



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 223 OF 2003**

ROSA A. MUNYWOKI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT  
ALFRED O. MWITA.....2<sup>ND</sup> PLAINTIFF/RESPONDENT  
AISHA R. ABDULLA.....3<sup>RD</sup> PLAINTIFF/RESPONDENT  
MICAH ROTICH.....4<sup>TH</sup> PLAINTIFF/RESPONDENT  
SALOME N. MUNYUI.....5<sup>TH</sup> PLAINTIFF/RESPONDENT  
ERASTUS MURIUKI.....6<sup>TH</sup> PLAINTIFF/RESPONDENT  
FRANCIS NYAGA.....7<sup>TH</sup> PLAINTIFF/RESPONDENT  
ALEX G. THABUKU.....8<sup>TH</sup> PLAINTIFF/RESPONDENT  
SOPHIA ODONGO.....9<sup>TH</sup> PLAINTIFF/RESPONDENT  
IGNATIUS CHERWON.....10<sup>TH</sup> PLAINTIFF/RESPONDENT  
MARGARET W. MBUGUA.....11<sup>TH</sup> PLAINTIFF/RESPONDENT  
JAPHETH K. KASANGA.....12<sup>TH</sup> PLAINTIFF/RESPONDENT  
ANTHONY M. KIBUE.....13<sup>TH</sup> PLAINTIFF/RESPONDENT  
DOMINIC M. MARACHA.....14<sup>TH</sup> PLAINTIFF/RESPONDENT  
MUNANO A. NJUKI.....15<sup>TH</sup> PLAINTIFF/RESPONDENT  
SAMSON NGUGI MWAURA.....16<sup>TH</sup> PLAINTIFF/RESPONDENT  
MATILDA WUGHANGA WADIA.....17<sup>TH</sup> PLAINTIFF/RESPONDENT  
ANGELO PEREIRA.....18<sup>TH</sup> PLAINTIFF/RESPONDENT

**-VERSUS-**

**INVESTMENTS AND MORTGAGES**

**BANK LIMITED.....1ST DEFENDANT/APPLICANT**

**HON. THE ATTORNEY-GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

**A. THE PRAYER: S.82 OF THE CONSTITUTION ON DISCRIMINATORY PRACTICES, IS IT APPLICABLE TO A PRIVATE PARTY SUCH AS THE 1<sup>ST</sup> DEFENDANT HEREIN?**

The 1<sup>st</sup> defendant's Chamber Summons application of 2<sup>nd</sup> March, 2004 filed on even date, was brought under Order VI, rule 13(1)(b) and (d) of the Civil Procedure Rules, and S.3A of the Civil Procedure Act (Cap.21). The 1<sup>st</sup> defendant has one substantive prayer: that the suit as against the 1<sup>st</sup> defendant be struck out.

The application is premised on the grounds that:

- (i) the suit, as against the 1<sup>st</sup> defendant, is frivolous and vexatious;*
- (ii) the suit as against the 1<sup>st</sup> defendant is an abuse of the process of the Court;*
- (iii) the suit discloses no reasonable cause of action against the 1<sup>st</sup> defendant;*
- (iv) it is wrong in law to call upon the 1<sup>st</sup> defendant, as the plaintiffs do, to answer as to the constitutionality of an Act of Parliament;*
- (v) the 1<sup>st</sup> defendant has not been a party to the contract of employment with any of the plaintiffs;*
- (vi) the 1<sup>st</sup> defendant has no capacity to engage in discriminatory conduct, in the terms of s.82 of the Constitution of Kenya;*
- (vii) it is in the interests of justice that the plaintiff's suit against the 1<sup>st</sup> defendant be struck out summarily.*

