



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 565 OF 2004

DR. JOSEPH NATHANIEL KIPRUTO

ARAP NG'OK.....PLAINTIFF/APPLICANT

VERSUS

HON. THE ATTORNEY-GENERAL1ST DEFENDANT/RESPONDENT

INVESTMENT PROMOTION CENTER.....2ND DEFENDANT/RESPONDENT

RULING

1. The Application and the Prayers

The plaintiff's application by way of Chamber Summons, dated and filed on 20th September, 2004 was brought under Order VI, rule 13(1)(a),(b) and (d), Order IXA, rules 5 and 7 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap. 21). The application makes the following prayers:

- (i) that, the defendants' defence and counterclaim as filed be struck out for being scandalous, frivolous and vexatious and otherwise an abuse of the process of the Court;
- (ii) that, in the alternative and without prejudice to the first prayer, the defence as filed be struck out on grounds that the 2nd defendant has not entered appearance as required under Order IX, rules 2 and 5 of the Civil Procedure Rules;
- (iii) that, the Court do grant leave to enter judgement for non-appearance and default of defence against the 2nd defendant;
- (iv) that, the costs of this application be provided for. The application is premised on several grounds, one being that while the 1st defendant did file, on 23rd June, 2004 a memorandum of appearance dated 18th June, 2004 the 2nd defendant has not entered appearance. Secondly, after entering appearance on 23rd June, 2004 the 1st defendant failed to file a statement of defence. Thirdly, it is stated that the Attorney-General lacks locus standi to file pleadings on behalf of the 2nd defendant. It is stated, fourthly, that the appearance by the Attorney-General on behalf of the 2nd defendant is improper, and offends against section 3(2)(b) of the State Corporations Act (Cap. 446) and section 3(3) of the Investment Promotion Centre Act (Cap. 485), as the 2nd defendant is capable of suing and being sued in its own name and is expected to instruct an advocate to represent it in Court. Fifthly it is stated that, as between the plaintiff and the 2nd defendant, the defence filed is an abuse of Court process. It is stated, sixthly, that the 2nd defendant has, in the circumstances, no defence in law.

2. The Evidence

The plaintiff swore an affidavit on 20th September, 2004 as the evidence in support of the application. He avers that the 1st defendant did enter appearance on 23rd June, 2004 and subsequently a defence and counterclaim was filed by the Attorney-General's Chambers on behalf of both the 1st and 2nd defendants. The deponent believes the advice received from his advocates, M/s. Waruhiu K'Owade & Ng'ang'a Advocates, that the appearance by the Attorney-General on behalf of the 2nd defendant is improper and offends the provisions of section 3(2) (b) of the State Corporations Act (Cap. 446) and section 3 of the Investment Promotion Centre Act (Cap. 485), as the 2nd defendant is a corporation and capable of suing and being sued in that capacity, and therefore capable also of instructing an advocate to represent it. The deponent believes that the Attorney-General is empowered by law to represent the Government in any proceedings, but cannot represent a public corporation such as the 2nd defendant. He further depones that the 2nd defendant has missed a vital step in the trial process, namely entry of appearance.

From the Court record, it is clear that the defendants elected not to file any depositions to address the factual material placed before the Court by the plaintiff. This, firstly, suggests that the defendants concede to the veracity of the depositions of the plaintiff, and secondly, indicates that the defendants have chosen to contest the plaintiff's application only by arguing points of law. The only evidentiary material, therefore, which the defendants can address in this matter is that which has emanated from the plaintiff; for they do not have their own.

3. Submissions by Counsel

Hearing of the plaintiff's application took place on 25th November, 2004 and on both occasions **Mr. K'Owade** represented the plaintiff while **Ms. Gathagu** came to represent both the 1st and the 2nd defendants.

