REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 460 of 2007

EDWIN ASAVA MAJANI ..... 1ST PLAINTIFF

GEOFFREY GATHURI NJOROHIO ..... 2ND PLAINTIFF

GEOFFREY KIUGU GAKURE ..... 3RD PLAINTIFF

VERSUS

TELKOM KENYA LTD ..... DEFENDANT

RULING

The plaintiffs who are the applicants herein have come to this court by way of a plaint dated 30th day of May 2007 and filed the same date. In it Edwin Asava Majani, Engineer Geoffrey Gathuri Njorohio, Geoffrey Kiugu Gakure as first, 2nd and 3rd plaintiffs respectively have sued Telkom Kenya Ltd, seeking various reliefs as set out in the plaint. The plaint is accompanied by a joint replying affidavit sworn on 30th May 2007 and filed the same 30th May 2007.

The salient features of the plaint are:

1) That the plaintiffs were employees of the defendant a successor company of the defunct Kenya Posts and Telecommunication Corporation. They were each employed on different dates.

i. The first plaintiff was employed in May 1971 and rose through the ranks and left the defendants employment at the rank of general manager in charge of operations and maintenance.

ii. The second plaintiff was employed in September 1977 and rose through the ranks and left the defendants employment at the rank of general manager in charge of sales and marketing.

iii. The 3rd plaintiff was employed in January 1980 and rose through the ranks and he left the defendant company at the rank of general manager in charge of Human Resources.

2) That the plaintiffs worked diligently and faithfully till the time in 2002 when the defendant in an attempt to achieve higher levels of efficiency and to reposition the company as a market leader in the Telecommunication sector decided to reduce the number of general managers from seven to two (2).

3) In consequence of matters said in No 2 above the plaintiffs who were all general managers as aforesaid were offered a retirement package in consideration of taking an early retirement from employment before attaining the mandatory retirement age of 55 years. The retirement package offered was

(a) Three (3) months consolidated salary in lieu of notice

(b) Golden handshake of Kshs.300,000/-

(c) Three (3) months basic salary for every year worked up to a maximum of 10 years.

(d) Resettlement allowance equivalent to three (3) months salary

(e) Transport of Kshs.20,000.

4) The package approved by defendant's Board of Directors is set out in paragraph 6 of the plaint as hereunder:-

i. The 1st plaintiff then aged 52 years, 7 months. He had put in 32 years and 2 moths service and was found to be entitled to Kshs 6,452,060.00 as emoluments.

ii. The second plaintiff was 50 years of age. He had put in 25 years and 8 months of service His emoluments came to Kshs.5,520,380.00

iii. The 3rd plaintiff was aged 53 years, 7 months and had put in 27 years, 5 months years of service and his emoluments came to Kshs.5,520,380.00

5. Under paragraph 7 thereof the Plaintiff accepted the offer for early retirement package offered by the Defendants Board of Directors and then opted to take voluntary early retirement.

6. That following the Plaintiffs acceptance of early voluntary retirement package on 20th May 2003 the Defendant sent the Plaintiffs on leave pending the processing of the early retirement package afore said.

7. In furtherance of matters aforesaid the Defendant wrote to the Permanent Secretary to the Cabinet and Head of the Civil Service seeking tax exemption of the said retirement package being paid to the Plaintiffs.

8. The Plaintiffs became aggrieved because, whereas the tax exemption was not granted the Defendant unilaterally changed the terms and conditions agreed earlier on between the parties forcing the Plaintiffs to retire at an early age without any of the agreed emoluments and against the laid down regulations on retirement as per the applicable human resources manual.

9. As a result of matters stated in number 8 above the Plaintiffs contend that they are generally aggrieved because the Plaintiff acted illegally, unconstitutionally, maliciously and breached the laid down principle of natural justice. Justification for saying so is set out in paragraph 11 of the plaint and these are:-

(i). The Defendant unilaterally changed the terms that had been agreed upon.

(ii). The Plaintiffs were not given an opportunity to make an election to opt for an early retirement.

(iii). Maliciously sent the Plaintiffs on leave pending processing of the early retirement package only to turn around and refuse to pay them the agreed retirement package.

