REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CIVIL CASE NO. 74 OF 2003

CHRISTOPHER KIPKORIR LEBO AND 331 OTHERS..... PLAINTIFFS

VERSUS

THE KENYA POWER & LIGHTING CO.LTD..... DEFENDANT

RULING

Christopher Kipkorir Lebo and his 331 co-plaintiffs were until 19.3.2002 employees of the Kenya Power and Lighting Company Limited. They were until then engaged in different capacities and categories of employment.

They claim that the said company, which I shall hereinafter refer to as “the defendant” purported to relieve them of their duties on diverse dates, between 30.6.2001 and 19.3.2002, in a retrenchment programme, whose terms and conditions they are not aware of. It is therefore their contention that the said retrenchment exercise, and the ultimate termination of their services was null and void, that the defendant misapprehended their entitlements, and made wrongful deductions after which if wrongfully retained their rightful entitlements, which they now claim, in this suit, which was filed on 13.8.2003.

They also claim that they were discriminated against in the manner in which the retrenchment and termination was conducted, and they thus pray for compensatory orders.

The defendant denies the issues raised in the plaint and as I discern it, the main bone of contention in this suit revolves around the staff retrenchment or as one may call it, the staff redundancies.

After the close of the pleadings, the plaintiffs set the suit down for hearing on 12.5.2004 and on 25.3.2004, Mr. Buluma learned counsel for the

plaintiffs wrote to one Titus Naikuni as follows:

> *" RE : ELDORET H.C.C. NO. 74 OF 2003 ……..*
> *We refer to the above matter in which the plaintiffs, our clients , are former employees of Kenya Power and Lighting Company Limited who*
> *were retrenched in the years 2001 and 2002 following a Staff Reduction Programme.*
> *Our clients believe that you have evidence that is crucial to the fair determination of their case in which they are suing for wrongful termination. We expect you to testify on a variety of issues and especially on your acknowledgement in Chairman's Review contained in*
> *the Stima Magazine issue of 30.6.2000 at page 15, regarding t he sacrifices made by staff aforesaid a copy of which is attached for your ease of reference.*
> *Kindly note that if we do not receive your confirmation before 13.4.2004 we shall be constrained to take out the requisite Witness Summons against you from court. We look forward to prompt and positive response."*

The plaintiff's thereafter filed their list of documents on 13.4.2004, and three days later, Mr. Buluma their learned counsel requested for Witness Summons to issue to seven people, amongst who was Titus Naikuni, the current Managing Director of Kenya Airways, who according to the Witness Summons issued by this court on 28.4.2004, was required to testify on behalf of the plaintiffs on 21.6.2004, when as aforementioned the suit was set to be heard.

Titus Naikuni is the Managing Director of Kenya Airways, and was the Chairman of defendant Company during the year 2000, which is the material time.

The defendant which feels aggrieved by the issuance of the said Witness Summons, moved this court on 18/6/2004, which was three days before the day when Naikuni was required to testify in court, and sought for an order that the Witness Summons issued to the said Naikuni be declared a violation of it's (defendant's) constitutional right to a fair hearing, and that the said summons be set aside and rendered null and void.

The application, which has been brought by way of a Notice of Motion, was taken out under interalia, Section 77 (9) of the Constitution of Kenya, Section 3A of the Civil Procedure Act. As required under rule 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedom of the Individual Practice and Procedure Rules, 2001 an order for the stay of the hearing of the main suit was granted soon after the application was filed.

The said Section 77(9), of the Constitution stipulates that:

> *"A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and imp artial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair*

hearing within a reasonable time".

It is based on two grounds, namely that the said Witness Summons amounts to an interference with it's witnesses and that the effect of summoning the said witness to testify on matters which it is entitled to use in its defence, is prejudicial, oppressive and adverse against it, and that as such, it is a violation of it's constitutional right to a fair hearing. It is also based on an affidavit by Beatrice Muendo, it's Chief Legal Officer.

