REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 548 OF 1995

W.O. 1 SAMUEL CHEGE GITAU & 23 OTHERS……PLAINTIFFS

-VERSUS-

THE ATTORNEY-GENERAL……DEFENDANT

- AND -

1. WATSON MICHENI M'NKUENE …….…. APPLICANT

2. JOSEPH GACHURU CHEGE …….…. APPLICANT

3. RAPHAEL VICTOR OTIENO …….…..... APPLICANT

4. JULIUS SIDANDE SEDA ……..... APPLICANT

5. AGGREY MUDI MUGANZI…….....….APPLICANT

6. PHILIP MUSYOKA KITUKU …….....….APPLICANT

7. MARTIN NAKWANGA OGUTU …..……..….APPLICANT

8. SAMUEL AGUI SAMOEI …….....APPLICANT

9. SIMON KIPROP BOOR ….....…….APPLICANT

10. JOHN KILITSA OVODOI …….....….APPLICANT

11. ZERUBBABEL MUTUA MUTHOKA ....…..APPLICANT

12. JAMES NDARERA NYARIOGI …..…….APPLICANT

13. PETER MOBEGI MOSETI …….....…….APPLICANT

14. JUSTUS MUSYIMI FUNDI …….....….APPLICANT

15. JOSEPH MWANIKI GAKUNJU….....….APPLICANT

16. GASPER OCHIENG AMOLO ….....…….APPLICANT

17. SHEM ONZERE LOVON …….....APPLICANT

18. EDWIN OTIENO JOSEPH …….....APPLICANT

19. CALVIN OKEYO OGUTU …….....….APPLICANT

20. LIVINGSTONE KIVISI MUDEMBE …....….APPLICANT

21. DAVID MWANGI KIBUGI …….....….APPLICANT

22. VINCENT ANDREW OMONDI …….....….APPLICANT

23. PETER MULWA …….....…….APPLICANT

24. JAMES MULIMA .....…….APPLICANT

25. PATRIC MURIGU …….....….APPLICANT

26. ROBERT CHELUGO MINIGWO ……...….APPLICANT

27. MICHAEL WAMAMBA AGANDI .....…….APPLICANT

28. BARRACK OGADA …….....APPLICANT

29. STANLEY NJOGU NGARUIYA ……...…….APPLICANT

30. ALBERT MALEYA …….....APPLICANT

31. IBRAHIM MOTURI RASUGU …….....APPLICANT

32. TITUS NJIRUI MICHAEL MACHARIA …….APPLICANT

33. MICHAEL KINYANJUI …….....…….APPLICANT

34. PETER MATHINA MBITHI …….....…….APPLICANT

35. L.R. NGURE …….....APPLICANT

36. ANTHONY NDIANGUI WAIGANJO.…….APPLICANT

37. WILFRED WAITIKI GAKURE ….....…….APPLICANT

38. DAVID MWANGI KIBUGE …….....…….APPLICANT

39. MWAO ONGARO ASUOYA …….....…….APPLICANT

40. JACKSON MANYONYI KEDENI …….APPLICANT

41. MICHAEL MOMANYI GISORE ……...…….APPLICANT

42. JACOB OMWENGA ONSONGO …….APPLICANT

43. KINYEWA WAINAINA …….....…….APPLICANT

44. MOSES OFULA AGUNDA …….....…….APPLICANT

45. SHADRACK OBUYA MUKANDA ....…….APPLICANT

46. JACK HAMILTON MBAI …….....….APPLICANT

47. EZEKIEL OUNO OBUDO ….....…….APPLICANT

48. JOSHUA KISILU …….....….APPLICANT

49. TITUS MUSYOKA DANIEL ….....…….APPLICANT

50. JILLO TADICHA JARSO …….....…….APPLICANT

51. JOSEPH MURIMI MATHENGE …..….…….APPLICANT

52. FREDRICK B. ABAKALLA …….....…….APPLICANT

53. PATRICK OMBUNA …….....….….APPLICANT

54. STEPHEN ODIE ORIANG …….....….….APPLICANT

55. MICHAEL JOHN KIARIE …….....….….APPLICANT

56. SALAVIUS NKONGE MUCHIRI ……..….….APPLICANT

57. JOHN OTIENO OPAM …….....APPLICANT

58. BENSON MUSANGA RAWIT …….....…….APPLICANT

RULING

A. APPLICATION, PRAYERS, DEPOSITONS

The applicants moved the Court by Chamber Summons dated 27th January, 2005 and filed on 28th January, 2005, brought under Order I, rules 10 (2) and 22 of the Civil Procedure Rules, and sections 3A and 63(e) of the Civil Procedure Act (Cap. 21) They were seeking leave to be enjoined in the suit as co-plaintiffs. This application was premised on the following grounds:

