



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT
CIVIL SUIT 2503 OF 1993

CHRISTIAN JUMA WABWIRE..... PLAINTIFF

VERSUS

ATTORNEY GENERAL..... DEFENDANT

JUDGMENT

The Plaintiff herein, Christian Juma Wabwire filed this suit against the Attorney General on 18th January 1993 following his termination of Employment with the Kenya Armed Forces. The reliefs sought in his Plaint filed by the firm of Kiptui & Company Advocates are as follows:

- a) General damages for unlawful and wrongful arrest
- b) General damages for false imprisonment and torture
- c) General damages for malicious prosecution
- d) Declaration that his prior demotion and sacking were unlawful and general damages for wrongful dismissal and/or reinstatement
- e) Costs of the suit
- f) Interest
- g) Any other appropriate award at the discretion of the Court.

Before the suit was set down for hearing parties entered out of Court negotiations at the instance of the Counsel for the Defendant who on the 20th of December 1994 wrote to the Defence Counsel requesting to be furnished with the Defendants' proposal for settlement. On 13th April 1995 Counsel for the Plaintiff submitted a proposal in which he quantified the Plaintiff's claim as follows:

- a) Damages for wrongful dismissal Shs. 950,000
- b) General damages for malicious prosecution Shs. 300,000
- c) Agreed costs Shs. 140,000

Total Shs.1,390,000

The said proposal was duly considered by the Defendant and acted upon as will appear later in this

judgment.

It is interesting to note that after the Defendant entered appearance on 18th June 1993 nothing seems to have happened regarding this suit until 4th April 2004 when the Plaintiff's present advocates filed a Notice of Change of Advocates dated 3rd February 2004 and on 5th February 2004 resurrected the suit by filing an application for leave to apply for judgment in default of Defence. The grounds on which the application was founded were that the Defendant failed to file a defence within the stipulated statutory period and that having been served with a proposal for a settlement in favour of the Plaintiff suggesting Kshs.950,000/= as damages for wrongful dismissal, Shs.300,000/= in respect of general damages for malicious prosecution, costs of Shs.140,000/= and interest on the said sums at the rate of 18% the Defendant admitted liability by paying to the Plaintiff Kshs.590,000 "but has failed to pay the balance of Kshs.800,000/= plus interest."

Another interesting twist in this matter is that after being served with the application the Attorney General filed a defence and grounds of opposition to the application on the 11th of August 2004. The Attorney General later filed a Replying Affidavit on 5th March 2004. Although in the coram recording on 14th March 2004 a Mr. Owang is shown as presenting the Defendant it seems he was not present during submissions leading the presiding judge to remark in his Ruling as follows: - "Although the Respondent on 5th March 2005 filed a Replying Affidavit and Grounds of Opposition he had no representation in Court in unexplained circumstances."

The application was heard ex parte and leave to apply for judgment granted with costs to the Plaintiff. Consequently the Plaintiff applied for judgment on 4th March 2005 and the same entered on 13th April 2005 with a further order that the suit be set down for formal proof whereupon costs would be considered. It is in respect of the formal proof hearing before me on 31st May 2005 that I now render this judgment. Mr. Agina for the Plaintiff called only the Plaintiff to give evidence while Mr. Bosire for the Attorney General cross examined the Plaintiff without calling any witness. Judgment having been entered, liability was no longer an issue. The out of Court negotiations and the payment of Shs.590,000/= not being in dispute, the only issue for determination by this Court is whether the said sum was paid in full and final settlement of the Plaintiff's claim as set out in the Plaint or whether the same was a part payment, in which case the Plaintiff would be entitled to the sum of Kshs.800,000/= which he claims as the difference between the proposed quantum offered by his advocates on 13th April 1995 and the sum of Shs.590,000 paid to him by his previous advocates following out of Court negotiations as a consequence thereof.

