

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 292 of 2002

STEPHEN WASIKE WAKHU

ANTHONY B. BOI
.....PLAINTIFFS

VERSUS

SECURITY EXPRESS LIMITED
.....DEFENDANT

JUDGMENT

The Plaintiffs in this case are former employees of the Defendant and have brought this suit on their own behalf and that of several other co-employees who they claim were, together with the Plaintiffs declared redundant and whose services were, as a result of the said redundancy terminated but without payment of salary arrears and redundancy benefits. The two named Plaintiffs obtained leave to represent their co-employees under an order of this court granted on 20th December 2001 and issued on 7th February 2002.

The sum claimed is expressed in the aggregate and amounts to **Kshs.3,501,187.50/=**. Neither the Plaintiff nor the order stated above disclose how many claimants there are. The hearing of the suit proceeded *ex parte* despite Notice having been duly served on the Defendants in person, their previous advocates on record having successfully applied to cease from acting for the Defendants for want of instructions. The Plaintiffs called only two witnesses, the 1st Plaintiff Stephen Wasike Wakhu and the 2nd Plaintiff, Anthony Bonorio Boi.

PW1 told the court that he represented his own interests and those of 60 other employees who have not been named anywhere in the pleadings. He also said he had worked for the Defendant from 1981 to 2000 when his services were terminated under a letter dated 17th June 2000 which he produced in evidence as "exhibit P.1". The order allowing the two named Plaintiffs to represent other co-employees was produced as "Exhibit P.2". There were no other documents tendered. P.W.1 says he is entitled to **Shs.50,800/=** which he claims to be so entitled under an agreement which stipulated that he was entitled to terminal dues of one month's pay for each year worked. No such agreement was tendered and no evidence was adduced as to whether it was oral or written or when it was made.

Similarly, the 2nd Plaintiff (P.W.2) testified that he worked with the Defendant from 1995 to 2001 and that he was supposed to be paid, upon being terminated, redundancy dues as well as salary arrears. He claims a sum of **Shs.87,000/=** which he too says he is entitled to under an agreement. Although he was emphatic that there was an agreement to that effect none was produced in evidence. He also says he is representing himself and others. None of the two witnesses have told the court how the sum of **Shs.3,501,187.50/=** is arrived at or what the various apportionments to the other unnamed co-Plaintiffs would be.

In the written submission by counsel for the Plaintiffs, it is stated that the Plaintiffs represent 63 other former employees. Save to summarize what was stated in evidence by the two witnesses, counsel made no submissions as would assist the court further in understanding the basis of the claim and why the Plaintiffs believe are legally entitled to the sums claimed. He only submitted that there being no evidence tendered to rebut the Plaintiffs' claim the court should enter judgment in their favour in the sum of **Shs.3,501,187.50/=** plus costs and interest thereon.

With due respect to counsel, I find that this suit was not properly prosecuted and counsel did not assist the court in a manner that would lead the court to determining the questions or issues for determination with a view to arriving at a properly considered judgment. A party seeking justice must place before the court all material evidence, and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that "**he who alleges must prove**". Without evidence as to the terms of the agreement allegedly giving rise to the Plaintiffs' claim the court is unable to establish a basis or foundation for the same. The sum of **Shs. 3,501,187.00/=** is also not substantiated and one cannot tell, even if the same was to be awarded, to whom the same would be payable and in what proportions.

It is unfortunate that the Plaintiffs have for the last four years prosecuted a suit in the believe that they would succeed in recovering monies they thought were due to them from the Defendants only to fail in proving their claim despite legal representation. That said, I find that the court does not have the necessary material evidence upon which to find that the Plaintiffs are entitled to the sums claimed herein. I find that they have not, on a balance of probabilities proven their claim and the suit cannot succeed.

In the premises the entire suit fails and is hereby dismissed with no order as to costs.

Dated and delivered at Nairobi this 29th day of September, 2006

M. MUGO

JUDGE

Judgment delivered in the presence of

Miss Kamende holding brief for Opiyo for Applicant/Plaintiff

No appearance for the Defendant