



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Misc Appli 833 of 2004

STEPHEN KIMOTHO & OTHERS.....APPLICANT

VERSUS

THE ATTORNEY GENERAL & OTHERS.....RESPONDENT

RULING

The Originating Summons dated 29th June 2004 was scheduled to be heard on 16th and 17th October 2006. When it came up on the 16th October 2006, Counsel for the Respondent Mrs. Owino was said to be unwell and in any event Dr. Kuria, Counsel for the Applicants indicated that he would be seeking directions on two issues when the matter came up on 17th October 2006, that is, whether this matter should be treated as a representative suit and secondly whether viva voce evidence can be called.

Dr. Kuria sought directions that the 5th, 6th and 10th Applicants be permitted to give oral evidence to elaborate on their Supplementary Affidavits sworn on 13th October 2006 and filed in court on 16th October 2006 and to answer further the Affidavit of Agnes Ndirangu sworn on 2nd Affidavit on behalf of the 1st and 4th Respondents. Counsel said it would accord the Applicants an opportunity to put fully their case before the court which case is already contained in the Affidavits of Mrs. Waitthaka, 5th, 6th and 10th Respondents and that the Respondents will have an opportunity to cross examine the witnesses. Counsel's view is that the witnesses would give evidence on;

- 1) Whether or not all Applicants were paid their terminal benefits;
- 2) Whether the Applicants were paid all their pensions by the Respondents in 2004;
- 3) Whether the persons on whose behalf the Affidavits are sworn have brought this suit or in other words whether this is a representative suit.

The 2nd direction sought is that Mrs. Agnes Ndirangu who has sworn an Affidavit for 3rd and 4th Respondents be cross examined by the Applicants through their Counsel. The reasons for that Application is that there are conflicting facts deponed to in the Affidavits of both parties and they can only be resolved by the Applicants being afforded a chance to elaborate on what is stated in the Affidavits and cross examination of the Respondents on their Affidavits. Counsel then attempted to demonstrate why the need for the said directions.

Before we proceed to these submissions may be we should set out the Application and the replies thereto.

The Originating Summons dated 29th June 2004 and filed in court on 30th June 2004 is brought under Sections 71, 74, 75, 77, 82 and 84 of the Constitution, and Rules 11 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001. It sought the following declarations;

- 1) A declaration that the Plaintiff and other former employees of the Kenya National Assurance Co. Ltd. (in liquidation) were, in July 1996, public servants to whom the Government had a duty of care to ensure that their terminal dues and pension were paid, within three months or a reasonable period, after Kenya National Assurance Co. Ltd. was forced in liquidation;
- 2) A declaration that the Government of Kenya, through the 1st defendant is under a duty under S. 71 of the Constitution to pay its employees after it terminated their services;
- 3) A declaration that the Plaintiff's right to life under S. 71 of the Constitution includes the right to live in dignity, shelter and protection of one's family and means of livelihood;
- 4) A declaration that the Defendants have jointly and severally contravened the rights of the Plaintiffs and other former employees, of the Kenya National Assurance Co. Ltd. (in liquidation) under S. 71 and 75 of the Constitution to be paid their terminal dues and pensions within a reasonable period;
- 5) A declaration that the rights of the Plaintiffs and other former employees of the Kenya National Assurance Company Limited to be paid their full terminal dues and pension benefits, are property rights within the meaning of S. 75 of the Constitution;
- 6) An order that the Respondents do pay to the 1,059 Applicants Kshs.657,972,532/= being the balance of their terminal dues as of 1st January 2004;
- 7) An order that the Respondents do pay the 1,059 Applicants Kshs.350,105,307/= being the balance of their pension benefits as of 1st January, 2004;
- 8) An order that the Respondents do pay the 1,059 Applicants interest on 6 and 7 above at 16% per annum;
- 9) An order that the Respondent do pay the 1,059 Applicants general damages;
- 10) An order that the Respondents do pay costs of the suit.