**B. DEPOSITIONS IN SUPPORT OF 1<sup>ST</sup> DEFENDANT'S CASE**

**Arun Shankar Mathur**, the 1<sup>st</sup> defendant's chief executive officer, in his affidavit of 2<sup>nd</sup> March, 2004 deponed that there has been no contractual relationship "of whatever nature between the plaintiffs and the first defendant." The deponent believes to be true the advice he has received from his company's advocates, that the 1<sup>st</sup> defendant as an employer, "acts in purely private capacity in pursuance of the principle of freedom of contract", and that in such measure as the 1<sup>st</sup> defendant has not acted by virtue of any written law or in the performance of the functions of a public office or a public authority, the 1<sup>st</sup> defendant was "incapable of discriminating against the plaintiffs or any other person within the meaning of section 82 of the Constitution." The deponent goes on to depone his belief as to the truth of his advocate's advice, that "the plaintiff's claim does not disclose any reasonable cause of action against the first defendant and that the same is scandalous, frivolous and vexatious and an abuse of the process of the Court."

The burden of the depositions, it may be remarked, is *legal contention* even if it is acknowledged to be honest belief founded on professional counsel. Strictly speaking, therefore, the depositions would not very well serve the cause of *testimony*; rather they would, I think, somewhat improperly arrogate the role of counsel which ought to come only through submissions in Court. Such a line of depositions, which has

become common in legal practice today in Kenya's Courts, is unhelpful in dispute resolution and ought to be discouraged. The full scope of my concern on this point unfolds further, upon considering the content of the *replying* affidavit of the plaintiffs/respondents, sworn on 23<sup>rd</sup> April, 2004 and filed on 26<sup>th</sup> April, 2004.

### **C. IS THERE AN ATTEMPT TO PRE-EMPT THE CANVASSING OF FIRST-IMPRESSION INFERENCES ON THEIR MERITS? — PLAINTIFFS' REPLYING DEPOSITIONS**

**Alfred O. Mwita** the 2<sup>nd</sup> plaintiff swore his representative replying affidavit on 23<sup>rd</sup> April, 2004. He avers that the Minister for Finance had, by *Gazette Notice* No. 7347 of 1<sup>st</sup> November, 2002 authorised merger between two banks – Biashara Bank Ltd and Investments and Mortgages Bank Ltd. Since then, and in particular with effect from 1<sup>st</sup> January, 2003 the merged banks have operated under the name Investments & Mortgages Bank.

The deponent deposes that the merger between the 1<sup>st</sup> defendant and Biashara Bank has been challenged in HCCC No. 1452 of 2002, *Kenya Union of Commercial Food and Allied Workers (KUCFAW) v. The Hon. C.M. Obure & 2 Others*, and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants therein are, respectively, Biashara Bank Limited, and I & M Bank.

It is averred that, on 26<sup>th</sup> November, 2002 Biashara Bank had written to all its employees including the plaintiffs herein, with regard to their employment, in view of the intended merger of the two banks; and that neither Biashara Bank Ltd. nor I & M Bank, in *H.C. Misc. Cause No. 1452 of 2002* had denied that a merger had indeed taken place between the two.

The deponent believes to be true the advice received from the plaintiffs' advocates, that the suit carries two main issues: (i) whether in view of the merger between the two banks, the merged entity (which bears the name of the 1<sup>st</sup> defendant herein) is liable for the plaintiffs' claims; and (ii) whether in view of the merger of the two banks, Biashara Bank and the 1<sup>st</sup> defendant could lawfully declare and enforce redundancy of the plaintiffs as they had done, whether acting jointly or severally. The deponent deposes his belief as to the truth of the advice of the plaintiffs' advocates, that the existence or non-existence of a contractual relationship between the plaintiffs and the 1<sup>st</sup> defendant, is a remote issue which cannot be a proper basis for striking out the suit against the 1<sup>st</sup> defendant.

Such a point, coming from a deponent, falls in the same category – I believe – as the legal argumentation which I had noted in the depositions of **Arun Shankar Mathur** for the 1<sup>st</sup> defendant. The point being made, in my assessment, is so normative and legalistic as to be an inappropriate subject for evidentiary depositions by lay client. Essentially, the point being made ought to be left to counsel, to personally articulate as a forensic matter, in the submissions presented in Court.

