



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 187 OF 2003

- 1. PHILIP ATENG OGUK**
- 2. STANLEY WANJOHI MWAI**
- 3. FRANK JUMA MWADIME (all suing on their own behalf and on behalf of 25 others)**
.....PLAINTIFF'S

V E R S U S

WESTMONT POWER (KENYA) LIMITED1ST DEFENDANT

EAST AFRICAN POWER MANAGEMENT LIMITED.....2ND DEFENDANT

Coram: Before Hon. Justice Mwera
Mr. Munyithya for Plaintiffs
Mr. Okongo for Defendants
Court clerk – Sango

RULING

The 2nd Defendant, East African Power Management Limited filed the present Chamber Summons dated 27th April 2004 under O25 rr. 1, 5, 6 Civil Procedure Rules for the main order.

1. *That the plaintiffs do give security of Kshs. 5m for its costs in the suit wi thin 30 days.*

While arguing this point Mr. Okongo told the court that the applicant is the only defendant remaining in this suit following the withdrawing of the suit by the plaintiffs against the 1st defendant – Westmont Power Kenya Limited. That that withdrawal followed this court’s orders of 23rd March 2004 when the plaintiffs were ordered to deposit Kshs. 5m as security for costs which that party, M/S Westmont required but the plaintiffs were unable to avail. On this point Mr. J. Munyithya was of the view that the plaintiffs took such a step following this courts observation on 23rd March 2004 that since the 2nd defendant then (now the only defendant / applicant) had pleaded that it was the plaintiffs’ employer (not Westmont), suing the 1st defendant was probably not a sound idea. Be that as it may, Mr. Okongo pressed the court to accept that the plaintiffs whom his client claimed that had no known places of abode, certain incomes or worthy assets against which the defendant would move in the event the suit was lost, added that by all accounts this was a case warranting the orders sought. That the defendant had legal rights to protect and

to cushion itself against going along a desperate or rather hopeless course in the event this suit failed and it was burdened with costs that could not be recovered.

There was even some allusion to what the applicant perceives of this cause: that from the pleadings and the fact that the plaintiffs supposedly breached their contracts of service when on they secretly and deliberately left the defendant's employment and they concluded and signed employment letters with another employer on or about 3rd March 2002 (See MA – 2), their suit was more likely than not to fail. But this argument seemed to verge on taking evidence during trial (as per the counter claim herein dated 22nd June 2004) and it was thought prudent not to say more of that for now.

Mr. J. Munyithya held the view that his clients were being barred from accessing the court to get justice on the basis of not being too well-endowed materially. That the defendant who once employed the plaintiffs had full records and material about these people including ID cards and details upto their villages of origin. That with the defendant's counter- claim, either side should not be excluded from proving its case or otherwise, ending in a final order of costs.

That a hurdle like depositing security for costs should not be placed in the path of the plaintiffs.

Having listened to both sides in this matter, the orders sought will not issue. When delivering its ruling on 23rd March 2004 where the 1st defendant M/S Westmont Power (K) Limited sought security of costs from the plaintiffs, this court granted the same on the main ground that the plaintiffs appeared to have sued a party who would not likely bear joint liability with the present applicant in the light of the latter having admitted in its pleadings that it alone would pass as the plaintiffs' employer. Of course the court added that the plaintiffs having themselves asked for security under Order 38 r 5 Civil Procedure Rules, it was fair that they too put up a security even if they had by consent withdrawn that application under Order 38 r. 5 Civil Procedure Rules dated 31st July 2003.

In the instant application it is not doubted that the plaintiffs have sued their previous employer for terminal benefits. Whether that cause ultimately succeeds or fails cannot be gone into now. As for meagre means (of income) or not known substantial assets, the applicant would have done well to file affidavit(s) of means about each plaintiff. In this court's view it is not enough simply to brand somebody a pauper and put it to him to prove otherwise. If one claims that the other is impecunious it is the duty of that who alleges to prove not the other way round.

In any case the defendant has filed a counter claim and who knows how it will end. Again like the main suit the end result would go one way or the other, but that is not for now.

Taking the plaintiffs as they are and similarly the defendant, this court dismisses the prayer sought above with costs to the plaintiffs. And because this case has been right at the threshold of being heard, it is ordered that parties should move to exchange documents and or compile agreed bundle(s), with a view to take hearing dates to be found in the diary before the Christmas Vacation.

Orders accordingly.

Delivered at Mombasa on 9th day of September 2004.

J. MWERA

JUDGE