The Originating Summons was supported by a 77 paragraphed Affidavit sworn by Anna Wambui Waithaka, the 3rd Applicant herein and a Supplementary Affidavit of Audi Lincoln, Reuben Okusi and Patrick Kimani, the 5th, 6th and 10th Applicants which is not dated but filed in court on 16th October 2006.

In opposition, the following Affidavits have been filed; Affidavit by S.M. Ndisya for the 3rd Defendant dated 17th June 2005; Affidavit by Alice Nzioka dated 22nd September 2005 who filed it on behalf of the 1st and 4th Respondents; that by James Israel Olubayi dated 10th May 2005 and filed in court on 17th June 2005, sworn on behalf of himself and the Official Receiver – the (2nd and 3rd Respondents); Affidavit by Rosemary Atieno Owino, Counsel for the 1st Respondent, dated 22nd September 2005 and lastly an Affidavit by Agnes Ndirangu, General Manager of Kenya National Assurance Company Limited (2001) the 4th Respondent, dated 22nd June 2006 and filed in court on 23rd June 2006.

Dr. Kuria contended that in prayer 6 of the Originating Summons, they seek payment of Kshs.657,972,532/= being the balance of the Applicants terminal dues and that is supported by Mrs. Waithaka's averments in her Affidavit at paragraph 33 that only a portion of their dues were paid. On the contrary Mr. Olubayi in his Affidavit deponed that all benefits were paid and all the other Respondents

have adopted the averments in Mr. Olubayi's Affidavit.

The other fact that is disputed relates to the number of persons on whose behalf the suit is brought. Whereas Mrs. Waithaka indicates that the Originating Summons is brought on behalf of the Applicants and other former employees of Kenya National Assurance Company Limited, the Respondents hold a different view and specifically Agnes Nzioka, in her Affidavit avers that only those who have signed the list are litigants. Other Respondents too have contested the question of representation and Counsel wondered who the court will believe. His view is that the only recourse is the court to have the Deponents cross examined in order to ascertain the truth.

Counsel submitted that he had not come across any authority where evidence was called in such a case but S. 77 (a) of the Constitution guarantees all a fair hearing and that a fair hearing cannot be achieved without cross examination and probing of the other party's case.

Counsel also submitted that this matter was filed under Rule 11 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, Legal Notice No. 133 of 2001 when those Rules were still in operation. The said Rules were revoked by Rule 35 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules Legal Notice No. 6 of 2006 but Rule 36 thereof provides for continuation of any pending matter commenced under the former rules. He said that under the said new Rules (Legal Notice No. 6 of 2006), to enforce fundamental rights a person needs to file a Petition with a supporting Affidavit and a Petition is analogous to an Originating Summons, a plaint or winding up Petition and though there is no specific provision for seeking of viva voce evidence or cross examination, the court has the power to call viva voce evidence or have deponents cross examined. Counsel urged that the court has very wide powers under S. 84 (2) of the Constitution and can even create new remedies. He relied on the case of **WANJUGUNA V R (2004) KLR 520** and **RAMANOOP V A G [2004] I LRC I** where the courts granted remedies that were not specifically provided for under S. 84 of the Constitution or its equivalent. Counsel also relied on Justice Nyamu's ruling in this matter in which the judge ruled that directions should only be given when issues have crystallized and it is Counsel's view that since the parties have not agreed the issues were not clear.

Mr. Munjla in reply opposed the Application by Dr. Kuria for further directions and said that directions in this matter were sought vide Chamber Summons Application dated 21st June 2005 before Justice Nyamu and the parties agreed by consent that this case would proceed by way of Affidavit evidence before a 2 judge bench. On 30th June 2005, leave was granted to both parties to exchange Affidavits and that Agnes Ndirangu swore the Affidavit dated 23rd June 2006 pursuant to that leave and the Applicants have replied to that Affidavit in respect of payments that were made and nothing new has emerged to warrant cross examination or calling of evidence and according to this Counsel, the matters of fact have crystallized.

