REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Suit 1285 of 2003

SIMON IGECHA & 510 OTHERS ……..…..…….PLAINTIFFS

VERSUS

KENYA BREWERIES LIMITED ……1ST DEFENDANT THE HON.

THE ATTONEY-GENERAL ….....……..……2ND DEFENDANT

RULING Two applications came up before me on 12th October, 2005. These were the 1st defendant's application by Notice of Motion dated 19th August, 2004 filed on even date; and the plaintiff's application by Chamber Summons dated 9th December 2004 and filed on 10th December 2004.

The 1st defendant's Notice of Motion was brought under s. 3A of the Civil Procedure Act (Cap. 21), and Orders XXIV, rule 6 and VI, rule 13 (1), (b), (c), (d) of the Civil Procedure Rules. The prayers in this application were:

(i) that, the plaintiffs' plaint be struck out.

(ii) that, in the alternative, such part of the plaintiffs' claims as remained outstanding, following the Court's ruling and orders of 30th July, 2004 be struck out.

(iii) that, the compromise reached between the plaintiffs and the 1st defendant for payment of Kshs.5000/= in full and final settlement, be recorded, and judgment entered accordingly.

(iv) that, costs be provided for.

The plaintiffs' Chamber Summons, by contrast, was brought under Order XVII, rules 1,2, and 8 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act. The plaintiffs had one substantive prayer:

"THAT the plaintiffs' herein be allowed to proceed with the 1st defendant/respondent's Notice of Motion dated 19th August, 2004 by way of viva voce evidence to be adduced by Rumba Kinuthia, Leonard Gitau Chege, and the first plaintiff, Simon Igecha."

The grounds for the 1st defendant's prayers were as follows: (a) the plaintiff's claim has been compromised by the execution of a certificate of discharge, by the plaintiffs' advocates; (b) the applicant

has, in its defence, pleaded the terms of the compromise reached, and given notice of the instant application to the plaintiffs; (c) the plaintiffs had applied for judgement on admissions under the terms of the certificate of discharge – which application was granted; (d) there is no further or other claim arising; (e) the plaintiffs are not, in the circumstances, entitled to proceed with the suit – and the suit ought to be struck out with costs to the 1st defendant. In support of the 1st defendant's application is an affidavit sworn by Ms. Madren Nderu, the 1st defendant's company secretary on 19th August, 2004. She avers that the plaintiffs' suit had been filed on 8th December, 2003 following the striking out of their earlier suit on 5th December, 2003 in High Court Civil Case No. 378 of 2003. In the 1st defendant's statement of defence which was filed on 21st January, 2004 the circumstance leading to this action had been set out (pars 12 – 15); which circumstances led to the 1st defendant making an offer to pay Ksh.5000/=. The deponent averred that the goodwill fund which had been set up by the 1st defendant was purely voluntary – and the plaintiffs willingly participated in the fund through their advocate, Mr. Rumba Kinuthia, it is deponed, that Mr. Rumba Kinuthia had on 2nd May, 2003 executed the participation certificate binding his clients to the terms therein set out. Mr. Rumba Kinuthia surrendered to his clients crown corks, which he had carried with him as required by the terms of the goodwill fund; and he later forwarded crown corks which had not been taken by his client.

The deponent believes that once Mr. Rumba Kinuthia and the plaintiffs agreed to participate in the goodwill fund, a binding contract had come into effect; and so the 1st defendant has always been ready and willing to meet its obligations under the fund, which was to pay each participant Kshs.5000/= per crown cork in full and final settlement of the claim made. The deponent believes that the plaintiffs' suit is compromised by the said agreement under the goodwill fund, and no further claim arises as prayed in the suit by the plaintiffs. It is deponed that the plaintiffs, by an application filed on 6th February,2004 had applied for judgment on admission, for the said sum of Kshs.5000/=; and the Court delivered its ruling on 30th July, 2004 granting the prayer, as pleaded in the 1st defendant's defence. The deponent avers that some of the plaintiffs in the suit have already been paid the said sum of Kshs.5000/= in full and final settlement, and they have acknowledged receipt by executing a further discharge voucher.