(iv). That the Defendant acted maliciously in failing to recall the Plaintiff back to employment after it had failed to pay them their agreed early retirement package.

10. They contend that had it not been for the offer to pay an early retirement package they would have opted to work till the age of 55 years.

11. They contend they are entitled to be paid the retirement package as set out in paragraph 6, 14 and 17 of the plaint as follows:-

1st Plaintiff – Kshs.6,452,060.00

2nd plaintiff – Kshs.5.520,380.00

3rd Plaintiff – Kshs.5,520,380.00.

Together with interest at court rates with effect from 30th October 2003 until payment in full, costs of the suit and interest thereon.

The Defendant was served, entered appearance and filed a defence dated 25th June 2007 and filed on 26th June 2007. The salient features of the same are:-

1. Though the defendant proposed to the Plaintiffs the package stated thereon the said package was subject to the approval of the Government as stipulated and mandated under the provisions of the State Corporations Act.

2. That the proposal was rejected by the Government and the Plaintiffs were paid their terminal dues in accordance with the terms of the employment.

3. Denied that it acted illegally or unconstitutionally, maliciously and or breached rules of natural justice, have denied the particulars set out in paragraph 11 of the Plaint.

4. The contract of employment provided for termination of the same and so the Plaintiff cannot claim the right to work up to the age of 55 years and contend that the Plaintiffs contract was terminated in accordance with the terms of employment.

5. Contend that the actions were in line with Government policies and procedures then in force.

6. Denied that the Plaintiffs are entitled to the reliefs sought. They prayed for the suit against them to be dismissed with costs.

The Plaintiffs put up a reply to defence dated 29th June 2007 and filed on the same 29th June. The sum total of which the Plaintiff reiterated paragraph 3, 4, 5 and 6 of the plaint, pleads the doctrine of estoppel, that the offer made to them by the Defendant was made by the Defendants Board of Directors which consists of the representation of the Government, reiterated the contents of paragraph 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the plaint all inclusive and prays for judgment as prayed in the plaint.

Against the foregoing background information as gleaned from the pleadings of both parties, the Plaintiffs have filed an interim application by way of notice of motion dated 29th June 2007 and filed the same date. They seek the following orders:-

(1) That summary judgment be entered in favour of the plaintiffs against the Defendants.

(2) That the costs of this application be provided for.

(3) That such other and or further orders be made as this honourable court may deem fit and just.

The grounds in support are set out in the body of the application, the replying affidavit sworn by Edwin Asava Majani who vide Paragraph 2 of the said affidavit deponed that he has authority of the other Plaintiffs to swear the supporting affidavit on their behalf. They also rely on the Annextures to the said supporting affidavit, points set out in the Written Skeleton Arguments as well as Case Law.

The Defendants on the other hand also rely on their pleadings, replying affidavit, their written skeleton arguments as well as Case Law.

In assessing the facts herein the court after going through the pleadings of each side, documentation relied upon by either side has identified common ground to the issues in contention and for this reason has found it fit not to set out the grounds relied upon by each side both in support and opposition of the application separately save for the legal issues in support for each side.

It is common ground that:-

(1) All the Plaintiffs were employees of the Defendant having joined the establishment at various positions. Each has worked for a number of years as specified in the Plaint. They each rose through different ranks and as at the time events leading to this proceedings, were set in motion, each of them was holding a post of a managerial rank as outlined herein.

(2) In the year 2002, the Defendant decided to restructure itself in an effort to achieve higher levels of efficiency and thus position the company as a market leader in the telecommunication sector. In the process of achieving that ideal, decided to reduce the number of General Mangers.

(3) The three Plaintiffs and the others were among 5 managers out of seven who were identified for retrenchment. They were approached and informed about the move. The early retirement package was agreed upon after negotiations between them and Defendants Board of Directors.

(4) The Defendant is the successor company of the Defendant Kenya Posts and Telecommunication Corporation which had succeeded the East African Posts and the Telecommunication Corporation.

