CONSTITUTION OF KENYA

**THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL) RULES 2001**

**IN THE MATTER OF: THE EMPLOYMENT ACT, CHAPTER 226 OF THE LAWS OF
KENYA AND THE TRADE UNIONS ACT, CHAPTER 233 OF THE LAWS OF KENYA**

AND

IN THE MATTER OF: JOANES OKOTCH

BETWEEN

JOANES OKOTCH APPLICANT

AND

HILTON KENYA LIMITED RESPONDENT

JUDGMENT

The applicant has filed an Originating Summons based on various constitutional provisions including section 60, 65, 73(1), 79(1), 82(2) and 84. He seeks a declaration that the action of summary dismissal from employment is unconstitutional and unlawful.

He further seeks an order against the respondent to pay him lost earnings and damages for unconstitutional and unlawful summary dismissal from employment.

At the outset it is important to point out that it is not denied that the applicant had an employee/employer relation with the respondent Hotel company. He has not explained why he could not sue the respondent for breach of the contract of employment if as he alleges, the summary dismissal was not lawful. If the summary dismissal was not lawful he would have had a cause of action based on wrongful dismissal. The remedy for wrongful dismissal is damages. Instead he has filed a Constitutional application.

I have fully reflected on the claim together with the written skeleton arguments filed by both parties and the case law set out in the parties respective lists of authorities.

This originating summons is misconceived and must be dismissed for the following reasons:

- (1) The Hilton Kenya Limited is a limited liability company which does not guarantee the alleged fundamental rights. The chapter 5 fundamental rights are guaranteed by the state and not by private entities and individuals who have nothing to do with the state
- (2) The substance of the claim is based on breach of a contract of employment which relationship lies in the realm of private law and not in constitutional law.

This court has in the past 3 years given rulings and judgments on the point in various cases including the following cases:

- (1) ***BOOTH IRRIGATION v MOMBASA WATER COMPANY Misc Civil Application No.1052 of 2004.***
- (2) ***KENYA BUS COMPANY & ANOTHER Civil Case No. 183 of 2000.***
- (3) ***RICHARD KARIUKI v LAWRENCE KARIUKI***
- (4) ***EBRAHAM KAISHA alias MOSES SAVAZA KENYA TRADING as KAPCO MACHINERY SERVICES MILANO INVEST... LTD v GORVERNOR CENTRAL BANK OF KENYA & OTHERS (HC MISC CIVIL APPLICATION NO. 1759 OF 2004)***

In the KAISHA case the court held that contractual law and commercial matters which are regulated by other laws eg the Loans Act etc are outside the realm of the Constitution and that the Constitution does recognize the existence of those other living but smaller trees. As the court put it the Constitution is the main living tree and the other smaller living trees cannot be grafted into the main tree. An attempt to graft in the other smaller trees or branches would result in automatic rejection because the trees are different. An attempt to enforce contractual or commercial claims under the Constitution jurisdiction is an abuse of the constitutional jurisdiction and process.

In the case of ***RICHARD KARIUKI v LAWRENCE KARIUKI*** the court held that the fundamental rights can only be enforced vertically and not horizontally unless the principle of State instrumentality or agency is applicable. This is not the case here since Hilton Kenya Ltd has nothing to do with the State.

In the result the application is dismissed. I further order that costs in the sum of shs 10,000 be paid to the respondent by the firm of advocates which filed the application and not by the applicant.

DATED and delivered at Nairobi this 5th day of October, 2007.

J.G. NYAMU

JUDGE