The deponent further avers that he believes to be true counsel from the plaintiffs' advocates, that the question whether the 1<sup>st</sup> defendant could be accused of discrimination, in the terms of s.82 of the Constitution, is a substantive question for submissions in the cause, and not for premature disposal at interlocutory-application stage. The deponent makes still further averments akin to the forensic perspectives of an advocate (para.13): "That I am informed by our advocates on record ... that the contention by the 1<sup>st</sup> defendant that the plaintiffs' suit does not disclose any reasonable cause of action is untrue, speculative and fantastic. Furthermore, there is nothing scandalous, frivolous and vexatious about the plaintiffs' suit."

The deponent makes still more submission-type averments (para.14): "That I vehemently deny that the plaintiffs' suit is an abuse of the process of the Court and hasten to add that the suit concerns serious injustices meted [out] upon us by Biashara Bank and I & M Bank..." He believes to be true the advice of the plaintiffs' advocates (para.15) "that this Honourable Court's time stands to be wasted by ill-advised and premature applications such as the current one..." In the same vein is the averment (para.16) that: "I am advised by our advocates on record... that the 1<sup>st</sup> defendant in instituting this application and its other

application dated 14<sup>th</sup> July, 2003 betrays its determination to block the merits of this suit from being heard and otherwise to delay the conclusion of this case.”

## **D. SUBMISSIONS BY COUNSEL**

### **1. 2<sup>nd</sup> Defendant Supports 1<sup>st</sup> Defendant’s Position**

Learned counsel **Professor Githu Muigai** (for the 1<sup>st</sup> defendant/applicant) and **Mr. Kibe Mungai** (for the plaintiffs) made their submissions on the issues raised by the application on 27<sup>th</sup> September, 2005, on 31<sup>st</sup> October, 2005 and 18<sup>th</sup> May, 2006; and a consent was reached that the process of submissions be completed by way of written skeleton arguments.

The 2<sup>nd</sup> defendant had been represented by learned counsel **Mr. Njoroge** who made all his submissions orally. He stated that the 2<sup>nd</sup> defendant was not opposed to the 1<sup>st</sup> defendant’s application seeking the striking out of the plaintiffs’ suit.

**Mr. Njoroge** submitted that if the suit was, in the event, struck out as prayed by the 1<sup>st</sup> defendant, then it must be treated similarly in respect of the 2<sup>nd</sup> defendant. He submitted that the plaintiffs had not shown any cause of action – and hence any losses they may have sustained, are not to be attributed to acts of the 2<sup>nd</sup> defendant. Learned counsel submitted that the plaintiffs’ claim of conspiracy on the part of the two defendants, resulting in injury to the plaintiffs, was unsubstantiated, and consequently the plaint did “not disclose any crucial statements that would provide a cause of action against the 2<sup>nd</sup> defendant.” Counsel urged that whereas the suit was brought against the 2<sup>nd</sup> defendant, it would appear that the injury alleged is being set down to the Minister for Finance and the Minister for Labour – and consequently any officers of those Ministries believed to be involved in a conspiracy should have been named.

### **2. Is the 1<sup>st</sup> Defendant, as a Private Entity, placed under a Constitutional Duty not to discriminate?**

Learned counsel for the 1<sup>st</sup> defendant contended that the plaintiffs’ suit as against the 1<sup>st</sup> defendant, is “groundless and fanciful and is [merely] intended to cause the 1<sup>st</sup> defendant unnecessary anxiety, trouble and expense.”

#### **(a) If s.71(b) of the Finance Act (Act No. 6 of 1994) is held to be unconstitutional, would this qualify the 1<sup>st</sup> defendant’s rights accrued in the context of existing law?**

In their claims by plaint dated 12<sup>th</sup> March, 2003 the plaintiffs have *nine* prayers, the first two being for declarations in relation to the consistency of ordinary legislation with the provisions of the Constitution; all the other claims are simply founded on existing provisions of statute law and the general law (which is the common law).