There are replying affidavits to the depositions made for the 1st defendant. Rumba Kinuthia in his affidavit of 18th November, 2004 depones that his firm of advocates had been instructed on 24th April, 2003 to file HCCC NO. 378 of 2003, which he did on 25th April, 2003. On 2nd May, the 1st defendant's company secretary, Madren Nderu called the deponent and requested him to present his clients' winning bottle tops No. 5774 for the Kenya Breweries PAMBAZUKO KENYA PROMOTION which had been stopped prematurely on 22nd April, 2003. The deponent thereupon, and while in the company of an employee of his law firm, one Leonard Gitau Chege proceeded to the Ruaraka headquarters of the 1st defendant, and there presented a total of 451 crown corks, after being assured that a total of Kshs.20,000/= would be paid for each crown cork surrendered. It is deponed that Ms. Madren Nderu, on that occasion, requested the deponent to return to his law offices and fetch his certified copies of the identity cards of the claimants, as well as a complete list of the names of his clients. Back at his office he met a number of his clients who were no longer willing to participate in the Pambazuko Fund – because they had learnt that the 1st defendant was intending to pay less that Kshs.20,000/= per person.

The deponent communicated the information on telephone and in writing to Ms Madren Nderu. In the written communication, the deponent had demanded payment of Kshs.20,000/= for each crown cork surrendered or, alternatively, a return of all the corks for the purpose of a Court case which had already been filed - HCCC NO.378/2003. It is deponed that the said crown corks were not returned, and there was no reply to the deponent's written communication; and the deponent was by these facts led to assume that the 1st defendant had accepted to pay Kshs.20,000/= per crown cork.

The deponent avers that the plaintiffs had attempted to join "Pambazuko Kenya Fund", but had withdrawn the same day and so had no commitment to the said "Pambazuko Kenya Fund " It is deponed that whereas the plaintiffs had attempted to join "Pambazuko Kenya Fund", the relevant newspaper advertisements had referred to a "45 Million Shillings Good Will Fund"; and the form signed by the deponent does not indicate the number of plaintiffs the deponent was representing, or even the number of crown corks he had surrendered on their behalf. The said form has a statement certifying that the deponent would withdraw the Court case "as soon as [he] received the cheque for all the claimants"; and

it was not clear whether this referred to all the 12,700 claimants. It is deponed that although the entry form for the fund referred to "Attached Certified Copies" of the plaintiffs' identifications – cum-instructions, the same were not attached either then or later, since the plaintiffs decided not to participate in the Fund less that one hour later. It is deponed that the entry form contains a grave factual error, in that it purports to comply with "the decisions by the Betting Control and Licensing Board that No.5774 in the Pambazuko Kenya Promotion is withdrawn ……" It is averred that the said Board was not running the promotion, and did not contribute any money towards it, or towards the "Good Will Fund".

It is deponed that the defendant's lawyer had not entered appearance in the instant suit at the time the entry form was signed, and that, therefore, they are not in a position to negotiate the withdrawal of the suit.

Mr. Rumba Kinuthia depones that he had, on 7th May, 2003 had a meeting with the 1st defendant's advocate, and it then emerged that the 1st defendant was only willing to negotiate on his firm's costs, but insisted on paying only Kshs.5,000/= per crown cork – and counsel for the plaintiffs rejected this.

The deponent attaches to his affidavit copy of a letter by V. K. Mbalu, Regional Sales Manager, Mt. Kenya Region dated 22nd April,2003 to one of the winners, George Mirera Munuhe the letter reads: "This is to confirm that today 22nd April, 2003 you have handed over to us a PAMBAZUKO Crown No.5774 which has won Ksh.20,000. "We will start processing your cheque immediately. A formal presentation of the cheque to you will be held at a later date in Nyeri as soon as the cheque is processed" The deponent avers that the said letter to George Mirera Munuhe is further proof that the defendant indeed had agreed to pay Shs.20,000/= on the winning cork No.5774. The deponent avers that the "Pambazuko Kenya Fund" form which he had signed on behalf of the plaintiffs herein, by no means indicated the plaintiff's acceptance of Ksh.5000/= as full and final payment of their claim. He deposes further that this suit has never been compromised by the execution of the certificate of discharge, since the plaintiffs' claim was and has always been for Kshs.20,000/= as is indicated in the plaintiffs' instructions.

