REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 1139 OF 2002

MENGINYA SALIM MURGANI……..….PLAINTIFF/APPLICANT

-VERSUS

KENYA REVENUE AUTHORITY…….. DEFENDANT/RESPONDENT

RULING

Hearing of the suit based on the plaint of *5th July, 2002 b*egan before me on *7th February, 2005* and was adjourned to *14th April, 2005*. On that date, and before hearing could progress further, the plaintiff moved the Court by Chamber Summons dated and filed on 14th April, 2005. His substantive prayer was one: That the plaintiff be granted leave to *amend the plaint* in accordance with an annexed draft amended plaint.

The application is supported by the plaintiff's affidavit, the content of which may be summarized as follows. It is deponed that the plaintiff had entered into a contract of employment with the defendant on 7th June, 1996 and his position was that of Senior Research Officer on *permanent and pensionable terms*. He was later promoted to the rank of Senior Assistant Commissioner, and while he was serving in that capacity the defendant, on 7th March, 2001 terminated his contract, without giving him any notice. His contract was terminated when he was 38 years old and *not due for retiremen*t. The plaintiff avers that he has not, since the termination of his employment, had the luck to find another job, and he has been out of employment. He had instructed the firm of *M/s. Kamau Kuria & Kiraitu*, Advocates to file suit against the defendant on 5th July, 2002. In his plaint he had prayed for special damages in respect of pension, *leave allowanc*e, and payment of salary in lieu of notice; but he had omitted a prayer for general damages for *loss of service*. The plaintiff has been advised by his advocates, and he believes their advice to be true, that his prayers should have included *general damages* and *exemplary damages*. So he comes to Court seeking leave to amend the plaint, to include a prayer for general damages for loss of career, and exemplary damages. He believes that no prejudice will be occasioned to the defendant if such leave is granted.

The defendant's replying affidavit of 26th May, 2005 was filed on even date; and in addition, there were *grounds of opposition* dated 11th May, 2005 and filed on 27th June, 2005. The content of the replying affidavit, sworn by ***Michael A. Onyura,*** Senior Deputy Commissioner in charge of Human Resource at the defendant's establishment, may be summarised as follows.

The deponent avers that the facts relating to this matter were not within his knowledge at the time the pertinent issues were brought before the appropriate disciplinary body. He also avers that the action taken by the defendant was *"in accordance with the events obtaining at the time the plaintiff was dismissed."*

In the grounds of opposition, the defendant contends that: the application is misconceived, frivolous, and an abuse of Court process; that the application is calculated to delay the trial proceedings; that the

application seeks to introduce new material which was not before the defendant's disciplinary committee.

When the application was heard, on 19th September, 2005 the defendant was not represented. There was evidence, however, that hearing notice had been duly served, on 21st July, 2005.

Learned counsel, ***Dr. Kuria***, observed, quite consistently with the depositions from both sides, that *certain facts had emerged after the meeting of the disciplinary committee* which effected the plaintiff's dismissal from the employ of the defendant, and such facts now formed a basis for amending the plaint to seek *further reparations*. In particular, the plaintiff wished to *add general damages* to his list of claims. As a person who had been employed on permanent and pensionable terms, the plaintiff would be entitled to make such a claim. In the Court of Appeal decision, ***Alfred J. Githinji v. Mumias Sugar Company Ltd.***, Civil Appeal No. 194 of 1991 the following passage appears:

> **"Our view is that where a contract of service, unlike that of the appellant, is 'for an indefinite period with an element of permanency and a degree of security of tenure', in that it does not provide for its termination by the giving of notice or payment of salary in lieu thereof, what the employee who is wrongfully dismissed will be entitled to, is that which is reasonable in the given circumstance."**

The reference to compensation on the basis o*f "that which is reasonable* in the given circumstance" is another way of saying "*general damages*" — compensatory relief in monetary figures such as the Court may, using appropriate criteria, and in the exercise of its own discretion, award.

Learned counsel stated the principle underlying the plaintiff's intention to claim general damages, by citing a passage in ***Sir William Wade's Administrative Law, 9th edition (Sir William Wade and Christopher Forsyth***), at p.781:

> **"Even where there is no ministerial duty…and even where no recognised tort such as trespass, nuisance or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing.There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration and perhaps also other unlawful acts causing injury."**

It is the plaintiff's contention that there was *malicious injury* caused to him; and he thus wishes to claim general damages. He wishes to include a new paragraph in the plaint (9B), in which he asserts misfeasance in *public office causing him injury*.

The basis for invoking the Court's jurisdiction in this manner is established in case law. It had been held in the former Court of Appeal for Eastern Africa, in Jashbhai C. Patel v. B.D. Joshi (1952) 19 EACA 42 that:

> **"Applications for leave to amend even if necessitated by negligence or carelessness will be granted so as to enable the right question to go to trial unless the party applying was acting mala fide or by his blunder he had done some injury to his opponent which could not be compensated by costs or otherwise."**

The learned Judges in that case cited a passage in the very relevant English decision, ***Claparede v. The Commercial Union Association, 32 W.R. 262 (Pollock, B):***

> **"The rule of conduct of the Court in such a case as this is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but if the amendment will put them into such a position that they must be injured, it ought not to be made."**

Dr. Kuria submitted that no injustice would, in the instant case, be occasioned to the defendant if the plaintiff was allowed to amend his plaint. Learned counsel noted that even though the hearing of the main suit has already commenced, the plaintiff had *not yet concluded his evidence-in-chief;* and so the defendant would have an opportunity of examining, and of *calling evidence.*

Learned counsel submitted that the defendant's grounds of objection were essentially based on a misapprehension of the applicable law, especially as the objections would have emanated from a belief that at this interlocutory stage, the Court would be examining the *merits of the case.*

I think the law is quite clear, from the authorities tendered by the applicant, and from the submissions of counsel. Firstly the plaintiff has a valid basis for seeking substantive reparations in the form of *general damages*; secondly, the law allows the plaintiff at this stage to *seek leave to amend* the plaint; thirdly, because granting such an application will cause no prejudice to the defendant; fourthly, because it is in the interests of justice that the *triable issues in the suit be fully ventilated and resolved*, in accordance with the law. Therefore I allow the plaintiff's application to amend his plaint, in terms of the draft annexed with the Chamber Summons of 14th April, 2005. Costs shall be in the cause.

Orders accordingly.

DATED and DELIVERED at Nairobi this 7th day of October, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Dr. Kamau Kuria, instructed by M/s. Kamau Kuria & Kiraitu Advocates

For the Defendant/Respondent: Mr. Ontweka, instructed by M/s. D.O. Ontweka, Advocate