The first prayer is for a “declaration that s.71(b) of the Finance Act (Act No.6 of 1994) is unconstitutional.” The second prayer is for a declaration that the redundancy of the plaintiffs was carried out in a discriminatory manner within the meaning of s.82 of the Constitution.

The first two prayers have provided the foundation of the instant application by the 1<sup>st</sup> defendant. Learned counsel urges that the 1<sup>st</sup> defendant as a private organization, is not responsible for law-making and cannot be made the subject of an obligation that turns on constitutionality or non-constitutionality. In counsel’s words: “The plaintiffs’ purported bringing of an action against...the 1<sup>st</sup> defendant seeking a declaration that [a] provision of the law is unconstitutional, is, without more, fanciful and intended purely to cause the 1<sup>st</sup> defendant unnecessary anxiety, trouble and expense.”

#### **(b) Is discrimination, in the terms of s.82 of the Constitution, a civil wrong of which a private entity**

**such as the 1<sup>st</sup> defendant may be accused?**

Counsel recalls that the terms of s.82(2) of the Constitution of Kenya provides that subject to subsections (6), (8) and (9) thereof, no person shall be treated in a discriminatory manner by a person acting “by virtue of any written law or in the performance of the functions of a public office or any public body.”

S.82(2) of the Constitution has been thus judicially interpreted (*Madhwa v. City Council of Nairobi* [1968] E.A. 406:

**“And the first issue is whether the defendant in giving the notices was acting ‘by virtue of any written law or in the performance of the functions of any public office’ within the meaning of section 26(2). I am satisfied that the defendant, in granting the plaintiffs their present tenancies in the market premises, was acting by virtue of its powers under the Local Government Regulations and I am satisfied that the defendant is a public authority.”**

Learned counsel, on the basis of the principle in the *Madhwa* case, submitted that the ‘particulars of discrimination’ as set out in paragraph 7 of the plaint, “do not allude to any action done by virtue of any written law or in the performance of the functions of any public office or any public authority on the part of the 1<sup>st</sup> defendant.”

Learned counsel urged that by s.26(2) of the original Constitution of Kenya, which is now s.82(2) of the Constitution, the element described as “public function” is “a prerequisite to establishing any allegation of discrimination.” It was urged that far from performing a “public function”, the 1<sup>st</sup> defendant in exercise of its *private capacity* freedoms of contract, had quite properly hired and dismissed its workers.

**(c) Is it, in any case, procedurally tenable that constitutional remedies be sought by way of an ordinary suit by plaint?**

Counsel contended that the plaintiffs had followed a wrong procedure in making their claim: because there was in place a well-settled method for seeking fundamental-rights remedies. In the High Court’s decision (*Ringera, J* – as he then was) in *Welamodi v. The Chairman, Electoral Commission of Kenya* [2002] 1 K.L.R. 486 the law had been thus stated (p.495):

**“It is equally incompetent to invoke sections 42, 79 and 80 of the Constitution of Kenya. To the extent that the motion before the Court invokes those provisions of the law to introduce the procedure of enforcement of the perceived fundamental rights of the applicant and other Matete Division voters in an application for judicial review under Order LIII, the motion is wholly incompetent and fatally defective...[An] action to enforce the fundamental rights guaranteed under sections 70 – 83 inclusive of the Constitution of Kenya can only be brought as separate proceedings by way of Originating Summons...”**

Counsel urged that the same principle had been adopted in other decisions as well: *William Birir arap Chelashaw v. Attorney-General & Another*, Nairobi H.C. Misc. Crim. Application No. 898 of 2003; and *R. v. The Hon. The Chief Justice of Kenya & Others, ex parte Roseline Naliaka Nambuye*, Nairobi H.C. Misc. Application No. 764 of 2004.

Upon that foundation it was urged that: “By brining an action by a mechanism that is fatally defective and incurably incompetent, the plaintiff’s suit should not be permitted to continue causing the 1<sup>st</sup> defendant such unnecessary anxiety.”