As is evident in the aforementioned letter by the plaintiff's counsel, Naikuni is supposed to testify on a variety of issues, and especially on an acknowledgement, on sacrifices by staff which he made in his Review and which appeared in the Stima Magazine of 30.6.2000, according to Mr. Kajwang, the issue is whether, to call him as a person who served as the defendant's chairman, during which time the matters in controversy herein arose, and to compel him to produce documents which are at the core of the dispute amounts or does not amount to a fair hearing, of the defence case.

It was his submission that, the defendant though inanimate is entitled to fundamental rights, such as would be accorded a natural person, that it relies on its alter-ego of persons, as on its own, it cannot give evidence or defend itself but can only do through its employees and members of its Board of Directors. He relied on section 123 which is the interpretation section of the Constitution, and where "person" "includes a body of persons corporate or unincorporated", and stated that when the applicant is called to testify, it will hinder the defence and will border heavily on plaintiff's weight of evidence, and that therefore, the Chairman's report is a crucial element of the evidence to be offered by the defendant. He then pondered, whether the plaintiff could compel Naikuni to give evidence on information, which he came about by virtue of his being the Chairman of the defendant company, on matters, which are crucial to the defendant and on documents, which are its property? He urged the court to find that an Annual Report of a Company, though already released to the public, remains the property of that company.

He went on to add that issues that have arisen after filing of the defence show that defendant must prepare its own list of witnesses, one of whom must give evidence on the contentious redundancy, that the defendant would rely on Naikuni who was it's chairman at the material time to give evidence, and that though the defendant would not be required to furnish its list, it would however be able to determine who to summon as witnesses from the issues raised in the pleadings.

He admitted that the parties could use interrogatories, discoveries and/or exchange documents, or even do so by way of inspection, to ensure that parties do not use the other litigant's documents to their detriment. He was emphatic that the plaintiff could call anybody else but not this particular applicant as the documents that he is supposed to testify on, and his position then, is in issue and the main bone of contention in the suit.

He added that fair hearing demands that a defendant expects the plaintiffs to prove their case on their own, without compelling the defendant's witness to testify or produce the defendant's documents and that being the case then, he felt that Naikuni's testimony would be adverse and therefore prejudicial to the defendant, which would not only amount to

unlawful interference with the defendant's witness, but that it would be a violation of defendant's right to a fair hearing as catered for in the Constitution.

He relied on B. Surinder Kanda v Government of the Federation of Malaya [1962] AC 322 in which the appellant, an Inspector of Police in the Royal Federation of Malaya Police had been dismissed by the Commissioner of Police on the ground that he had been guilty of an offence against discipline. One of the issue at Appeal was whether the proceedings which had resulted in his dismissal were conducted in accordance with natural justice. It was held *" that the failure to supply the appellant with as copy of the report of the board of inquiry, which contain ed matter highly prejudicial to him and which had been sent to and read by the adjudicating officer before he sat to enquire into the charge, amounted to a failure to afford the appellant 'a reasonable opportunity of being heard' in answer to the charge.....and to a denial of natural justice"* . In Mr. Kajwang's opinion that holding is similar to the same concept of fair hearing as is conceived in the Constitution.

He also relied on the following extracts of the same case where the court held that *"if the rig ht to be heard is to be a real right which is worth anything, it must carry with it, a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them ……..it follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inqui re whether the evidence or representations did work to his prejudice. Sufficient, that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing"*, and added that, if Naikuni is called to testify on matters, which might affect the defendant, it can only contradict such matters by calling its own witness, but if he will have already been called by the plaintiffs, it will affect and prejudice it's case. It therefore was his contention, that the risk is high, that the defendant stands to be prejudiced, that the Rules of Civil Procedure provide that a party can summon any person but the rule must be applied within the provisions of the Constitution, and the presiding Judge must exercise his discretion judiciously. He relied on the fact that " where …there was a conflict between the existing law and the constitution, the former would have to b e modified so as to accord with the latter ".(Kanda's case)

