



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(CENTRAL REGISTRY)
CIVIL CASE NO. 280 OF 2010

KENYA ANTI-CORRUPTION COMMISSIONPLAINTIFF

VERSUS

DR DAVY KIPROTICH KOECH1ST DEFENDANT

DUNSTAN MAGU NGUMO2ND DEFENDANT

RULING

The application before this Court is a Notice of Motion dated **23rd December 2010** brought under Order 2 Rules 15 (1) (b) and (d) and Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and all the other enabling Provisions of the Law. The Plaintiff/Applicant seeks the following orders;

- i. **THAT** the plaintiff's suit herein against the 1st defendant be struck out for being scandalous, frivolous and an abuse of the Honourable courts process.
- ii. **THAT** the costs of this application and the suit be borne by the plaintiff/respondent.

The application is premised on the following grounds;

- a. **THAT** the plaintiff's suit as pleaded herein relates to fund belonging to Kenya Medical Research Institute Retirement Benefits Scheme wherein the defendants are sued as the former trustee.
- b. **THAT** Kenya Medical Research Institute Staff Pension and Life Assurance Scheme was established sometimes in 1983 and the same was managed by Kenya National Assurance Company Limited (KNA) up to 1996 when the same collapsed by which time the members contribution together with the interest in the said scheme was more than Kshs.150,000,000/=
- c. **THAT** subsequently the management of the pension scheme reverted to the Kenya Medical Research Institute Retirement Scheme which was established vide a resolution made on 30th September 1987 by the Kenya Medical Research Institute Board of Management and which was incorporated as a Trust and a Trust Deed to that effect was registered.

- d. **THAT** subsequently and around the year 2002, the Board of Trustees of the Pension Scheme appointed Genesis Kenya Investment Management Limited as the Pension Scheme Manager, Barclays Bank of Kenya Limited as the Scheme custodian, Anduuru and Co. Associates auditors and Actuarial and Benefits Consultants as the Scheme advisory.
- e. **THAT** as per the Trust Deed establishing Kenya Medical Research Institute Pension Fund the main duties for the same is providing retirement benefits, life assurances and other benefits for the employees of Kenya Medical Research Institute who were members of the Retirement Scheme.
- f. **THAT** it is therefore clear that all the funds and assets for the said Kenya Medical Research Institute Pension Scheme are not public property and the same belongs to the individual employees who are members of the said Pension scheme who are private members.
- g. **THAT** under the provisions of the Anti-corruption and Economic Crimes Act (Act No. 3 of 2003) under which the plaintiff is established, its power relating to claim over corruption and Economic claims only extend to public body and/or public properties.
- h. **THAT** it is therefore clear that the plaintiff does not have the locus to institute this suit against the applicant as Kenya Medical Research Institute Pension fund is not a public body and its pension fund is not a public asset but private funds belonging to Kenya Medical Research Institute employees who are members to the pension scheme.
- i. **THAT** it is therefore clear that this suit as filed by the plaintiff herein is otherwise an abuse of this Honourable court's process.
- j. **THAT** it is now only fair and in the interest of justice that this application be allowed as prayed.

The application is supported by the affidavit of Dr. Davy Kiprotich Koech sworn on 23rd December 2010. In his affidavits he reiterates the grounds on the face of the application as facts to support the application.

The application was opposed. The respondent filed a replying affidavit sworn by Ignatius Wekesa an investigator with Kenya Anti -Corruption Commission dated 21st March, 2011. He gives a brief background of the suit culminating to the current application. That Kemri Retirement benefit scheme was established through an irrevocable trust deed dated 30th August 1987 and had been in existence since 1st July 1983 as KEMRI Staff pension & life assurance scheme. That from 1986 to 1987 the same was managed by KNAC which later collapsed and the management was assumed by the Board of Trustees. On the 1st July 2003 the Trust was amended and it changed its membership of Board of Trustees and name to Kemri Staff Pension Scheme. The Trust was further amended on 1st July 2004 due to retirement of some of the Trustees but the 1st and 2nd defendants continued on as trustees. The trust managed two accounts which received contribution to hold in trust these were;

- a. KEMRI Pension fund account held at Standard Chartered Bank, Yaya Centre Branch A/C No. **[particulars withheld]**. The signatories to these accounts were Davy Koech and Dunstan Ngumo.
- b. KEMRI retirement benefit scheme account held at Standard Chartered Bank, Yaya Centre Branch A/C No. **[particulars withheld]**. The signatories to these accounts were Davy Koech, Dunstan Ngumo, Reninson K. Kirui, Joel Achiba and Prof. Battan M. Khaemba.