Mr. Munjla further argued that under Legal Notice No.6 of 2006, the Petition or Originating Summons shall be supported by an Affidavit and Rules 16-18 gives the court power to allow other Affidavits, which clearly shows the intention of the Rules Committee that the Applications brought pursuant to these Rules do proceed on Affidavit evidence. He said that each party had taken a position as to payment of dues and Pension and there is nothing that can change that even in cross examination. Regarding the number of Applicants before the court, Counsel urged that the Applicants can, if they wish, file a list of all Applicants, exhibit their employment and termination letters and if need be ask for time to do so.

As regards the court's power to grant all manner of remedies under S. 84 (2) of the Constitution, Counsel submitted that that can only be done after hearing of the Originating Summons. Counsel added that it is only if directions were given under Order 36 Rule 10 of the Civil Procedure Rules that the Applicants may be deemed to have come by way of plaint and the court may then order adduction of viva voce evidence. He denied that Order 36 R. 9 & 10 of the Civil Procedure Rules specifically provide for adduction of viva voce evidence as this court observed in Misc Application 1732 of 2004 **JAMES JORAM NYAGA V A G.**

Counsel argued that the directions sought will give room to speculation and there is no basis for the Application for directions and it should be disallowed.

Mr. Mwaniki Counsel for 1st and 4th Respondents adopted Mr. Mungla's submissions and added that under S. 84 of the Constitution there is no provision for representative suit save for a person detained on whose behalf such an Application can be brought.

In reply, Dr. Kuria said that the consent order of 22nd September 2005 was no longer relevant as other Affidavits had been filed thereafter and other events had arisen requiring the calling of viva voce evidence.

We have considered Dr. Kuria's submissions on directions and the objections thereto by the Respondents. There is no doubt that the Applicants' Originating Summons was brought under Sections 71,74,75,77,82,84 of the Constitution and under Rule 11 of Legal Notice No. 133 of 2001, the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 which were revoked by Rule 35 of Legal Notice No. 6 of 2006 (the New Rules or Gicheru Rules). Under Rule 36 (1) of the New Rules, any matter currently pending in court under Legal Notice No. 133 of 2001 shall be continued under these Rules. These proceedings are therefore properly before this court by virtue of the above provisions.

Under Legal Notice No.133 of 2001, an Application of this nature would be brought by way of Originating Summons and provisions of Order 36 Civil Procedure Rules would apply. Order 36 Rule 9 provides that on the hearing of the Summons, if the parties do not agree to the correctness and sufficiency of the facts set out in the Summons and affidavit, the judge may order the Summons to be supported by such further evidence as he may deem necessary and may give directions as he deems just for the trial. That sub-rule gives the court an unfettered discretion to make further orders as to evidence be it viva voce or otherwise. Similarly under Order 36 R. 10 there is no reference to viva voce evidence but proceedings started by Originating Summons may proceed as if the case began by way of filing a plaint. Again it is left to the court's discretion on how to proceed and depending on the circumstances of each case the court may or may not order that the case proceeds by way of adducing viva voce evidence.

This is what the court observed in its Ruling in **JAMES JORAM NYAGA V THE HON. THE A.G. Misc Application 1732 of 2004**

Under Legal Notice No. 6 of 2006, Rule 12 provides for the filing of a Petition under Rule 11, which is concerned with breach or threatened breach of fundamental rights under S. 70 to 83 of the Constitution. Under Rule 13, the Petition shall be supported by an Affidavit. Under Rule 14, if one wants to rely on a document, it will be annexed to the supporting Affidavit. Rules 16, 17 and 18, provide for filing of replying Affidavits and further Affidavits in response to or in support of the Petition. There is no mention of viva voce evidence being adduced. Having considered the Applicants submissions, the question is whether there is any provision for viva voce evidence under the new Rules. (Legal Notice No. 6 of 2006).