Secondly, he relied on Triplex Safety Glass Company, Limited Lancegaye Safety Glass [1939] Ltd [1939] 2.K.B. 395, in which case, an action had been brought against Lancegaye Safety Glass [1934] Ltd, and its directors by Triplex Safety Glass Company Ltd, in which it claimed damages for libels and slander, on matters pertaining to patent claims and right of ownership. Hence the issue of whether the plaintiffs had acted dishonourably and fraudulently had arisen. Interrogations were administered to both the defendants directed to obtaining admissions of their publication of the alleged libels and slander. Both the defendant company and directors refused to answer on the ground that to the best of their knowledge, information and belief, the answers would tend to criminate them. The court had reiterated the principles behind the rule against self incrimination, which is meant, to safeguard any party to a suit from being compelled or put

in a situation in which it would be required to provide information which would incriminate it, and as per Du Parcq L.J, *" the law is well settled. It is a general rule that 'no one is bound to criminate himself' in the sense that he is not to be compelled to say anything w hich may tend to bring him into the peril and possibility of being convicted as a criminal;* (per Field J. in Lamb v Munster 10 Q.B.D 110,111.

Mr. Kajwang submission was that the same principle would apply in the civil matters as it addresses the issue of self incrimination within the principle of fair hearing, and he based his submission on the fact that the court had proceeded to find that "no distinction can be drawn between the case of the company and that of the defendant ……", which he urged this court to find, meant that the company and an individual would be accorded the same treatment in such an instance.

He also cited Rio Tinto Zinc Corporation and others v Westinghouse Electric Corporation and others [1978] 1 ALL E.R. at page 434, and relied on the holdings that *" the RTZ companies were entitled to claim the privilege from production of documents ……. notwithstanding that the Commission had knowledge of the cartel and had not taken any action in respect of it, for if the documents were prod uced under the letters regatory, the RTZ companies would be exposed to greater risk of proceedings being brought against them by the Commission for the recovery of a fine that they were exposed to at present, since production of the documents might authenticate and support the existing information in the hands of the commission and afford conclusive, proof of a breach ……and might cause the Commission to decide to take action against the RTZ companies",*

He finally relied on George Ngodhe Juma and 2 others v the Attorney General, H.C Miscellaneous Cr. App. No.(Nairobi) 345 of 2001 (unr) on, what is a fair hearing, and laid his emphasis on the courts finding that *"the adjective 'fair' describing the requisite hearing requires the court to ensure that ever y hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice; every step is not obscure, and in whatever is done it is imperative to weigh the interests of the parties alike for both, and make an estimate of what is reciproc ally just. The processing and hearing or trial of a case must be free from prejudice "*. It was his submission, that though that Constitutional court was considering section 77 (1) of the Constitution, section 77 (9) thereof refers to the same issue and that the act of summoning Naikuni to produce contested documents, would be prejudicial and it would not be fair to the defendant in it's defence. He felt that the said Annual Report could as well as be produced by the defendant's witnesses who would be subjected to cross-examination by the plaintiff. He however conceded that the defendant had a right to keep quiet and not call any witnesses, should it realise that the plaintiffs have not made out their case sufficiently.

In his opinion, the plaintiff's action would best be described as a fishing expedition, in which they seek to build their case on the defence case, and urged the court to find that the plaintiffs were unprocedural, and that their act of summoning Naikuni to testify on their behalf was null and void.

Mr. Buluma however opposed the application, it was his submissions, the defendant had not provided his client with it's list of documents, and that it could only be concluded that his clients were fishing, if they were

compelling the defendant to bring the document, which in any event appeared in the plaintiffs list of documents; that the said document was produced at Annual General Meeting, at which time the plaintiffs were employees of the defendant company, and that the plaintiffs interest was the applicants statement on the issue “staff”; that having released it to the public and its employees (including these plaintiffs) the document no longer belonged to the defendant; that these plaintiffs were entitled to use it as evidence in support of their case; that it therefore amounts to interference to prevent the plaintiff from relying on material, which is necessary to prove its claim; that even if such evidence would be adverse to the defendant, the issue to be considered would be whether such evidence would be relevant.