(5) Upon agreeing on the early retirement package, the plaintiffs duly took their terminal leave awaiting the payment of the early retirement packages negotiated and agreed upon. The details of the package set out in paragraph 6 and 14 of the plaint as well as the reliefs in paragraph 17 of the Plaint. They are also reproduced in paragraph 9 of the supporting affidavit.

(6) The Managing Director of the Defendant through the Permanent Secretary in the Ministry of Transport and Communications sought tax exemptions on their behalf from the Director Civil Service. Ambassador Francis Muthaura who responded that the three be retired under the 50 year rule. The Defendant proceeded to retire them under the 50 years rule.

(7) It is their contention that since they had been asked earlier on to elect to retire under the 50 years rule and, they had declined, they should have been consulted again on the same before proceeding to retire them under the 50 year rule.

(8) It is the applicants stand that once they negotiated and reached an agreement on early retirement packages, the Defendants cannot back on that hence the need to have their claim enforced as presented.

(9) While the stand of the Respondent/Defendant is that the negotiated package was subject to Governments approval which was not approved by the Government. Instead the Government acted within its powers to decline the payment of the package and instead paid retirement dues under the 50 year rule.

(10) The applicants have countered that by saying that the Defendants Board of Directors is composed of Government officials and as such the decision to pay the agreed retirement package was a government decision and so the same cannot be overturned by another Government arm without consultation.

(11) They contend their case is a proper candidate for summary judgment which this court should proceed to enter on their behalf since the defence both in their pleadings namely the defence and replying affidavit have admitted the sequence of events as outlined by them.

(12) The defence on the other hand has countered the stand in number 11 above that the matter is not a proper candidate for summary judgment as there are several issues for determination as enumerated at pages 1 – 2 of their skeleton arguments numbered i – ix.

The court has taken into consideration all the relevant factors herein and examined the pleadings as well as documentations filed for and against the interim application. It has come to the conclusion that determination of the interim application has to be approached both from the technical front as well as the merit front. The technical front arises because it is necessary to determine that both the plaint, on which the interim application is anchored is competent, that is it has been procedurally presented to court both in content and format. Whereas as the merit front because in order to succeed the applicant has to show that the application has satisfied the ingredients governing the grantors of the relief of summary judgment both as set by the civil procedure rules as well as case law relied upon both sides.

On the technical front it is clear that the proceedings were commented by plaint. Its mode of presentation automatically brings the proceedings within the provisions of order 7 rules 1 (1), (2) and (3) thereof. It states: -

"**(1).** The plaint shall contain the following particulars:-

(a) The name of the court in which the suit is brought.

(b) The name, description and place of residence of the Plaintiff and an address of service.

(c) The name, description and place of residence of the Defendant so far as they can be ascertained.

(d) Where the Plaintiff or Defendant is a minor or person of unsound mind, a statement to that effect.

(e) An averment that there is no other suit pending and that there have been no previous proceedings in any court between the Plaintiff and the Defendant on the same subject matter.

(2) The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.

(3) The court may of its own motion or on the application of the Defendant order to be stuck out any plaint which does not comply with sub rule (2) of this rule".

The interim application on the other hand falls under the provisions of Order 50 Rule 1 of the Civil Procedure Rule. It is required there therefore to comply with Rule 3 thereof which provides "*every notice of motion shall state in general terms the grounds of the application and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served*".

A perusal of the record herein reveals that order 7 rule 1(1) of Civil Procedure Rules as regards the content lay out and or the format of the plaint has been satisfied. What has invited the court's attention to the plaint is the verifying affidavit. It is noted as stated earlier on that it is a joint verifying affidavit. The joint verifying affidavit is meant to meet the requirements of order 7 rule 1(2) of the Civil Procedure Rules set out above. A perusal of the same shows clearly that it talks of "*an affidavit sworn by the plaintiff*". The rule is therefore silent as regards the position where there are more than one plaintiff. Whether these are to swear a joint affidavit or each is to file a separate affidavit. This leads to the question as to whether a joint affidavit is provided for within the rules. The general provision regards affidavits is found in order 18 of the Civil Procedure Rules. But before turning to examine those provisions, it is better to deal with the supporting affidavit as well.

