REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 303 of 2004

MESHACK NYAMIAKA ONG'UTI…….... PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL…….…..….. 1ST DEFENDANT

PERMANENT SECRETARY,

MINISTRY OF HEALTH……...….. 2ND DEFENDANT

HON. ATTORNEY GENERAL…… 3RD DEFENDANT

RULING

The Plaintiff/Applicant has moved the Court by way of a Chamber Summons dated 1st September 2004 brought under Order VI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules and all other enabling provisions of the law. He seeks orders against the Defendant/Respondents as follows:

1. That the 1st Defendants' Amended Defence and Counterclaim and the 2nd and 3rd Defendants' Defence filed herein be struck out with costs.

2. That judgment be entered for the Plaintiff against the Defendants jointly and severally as prayed in the Plaint.

3. That the Plaintiff's suit be listed for formal proof.

4. That costs of the application be provided for.

5. That such other and/or further relief be granted as this Honourable Court may deem fit.

Although the application is brought under rules 13(1) (b) (c) and (d) of Order VI the same is expressed to be grounded on the Applicant's Affidavit annexed thereto and "on such other grounds or reasons to be adduced at the hearing hereof and more particularly so on 17 grounds and/or reasons listed in the application as (a) to (q). Save for the Applicant's ground (a) which states that

"The Defences are comprised of mere denials, they are frivolous, vexatious and a grave abuse of the Court's process"

and which appears to incorporate Rule 13(1) (b) and (c) of Order VI, rule 13 (1) (c) appears not to have been pleaded.

I find it necessary at this point to reproduce herein the wording of Order VI Rule

13 (1) (b) (c) and (d) since it is as against these provisions that the Defendants' Defences and Counterclaim on the part of the 1st defendant are challenged for the purposes of striking out. Order VI Rule 13 (1) (b) (c) and (d) read as follows: "13 (1)At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that…

(a) ……

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment be entered accordingly, as the case may be.

Grounds (a) (n) and (o) of the application appear to introduce rule 13 (1) (a) of Order VI in so far as the same refer to the Defences and Counterclaim respectively as being mere denials, lacking in merit or substance. The rest of the grounds or reasons appear to the Court to be a summary of the Plaint and the Applicant's supporting affidavit of 45 paragraphs.

Parties herein chose to file written submissions on the application instead of arguing the same orally. They also filed, along with the said submissions, copies of the authorities they rely on in support of their respective arguments for and against the Applicant's application.

The Applicants having alluded to various facts relating to the merits of his case, the submissions filed on his behalf mainly relate to merits. It has been submitted on his behalf that his qualifications cannot be in doubt and that it is by virtue of such qualifications he was appointed a director of the 1st Defendant. Details of procedures adopted during his appointment and termination of services have been expounded in detail with particulars of the alleged illegality and unlawfulness of his termination covering six pages of the submissions.Although the Applicant has not invoked the provisions of Order VI Rule 13 (1) (a) as earlier indicated, his submissions go to emphasize the fact that the Defendants have no defence to the suit and that the 1st Defendant's Counterclaim is unfounded. In paragraph 10 of his submissions Counsel for the Applicant specifically states that

"It is therefor my submission that the Defendants have no defence whatsoever to their actions as they deliberately flouted the laid down procedures, the Law and Rules of Natural Justice in retiring the Plaintiff….."

At page 11 of the submissions Counsel summarizes by stating that

"Therefore the Defendants did not have any reason or justification to terminate the Plaintiff's appointment and/or even relieve him of his duties."

As regards the 1st Defendants' Counterclaim Counsel for the Applicant submitted as follows:

"The 1st Defendant knows only too well that according to practice or protocol any act done by the Plaintiff in his capacity as the Director of the 1st Defendant is subject to the approval or disapproval of the 1st Defendant's Board of Management and therefore the Plaintiff cannot be held personally liable for any action or decision that he took in his capacity as director. Such action or decision was the Board's decision. The 1st Defendant is well aware that during the Plaintiff's short tenure as a Director…. There was never a time that the Plaintiff was ever reprimanded or even sent a warning letter by the 1st Defendant's Board of Management. Therefore under these circumstances, the 1st Defendant's Counterclaim is frivolous, vexatious and scandalous. The 1st Defendant's Counterclaim is only meant to vex the Plaintiff and cause unnecessary delay to the fair hearing and determination of this suit."

