REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 494 OF 2005

DAVID THUO…….....….PLAINTIFF/APPLICANT

HAWKINS AZENGA…….....….PLAINTIFF/APPLICANT

JANE NYAGAH…….....….PLAINTIFF/APPLICANT

JUDY NYAGAH…….....….PLAINTIFF/APPLICANT

MARGARET KIIGI…….....….PLAINTIFF/APPLICANT

SALIM ELIAS…….....….PLAINTIFF/APPLICANT

SALIM MAHSEN…….....….PLAINTIFF/APPLICANT

SAM LEMEIRUKO …….....….PLAINTIFF/APPLICANT

TABITHA KIRAGU…….....….PLAINTIFF/APPLICANT

-VERSUS-

FIRST AMERICAN BANK OF KENYA LIMITED…...DEFENDANT

RULING

I. AMALGAMATION OF TWO BANKS, AND CONSEQUENTIAL CHANGE TO EMPLOYMENT RELATIONSHIPS:

APPLICATION AND PRAYERS

The plaintiffs moved the Court by Chamber Summons dated 10th May, 2005, filed on 12th May, 2005 and brought under Order XXXIX, rules 1 and 2 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21). In the background to the application was the plaintiffs' plaint dated 26th April, 2005 and filed on 27th April, 2005.

The applicants' prayers were as follows:

> *(i) that, an order of injunction do issue against the defendant bank whether by itself or through its authorised servants and agents, restraining it from transferring its equity to a third party, pending the determination of the instant application;*

(ii) that, an order of injunction do issue against the defendant bank, restraining it and/or its lawful and/or authorised agents from terminating the services of the plaintiffs individually or collectively pending the determination of this application;

(iii) that, an order be issued restraining the defendant bank from receiving and disbursing the intended sale proceeds pending the hearing and determination of the instant suit;

(iv) that, costs be paid by the respondent.

This application was premised on the grounds, firstly, that the applicants' contracts of employment are about to be unilaterally transferred to a third party and/or terminated without the consent of the applicants; secondly, that the respondent bank is about to transfer its entire equity to a third party, which action will prejudice the rights and interests of the applicants; thirdly, that the applicants needed to secure their employment status in the bank before it changes its current status.

II. DEPOSITONS

Evidence in support of the application is in the affidavit of **Jane Nyagah** sworn on 10th May, 2005. She depones that she is the 3rd plaintiff/applicant herein and that she is competent to make the depositions, and has been authorised in that behalf by her co-applicants, as well as 114 other employees of the defendant Bank. She avers that she is, together with her coplaintiffs, in the employ of the defendant bank. She has worked as a Dealer in the respondent's Treasury Department for the last four years. She deposes that she and her coemployees learned for the first time on 4th January, 2005 that the respondent bank intended to sell its entire equity to a third party, namely Commercial Bank of Africa. These employees, after learning of the proposed transfer of business, held a meeting on 6th January, 2005 and discussed their plans of action. At this meeting the main concern was "the effect of the bank sale of equity on the employees' individual contracts of employment." On 28th February, 2005 the employees were addressed by the management representative of the Bank, who informed them that their terms and conditions of service would be "taken over by the purchaser of the Bank's equity." The deponent averred that the defendant Bank had not consulted the employees and did not involve them in the decision to transfer their contracts of service to a third party. The deponent and others among the plaintiffs had instructed an advocate to communicate with the respondents regarding the future of the tens of employment contracts. She further averred that the defendant had given an insufficient response, and it further turned out that "the Bank had secretly sought approval by the Central Bank of Kenya and the Commissioner of Monopolies and Price Control, to sell the equity…" In seeking such authority, the deponent averred, there had been no disclosure of the fate of the individual employment contracts. It was deposed that, following intervention by the Commissioner of Monopolies, the defendant Bank wrote to the plaintiffs' advocates confirming that the employees' contracts would be transferred to the purchasers. The deponent averred that the defendant Bank was determined to hand over their operations on or before 31st May, 2005 without resolving the stalemate touching on the status of the employment contracts. The deponent expressed the apprehension of the plaintiffs that their contracts of employment would be terminated if the defendant ceased operation as a Bank.