> (i) that, the applicants were at all material times to this suit servicemen and officers of the Kenya Air Force, just like the plaintiffs;
>
> (ii) that, the applicants' claims are identical to those of the plaintiffs, in all material respects;
>
> (iii) that, it is in the interest of justice to avoid a multiplicity of suits and decisions, hence the need to enjoin the applicants in this suit;
>
> (iv) that, the applicants were illegally deprived of their employment and benefits of 82 Air Force in breach of the Armed Forces Act (Cap. 199);
>
> (v) that, the applicants were illegally detained, tortured and did sustain permanent injuries and on that account are entitled to compensation;
>
> (vi) that, the applicants' constitutional rights were breached with impunity, and justice demanded that they be accorded a hearing.

Justus Musyimi Fundi, the 14th applicant swore a supporting affidavit on 27th January, 2005 in which he avers, in summary, as follows. He is one of the applicants, and is expressly authorised to make depositions on behalf of his co-applicants. All the applicants were servicemen and officers of the Kenya Air Force at all material times to this suit. All the co-applicants were arrested and detained for long

periods, and during detention each was subjected to inhumane, degrading treatment. The applicants were subjected to termination of service and they were denied their terminal benefits. Each of the applicants was required to report to his local Location Chief once every week. Following their arrest, each of the applicants had his home subjected to trespassory entry and vandalism. The deponent prays for a hearing before the High Court as a Court endowed with inherent and unlimited jurisdiction. The deponent makes the prayer to be enjoined in the proceedings as plaintiff.

The application is opposed by the original 24 plaintiffs. In the replying affidavit of one of them, ***Major J.N. Irungu*** dated 4th February, 2005 it is deponed that the original suit was filed in 1995 and, within its framework, several applications have been heard and determined. The last orders were those made by the ***Honourable Justice Ransley***, and they carried the effect that the suit be heard and determined by 30th April, 2005 failing which the suit would stand dismissed. The deponent avers that the intended co-plaintiffs have not consulted the current plaintiffs and obtained their consent to joinder of new plaintiffs.

Opposition to the instant application has been lodged, too, by the office of the Attorney-General, dated 9th February, 2005. It is asserted that the intended claimants are guilty of laches; that their claim is statute-barred; that the intended claimants have not complied with the provisions of the Government Proceedings Act (Cap. 40); that the application as filed is incompetent, frivolous, and an abuse of the process of the Court. Some of those objections are repeated by the original plaintiffs, in their grounds of opposition of 11th February, 2005.

B. SEEKING JOINDER OF MORE PLAINTIFFS: APPLICANTS' CASE

Mr. Agina for the applicants stated that the applicants were seeking to be enjoined as plaintiffs in good time before the trial of the suit begins, and that the Court has already stated that the suit was at risk of being dismissed if it did not proceed to hearing without delay.

Mr. Agina submitted that as the applicants' claims were identical to those of the original plaintiffs, joinder would serve the purpose of preventing the filing of a multiplicity of suits. He urged that the applicants had been subjected to a violation of their constitutional rights, and so justice dictated that their grievances be heard; and that this was the opportunity to secure that hearing. Counsel contended that grant of joinder as requested, would in no way delay or interfere with the hearing of the suit as originally filed.

Learned counsel submitted that the current suit and the intended joinder, both sought declaratory orders based on the Constitution; and constitutional grievances had no time-limits under the Limitation of Actions Act (Cap. 22) or any other law. He submitted that since the suit had been commenced in 1995 and was now pending in Court, no further notices to institute suit would be necessary; and hence the application for joinder was in order in every respect.

C. CONTESTING JOINDER: RESPONDENTS' CASE

Learned counsel, ***Mr. Kamau,*** disputed the contention made for the applicants that the original suit was seeking declaratory orders under the Constitution; and submitted that the applicants ought to have sought the empanelling of a Constitutional Bench if they have claims which turn on the Constitution.

The point being urged was that the applicants, rather than pursue their constitutional case by a different method, were, in the words of counsel, "now hijacking a civil suit."

