REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 443 of 2003

BEATRICE WANJIKU KARANJA……...…….PLAINTIFF

VERSUS

ELISHA KATAM…….……..…..1ST DEFENDANT

THE CONSERVATION CORPORATION OF KENYA LTD

T/A HOLIDAY INN MAYFAIR COURT HOTEL….2ND DEFENDANT

RULING

The 2nd Defendant/ Applicant seeks an order that the Plaint discloses no cause of action against it and should be struck out. The Application is brought under OVI Rule 13 1 (a) (b) and (d) but is supported by an affidavit sworn by the Financial Controller of the 2nd Defendant.

No evidence can be adduced to support an application under OVI rule 1 (a) (See OVI r 2) and l therefore disallow the supporting affidavit and ignore it.

In order to succeed the Applicant must show that on the face of it the Plaint discloses no cause of action. See **D.T Dobie Company (Kenya) ltd Vs Joseph Mwaura Macharia & Leah Wanjiku CA No 37 of 1978 where** Madan JA (as he then was) cited with approval a passage from the case of **Wenlock Vs Halogen & Another (1965) 1 WLR p** 1238 in which Sellers LJ stated as follows:

> **"That the summary jurisdiction of the court to strike out pleadings was never intended to be exercised by a minute and protracted examination of documents and the facts of the case…….To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way."**

The Plaintiff in this case was employed by the 2nd Defendant and she alleges that she was sexually harassed by the 1st Defendant who was also employed by the 2nd Defendant. The Plaintiff alleges that the 2nd Defendant is liable to her in respect of the matters set out in paragraphs 8, 9, 10, 11 and 12 of the Plaint.

The causes of action relied on by the Plaintiff are that:

1. The acts of assault and harassment were done by the 1st Defendant in the course of his employment as a manager with the 2nd Defendant.

2. The 2nd Defendant (wrongfully referred to Paragraph 9 as the 1st Defendant) was under a duty

and /or obligation to provide an environment where the Plaintiff would not be harassed, intimidated and discriminated against.

3. That having reported the 1st Defendant's behavior to the 2nd Defendant, the 2nd Defendant failed to investigate or deal with the complaint and that in doing so it failed in its duty to the Plaintiff.

4. That by failing to provide an enabling working environment the Plaintiff's rights as a human being were violated and as result she suffered damage.

Mr. Obura submitted that as a result of the doctrine of Common Employment the acts of one employer to another cannot render the employer liable for such acts. He relied on **Nawiundu Vs A.G (1972) E.A p 108** in which Salamba J cited with approval a passage from **Salmond on Torts 15 Edn at Page 620** where it is states:

It is clear that the master is responsible for acts actually authorized by him for liability won't exist in this case even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modelsalthough models of doing them.

In other words, a master is responsible not only for what he authorizes his servant to do, but also for the way in which he does it.

If a servant does negligently that which he was authorized to do carefully or if he does fraudulently that which he was authorized to do honestly, or if he does mistakenly that which he was authorized to do correctly, his master, will answer for that negligence, fraud or mistake.

On the other hand, if the unauthorized and wrongful act of the servant is not connected with the authorized act as to be a mode of doing, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside it.

He can no longer be said to be doing although in a wrong and unauthorized way what he was authorized to do. He is doing what he was not authorized to do at all.

Mrs. Thongori in reply submitted the doctrine of Common Employment was refined by the Employers Liability Act 1888 of England where in clause 1 it is stated as follows:

Where after the commencement of this Act personal injury is caused to a workman:

1. By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer.

2. By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

3. By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed.

4. By reason of the act or omission of any person in the service of the employer done or made in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ;

5. By reason of the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive engine or train upon a railway,

The workman, or in case the injury results in death, the legal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

I agree with her that this is an Act of General Application and as such applies in Kenya. Having said that as we know the doctrine of Common Employment was abolished in England in 1945. Whether that doctrine is still compatible with the law in Kenya as laid down in the Judicature Act is a matter for consideration by the courts.

At this stage l am not required to determine whether the Plaintiff will succeed in her suit or not but to examine the pleadings in this case the Plaint, to determine whether there is an arguable, and reasonable cause disclosed.

In my view although it may raise somewhat novel matters, l think that it would be wrong for me to strike out parts of the Plaint which relate to the 2nd Defendant.

In the result l am of the view that arguable matters have been raised and as such dismiss the application with costs to the respondents.

DATED and DELIVERED at NAIROBI on 22nd February 2005.

P.J RANSLEY

JUDGE