The Plaintiff admits that the firm of Kiptui and Company had his instructions to negotiate an out of Court settlement on his behalf. Indeed he has relied heavily on the correspondence exchanged between the said advocates and the Attorney General including correspondence exchanged between the Attorney General and the Department of Defence in which the Plaintiff worked. The Plaintiff has also confirmed in evidence that he received the entire sum paid by the Department of Defence as appearing in the Cheque No. 028003 dated 28.11.95 and produced herein in evidence. The Plaintiff stated in cross examination that he was not advised of any settlement reached, yet when he was paid Shs.590,000/= he did not contest the sum. He claims not to have enquired as to the difference and that he believed negotiations were still going on between November 1995 and the year 2004 when he resurrected the suit. He has not told the Court why he found it necessary to wait that long or what explanations, if any, his previous advocates gave him prior to instructing his present Counsel. This, unfortunately, casts doubt in the mind of the Court as to whether the Plaintiff truly believes in his entitlement to Shs.800,000/= now claimed. In the course of re-examination by his advocate the Plaintiff testified as follows:

"I did not consent to the Shs.590,000 and claim the balance of the proposal."

Seeing that the Plaintiff did not protest in any way when the cheque for Kshs.590,000/= was paid and remained silent on the issue for over eight years the Court finds him to have acquiesced to the settlement of his claim at this sum without more. In accepting the said sum and paying the same over to the Plaintiff and not pursuing the difference, the firm of Kiptui & Company must be taken to have done so for and on behalf of the Plaintiff. I find on the other hand that the Attorney General having settled the matter at the said sum did so in full and final settlement as appearing in the letter of 24th May 1995 produced in

evidence by the Plaintiff (underlining supplied). The Plaintiff has told this Court that the said letter was extracted from his file with his previous advocates. One wonders how the same would have found its way there since the same does not appear to have been copied to them. Whether or not the same was marked confidential it clearly is a part of correspondence exchanged between the Attorney General and his client ministry with which the Plaintiff worked. By producing it in evidence the Plaintiff must have intended that the Court considers it alongside his advocate's proposal. Its contents clearly show that the sum of Kshs.590,000/= was paid to the Plaintiff in full and final settlement of his claim and explains why the Attorney General did not find it necessary to file a defence to the suit. It would also suggest that the Plaintiff through his previous advocate considered the matter as settled and did not therefore apply for judgment sooner. The Plaintiff has not contested the actions of his previous advocates in conceding to the settlement. Neither has he challenged the same. Further the Plaintiff has not tendered any evidence to prove that the sum paid pursuant to the negotiations was not adequate to compensate him for the damages claimed. Having obtained an interlocutory judgment the Plaintiff was still under a legal obligation to mitigate his losses and to prove his claim of Shs.1,390,000/=. As it is one can only assume and, I believe rightly so, that all the particulars of his proposal as tendered to the Attorney General by his advocates were considered in the negotiations leading to the payment of Kshs.590,000/= in November 1995. To my mind the resurrection of the suit in the year 2004 was an afterthought. Even if it were not so, I am inclined to accept Defence Counsel's submission that the Plaintiff is guilty of laches and has slept on his rights, if any, for so long that this Court would not be in a position to come to his aid. It is a well known principle of law that a Court of Equity will not render its aid to stale demands where a party has slept on his rights and acquiesced for a great length of time. Creating doubt in the mind of the Court as to the genuineness of a party's claim as has occurred herein is an indication of lack of good faith on the part of a litigant. Conscience, good faith and diligence are the three most important factors in moving the wheels of justice and calling a Court of Equity into activity. Where these are lacking, as in the present case, the Court will remain passive and do nothing.

The Plaintiff has failed to satisfy the Court why, the settlement made in November 1995 ought to be disturbed 10 years later and be declared a partial payment or why the sum paid thereunder ought to be considered inadequate and be enhanced by a further Shs.800,000/=. I find that the Plaintiff's suit ought to be marked as having been settled upon the payment of Kshs.590,000/= all inclusive. In these peculiar circumstances, an order for dismissal of the suit as prayed for by the Defence cannot be made as the same would not be appropriate. The only real issue which has led to the revival of these proceedings is that a consent judgment was not recorded after payment was made out of Court.

Save as to mark this suit as settled, I find that the Plaintiff is not entitled to any further reliefs. Having noted that the out of Court settlement included a figure for party and party costs, each party shall bear its own costs as may have been necessitated by the failure to record a consent judgment after settlement was reached.

Dated and delivered in Nairobi this 30th day of September 2005.

M.G. Mugo

Judge

In the presence of:

N/A for the Plaintiff

Mr. Bosire for the Defendant