The same deponent swore a supplementary affidavit on 27th June, 2005. She deponed that to-date the defendant had not addressed the applicants directly, for the purpose of informing them of the fate of their employment contracts. She went on to depose: "whereas I together with my co-applicants have been issued with letters of offer of employment by M/s. Commercial Bank of Africa Ltd., we were never consulted for approval nor consent before the said letters were unilaterally drafted and issued to us". She deposed that media reports showed that "there would be reduction of staff to the extent of 74 employees and further [the defendant] had already identified positions that it hoped to retain and those that would be eliminated."

Manlio Blasetti, a director of the defendant Bank, swore a replying affidavit in which he avers that the Managing Director of Commercial Bank of Africa Ltd., ***Mr. Isaac Awuondo***, had met all the employees of the defendant on 28th February, 2005 and that, subsequently, ***Mr. Bristow***, a director of Commercial Bank of Africa Ltd, did meet with all the employees of the defendant in early March, 2005.

It is further deponed that on 14th and 15th June, 2005 Commercial Bank of Africa Ltd. delivered a letter dated 13th June, 2005 and signed by ***Mr. Awuondo*** to all the employees of the defendant in Nairobi. The deponent was informed by ***Mr. Awuondo*** (which information he believes to be true) that the same letter was being delivered to the defendant's employees in Mombasa, on 16th June, 2005. All the letters were in the same terms but addressed personally to each employee.

The deponent averred that the defendant, and Commercial Bank of Africa Ltd, did estimate that there would be a reduction of 15% in the combined head count of the defendant and Commercial Bank of Africa Limited. The assurance was given in the individual letters that Commercial Bank of Africa Ltd. would take over all contracts entered into by Commercial Bank of Africa Ltd, and all employment contracts would "continue uninterrupted on the same terms as to salary and benefits and with full recognition of [past] service with [the defendant]."

III. THE QUESTION OF TRANSFERABILITY OF CONTRACTUAL RIGHTS:

SUBMISSIONS FOR THE APPLICANT

This application was heard before me on 30th June, 2005 when ***Ms. Guserwa*** represented the plaintiffs/applicants, while ***Mr. Fraser*** represented the defendant/respondent.

Ms. Guserwa stated that the nine plaintiffs had, on 27th April, 2005 been allowed by ***Ransley, J*** to file a *representative* action and to advertise this process in the media, for the purpose of initiating such action. Upon the advertisement being published on 11th May, 2005 some of the original employees (3) withdrew from the suit, while some others (7) resigned from their employment — thus leaving only 114 employees to proceed with these proceedings.

The plaintiffs all had individual employment contracts with the defendant, but the same were due to be terminated on the very same day of hearing, at midnight. So, learned counsel urged, the plaintiffs were seeking *injunctive relief*: the Bank must not be allowed to transfer its equity to Commercial Bank of Africa Ltd. But counsel stated at the same time that the defendant had "sold all their shares and all their equity to Commercial Bank of Africa Ltd." The effect, counsel argued, was that "the respondent bank will cease to be a separate legal entity; so from midnight tonight, the respondent will cease to be." The Chairman of the defendant Bank had, however, written to the advocates for the plaintiffs in these terms: "We…expect all members of staff who, we have been assured, will all be treated fairly and justly by Commercial Bank of Africa Ltd to avoid any action prejudicial to the success of this transaction." This assurance had not satisfied the plaintiffs. Counsel contended that the employees of the defendant had *individual contracts*, and it was essential that each one of them should give his or her consent to any new contract. In the words of counsel, "such contract is not assignable nor transferable without approval and consent." ***Ms. Guserwa*** maintained that the plaintiffs had not been consulted when the defendant's shares were sold to the third party, and so as employees, they could not be transferred to the third party without their approval.