The grounds for the plaintiffs' Chamber Summons application of 9th December, 2004 are, firstly, that an identical suit had been filed by the plaintiffs in HCCC No. 378 of 2003 and all parties had agreed to proceed with viva voce evidence, but the suit was then struck out. It is stated that if viva voce evidence was adduced, it would facilitate the disposal of the suit and would save Court time. It is stated that the plaintiffs, who are as many as 510 in number, intend to call only three witnesses – those who have deponed by affidavit. It is further stated that the judgement on admission already entered, is not based on the discharge voucher.

A supporting affidavit is sworn by Rumba Kinuthia, who avers that at in the proceedings relating to HCCC No.378 of 2003 the parties had reached agreement, before Ransley, J that the matter be heard by adducing viva voce evidence. It is deponed that there was agreement, in HCCC No.378 of 2003 that if the application therein, which was similar to the instant application, that viva voce evidence be taken, and that this would dispose of the main suit. It is deponed that viva voce evidence was already being taken in HCCC No.378 of 2003, but it abruptly stopped when the suit was struck out. The deponent avers that the judgment on admission already entered in the instant suit was not based on the discharge vouchers as alleged by the 1st defendant; rather it was entered as a result of the 1st defendant's express admission as contained in the statement of defence, at paragraphs 14, 15 and 16. It is deponed that the Betting Licensing and Control Board, in its statement of defence filed through the Attorney-General, has categorically denied having stopped the "Pambazuko Kenya Promotion", contrary to the 1st defendant's claim.

Rumba Kinuthia deposes that if the 1st defendant's Notice of Motion is allowed to proceed just by relying on affidavits, then the plaintiffs would be prejudiced, as not all matters could reasonably be expected to be covered by the said affidavits. A further supporting affidavit was sworn on 8th December, 2004 by Simon Igecha. He depones that on divers dates inclusive of 19th April, 2003 the 1st defendant had advertised through the electronic and print media a promotion known as "Pambazuko Kenya Promotion", by which a holder of every winning bottle-top would be paid the amount of money indicated in that

bottle-top. On 19th April, 2003 the 1st defendant carried out a draw, in which the winning number turned out to be No. 5774, for Kshs.20,000/=. It is deponed that the plaintiffs were all lucky as they each had in their possession the said No. 5774, for Ksh.20,000/=. The deponent and his co-plaintiffs, on 22nd April, 2003 presented the winning bottle-tops to the 1st defendant's offices, for payment of the agreed sum of Kshs.20,000/=. But the 1st defendant then, rather than pay up, informed the plaintiffs that the winning number had been withdrawn due to some technical errors – and so no payments would be made. And on 23rd April, 2003 the 1st defendant purported to advertise stoppage of the winning number.

It is deponed that the plaintiffs waited to hear what solution to the crisis the 1st defendant had; but when there was no information coming forth, they instructed their advocate to file suit – and suit was filed on 25th April, 2003. At this stage, it is deponed, the 1st defendant in an apparent retreat set up a new fund, the "Goodwill Fund", on 1st May, 2003. This new fund, it is averred, contained ambiguous terms, and stated that the maximum amount the 1st defendant would pay against the failed promotion project, was Kshs.20,000/=. The deponent believes to be true the information received from the plaintiffs' advocate, Mr. Kinuthia that he (Mr. Kinuthia) had undertaken direct negotiations with the 1st defendant, towards a solution; and the 1st defendant had assured Mr. Kinutha, that the full amount shown on the bottle-tops would be paid. The deponent believes his advocate's information, that he, Mr. Kinuthia, had had a meeting with the 1st defendant on 2nd May, 2003 at which it was agreed that the suit be withdrawn, once the 1st defendant had dispatched to the advocate's office a cheque for all the plaintiffs.