It is on record and it is not disputed that there are three plaintiffs and as noted earlier on, here in that in paragraph 2 thereof the first plaintiff has deponed that he has authority from the other plaintiffs to depone on their behalf.

Both the verifying affidavit and the supporting affidavit being affidavits are subject to the provisions of order 18 Civil Procedure Rules.

As regards a joint affidavit, this court had occasion to consider the provisions of order 18 civil Procedure Rules in so far as they are to affect the regularity or the irregularity of a joint affidavit in its own ruling delivered on 27th day of July 2007.

In the case of Meshack Riaga Omolo and 7 others versus Henry Michael Ochieng and 4 others, Nairobi, HCCC No. ELC. 30 of 2007. At page 11 of the ruling line 2 from the top this court observed that "it is evident from the record that the supporting affidavit is signed by four defendants. At line 3 from the bottom of the same page, the court observed "*the applicant has argued that the defect is curable under order 18 Civil Procedure Rules*". The court went on to observe thus "*Rule 3(1) of order 18 Civil Procedure Rules provides that an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. Rule 4 on the other hand provides that every affidavit shall state the description, the place of abode and postal address of the deponent*". The court went on to make observations at line [ ] from the top at page 12 thus the operative words in rule 3(1) and 4, refer to "*a deponent*" and not deponents. In view of that construction, this court, made this finding that "This being the case the proper construction of these two provisions is that the intention of the legislative or the rules committee is that there shall be one deponent to an affidavit and if there is need for more than one, then the additional parties swear supporting affidavits." The court was of the opinion that "if joint affidavits were receivable in evidence there would have been provision for words such as these "*or deponents*" in both rules 3(1) and 4.

The court went on to consider whether the effect is curable under section 7 of the said order 18. The provision is reproduced at page 12 paragraph 2 line 9 from the bottom. The said rule 7 provides "*The court may receive any affidavit sworn for the purpose of being used in any suit not withstanding any defect by mis-description of the parties or otherwise in title or other irregularity in the forms thereof*." After due consideration of the said rule 7, this court at line 6 from the bottom ruled the irregularity envisaged by this rule is one that is minor and does not go to the root of the affidavit. The affidavit herein which is made not in the name of the deponent but signed by 3 extra persons is not only an irregularity but an illegality which cannot stand. At line 1 from the bottom the court stood guided by the findings in the case of ***Rajput versus Barclays Bank of Kenya Ltd and others Nairobi HCCC No. 38 of 2004.*** One of the issues in the said cited case was whether a failure to comply with the provisions of the Oaths and Statutory Declarations Act Cap 15 and its rules is a matter of substance or of form and whether an affidavit which does not comply with the provisions and rules is incurable and should be struck out. The court held that such an affidavit is incurable and it should be struck out. On the basis of that reasoning this court struck out the joint affidavit and with it also went the application it was supporting as without a supporting affidavit the application would not be in compliance with the provisions of order 50 rule 1 and 3 Civil Procedure Rules.

This Court still stands by the above reasoning.

Turning to an authority to swear or depone on behalf of other litigants in the same proceedings, it should be noted that a reading of the whole of order 18 Civil Procedure Rules generally and rule 3 and 4 in particular does not reveal donation of the power or authority to depone on behalf of another litigant. This has been developed by case law and anchored on the provisions of order 1 rule 12(1) (2) Civil Procedure Rules. These provides "*where there are more plaintiffs than one any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and in like manner, unless where are more defendants than one, any one of them may be authorized by any other of them to appear plead or act for such other in any proceeding*.

(2) *The Authority shall be in writing signed by the party giving it and shall be filed in the case*."

The Court of Appeal has provided guidance on construction of that provision. What was under inquiry was one of the plaintiffs swearing a verifying affidavit on behalf of the other plaintiffs in the absence of a written authority to so depone on their behalf having been filed in the proceeding. This is the case of

Research International East Africa Ltd versus Julius Arisi and 213 others Nairobi CA 321 of 2003.
The litigants argument is found at page 5 of the ruling 2nd paragraph line 10 from the bottom: "*that order vii rule 1(2) Civil Procedure Rules is silent as to whether each plaintiff should file a verifying affidavit, that there is no need for filing affidavit by each plaintiff as what is to be verified is the correctness of the averments and not their truthfulness, that the truthfulness of the claim is a matter for the trial, that the verifying affidavit of the first respondent is sufficient and lastly that the court has power to order each claimant to file a verifying affidavit instead of striking out a suit*."