Learned counsel was concerned by the fact, as indicated in the letter from the Monopolies and Prices Commission dated 12th April, 2005, that once the defendant bank is sold off to the third party, "staff numbers will be reduced by 15% from the current combined head count of the two banks of 401." Counsel construed this to mean that "all the applicants or some of them are likely to be retrenched from the Commercial Bank of Africa Ltd.," even though "they were brought on board by their employer without their consent or approval." The effect, ***Ms. Guserwa*** argued, would be that s.5 of the *Trade Disputes Act* (Cap. 234) would not have been observed. By that section, termination of employment, in circumstances such as are prevailing in this matter, should be by *declaration of redundancy* effected by the employer. Termination of employment in this manner by declaring redundancy is to be on the basis that there is a *trade dispute*; and so the safeguards provided for trade disputes would be applicable.

Although Commercial Bank of Africa Ltd had made job-offers to the defendant's employees (on 13th June, 2005), counsel contended, the offers had not sought the consent and approval of these employees. Learned counsel relied on the case ***Nokes v. Doncaster Amalgamated Collieries Ltd.*** [1940] A.C. 1041 in

which the personal character of an employment contract was considered. Viscount Simon, L.C. stated (pp.1021 – 1022):

> **"…after much reflection, and after weighing the reasoning in those judgements…I have to come to the conclusion that contracts of a personal service are not automatically transferred by an order…"**

He observed further (p.1024):

> **"…I do not agree with the view expressed in the Court of Appeal that a right to the service of an employee is the property of the transferor company. Such a right cannot be the subject of gift or bequest; it cannot be bought or sold; it forms no part of the assets of the employer for the purpose of administering his estate."**

Similarly Lord Atkin stated (p.1026):

> **"My Lords, I confess it appears to me astonishing that apart from overriding questions of public welfare power should be given to a Court or anyone else to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another."**

His Lordship went on to remark (pp.1027 – 2028):

> **"In other words rights not transferable in law or equity were in fact transferred if necessary against the will of the parties against whom the rights existed, and in confiscation of the rights which those parties had reserved to have dealings only with the person, i.e. transferor company, with whom they had elected to be associated. It means that contracts of service are compulsorily altered; and new contracts of service with a new employer created without the consent of one of the contracting parties."**

His further remarks are equally relevant (p.1030):

> **"…however excellent the new master may be it is hitherto the servant who has the choosing of him, and not a judge. [It] is a complete mistake in my experience to suppose that people, whether they are servants or landlords or authors did not attach importance to the identity of the particular company with which they deal."**

Learned counsel contended that there was an attempt by the defendant to achieve an automatic transfer of the contracts of employment between it and the plaintiffs, to the third party — and that this was contrary to established principles of law. Counsel also relied on ***Brace v. Calder & Others*** [1895] 2Q.B. 253 where it had been held (***Rigby, L.J***. at p.263):

> "A contract to serve four employers cannot without express language be construed as being a contract to serve two of them. In my judgement the dissolution of the partnership operated as a dismissal of the plaintiff not authorised by law."

IV. REDUNDANCY NOW OR LATER? WHO IS PREJUDICED? — SUBMISSIONS FOR THE DEFENDANT

Learned counsel, ***Mr. Fraser***, submitted that the defendant, as a limited liability company, was perfectly at liberty in law to sell its equity, and so it would not stand to blame if it did so. The shareholders shared in that liberty, and they too could sell off their shares any time. Counsel submitted that these shareholders, who were entirely independent of the defendant as a legal entity, were *not a party to these proceedings* — hence whatever rights the plaintiffs would claim in their suit, could not limit the competence of the shareholders to transfer their shares. My understanding of this point was that the instant proceedings insofar as a they were aimed only at the defendant Bank, were largely misdirected. The operative

principle of law is succinctly stated in **Palmer's Company Law**, 21st ed., 1968 (by **C.M. Schmitthoff and J.H. Thompson**) (at p. 124):