The deponent avers that at a meeting with Mr. Kinuthia in his office, at 2.30 p.m. on 2nd May, 2005 he and other co-plaintiffs had given the advocate firm instructions to provide their personal details to the 1st defendant, and to secure payment of Kshs.20,000/= for each winning bottle-top, and nothing less – otherwise they would not participate in the 1st defendant's scheme of payment. Mr. Kinuthia thereupon communicated with the 1st defendant by telephone, and duly briefed the deponent who believes the briefing to have carried true facts. The deponent avers that it is untrue, as a statement from the 1st defendant, that the plaintiffs agreed to take the reduced payment under the "Goodwill Fund".

The 1st defendant reacted to the plaintiffs' Chamber Summons application of 9th December, 2004 by filing grounds of opposition under Order L rule 16 (1) of the Civil Procedure Rules. The following are the grounds of oppositions: (i) the Court has no jurisdiction to make the order sought at the present stage of the proceedings; (ii) the application has no merits; (iii) some of the alleged plaintiffs have already been paid as per the discharge vouchers annexed to the affidavit of Madren Nderu sworn on 19th August, 2004. On the occasion of hearing the two applications, on 2nd November,2005 the plaintiffs were represented by Mr. Rumba Kinuthia; the 1st defendant by Mr. Gachuhi; and the 2nd defendant by Mr. Chahale. Learned counsel Mr. Kinuthia stated that the merits of the proceedings are to be determined on the basis of the 1st defendant's Notice of Motion of 19th August, 2004 but such determination is set to conclude the whole suit and thus to save the Court's time. However, Mr. Kinuthia submitted, the dual purpose of saving the Court's time, and determining the 1st defendant's claims in a just manner, required certain procedural steps – which indeed was the prayer in the plaintiffs' Chamber Summons application of 9th December, 2004: the taking of viva voce evidence. Learned counsel recalled that the taking of viva voce evidence in this matter was by no means new. It had already been accepted in an earlier, identical suit, HCCC No. 378 of 2003, which however had been struck out, for reasons not related to the merits of the case. Mr. Kinuthia cited the provisions of Order XVII, rules 1, 2 and 8, which empower the Court to take oral evidence at, any stage; and on this basis he was calling for viva voce evidence, in the hearing of the 1st defendant's application.

Learned counsel submitted that, on the strength of the ruling of Lenaola, J on 22nd July, 2004 a preliminary decree had been drawn on the basis of which the 1st defendant was to pay certain admitted sums of money to the plaintiffs. The gravamen now was the unpaid balance, in respect of which the 1st defendant had made no admission. Counsel's contention in this regard, I believe, is a valid one: apart from the sum of Shs.5000/= which the 1st defendant has agreed to pay to each plaintiff, there remains a dispute as to the difference between Kshs.5000/= and Kshs.20,000/=. This, I think, would have to be regarded as a legitimate subject of contention; and consequently it is for this Court to resolve the matter. And counsel for the plaintiffs has proposed that such a solution be found through a hearing of the 1st defendant's application, in the context of viva voce hearings.

Learned counsel Mr. Gachuhi addressed the Court on the basis of his client's grounds of opposition. He submitted that the content of the earlier suit, HCCC No.378 of 2003 ought not to have a bearing in the suit herein – because the 2nd defendant had not been a party in the earlier suit, and also the earlier suit had ended in a consent ruling. Mr. Gachuhi submitted that since in the instant matter replying affidavits had already been filed, there was no jurisdiction to take viva voce evidence. Counsel submitted that Order XVII, rule 8 is only concerned with procedures at a substantive hearing and did not apply to the hearing of applications. Learned counsel urged that an affidavit is evidence, and is, within its ambit, complete in every aspect – and hence viva voce evidence cannot be allowed. Learned counsel urged that a deponent to an affidavit could not be examined except within the terms of affidavit evidence, that is to say, within the terms of Order XVIII. When learned counsel Mr. Kinuthia proposed that he could now, under section 100 of the Civil Procedure Act (Cap.21) seek an amendment in the rubric of his application to refer also to Order XVIII, rule 1 learned counsel Mr. Gachuhi raised the issue of impropriety, since Mr. Kinuthia was himself a deponent – and he could thus not be crossexamined, unless he ceased to perform the role of counsel. Mr. Gachuhi urged that the application was incompetent, and should be dismissed.