The Court of Appeal's response to that argument is found at page 8 of the judgment line 9 from the bottom. The Court of Appeal observed "*We observe at the outset that the suit filed by the respondents is not a representative suit. That is to say it is not a suit filed by Julius Arisi, the first respondent on behalf of the other 213 persons ... Rather the suit is filed by all the 214 persons through the advocate as authorized by order 1 rule 1 Civil Procedure Rules. In that case, each of the plaintiffs is personally responsible for the conduct of his own suit. In our view none of the 214 plaintiffs has any right to take any steps in the suit on behalf of any other without any express authority in uniting*." At page 9 of the judgment 2nd paragraph line 9 from the bottom the Court of Appeal continued "*in our respectful view the learned judge overlooked rule 12(2) of order 1 Civil Procedure Rules which requires that the authority if granted, should be in writing and signed by the person giving it and further that such written authority should be filed in the case. In the absence of such a written authority in the case file, the learned judge erred in holding in effect that Julius Arisi had sufficiently verified the correctness of the averments in the plaint within the authority of and on behalf of the 2nd to 214 plaintiffs*".

Regarding construction of order vii rule 1(2) of the Civil Procedure Rules the said court had this to say at page 1 of the same judgment paragraph 2 line 14 from the bottom "In our view, the true construction of rule 1(2) of order vii Civil Procedure Rules is that even in cases where there are numerous plaintiffs, they are required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing and files such authority in the court, to file a verifying affidavit on his behalf. In which case such a verifying affidavit would be sufficient compliance with the rules. On the consequences of non compliance with the filing of the verifying affidavit totally or filing a defective one, the Court of Appeal had this to say, at the same page 1 of the judgment line 3 from the bottom, "*Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provision of rule 1(2) of order vii Civil Procedure Rules and that their suit was liable to be struck out by the superior court. Under rule 1(3) of order vii Civil Procedure Rules, the Superior Court however had a discretion – it had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule*."

As stated earlier in the ruling the issue of the verifying affidavit has featured in this interrogatory proceedings because it is a requirement of law that an interlocutory proceeding be anchored on a competent plaint. The only way a plaint can be competent is by being presented in compliance with the provisions and requirements of order vii rule 1(2)(3) of the Civil Procedure Rules which competence is simply acquired by the plaint simply being accompanied by a verifying affidavit. This being the case, it therefore follows that in a situation where the competency veil has been removed by the faulting of the verifying affidavit the court is faced with the task of deciding on the next move as regards that pleading. Either to strike it out or to save and whether struck out or saved, the authority for striking out or saving it.

The court appreciates that all that it has been dealing with as well as what the Court of Appeal dwelt on in the Research International East Africa Ltd case (supra) has been compliance with rules of procedure. In the light of the circumstances displayed herein the court has to decide whether to opt for substantial justice or uphold technicalities.

In this Court's own ruling delivered on 11th day of May 2007 this court had occasion to discuss the two sides of the two elements of justice namely substantial justice and technical justice, in the case of ***Municipal Council of Limuru versus George Mburu Muchina Nairobi HCCC No. 49 of 2006*** at pages 5-8. In summary the court had referred to the case law on the subject. In the case of ***Sarah Hersi versus***