> **"A corporation is not, like a partnership or a family, a mere collection or aggregation of individuals. In the eyes of the law it is a person distinct from its members or shareholders, a metaphysical entity or a fiction of law, with legal but no physical existence."**

The point is equally clearly stated in **Gower's Principles of Company Law**, 4th ed., 1979 (by **LC.B. Gower, J.B. Cronin, A.J. Easson and Lord Wedderburn of Charlton**) (at p.97):

> **"As already emphasised, the fundamental attribute of corporate personality — from which indeed all the other consequences flow — is that the corporation is a legal entity distinct from its members. Hence it is capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members. In other words, it has 'legal personality' and is often described as an artificial person in contrast with a human being, a natural person."**

The learned authors, for good effect and in relation to the respective property rights of a company and of its members, thus write (p.103):

> **"The corporate property is clearly distinguished from the members' property and members have no direct proprietary rights to the company's property but merely to their 'shares'."**

Mr. Fraser distinguished the authorities relied on by counsel for the applicant: ***Nokes v. Doncaster Amalgamated Colleries Ltd*** [1940] AC 1041 was about a merger effected under the *companies statute*; ***Brace v. Calder*** [1895] 2 Q.B. 253 was a partnership case; etc.

By contrast, learned counsel submitted, the instant matter is concerned with amalgamation under the Banking Act (Cap. 488), and the same had been duly accorded *ministerial approval as required under s.9 of that Act*. The said section has provided a statutory scheme to allow two or more banks to come together as one entity, and the intention of Parliament is that such *amalgamating banks should come together as a going concern.*

> ***Mr. Fraser*** submitted that there was no basis for the plaintiffs' prayer —
>
> "that an order of injunction do issue against the defendant bank…. Restraining them from transferring their equity to a third party…;"
>
> or
>
> "that an order restraining the defendant bank from receiving or disbursing the intended sale proceeds…";

for as it emerged from the evidence, only the shareholders had sold their equity.

With regard to the plaintiffs' prayer "that…an injunction do issue against the defendant …restraining it… from terminating the services of the plaintiffs individually or collectively…", ***Mr. Frase***r submitted, I believe correctly, that what was being sought was unclear: was it an injunction against all *termination of employment*? Or was it against *termination other than by way of redundancy*? From the submissions of learned counsel, ***Ms. Guserwa***, it was however evident that what was now being sought was termination through *redundancy* only; and it was my understanding that the plaintiffs saw that mode of termination as carrying in-built safeguards, and the plaintiff would rather go that route than take up new contracts with Commercial Bank of Africa Ltd. which might later expose them to termination of employment. It is, I believe, at this point that the plaintiffs' case falls: a guarantee has been made to all of them and those they represent, in writing and by verbal representation, that at this moment they run no risk of termination of employment; but if and when such termination becomes necessary, only some 15% out of the combined

staff strength from the defendant and from Commercial Bank of Africa Ltd, is likely to be affected — and *in any event recourse will be had to the very protections of the redundancy provisions* as are now being sought at the beginning. ***Mr. Fraser*** restated the content of the letters to the individual employees of the defendant, which had been dispatched from Commercial Bank of Africa: this Bank will honour all the contracts of employment.

Mr. Fraser submitted that there was no basis in law to support the plaintiffs' prayers for injunctive relief. Their contracts remained in force; they can show no irreparable harm which they are destined to suffer; they do not satisfy the basic tests as laid down in the Court of Appeal decision, ***Giella v. Cassman Brown & Co. Ltd***. [1973] E.A. 358, for qualifying prima facie for injunctive relief.