Learned counsel, **Mr. K'Owade** submitted that it was not tenable that the Attorney-General should represent an independent body corporate such as the 2nd defendant, and that he could only lawfully appear in Court in respect of matters brought under the Government Proceedings Act (Cap. 40), and the suit herein did not fall in that category. Counsel submitted that the Attorney-General had wrongfully purported, in the suit herein, to file a defence for the 2nd defendant, and that such a defence could not be allowed to stand and to proceed to trial.

Mr. K'Owade referred the Court to persuasive authority in the High Court decision, **The Attorney-General v. Kenya Commercial Bank Ltd**, HCCC No. 329 of 2001. In that case the Attorney-General purported to institute legal proceedings on behalf of the National Irrigation Board, a statutory body established under the Irrigation Act (Cap. 347); and he purported to do so by virtue of the Government Proceedings Act (Cap. 40). Several passages in the ruling of **Mr. Justice Ringera** in that case may be quoted:

(i) "Indeed to accept the submissions of the Attorney-General to the contrary would be tantamount to judicial amendment of the clear words of section 3(1) of the Irrigation Act which provide that the Irrigation Board shall be a body corporate having perpetual succession and a common seal, with power to sue and be sued, and doing all things necessary for the proper performance of its duties and the discharge of its functions under the Act. Such a naked usurpation of the legislative function does not appeal to me. I think it is a temptation to be firmly resisted."

(ii) "All in all, I think the Attorney-General's institution of a suit for and on behalf of the National Irrigation Board which is a body corporate with power to sue and be sued in its own name is a legal misadventure. It is an action without [a] juridical basis. The Attorney-General has no locus standi to do so and consequently the plaint filed herein discloses no cause of action against the defendant. I order that the same be struck out with costs to the defendant."

Applying those principles to the present matter, learned counsel submitted that the Government Proceedings Act (Cap.40) creates no locus standi for the Attorney-General to defend the Investment Promotion Centre (2nd defendant). It was submitted that the 2nd defendant has its corporate seal and stands entirely on its own as a juristic person, in the litigation process. At all material times, counsel submitted, the plaintiff was the chief executive of the Investment Promotion Centre; and a Managing Director in those circumstances, upon appointment, ceased to be a civil servant, and his terms of service are regulated under the governing statute. Such legislative arrangement, counsel argued, was deliberately made, and the Court could not usurp the legislative function.

Relying on another decision of this Court, *Amira (K) Ltd v. National Irrigation Board* [2001] 2 E.A. 323 (HCK), counsel submitted that even though the 2nd defendant was charged with public functions, this by no means made it part of the Government for the purposes of the Government Proceedings Act (Cap.40). Mr. Justice Mwera in that ruling held (p.335):

“The argument, persuasively as it was put, does not commend itself to this Court. In its view the defendant board is a body corporate and as it discharges public functions of government it is not the government in the larger context... It is a specific entity clearly set out and able to sue or be sued. It can enter into contracts and hold property etc.”

Learned counsel, Ms. Gathagu who made her submissions on 24th February, 2005 started from the grounds of objection drawn by the Attorney-General's Office on 16th November, 2004 and filed on 18th November, 2004. The objections are listed as three items: (a) that the application is incompetent and an abuse of the process of the Court; (b) that the 2nd defendant has duly entered appearance and filed a defence and so the application has no merits; and (c) that the 2nd defendant is legally and properly being represented by the Attorney-General.

Ms. Gathagu submitted that the Attorney-General had properly appeared on behalf of the 2nd defendant because the Government had an interest in the subject-matter of the litigation. What was the nature of this Government interest? It was, according to learned counsel, the fact that the plaintiff, who had been the chief executive of the 2nd defendant and was claiming the sum of Kshs.12,961,566/= for wrongful termination of service, would be making a large claim on Government funds; and thus Government interest was spectacularly manifested in this matter. On that account, in the words of counsel, “the Attorney-General has come in and offered legal counsel to the 2nd defendant who is a state corporation.” She noted that the Attorney-General had filed a memorandum of appearance on behalf of himself and of the 2nd defendant. From the Court records, however, the memorandum of appearance filed by the Attorney-General's office on 23rd June, 2004 is clearly expressed to have been “entered...on behalf of the 1st defendant,” and there is no mention of the 2nd defendant.