The Plaintiff has also submitted that the Counterclaim is badly brought in the suit and ought to have been instituted separately. The 1st Defendant's submissions may be summarized as follows:

1. That the 1st Defendant's Amended Defence and Counterclaim raise several triable issues that require the Court to conduct a full and proper trial for their determination and disposal

and that for this reason the Court ought to consider the Amended Defence and Counterclaim in light of the Plaintiff's pleadings as regards the Plaintiff's academic qualifications and career progression and standing, the alleged consultation leading to his appointment and how the appointment was made and whether the Plaintiff enjoyed security of tenure and finally whether the Plaintiffs termination was improper or unprocedural. The 1st Defendant has submitted that the Defence specifically denies that Plaintiff enjoyed security of tenure and avers that the termination was neither improper nor unprocedural.

2. That the 1st Defendants' Counterclaim is properly filed and cannot be challenged at this stage and its merits can only be tested at a full hearing as it too raises triable issues.

The 2nd and 3rd Defendants having not filed any Replying affidavit to this application have submitted that they rely entirely on their defence filed on 5th May 2004 which according to their submissions does not consist of mere denials nor is it frivolous or an abuse of the process of the Court. The 2nd and 3rd Defendants contend that their said defence, having traversed certain of the Plaintiff's allegations in the Plaint while admitting others is not fit for striking out under Order VI Rule 13 (1) (b) (c) and (d). The law relating to the striking out of pleadings is very well established in our jurisdiction as is evident from the numerous authorities available on the subject, many of which have been submitted by Counsel for the parties herein. The position adopted by our Courts is that the procedure is to be exercised with extreme caution and only in very clear and special circumstances. Accordingly a defence will not ordinarily be struck out where there are triable issues which require evidence being taken for their proper adjudication and determination. Indeed the said position was well settled in the Court of Appeal decision of **D.T. DOBIE & COMPANY** LTD –vs- **MUCHINA** [1982] KLR 1 wherein the late Mr. Justice Madan J.A. (as he then was) summarized the same in the following words:

"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable…….

I find that the above authority is relevant herein seeing that the Plaintiff seeks orders for the striking out of the 1st 2nd and 3rd Defendants' Defences as being

"a grave abuse of the process of the Court"

and also that they consist of no defences at all, and, specifically in respect of the Counterclaim, that the same is

"not only unmerited and without substance…… the same is also frivolous vexatious and a grave abuse of the Court."

Being guided by the binding authority of **D.T. DOBIE –vs- MUCHINA** (Supra) I find that this is not a suitable case for striking out. My study of the Amended Defence shows that the amendments specifically address allegations in the Plaint and do traverse to the same. Clearly from paragraphs 11, 13, 16 (b) (c) and (i) as well as paragraph 18, the Plaintiff's contentions as to his appointment, how made and how governed are challenged. His terms of service as well as the existence of a contract and the nature of the termination thereof are matters which cannot be determined without evidence being called on both sides. The wrongfulness or unlawfulness of the Plaintiff's termination and indeed the alleged mala fides on the part of the Defendant are not issues which can be determined summarily. The Plaintiff has attempted to explain the same in this application which is clearly wrong in view of the fact that this Court cannot at this stage examine the merits of the case. Clearly the Court cannot accept the Plaintiff's contentions as to his qualifications and expertise without taking evidence. The Plaintiff desires that this Court considers the

merits of the case as seen from page 13 and 14 of the submissions wherein authorities have been cited to support submissions on

“the Plaintiff's unlawful dismissal on termination of employment”

and on

“the Rules of natural justice”.

The above authorities can only be considered in support of final submissions after a full hearing in which evidence has been taken, since the same go to the merits of the case. In the same vein I find that the 2nd and 3rd Defendants’ defence particularly as can be seen from paragraphs 8 and 9 does disclose triable issues and is not in that case a mere denial. Having found that triable issues do exist herein and having identified the same I find that on that ground the authorities submitted in regard to the striking out of the Defences are distinguishable. As regards the 1st Defendant’s Counterclaim I am of the considered view that the same is properly brought under the provisions of Order VIII Rule 2 of the Civil Procedure Rules. I have noted that the Plaintiff’s main argument against the same being brought is that had this suit not been filed, perhaps the same would never have been filed. I do not consider this a sound ground for the Court to find that the same cannot be conveniently disposed of in the pending suit, considering that the Plaintiff has filed a Defence thereto, albeit under protest. I see no reason to deny the 1st Plaintiff the opportunity to avail himself of the opportunity to be heard on the same since it relates to acts directly relating to the Plaintiff’s performance of his duties during the time of his subject appointment.In view of the above I disallow the application and dismiss the same with costs to the Defendants.

Dated and Delivered at Nairobi this 26th day of July, 2005

M.G. Mugo,

Judge

In the presence

Omwenga h/b for Machira for the Plaintiff

Namisi for the 1st Defendant

N/A for 2nd and 3rd Defendants