**(d) A new bank has emerged from merger; does it carry upon itself pre-merger contractual obligations to employees?**

Counsel contended that the plaint carries no claim that the plaintiffs had been *employees of the 1<sup>st</sup> defendant*; whence it follows, in this submission, that it lies not in the mouths of the plaintiffs to pray for

payment for over-time service by the 1<sup>st</sup> defendant, loss of service, payment of gratuity, etc. It is urged: “The prayers are contractual in nature and to make the same without pleading the existence of a contractual relationship is fanciful.”

The 1<sup>st</sup> defendant relies on the decision in *Meru Farmers Co-operative Union v. Abdul Aziz Suleman* [1966] E.A. 436, in which the Court struck out the suit as against the defendant, as the plaintiff did not plead any wrong on the part of the defendant; it was held that the suit did not disclose any reasonable cause of action. “Reasonable cause of action’ had been defined in *DT Dobie & Co. (Kenya) Ltd v. Muchina* [1982] KLR 1 as an act *on the part of the defendant* which gives the plaintiff his cause of action.

**(e) What is the state of the law on the transfer of undertakings?**

Learned counsel submitted that there is at present no statutory provision on the transfer of undertakings; and consequently the common law position represented the legal position in Kenya.

In considering the state of the common law, counsel focussed his attention on privity of contract; and he urged: “no one, except a party to a contract, can acquire rights under it; and no one except a party to a contract can be subjected to its liabilities.”

Relying on *Andrew C. Bell’s Employment Law in a Nutshell* (London, 2000), p.87 counsel urged that since the common law held the contract of employment to be a personal contract, and not an asset of the company as such, the sale or transfer of a business would have the effect of terminating the contract rather than transferring it to the purchaser. Counsel urged that the plaintiffs’ employment contracts were never transferred to the 1<sup>st</sup> defendant; and so, claims based on those contracts and aimed at the 1<sup>st</sup> defendant, would be groundless, and devoid of substance.

**3. In the Light of the Exhaustive Scope of the Pleadings, Does the Plaintiffs’ Case Merit Summary Dismissal as Prayed by the 1<sup>st</sup> Defendant?**

Counsel on the plaintiffs’ side begin their submissions by contending that a case such as this, bearing the signs of a full-scale contest on the merits, is an inapt one for summary dismissal on technicalities.

The six-page (and nineteen-paragraph) close-typed plaint, dated 12<sup>th</sup> March, 2003 carries far-reaching claims. It avers that at all material times, the plaintiffs were employees of Biashara Bank of Kenya Limited. On or about 31<sup>st</sup> December, 2002 at midnight the said Biashara Bank of Kenya Limited merged with the 1<sup>st</sup> defendant (the applicant herein), pursuant to the authority of the Minister for Finance expressed in *Gazette Notice* No. 7347 published in the *Kenya Gazette* of 15<sup>th</sup> November, 2002. The effect and consequence of the said merger was that, all the assets and liabilities of Biashara Bank of Kenya Ltd. were now deemed to have been transferred to the 1<sup>st</sup> defendant. The transfer process may have presented little difficulty for inanimate resources and assets, but it had serious repercussions for employees of Biashara Bank of Kenya Limited.

There is a juridical point to be considered at this point. If the merger of the two banks was in all respects in accordance with the law, then, clearly, the transfer of the assets and liabilities of Biashara Bank of Kenya Ltd to the 1<sup>st</sup> defendant Bank would present minimal difficulty from the standpoint of the law; but more complex legal issues would be raised with regard to the position of the serving employees of Biashara Bank of Kenya Ltd as at the time of the merger. The reason is that such employees would have been serving under employment contracts with Biashara Bank of Kenya Ltd; and therefore it must be determined as a legal question what the status is of such employment contracts, consequent upon the process of merger. Such is a substantive juridical point which, I would hold, cannot be disposed of in an interlocutory application and must be fully canvassed in a trial of the suit.