Counsel also said that the Attorney-General had on 21st July, 2004 filed a defence and counterclaim on behalf of the 2nd defendant.

Now although the instant application is concerned with preliminary issues of law, and it is the same that had featured in the defendants' grounds of objection, learned counsel for the defendants stretched her submissions to the point of asserting that the plaintiff's contract had expired and he was not unlawfully dismissed; that he had been paid all his dues, etc; but this was improper as firstly it was addressing issues of merit in the pleadings themselves; and counsel was now, in effect, giving evidence from the Bar. As already stated, it is to be taken that counsel for the defendants did elect to address only matters of law, since no replying affidavit had been filed.

Ms. Gathagu submitted that under s.34 of the Government Proceedings Act (Cap. 40) it was provided that no provision of the Act would qualify the Government's rights to intervene in proceedings that affect its rights, its property, or its profits. These elements, counsel argued, would in the instant case be jeopardised if the Attorney-General's office did not come in to represent the interests of the Government. She cited the East African Court of Appeal decision in *Chief Nehemia Gotonga v. Stephen Kinyanjui* [1959] E.A. 1096 to support the proposition that the Attorney-General was mandated to appear in these proceedings on behalf of a state corporation. Counsel sought to rely on that authority as upholding the contention that

the Attorney-General is perfectly free to intervene in any legal proceedings at all if he considers that the Government's interests will thereby be affected, however remotely. That case, with due respect, restates old practices of the English Courts which have not clearly been reflected in recent decisions in East Africa. The Chief Nehemia Gotonga case, for instance, adopts the principle in *R v. Archbishop of Canterbury* [1903] 1 K.B. 289. At pages 295 – 296 in that decision, Romer, LJ thus stated:

“It appears to me that when the Crown for good and sufficient reasons thinks it is for its interests that the defence of an individual, in an action or proceeding against him, should be undertaken, and the treasury solicitor is delegated by the treasury authorities to act as solicitor for that individual, that is within the rights of the Crown, and is within the purview of the ordinary duties of the solicitor.”

On the same lines, Gould, J.A. in the Chief Nehemia Gotonga case [1959] E.A. at p. 1100 stated:

“It does not follow that in such an action the attorney-general is necessarily entitled to the relief claimed...but his right to bring the action cannot be challenged. Similarly, in my opinion, it is entirely within the administrative discretion of the attorney-general to decide whether it is in the interest of the crown that it should provide legal representation for a particular litigant. That decision having been taken and Mr. Rumbold instructed to appear, he is clearly acting in a cause or matter within the scope of his official duties and has the right of audience.”

On these principles, learned counsel for the defendants submitted that it was entirely the responsibility of the Attorney-General to decide that the Government's interests were affected in such a manner as to require his provision of legal services to any party, private or public.

Ms. Gathagu doubted whether the case *The Attorney-General v. Kenya Commercial Bank Ltd*, HCCC No. 329 of 2001 was truly in support of the applicant's case. She thought that the words of Mr. Justice Ringera at pages 5, 7 and 8 of the ruling were more in support of the defendants' case. This, however, is doubtful. At page 7 the learned Judge remarked (clearly against the defendants' position):

“I also accept the broad proposition that the Board's property, including the property in question, is public property considering that the Board is partly financed by public funds. However, I am unable to accept and do reject the submissions on behalf of the Attorney-General that because the Board is subject to the general and special directions of the Minister and its raising of funds and any borrowing is subject to ministerial approval, its corporate status and the attendant power to sue and be sued in its own name is any the less diluted. Nor do I accept the submission that because the Board's property is public property and the Board itself is a public body, the Attorney-General can purport to step into its shoes and sue for and on its behalf as he purports to do here.”