Counsel also contended that the claim by the applicants was statute-barred under the Public Authorities Limitation Act (Cap. 39), by which a tort case must be filed within one year of the matter said to constitute the tort; and a contract case must be filed within three years of the act said to constitute a breach thereof. Counsel contended that as the applicants were members of the Air Force upto 1982, time began to run then, and so in 1985 the claims became statute-barred, and the applicants had not sought an extension of the limitation period and had only come before the Court some 20 years later. Counsel

contended that his clients' case was in contract and tort, and no prayers for constitutional reliefs were involved. He submitted that the applicants were, in effect, using the backdoor to join in litigation the doors to which closed 20 years ago. In that period, ***Mr. Kamau*** urged, many things would have happened such as would undermine the basis for a fair trial at the instance of the applicants; for instance, relevant documents would have disappeared.

Learned counsel cited in support of his submission the case of ***Thuranira Karauri v. Agnes Ncheche,*** Civil Appeal No. 192 of 1996. That case related to a road accident said to have happened on 6th November, 1988. The tort claim was filed on 24th November, 1994. The relationship between the delay and the question of jurisdiction was the main issue before the Court of Appeal, which stated:

> **"As the issue of limitation goes to jurisdiction, we shall deal with it first. The plaintiff's answer to the defendant's plea that the claim was time-barred was that she had obtained the necessary extension from the superior Court. She did not produce any such order and none was shown either to the Judge or to the counsel for the defence. We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction. The order for extension, if indeed obtained, as alleged, should have been served on the defendant with the plaint. And since it was not, the plaintiff's advocate was under a duty to prove its existence as part of the plaintiff's case at the trial. Since this was not done, the defence of limitation raised by the defendant in his defence stood, and the plaintiff should have been nonsuited forever. In view of this failure, the plaintiff's suit was incompetent and should have been struck out."**

The final outcome was as follows:

> **"In the final analysis, the appeal succeeds and is allowed. We set aside the judgement and decree of the superior Court, and in view of our finding that the claim was time-barred, which rendered the suit incompetent, we substitute an order striking out the plaintiff's suit with costs to the defendant. The defendant will also have the costs of this appeal."**

Learned counsel also submitted that the applicants had not complied with the mandatory provisions of the Government Proceedings Act (Cap. 40). Section 13A (which was inserted by Act No. 5 of 1974) thus provides:

> **"(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings."**

Counsel stated that he had been served with notice to the Government only on 3rd February, 2005 and this hearing was taking place on 23rd February, 2005 and hence there had been no 30 clear days' notice to the Government as required under s. 13A(i) of the Act. This argument was sought to be validated by the case ***James K. Mwamba and 2 Others v. The Commissioner of Lands & 2 Others*** HCCC No. 2106 of 1996. It had in that case been held:

> **"It is quite clear that the plaintiffs failed to comply with the notice requirement before filing suit, as provided for by section 136(2) of the Government Lands Act (Cap. 280). On this ground alone I would hold the suit to be incompetent. But in addition, the suit did not comply with the terms of Section 3(2) of the Public Authorities Limitation Act (Cap. 39), and therefore it was a nullity."**

Counsel submitted that the required notice under section 13A(1) of the Government Proceedings Act is

to be brought one month before the suit is commenced.

Learned counsel submitted that the applicants were, besides, disqualified by their long delay, and the application of ***laches*** in equity. Since the applicants had waited for 20 years to make their claim, equity could not come in aid of their case, it was urged.

Learned counsel, ***Mr. Mussilli*** for the respondents opposed the application on the ground that it would prejudice the position of the respondents. He stated that the suit had, after some ten years, now belatedly got to the hearing stage; and so long as the present application remained undetermined, it would not be possible to hear and dispose of the original suit. Such further delay was objected to because, according to the deponent on the side of the respondents, they had not been consulted by the applicants and they had given no consent. Counsel said: "*had they consulted us, things would have been different."* Such a submission, I think, would suggest that all that was being demanded was the *courtesy* of appropriate consultations with the plaintiffs, before getting on board their train.

Yet at the same time ***Mr. Mussilli*** urged the conceptual point that there was a difference between *constitutional reference* and civil suit, submitting that the suit in process is a *civil suit*, which the plaintiffs had opted for in place of constitutional reference. He urged that the applicants seek recourse to constitutional reference which did not have a limitation period.