The plaintiffs seek a declaration that s.71(b) of the Finance Act (Act No. 6 of 1994) – the statute by virtue of which the Minister had authorised the merger of the two banks – is unconstitutional. Secondly it is

claimed that the plaintiffs had been declared redundant following the merger of the two banks in a discriminatory manner contrary to s.82 of the Constitution. The plaintiffs seek substantial damages in the form of overtime payments said to have accrued, and for loss of service – the amounts involved being in the order of some Kshs.250,000,000/=.

To such substantial claims, the 1<sup>st</sup> defendant filed a statement of defence on **14<sup>th</sup> April, 2003** which is most detailed and runs to 59 paragraphs. Learned counsel for the plaintiffs/respondents have submitted: “The sheer factual depositions and [the scope] of [the] legal issues [in] the plaint and the 1<sup>st</sup> defendant’s defence [raise] serious doubts as to whether this Honourable Court can, on the basis of the uncontroverted affidavit evidence by the parties, hold that the plaintiffs have no reasonable cause of action against the defendant and proceed to strike it out.”

Counsel submitted that in the Court of Appeal decision in **D.T. Dobie & Company (Kenya) Ltd v. Muchina** [1982] KLR 1 it had been held that “reasonable cause of action”, as used in Order VI rule 13(1) means, in relation to the allegations contained in a plaint, an action with some chance of success; and that “cause of action” means an act on the part of the defendant which gives the plaintiff his cause for complaint. It was in that case also held that the Court’s power to strike out pleadings, since it is exercised at an *interlocutory stage*, and without the Court being fully informed on the merits of the case – information which only comes through *discovery of documents* and through *oral evidence* – should be exercised only sparingly, and with caution. In the **D.T. Dobie** case **Madan, J.A.** had thus pronounced himself (p.9):

***“If an action is explainable as a likely happening which is not plainly and obviously impossible, the Court ought not to overreact by considering itself in a bind, summarily to dismiss the action. A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a Court of justice ought not to act in darkness without the full facts of a case before it.”***

Learned counsel **Mr. Mungai** submitted that the facts deponed by the plaintiffs properly supported the reliefs they were seeking; that their allegations against the 1<sup>st</sup> defendant “clearly gave them good cause of complaint”; and that the 1<sup>st</sup> defendant was, in effect, endeavouring to prevent the claims from being heard “without the Court being fully informed on the merits of the case through discovery and oral evidence.”

The plaintiffs’ gravamen arose mainly from the declarations and actions of Biashara Bank of Kenya Ltd. The merger between that Bank and I & M Bank Ltd (1<sup>st</sup> defendant) took effect at midnight on 31<sup>st</sup> December, 2002. Prior to this merger, Biashara Bank of Kenya Ltd. had, by its letter of 7<sup>th</sup> November, 2002 stated as one of the new challenges: “to strive harder to ensure that the proposed objectives of a merged entity are achieved.” The letter also stated: “It will also be inevitable to have certain organizational changes which would also involve realignment in positions and placement of staff....” The Bank then wrote another letter to staff, on 26<sup>th</sup> November, 2002 in these terms:

***“I & M Bank has since advised us that they will consider offering employment to the employees of Biashara Bank of Kenya Ltd. who are keen on working for the merged entity. I & M Bank’s offer for employment consideration will be subject to an interview process on a without-prejudice basis. In order to enable us to furnish I & M Bank [with] a list of the employees of our Bank who would like to be considered for employment in the merged entity, please indicate on the duplicate copy of this letter your willingness or otherwise for taking up employment with them if you are so offered.”***

Counsel submitted that if the 1<sup>st</sup> defendant’s application were to be allowed, the new Bank, which emanates from a merger, would have succeeded in ridding itself of “unwanted employees”, in breach of applicable labour law.

**Mr. Mungai** relied on the persuasive authority of *Caleb Gulam & Another v. Cyrus S.K. Jirongo*, Nairobi HCCC No. 393 of 2003 (*Ringera, J*) for the proposition that “a defence that raises a single triable issue cannot be struck out”; and conversely, “a plaint that shows a single ground for the plaintiffs to reasonably complain and seek the aid of this Honourable Court cannot be struck out...”