Learned counsel Ms. Gathagu urged that the discretionary power of Court to strike out pleadings be exercised only very sparingly, citing in support this Court's ruling (Ringera, J – as he then was) in *Trust Bank Ltd v. Ajay Shah & 8 Others*, HCCC No. 103 of 2001 in which he attempted to define some of the conditions which would justify the striking out of a plaint. It might be struck out, for instance, where it is frivolous and vexatious — meaning, lacking in seriousness and tending to annoy. She submitted that the defence and counterclaim were not frivolous and vexatious, and thus did not merit being struck out.

Learned counsel, Mr. K'OWade in response submitted that the merits of the instant application and of the opposition thereto, is to be judged in the first place from the design of the Investment Promotion Centre Act (Cap. 485). This Act, which constituted the 2nd defendant a corporate body is specific to the 2nd defendant and hence the 2nd defendant was not set up under the more general State Corporations Act (Cap.446). The purpose of the Investment Promotion Centre Act was to define the 2nd defendant's identity and to repose in it special corporate empowerment; and this precluded the intervention on its behalf of the Attorney-General, as legal representative.

4. Further Analysis, and Orders

In the foregoing review of evidence and submissions, my line of conviction as to the appropriate outcome in this matter has, I believe, already taken shape. I have not been convinced by the old authorities cited by counsel for the defendants, tending to show that the Attorney-General, who is appointed under the Constitution as the Government's chief legal advisor, has an unfettered discretion to provide legal services to all-and-sundry, provided only that in his reckoning a particular suit has some kind of impact on Government interests.

That is an extravagant proposition and would result in considerable waste of Government resources. I have also not been convinced that notwithstanding the statutorily-defined corporate status of the 2nd defendant, its funds and resources are still considered as so mixed with those of the Government, that when its autonomous management plans for those resources and disposes of the same, the Government must keep watch and assert protection over such resources. That would be contrary to essential rules and principles that define corporate personality. It is therefore, not at all tenable that the Attorney-General may intrude into the management of corporate litigation by the 2nd defendant, in the name of the Government. I am in complete agreement, in this regard, with the perspicacious ruling of Mr. Justice Ringera in *The Attorney-General v. Kenya Commercial Bank Ltd*, HCCC No. 329 of 2001.

It follows that the claim that the Hon. The Attorney-General had entered appearance and filed a defence on behalf of both defendants, would have no legal standing; and those steps in the litigation process, if they were indeed taken, must be regarded as a nullity, at least as far as the 2nd defendant is concerned. The legal position, as I must hold, is that the 2nd defendant did not enter appearance and did not file a defence, following the filing of suit by the plaintiff on 2nd June, 2004.

Learned counsel, Ms. Gathagu, submitted that under s.34 of the Government Proceedings Act (Cap.40), no provision of that Act may qualify the Government's rights to intervene in proceedings that affect its rights, its property, its profits. Now, who is to decide which matters affect those elements ascribed to the Government? The determination of that question must not be based on fanciful criteria but must have a tangible basis. From the forgoing analysis, I can only conclude that the Government's rights, interest, property or profits are not directly affected by the commitments such as may be incurred, under the management of the relevant statutory board, by the 2nd defendant as an autonomous juristic entity. In this respect I would not, with respect, accept learned counsel's submission.

There are, therefore, fundamental considerations of law, which lead me to determine this application in favour of the plaintiff, and against the defendants. I will make the following specific Orders:

- (a) The defence filed in the suit herein shall be struck out as the 2nd defendant has not entered appearance as required under Order IX rules 2 and 5 of the Civil procedure Rules.
- (b) Leave is hereby granted for judgement to be entered against the 2nd defendant for nonappearance and for default in filing a statement of defence; and I hereby enter judgement accordingly. (c) The costs of this application shall be borne jointly and severally by the defendants.

DATED and DELIVERED at Nairobi this 15th day of April, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. K'Owade, instructed by M/s. Waruhiu K'Owade & Ng'ang'a

Advocates

For the Defendants: Ms. Gathagu, instructed by the Hon. The Attorney-General.