Mr. Osoro further supported the position taken by the two other counsel for the respondents. Counsel expressed the plaintiffs' apprehension that enjoining the applicants as co-plaintiffs would *give reason to the State to raise preliminary objections*, which would cause further delay in the hearing and determination of the plaintiffs' case; and one of such objections could be that the plaintiffs had not served notice of intention to sue as required under s. 13A(1) of the Government Proceedings Act (Cap. 40). Counsel submitted that the Attorney-General would also need to file a defence against the case of the applicants as new plaintiffs. Learned counsel urged that the applicants were not entirely without a remedy; they should serve proper notices on the Attorney-General, and then seek leave to file and serve their suit separately; *if at that stage the present suit has not been heard, then they can seek consolidation*. I take it that such a submission indicates a concession on the part of learned counsel, ***Mr. Osoro,*** that there is *no serious objection in principle*, to the applicants' desire to be enjoined as co-plaintiffs.

Mr. Osoro considered that the applicants had, over the years, been indolent and had slept on their rights, and the price of this indolence should not be imposed on the plaintiffs' case, as it would become an encumbrance on motions for disposal. Should the applicants be allowed to be enjoined as co-plaintiffs, learned counsel submitted, the suit would be delayed, as it would have to go backwards to the step of framing of issues; and such a delayed process might accord the defendant a chance to seek leave to amend the statement of defence – which would cause more loss of time.

Mr. Murage expressed his agreement with other counsel for the plaintiffs, and doubted whether the application had been properly brought under Order I, rule 10(2). Although the application claims to be brought on behalf of 58 persons, and that the supporting affidavit is sworn in that behalf by one of the applicants, ***Justus Musyimi Fundi***, there was no written authority whereby the deponent would have acquired due authority.

All counsel for the respondents (the plaintiffs) prayed that the application be struck out with costs, for want of merit.

D. APPLICANTS' CASE AGAIN — REPLY

Mr. Agina in his reply stated that the last amendment of the plaint had taken place on ***4th June, 2004***; and that the prayers in the amended plaint were seeking a *declaration*. He was of the view that the original claim, as amended by amended plaint, had nothing to do with contract or tort. In counsel's words, "if the plaint could be amended in June, 2004, what makes it difficult for further amendments to be made, [in 2005], incorporating the applicants in the suit?

Learned counsel submitted that there was no need for written authority for representation, since all the applicants wanted to come into the suit by themselves. Counsel argued that a joinder as co-plaintiffs as proposed would avert the mischief of running a multiplicity of suits.

Mr. Agina disputed the contention that the applicants ought to go before a Constitutional Bench. Such a Bench, counsel contended, was a purely administrative arrangement which should not condition the manner in which the applicants chose to seek fulfilment of their legal rights. He stated that there was no concrete evidence of delay that would be occasioned if the applicants were joined in as plaintiffs.

On the requirement for notice to the Attorney-General under s.13A of the Government Proceedings Act (Cap. 40), ***Mr. Agina*** submitted that such notice was required where a new suit was being instituted, but not where more persons were joining an existing suit as parties. Consequently, counsel urged, section 13A of the Government Proceedings Act had no application.

E. ANALYSIS OF THE SUBMISSIONS — AND FINDINGS

The record shows that the suit, dated 21st February, 1995 was filed on even date. The plaint was amended on 29th September, 2000 and further amended on 27th April, 2001; and amended yet again on 4th June, 2004.

The basis of claims in the plaint is set out in paragraphs 5, 6 and 7 of the re-amended plaint of 4th June, 2004 — particularly in paragraph 6 which reads:

> "The plaintiffs aver that the commanding officer of the said so-called "82 Air Force" had no power or jurisdiction to discipline, dismiss, discharge, terminate and/or to take any enforceable action against the servicemen contracted for service by the Air Force (hereinafter known as KAF) as constituted by the Armed Forces Act, Cap. 199, Laws of Kenya".

Considering that this is the background to all the claims of unlawful dismissal, denial of retirement benefits, loss of terminal benefits, loss of privileges, denial of severance benefits, denial of pension, etc which mark practically all of the claims by the scoresome plaintiffs, I would not agree with learned counsel who have maintained that the suit is concerned purely with *contracts* and *torts*. The foundation of the claims is *lack of jurisdiction and violations of statutory safeguards for employees of the armed forces*. I would entertain no doubts at all that such claims are, at a general level, *public law claims*, which must be seen as belonging to the categories of *constitutional law and administrative law*. Quite contrary to the position taken by counsel for the plaintiffs, a determination of the specific claims in the plaint must start with *declarations of a constitutional nature*. Unless such declarations are made, the pleadings on file may not facilitate effective proof of the *employment issues* which are presented as the proximate grounds for damages.