#### **4. Can the 1<sup>st</sup> Defendant be called upon to answer to the unconstitutionality of an Act of Parliament?**

**Mr. Mungai** submitted that the 1<sup>st</sup> defendant has not denied that the plaintiffs were declared redundant by virtue of s.4(5) of the Trade Disputes Act (Cap.234) as amended by s.71(b) of the Finance Act (Act No. 6 of 1994). Those enactments, the plaintiffs aver, were enforced by the two Banks in this case, and enforced to the detriment of the plaintiffs. Hence, the plaintiffs maintain, it is fitting that the Court do address the constitutionality of the Finance Act, s.71. The plaintiffs are raising the issue whether the 1<sup>st</sup> defendants, either alone or in collaboration with other parties, “deployed and benefited from the enforcement of an unconstitutional law, to the detriment of the plaintiffs.” This issue, counsel submits, “can only conclusively and fairly be determined after the plaintiffs have been accorded [an] opportunity to prove their claim....”

#### **5. Is the 1<sup>st</sup> Defendant capable of discriminating, within the meaning of s.82 of the Constitution?**

Learned counsel submitted that the issue of discrimination, as it falls under the terms of s.82 of the Constitution, would not be a proper basis for the instant application by the 1<sup>st</sup> defendant: because the plaintiffs, at paragraph 12 of their replying affidavit, have stated their intent that, in the due course of time, they will prosecute the constitutional element in their claim before a duly constituted Constitutional Court. Counsel urges: “Until the plaintiffs do so the 1<sup>st</sup> defendant’s endeavour to raise the issue at this stage is clearly premature and a serious abuse of Court process.”

**Mr. Mungai** recalls the two components of discrimination, as provided for under s.82(2) of the Constitution. The section thus stipulates:

*“Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public officer or a public authority.”*

It is the *first* arm of the forgoing provision which lies at the centre of the plaintiffs’ claim based on discrimination; but the 1<sup>st</sup> defendant’s claim that the plaintiffs’ claim is untenable, is founded only on the *second* arm of the constitutional provision. **Mr. Mungai** has gone further to support his construction of the non-discrimination clause with the persuasive authority of the very case also called in aid by the 1<sup>st</sup> defendant – *Madhwa v. City Council of Nairobi* [1968] E.A. 406. It all goes to show – without the need to determine the relative merits of the two standpoints – that questions of forensic assessment herein abide, which can only be justly disposed of after full trial has taken place.

### **E. ANALYSIS**

What has come up before me is an application brought within the umbrella of a lengthy and technically–complex suit. The suit touches on *contracts of employment, in relation to business mergers*; and it turns on *constitutional questions*. Although the 1<sup>st</sup> defendant contends that the suit is entirely devoid of merit and ought to be summarily dismissed, in response to prayers in an interlocutory application, the main basis of the claim is a controversial constitutional argument. Is it at all tenable that the Court can proceed to address the plaintiffs’ prayers in the plaint, when some of them touch on the fundamental rights of the individual as provided for in the Constitution? Or must special procedures be employed to invoke the Court’s constitutional jurisdiction?

On this point, the merits of the 1<sup>st</sup> defendant’s position are not, in my view, immediately apparent; for the Constitution is the very medium within which all laws in Kenya operate, and this Court must be ready to

address *any constitutional question* in the course of *all* such litigation as may come before it, whenever its jurisdiction is invoked. From this position, it must follow that certain fundamental-rights issues can indeed come before the Court as, or in combination with, *general issues of law* which stand to be resolved by the normal mode of litigation, by way of *plaint*.

I am unable, therefore, to accept the contention that merely because discriminatory practices are alleged in the plaintiffs' claims, then *ipso facto* the plaint becomes an incompetent procedure before the Court.

In my assessment, the vital juridical question which the plaintiffs have brought to Court, turns on the *effect of business mergers on employment contracts* – a classical claim in civil law, and one in respect of which the plaint is the standard procedure of proceeding before the Court (see **David Thuo & Others v. First American Bank of Kenya Ltd., Nairobi** HCCC No. 494 of 2005).