Learned counsel submitted that the plaintiffs' application ought to fail, for it was overtaken by events. An injunction was being sought against a transfer of equity which had *already taken place*, and taken place at the behest not of the defendant as a corporate entity, but of different legal persons — the shareholders. To buttress this submission, the Court of Appeal decision in ***Moses Mbugua Mwangi & 4 Others v. Coffee Board of Kenya***, Civil Appeal No. 276 of 2000 was cited. The Court there remarked:

> **"The purported mischief the appellants wanted to obviate has been committed, and any resultant damage or injury may have been suffered."**

Learned counsel submitted that the plaintiffs did have in their favour all the safeguards of the law, under the present arrangements between the defendant and Commercial Bank of Africa Ltd. The remedy of *damages for breach of contract was always available* to any employee whose employment may be wrongfully terminated, a principle which was well embodied in case law as is demonstrated by the Court of Appeal decision in **Eric V.J. Makokha & 4 Others v. Lawrence Sagini & 2 Others**, Civil Application No. Nai 20 of 1994:

> **"In our opinion, the well settled rule that a breach of contract of personal service cannot be redressed by the equitable remedies of injunction and specific performance remains good law. The comparatively few cases in which declarations were made and injunctions granted to restrain a breach of contract of personal service are exceptions to the general run of the common law.**
>
> **"In our opinion, the common law rule that damages are the generally accepted remedy for redressing breaches of contracts of personal service is too firmly established to be overthrown by a side wind."**

So in the event that an act of breach of employment contract was committed against any former employee of the defendant, learned counsel submitted, there was a ready recourse to a claim for damages; and the brunt would fall on Commercial Bank of Africa Ltd.

The argument was further supported by ***The Despina Pontikos*** [1975] E.A. 38 in which the Court of Appeal had thus held (**Spry, Ag**. P., at p.57):

> **"We would begin by remarking that this court has held more than once that interlocutory mandatory injunctions should only be granted with reluctance and only in very special circumstances. On the other hand, the issue of an injunction is an exercise of discretion…"**

Mr. Fraser submitted that what the plaintiffs were seeking was, in effect, a *mandatory injunction compelling the defendant to continue employing them, even when — as is now the case — the defendant had no business*. Yet the plaintiffs did indeed have jobs with the amalgamated entity, and the amalgamation had properly been effected under section 9 of the Banking Act (Cap. 488).

Learned counsel expressed doubts on the propriety of resorting to representative action to enforce individual contracts of employment. It had been held in ***Daud Abdulla & Osman Haji Ladha v. Ahmed Suleman & 2 Others*** (1946) 13 EACA 1, that representative action is brought "where there are numerous

persons having the same interest in one suit" (p.1); "given a common interest and a common grievance, a representative suit is in order if the *relief sought is in its nature beneficial to all whom the plaintiff proposes to represent"* (p.1).

The authoritative statement of the proper condition for seeking leave to proceed by representative action is found in ***Markt & Co. Ltd v. Knight Steamship Co. Ltd*** [1910] 2 K.B. 1021 (at p.1035 – per ***Fletcher Moulton, L.J.***):

> **"I will take for the purpose of this part of my judgement that which I consider to be the most authoritative statement as to the cases in which representative actions can be brought, i.e., the statement of Lord Macnaghten in the case of Duke of Bedford v. Ellis [1901] A.C.1. It is as follows: 'Given a common interest and a common grievance, a** *representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.'* **These words shew that where the claim of the plaintiff is for damages the machinery of a representative suit is** *absolutely inapplicable***. The relief that he is seeking is a personal relief, applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action."**

As already remarked, the ordinary remedy for any of the former employees of the defendant, once the amalgamation with Commercial Bank of Africa Ltd. has taken place, is *damages.* Such is clearly a *personalised channel of relief*; and it must follow that representative action will, in these circumstances, be inappropriate. I am, with respect, in agreement with counsel for the defendant, that representative action should not have been allowed in these proceedings.