Kenya Commercial Bank civil Appeal No. Nai 165 of 1999 Akiwumi JA as he then was ruled: "*Rules are hand maidens of this court which court is called upon to ensure, that the hand maidens do not become bad masters*." The case of ***Ndegwa Wachira versus Ricarda Wanjiru Ndanjeru (1982) I KAR*** where it was held inter alia that when a breach of the rules is not fundamental the proceedings will not be set aside. In the case of ***Consolata Ndinda Julius and 4 others versus Banuel Bouis Omambia, Nairobi HCCC No. 2050 of 1993 Kubo J*** held inter alia that " *Nobody has vested right in procedure and a court must at least be prepared to do substantial justice to the parties undeterred by technical procedural rules ... errors or omissions should not always enjoy clemency but court procedures are made for a purpose to ensure orderly, effective and predictable management of cases. But there will from time to time be cases where substantive justice demands priority over technicalities of procedure*". And lastly the case of **MACHAKOS RANCHING COMPANY LTD VERSUS JOSEPH KYALO MUTISO CIVIL APPEAL NO. NAI 12 OF 1997 CONSOLIDATED WITH MACHAKOS RANCHING COMPANY LTD VERSUS WAEMA ITUMO MUOKA CIVIL APPEAL NAI 123 OF 1997** where A B Shah JA as he then was (now retired) held inter alia that it is the duty of the court to strive to do justice between the parties undeferred by technical procedural rules. Rules of procedure are good servants but bad masters."

The case law on effect of rules of procedure in so far as they go to affect either substantive justice or technical justice as well as Civil Appeals construction of order vii rule 1(2) and (3) of the Civil Procedure Rules on the effect of non compliance with that rule in so far as the filing of a verifying affidavit is concerned, and the effect of non compliance with the provisions of order 1 rule 12(1) (2) of the Civil Procedure Rules in so far as authority to act for a fellow litigant is concerned, have been considered and applied to the joint verifying affidavit filed in support of the plaint on which the interim application for summary judgment is anchored and on the authority to depone on behalf of the other plaintiffs contained in the supporting affidavit and the court makes the following findings:-

1) The interim application has failed to pass the technical test because of the following reasons:-

i. The joint verifying affidavit filed in support of the plaint has been faulted as there is no provision in order 18 Civil Procedure Rules for the filing of a joint affidavit. Rule 3 and 4 of the said order 18 talks of a "***deponent***" and not "***deponents***" it was therefore necessary for each of the three plaintiffs to file own verifying affidavit or authorize any one of the other or others to swear a verifying affidavit on his behalf.

ii. The faulting of the verifying affidavit removes the competence veil from the plaint as the provisions of order vii rule 1 (2) are mandatory.

iii. The resultant effect is that being an incompetent plaint it cannot anchor a competent interim application. The interim application therefore has no base and cannot be sustained.

iv. Had the plaint been found to be competent and the interim application sustained failure to file written authority to so depone by the other two plaintiffs in accordance with the provisions of order 1 rules 12(1)(2) Civil Procedure Rules, the only party who would have benefited from the ultimate results of that application would only have been the first plaintiff who had sworn the supporting affidavit to the application.

v. This court is alive to the case law cited herein both by superior courts and the Court of Appeal to the effect that courts should bend towards rendering substantial justice to litigants undeterred by technicalities. This court is non the less bound by the guidance provided by the reasoning in the **RESEARCH INTERNATIONAL EAST AFRICA LTD CASE (SUPRA)** that there is no cure for a defective verifying affidavit. It has to be struck out, the court accordingly strikes out the same.

vi. On the other hand on the basis of the same court of appeal reasoning in the said cited case, and being alive to the discretion given to the court by order vii rule 1(3) Civil Procedure Rules and being alive to the call to do substantial justice undeterred by technicalities, the court exercises its discretion to save the plaint filed and allow the plaintiff a time frame within which either to file separate verifying affidavits, or alternatively one or more of them to be authorized by the other or others to swear a verifying affidavit on

their behalf and have the said authority given in writing and filed in court.

vii. The interim application which had been anchored on the plaint whose veil of competence has been removed as above cannot be sustained. The same is truck out with leave to file a proper one after the plaintiffs comply with the filing of verifying affidavit as in No (vi) above.

viii. Compliance with No (vi) above to be done within 21 days from the date of the reading of this ruling.

ix. Compliance with No (vii) above to be within 30 days from the date of complying with No (viii) above.

x. Thereafter parties to proceed according to law.

xi. The respondent will have costs of the application, proceedings paid by the applicant.

DATED and read and delivered at Nairobi this 13th day of December, 2007.

R NAMBUYE

JUDGE