As I have noted above, in situations of merger hardly any difficulty arises in relation to assets and liabilities; but employment contracts present a different situation. Whenever conflicting claims are made in that regard, the *facts of each case* become most important, and the same can only be established where there is an unlimited opportunity to hear the case. There are general principles, of course, in this sphere – though they must be properly canvassed in the lights of the facts. A general principle, for instance may be drawn from the English case, **Nokes v. Doncaster Amalgamated Collieries Ltd** [1940] A.C. 1041, which underlined the *personal character* of an employment contract. **Viscount Simon, L.C.** there held (pp.1021 – 1022):

**“...I do not agree with the view expressed in the Court of Appeal that a right to the service of an employee is the property of the transferor company. Such a right cannot be the subject of gift or bequest; it cannot be bought or sold; it forms no part of the assets of the employer for purpose of administering his estate.”**

And **Lord Atkin** remarked (p.1026):

**“My Lords, I confess it appears to me astonishing that apart from overriding questions of public welfare power should be given to a Court or anyone else to transfer a man without his knowledge and possible against his will from the service of one person to the service of another.”**

Obviously the mischief in the **Nokes** case is possible *loss of freedom* to serve a master of one's preference. What would be the mischief, in the context and circumstances of Kenya? As I see it, the mischief would be *unreasonable denial of employment* to an economically disempowered individual. I would take this, as a matter of judicial notice, to be the most recurrent theme in the local labour economics. Therefore the Court's constructive role, when such a dispute comes up, would be to require equity and fairness, as well as compliance with *constitutional requirements*, in denying a particular employee a place in the newly- merged entity – such as the 1<sup>st</sup> defendant herein. The relevant points must be *fully canvassed*, with necessary *documentation tendered*, and *evidence taken*, before justice can be dispensed in the manner deemed fit by the Court. This is the same thing as saying that the issues in the instant case are far too complex to permit of summary disposal through prayers made in interlocutory applications.

Is the 1<sup>st</sup> defendant so intrinsically a private entity, that constitutional obligations would not properly extend to its operations? I doubt that such would be a valid argument; for if the 1<sup>st</sup> defendant operates by virtue of a *statute*, and the statute offends the *Constitution*, then by s.3 of the Constitution of Kenya such law could be nullified, with radical consequences on the operations of a *private organization* such as the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant's position, in this regard, thus cannot be sustained.

From the foregoing analysis I would hold that it would not be right to treat the plaintiffs' case as devoid of a *reasonable cause of action*. I am in perfect agreement, on this point, with the principle set out by **Madan, J.** in **D. T. Dobie & Company (Kenya) Ltd. v. Muchina** [1982] KLR 1 (p.9):

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”***

## **F. ORDERS**

It follows from the foregoing analysis that, with regard to the 1<sup>st</sup> defendant’s application by Chamber Summons of 2<sup>nd</sup> March, 2004 I find the following orders meet and, accordingly, make the same:

- 1. The prayer that the suit against the 1<sup>st</sup> defendant be struck out, is refused.***
- 2. The plaintiffs’ costs in this application shall be borne by the 1<sup>st</sup> defendant.***
- 3. The suit herein shall be listed for hearing on the basis of priority, before a Judge in the Civil Division of the High Court.***
- 4. Any application in relation to this ruling such as may be made hereafter, shall be heard and disposed of within the Civil Division of the High Court.***

DATED and DELIVERED at Nairobi this 14<sup>th</sup> day of July, 2006.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiffs/Respondents: Mr. K. Mungai instructed by M/s. Kinoti & Kibe Co. Advocates**

**For the 1<sup>st</sup> Defendant/Applicant: Prof. Githu Muigai, instructed by M/s. Mohammed & Muigai Advocates**

**2<sup>nd</sup> Defendant – Mr. Njoroge, instructed by The Hon. The Attorney-General**