He thus urged the court to find that there was no law, which provides that, any evidence adverse to a party must be rendered by that party. He appreciated the fact that the defence had a right to remain mum and that there was no legal requirement to compel a defendant to call evidence after the plaintiff closed its case, and in which case then, his clients should be allowed to prove their case in accordance with the Civil Procedure Act and Civil Procedure Rules and, in his opinion, the defendant stood to suffer no prejudice as it would have a chance to cross- examine Naikuni, and that in any event, there has been no evidence so far, that the defendant would want to call the applicant as its witness, as it had not filed its list of documents.

He urged the court to find that the application was premature, as the defendant ought to wait for the applicant who in any event was no longer the defendant’s Chairman, to start testifying at which point, should the issue of ownership of evidence arise, the defendant may raise any objections in accordance with its rights as per the Civil Procedure Rules, but that the defendant should not interfere with the conduct of the plaintiffs’ case, at this stage, otherwise it would also be tantamount to interfering with a fair trial of the matter.

He relied on the second principle as enunciated by Du Parcq L.J in the Triplex Safety Glass Company case while laying down the law as it applies to the duty of the court to make sure, that *“the protection of the abov e referred rule on self incrimination, is not accorded to persons who have in truth no claim to it ”,* and that *“ the court will insist upon an answer if”*. Before I proceed further, it is important that I state right from the outset that a company is owned by its shareholders. It is common ground that the defendant company is a company, which is quoted on the Nairobi Stock Exchange, and it is in the circumstances, a Public Company, and anybody who subscribes to its ideals can buy its shares from the bourse. That being the case then, once its Annual Report is released at it’s Annual General Meeting, that Report can no longer be said to be confidential, nor can it be said to remain the sole property of the company. It becomes a public document, and can be referred to by its shareholders as well as all other people who have an interest in the company, amongst whom are employees of the Company.

Be that as it may, I have considered the submissions by both very able counsel and have taken into account the findings in the cases which Mr. Kajwang referred to. It cannot escape one attention that all of them referred to criminal matters, and apart from the concept of fair hearing, which is well enshrined our Constitution, the main issues that two of those arose in cases, was the right not to incriminate oneself. Indeed such a right exists in all matters where the possibility of one incriminating himself arises and *“the danger must be the peril the possibility of being convicted as a*

criminal”. The apprehension must be real. Granted, a company such as this defendant would be entitled to protection such as would be accorded to a person, if circumstances were similar to those in the Rio Tinto, and Triplex safety glass cases but this suit in my humble opinion is purely a civil matter, and I am unable in this particular instance to foresee any risks of any criminal action that would be taken against Naikuni or the defendant company for that matter.

In any event, Mr. Kajwang did not at any one point, elaborate or give specific of what type of criminal action would befall the defendant and Naikuni should the latter be called to testify. I do therefore find that the protection cannot be offered to Naikuni, whose only duty would be to testify on a document, which I have found to be a public document, in a purely civil matter. I form the opinion that there would be no chance of incriminating himself in any way. Needless to say, incrimination can only happen in criminal matters and criminal activities. This is not one of them.

Having found as I do, and having in mind the fact that the Rules of Civil Procedure provide for discovery, and interrogatories, it is my opinion that there are no hurdles in the defendant’s way, and that the trial stands to suffer no prejudice if Naikuni is called to testify for the plaintiffs.

I do in the circumstances find that this application lacks in merit and I do dismiss it with costs.

Dated and delivered at Eldoret this 21st day of July 2004.

JEANNE GACHECHE
JUDGE

Delivered in the presence of :-