Learned counsel Mr Chahale submitted that under Order XVIII, rule 2 evidence in applications is to be given by affidavit; but it was provided that where such affidavit supports the case of one party, the other party may apply that the deponent be crossexamined. That rule, Mr. Chahale submitted, does not mean that a deponent can himself ask to be cross-examined; and hence, whether or not a Court can make an order such as is now sought by the plaintiffs, would be a question going to jurisdiction.

Learned counsel Mr. Kinuthia submitted that by Order XVIII, rule 2 oral evidence can be ordered at the instance of either party. On the question whether it was in order for counsel to appear as a witness in Court, in a case that he himself was conducting, it was Mr. Kinuthia's view that he could for a short duration cease to act as counsel, and instead be a witness, and then he restores himself in the role of counsel.

Is it the case that once affidavits have been filed, then by the fact alone, the Court has lost jurisdiction to allow viva voce evidence? No authority was brought to my attention on this point, and the issue was moreover addressed only cursorily by counsel. Such a mode of treatment of important issues in Court ought not to lead to the determination of a point of law; specific issues of merit must be set out and canvassed before the Court, before counsel can urge that a particular principle of law be pronounced, or that a decision be taken which may have implications for future rulings.

Considering that in Originating Summons suits, for example, the Court will in its own discretion give directions on the combination of categories of evidence to be resorted to, it must be the case that no issue of jurisdiction arises merely because supporting and replying affidavits have been filed in a given matter; the Court cannot thereby be precluded from ordering that viva voce evidence be taken.

As a general principle, broad claims that the High Court, in any given dispute situation, lacks jurisdiction cannot possibly be right. The availability of the dispute - settlement process for all people is a vital constitutional principle, and any person in this land who entertains a grievance the characteristics of which permit of legal definition, enjoys the right to have access to the judicial process. The one single Court in the judicial set-up with the unlimited jurisdiction to hear and determine all such claims, unless the legislature has formally made a different arrangement, is the High Court. So generally, no party should set out on a broad supposition that the High Court lacks the jurisdiction to hear a matter in dispute.

In aid of the constitutional principle elucidated in the foregoing paragraph, the Civil Procedure Act (Cap.21) specifically gives a general empowerment to the Court (s.3A): "Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." On the facts of this case, I think there is a genuine dispute between the plaintiffs and the 1st defendant. The 1st defendant appears to have made a contract with any members of the public who cared to come along; and the plaintiffs came along and acted under the terms of the 1st defendant's offer. Something then went wrong, and the 1st defendant partly consented to a solution, through making some payment. That payment did not satisfy the plaintiffs, and they are claiming more.

The issue could be litigated through a normal full trial. But, with the concessions already made by the 1st defendant, the plaintiffs think a speedier hearing process can be achieved, through calling oral testimony at the application stage. This proposal, in my view, is entirely reasonable, and I will make orders incorporating that position. I however have difficulties with counsel who is actively involved in the litigation, being called as a witness. It will not lead to an orderly hearing, and so I cannot approve it in general terms.

I will make orders as follows: (1) On priority, the 1st defendant's Notice of Motion of 19th August 2004 shall be listed for substantive hearing within the Civil Division of the High Court. (2) The hearing of the said Notice of Motion of 19th August, 2004 shall take place on the basis of viva voce evidence, with the plaintiffs calling not more than three witnesses (3) Mr. Rumba Kinuthia, learned counsel for the plaintiffs, will on the occasion of hearing, elect between attending Court as counsel, or as a witness; and if the latter, then the plaintiffs shall instruct a different advocate to conduct their case up to the end. (4) The costs of the 1st defendant's Notice of Motion of 19th August, 2004 and of the Plaintiffs' Chamber Simmons of 9th December, 2004 shall abide the outcome of the hearing of the said Notice of Motion.

J. B. OJWANG JUDGE

Coram: Ojwang, J. Court Clerk: Mwangi For the Plaintiffs: Mr. Rumba Kinuthia, instructed by M/s. Rumba Kinuthia & Co. Advocates For the 1st Defendant: Mr Gachuhi, instructed by M/s. Kaplan & Stratton Advocates For the 2nd Defendant: Mr. Chahale, instructed by the Hon. The Attorney-General