We do appreciate that under S. 84 (2) of the Constitution this court has wide powers to create and grant remedies in order to do justice to the parties. However this court is not concerned with remedies at this stage but the process of how evidence will be adduced in order to arrive at a determination on the rights of the Applicants and thereafter prescribe which remedy if at all the Applicants will be entitled to. It is premature for Dr. Kuria to invoke S. 84 (2) of the Constitution when seeking directions as to what kind of evidence to be taken, viva voce or Affidavit evidence.

The reason why Counsel for the Applicants wants the Applicants to give viva voce evidence and Respondents to be cross-examined is because the parties have not been able to agree on some facts, i.e whether payment of pension and dues has been fully made by the Respondents. The Applicants filed an Affidavit, stating what their evidence is and replying Affidavits were filed by the Respondents claiming that all sums were paid. That would be normal even in any case that one alleges one thing and the other side alleges the contrary. There is no guarantee that if viva voce evidence is adduced that will change

anything. An Affidavit is a voluntary declaration of facts written down and sworn by the declarant before an officer authorized to administer oaths such as a notary public:- See **Blacks Law Dictionary 8th Ed.** The Affidavits filed are accepted in law as evidence and in our considered view, the Applicants have not raised anything new that require viva voce evidence to be adduced or that the Respondents need to be cross examined on. If there be need for any further evidence the Applicants are free to seek the court's leave to so file.

Directions had been taken that the matter do proceed by way of Affidavit evidence. Though time lapsed before the Respondents filed their replies they did so and the Applicants have filed further Affidavits thereafter. Dr. Kuria has not told the court what more needs to be clarified.

Even if the parties are not in agreement as to the payments or the number of Applicants, that will be left to the court to make its own findings and conclusions from the evidence adduced by way of Affidavits.

From an examination of Rules 11, 12, 13, 14, 16, 17 & 18 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, the intention of the Rules Committee seems to be clear, that proceedings would be by way of Affidavits. Since viva voce evidence is not specifically excluded, we are of the view that the court can call for viva voce evidence but only in exceptional cases where the need arises.

We find that the Applicants have not laid basis for viva voce evidence or cross examination. The matters of fact that Counsel for Applicants wanted clarified can be dealt with by Affidavits. Further, under Rule 32 of the Legal Notice No. 6 of 2006, References and Applications should be heard and determined expeditiously. We believe that is why Affidavit evidence is preferred. Encouraging adduction of evidence would result in unnecessary delays and resorting to proceedings under order 36 Civil Procedure Rules or proceedings by way of plaint which would clog the system and not achieve the intention of the law makers of efficacy and expedience. Dr. Kuria came out clearly that he did not want to proceed under Order 36 Rule 10 of the Civil Procedure Rules.

As regards whether the Applicants who are before the court can be deemed to have brought the suit on behalf of the others who are not before court, we find that under S. 84 (1) of the Constitution, the rights which are allegedly infringed relate to the person who brings the Application or a person who is detained. There seems to be no provision for representative suit. Even if the court were to invoke its inherent jurisdiction, the court has to be moved to do so.

In any event, looking at the prayers sought in the Originating Summons and specifically prayers 6 and 7 it is our view that each applicant would need to prove specifically that he/she was an employee of the Kenya National Assurance Company Limited, what they earned and what their final dues are and if they form part of the specific sums claimed in the Originating Summons. That cannot be done by way of representative suit and in our view, the Applicants before the court cannot represent any others who are not before court.

For the aforesaid reasons we decline to grant the directions sought by the Applicant's Counsel.

We direct that if the Applicants need to clarify any other facts, they may seek leave of court to file other Affidavits to enable them articulate their case.

The Respondents would be given corresponding leave if need be. Otherwise the Originating Summons do proceed as per the earlier directions given by Justice Nyamu that is by way of Affidavit evidence.

Dated and delivered this 24th day of November 2006.

R.P.V. WENDOH

JUDGE

ANYARA EMUKULE

JUDGE