



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPL. NO. 1296 OF 2000

CHARLES N. MBAKA & 32 OTHERS.....APPLICANTS

versus

PEARL DRY CLEANERS LTD.....RESPONDENTS

RULING

On 2nd December 2000, these applicants who number eighteen, came to court by way of an Originating Motion and sought several declaratory orders against their former employer Pearl Dry Cleaners Ltd (hereinafter called the company).

The gist of their application is that although their services have been terminated, the company has failed to pay their terminal dues for services already rendered.

The application is based on the grounds that the applicants have served the company for a period ranging between two and thirty two years, that they have been condemned to compulsory leave without pay and eventually to redundancy without pay and without an opportunity to be heard contrary to rules of natural justice.

The application is made under sections 84 (1) (5) & (6), 73, 74 & 80 of the constitution of Kenya, the Employment Act, Regulation of Wages and Conditions of Employment Act, section 3 of the Judicature Act and all other enabling legislation.

The said sections of the constitution relate to the following

73 - Protection from slavery and forced labour

74 - Protection from inhuman treatment

80 - Protection of freedom of assembly and association

while section 84 is for the Enforcement of the above protective provisions.

Counsel for the company filed only a Notice of Appearance and at the initial hearing of the application he raised a preliminary objection in point of law that the application is totally defective and does not lie.

It was Mr. Chacha – Odero’s submission that the Originating Motion is by form a Notice of Motion. That the company had been denied opportunity enter appearance in which case they cannot file an objection to the motion. It was also his submission that the Originating Motion does not conform to the form 13 A in Appendix B of the civil Procedure Rules and that it is not signed by the court in compliance

with order it rule 3.

In reply, Mr. Mwanyumba having been aggrieved by their employer, and this was the best way to come to court to seek redress and pre-empt delays in obtaining the required redress. In any case, it was his submission that the applicants could not afford to file a plaint and that they should not be penalised on account of the format of their application.

The issue that arises is whether this application is properly before this court.

Where under a provision of statute or where the statute does not lay down the form in which an application is to be made, a party can approach the court by way of an Originating Motion. In *Masaba v Republic* [1967] EA 488, the general rule was laid as that

Every Originating Motion must be in writing. It must be properly signed by the party moving it in person or by his counsel. The notice of Motion must be addressed to the correct parties and it must be properly framed.....every motion must be instituted with the reference to the record and headed in the cause or matter in which the application is to be made; and must also express by whom such application is being made.”

Mr. Chacha Odera’s submission was that the said Originating Summons was in reality an Originating Motion which even if it was, it did not comply with Form 13 or 13 A of (schedule B of the Civil Procedure Act as having omitted the NOTE, as it did not afford the respondents an opportunity to enter appearance.

The application is defective as it does not conform to any terms under the Civil Procedure Act.

The same is hereby dismissed with costs.

Dated and delivered this 2nd day of February, 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of Mr. Mwanyumba for the applicants

Mr. C. Odera for the respondents