V. THE EMPLOYMENT CONTRACTS, CONSENT, INJUNCTION — APPLICANTS' REJOINDER

Learned counsel, ***Ms. Guserwa***, would attach no significance to the fact that it is the defendant's shareholders who had sold off their equity to Commercial Bank of Africa Ltd. In her words: "The applicants do not have contracts of employment with the shareholders, but with the defendant." Counsel argued that the effect of the sale of shares in the defendant Bank had led to change in the character of the defendant as an employer of the applicants, and the outcome had placed the applicants at risk, even though they had not given their consent or approval. Irreparable loss, counsel submitted, would be the lot of the applicants; their rights would be infringed; and so they deserve injunctive relief.

VI. THE DECISION

From the tenor of my analysis it is clear that I am not in agreement with learned counsel in her argument. This detailed judgement now sets out the reasons which led me, on the occasion of hearing the application, to render a short ruling, with the promise of a more detailed account which I have now set forth. I do not accept learned counsel, ***Mrs. Guserwa's*** contention that the plaintiffs and those they represent have been wrongfully forced to assign personal-service contracts. This is because, firstly, the ***Nokes v. Doncaster*** scenario is inapplicable since the amalgamation between the defendant and Commercial Bank of Africa Ltd. is duly authorised under Kenyan statute law. Secondly, I am not convinced that the situation typified by ***Lord Atkins*** in the ***Nokes*** case prevails here: "however excellent the new master may be it is …the servant who has the choosing of him…" In the circumstances of this case, and in view of the grim unemployment situation in Kenya, of which I do take judicial notice, it cannot be the case that the plaintiffs are so sentimentally attached to the defendant as employer that they will implacably resist being taken on by Commercial Bank of Africa Ltd — a larger employer with a dependable capital base. The ruling as delivered on 30th June, 2005 read as follows;

> "I have read the applicants' Chamber Summons application dated 10th May, 2005 and considered the grounds and the affidavits in support.
>
> "I have heard the detailed submissions of counsel on both sides.

"From the submissions, certain matters emerge with clarity:

(1) At midnight tonight, the amalgamation between the respondent Bank and another Bank, Commercial Bank of Africa Ltd., is set to take place.

(2) The amalgamation comes in the aftermath of a fundamental structural change in the capital base of the respondent Bank, namely the transfer of shareholders' equity over time, to the Commercial Bank of Africa Ltd. As a result, the business substratum of the respondent Bank has now merged into the capital base of Commercial Bank of Africa Ltd., a fact which has been responded to by the management of the respondent Bank by taking actions under the Banking Act (Cap.488) to effect a complete merger with Commercial Bank of Africa Ltd.

(3) Such business decisions, firstly by the shareholders, and then by the respondent Bank, do have or will ultimately have implications for existing employment contracts between the plaintiffs and the respondent Bank.

(4) It is quite clear to me that the driving force behind the suit is the apprehension of possible loss of jobs, for all or for some of the plaintiffs.

(5) The plaintiffs have sought recourse to interim injunctions to restrain the respondent in the execution of the merger arrangements due to take place tonight.

(6) Learned counsel for the respondent, ***Mr. Fraser,*** has restated the content of earlier communications between the parties — that at midnight tonight there will be no employment crisis for any of the former employees of the respondent. The original contracts of employment will continue to be honoured by Commercial Bank of Africa Ltd.

(7) The only possibility of risk to the employment contract of any of the plaintiffs, ***Mr. Fraser*** has assured the Court, would come *only in the future; but when that comes*, *the law* relating to redundancy will be complied with, and the rights of all parties will be protected in accordance with the law.

"In the light of those facts, it is evident to me that the plaintiffs will not suffer any detriment in their standing, under the law of contract, as of tonight.

"I will, therefore, give the order that the plaintiffs' application by Chamber Summons of 10th May, 2005 be and is disallowed."

Now in this reasoned ruling, I hereby dismiss the plaintiffs' application with costs to the defendant in any event.

Orders accordingly.

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

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiffs/Applicants: Ms. Guserwa, instructed by M/s. J.A. Guserwa & Co. Advocates

For the Defendant/Respondent: Mr. Fraser, instructed by M/s. Hamilton Harrison & Mathews, Advocates