It means, therefore, and with much respect, that the contention of counsel that the limitation periods for torts and contracts, as specified in section 3 of the Public Authorities Limitation Act (Cap. 39), is not well-founded in law; and that the position of counsel for the applicants is preferable.

Several learned counsel for the respondents contended that the applicants had acted in bad faith, after failing to meet the terms of the limitation periods, by seeking a joy-ride on a suit process founded on contract and tort; they urged the applicants to start a new process based on *constitutional reference*. Such a submission, with much respect, has no basis, as I have already found and held that the foundation of the existing suit is constitutional and not contractual or tortious. This, of course, would point in the direction of joinder as prayed for by the applicants, as the correct way to go.

It was argued for the plaintiffs that the intending co-plaintiffs (the applicants) ought to give one month's notice to the Attorney-General of their intended suit by section 13A of the Government Proceedings Act. In a normal situation, I think, such an argument would have been upheld, as has been done in other cases: see ***Thuranira Karauri v. Agnes Ncheche,*** Civil Appeal No. 192 of 1996; ***James Mwamba and 2***

Others v. The Commissioner for Lands and 2 Others HCCC No. 2106 of 1996. I have found much merit in the argument of ***Mr. Agina*** for the applicants, that there would be no need for such notice here, since a suit was already rolling on, having been initiated with precisely the notice period as prescribed. There is no need for a repeat job, giving the Attorney-General further notice when the applicants will simply be filtering into the process of suit already in progress.

I was not, with great respect, able to find any merit in the further submissions made in opposition to the application, such as: (i), that there was a Court order in place for the dismissal of the suit if hearing did not take place on 30th April, 2005; (ii) that the applicants should have consulted the plaintiffs informally before seeking to come aboard their ship; (iii) that allowing the application would provide grounds for the Attorney-General to inflict further delay by raising objections and seeking to amend his defence. It was not clear whence such suspected conduct by the Attorney-General was communicated, as the State Law Office was, as is typical, unrepresented. Moreover, I would not have considered it to be the proper professional thing that the course of litigation should be dictated by apprehensions of what the Attorney-General might or might not do. I must emphasise that the trial process is directed by the Court, whose duty it is to ensure that justice is done; and whatever the State Law Office may choose to do will not in any way compromise the full authority of the Court to issue appropriate orders and to regulate the trial process.

It is a cogent submission, I think, made by counsel for the applicants that the plaint having been amended only as lately as 4th June, 2004, and for the purpose of inserting additional information in respect of the 3rd, 7th, 9th, 11th, 20th, 23rd and 24th plaintiffs, could in like manner be amended in 2005 to incorporate new plaintiffs.

A careful listening to counsel for the plaintiffs left me wondering as to the exact nature of the gravamen of their clients. With great respect, I could not but form the impression that there were ill-articulated apprehensions in the minds of counsel, probably of little relevance to their clients. I have thought through this scenario, coming up with what I think is the only plausible explanation, that additional plaintiffs may present a more complicated picture in the discharge of instructions, and the sharing out of responsibility with its ramifications. I will be mindful of this factor as I make the Court's orders.

F. ORDERS

I will make the following orders in relation to the applicants' Chamber Summons of 27th January, 2005:

(1) That, the applicants be and are hereby granted leave to be enjoined in the suit as co-plaintiffs.

(2) That, counsel for the applicants shall act together with counsel for the plaintiffs to prepare a further amended version of the plaint, which shall be drawn, filed and served by Friday, 29th April, 2005.

(3) That all counsel now on record for the plaintiffs and the applicants shall take appropriate instructions on the best mode of representing the enlarged number of plaintiffs, and shall file a memorandum in Court on the agreed format of representation.

(4) That this matter shall be listed for mention and directions before the Duty Judge on Thursday, 12th May, 2005 at 9.00 a.m. Hearing shall take place before any Judge in the Civil Division, as may be appropriate.

(5) That there shall be no order as to costs.

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

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Applicants: Mr. Agina, instructed by M/s. Agina & Associates Advocates

For the Respondents: Mr. Mussilli, instructed by M/s. Mussilli & Mussilli Advocates.

· Mr. Osoro, instructed by M/s. Osoro & Co. Advocates

· M/s. Otieno Okeyo & Co. Advocates