KEMRI was providing retirement benefit scheme and was subject to regulations to RBA and the service providers were appointed as per the RBA. The Applicant selectively applied and misinterpreted the Anti-corruption and Economic Crimes Act and its application to this matter. He deponed that Kenya Medical Research Institute was established under Section 12 (1) of The Science and Technology Act, Cap 250 Laws of Kenya and was therefore a public body within the meaning of the Anti-corruption and Economic Crimes Act; that under **Section 6(1)** of the **Anti-Corruption and Economic Crimes Act, 2003** – Act No. 3 of 2003 some of its functions as stipulated in Section 7 (1) (h) (i) are:

“to investigate the extent of liability for loss of or damage to any public property and

- i. To institute civil proceedings against any person for recovery of such property or for compensation**
- ii. To recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya;”**

Between the year 2000 and 2007, the 1st & 2nd defendants by virtue of their positions as trustees of the retirement scheme and signatories to the scheme’s bank account fraudulently misappropriated funds of the said scheme resulting into insolvency of the retirement scheme. The investigations established that out of Kshs.509,002,643.80 that was misappropriated, the 1st defendant was wrongfully paid Kshs.385,690,409/= with Kshs.358,801,909/= being paid to African Medical Services Trust (AMSET) which he is a trustee and the balance of Kshs.27,288,500/= being paid personally to him vide cheques signed by both defendants; that under Section 38 of the Retirement Benefits Act, provides that no scheme funds shall be paid to a trustee. It was therefore clear that the payments made by both defendants to the applicant and various persons and/or entities who were not beneficiaries or had no link whatsoever to KEMRI’s scheme and were illegal; that section 40 of the Retirement Benefits Act, the trustee has a mandatory obligation to take reasonable care to ensure that the management of the scheme is carried out in the best interest of the members and sponsors of the scheme. It is clear that KEMRI as the sponsor of the scheme has an interest in the funds of the scheme and therefore the plaintiff through Section 7 (1) (h) (i) of ACECA has a locus standi to institute these proceedings; that it was not in dispute that the defendants while trustees of the scheme were also employees of KEMRI; that under Section 16(g) of the Science and Technology Act, Cap 250 Laws of Kenya, KEMRI is empowered to administer retirement benefits of its employees.

By establishing a retirement benefits scheme for its employees, the trustee of the scheme, in this case both defendants, were first and foremost employees of KEMRI and agents of KEMRI is so far as administering the scheme was concerned; that in fraudulently disposing the scheme funds, the defendants as trustees acted ultra vires to the instructions of KEMRI and against its interest as a sponsor of the Scheme thus contravening the provisions of Section 45 (3) of ACECA which defined public property as “real or personal property, including money, or a public body or under the control of, or consigned or due to, a public body; that the KEMRI retirement scheme belong to individual employees of KEMRI and not KEMRI is a misconception of the law and this Court should dismiss the applicant’s application forthwith with costs to the plaintiff and that the plaintiff has a locus standi to institute this suit for recovery of the funds misappropriated by the defendants; that KEMRI’s pension scheme is not a private body but a public body , its members are employees of a public body established under the Science and Technology Act, Cap 250 Laws of Kenya, which administers the scheme through trustees appointed by KEMRI. That the 1st Defendant’s application has no basis, is fatally defective, an abuse of the Court process and is only intended to delay the hearing of the main suit and should be dismissed forthwith with costs.

Parties filed written submissions. The applicant reiterated the grounds on the face of the application. The applicant summarized the suit as follows; that plaintiff filed this case vide their plaint dated 2nd June 2010 alleging that the defendants as trustees of the said scheme misappropriated funds belonging to the said pension scheme and sought restitution of the funds; that 1st defendant his statement of defence dated 28th June 2010 denied having misappropriated the funds owned by KEMRI Retirement Scheme in the sum of Kshs. 509,002,643.80 and further argued that the plaintiff lacked locus to institute this suit and the same offends the statutory provisions of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The 1st defendant argues that the plaintiff’s suit be struck out for being scandalous, frivolous and an abuse of the Court process as it lacks the necessary locus to institute the suit against the applicant; that the Kenya Medical Research Institute Pension scheme did not fall under section 2 of the Anti-Corruption and Economic Crimes Act, 2003 as to give the plaintiff power and locus to institute the current claim; that the pension scheme is a private body and its members are private individuals and once the contributions are made they become property of the Pension scheme holding the same in trust of its members who are private individuals; that Section 45(3) of the Anti-Corruption and Economic Crimes Act, 2003 in its

definition of property included, real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body and that it was only the members of the said pension scheme who had locus standi to institute the suit.

The plaintiff/respondent submitted that it is a body corporate established under Section 6(1) of the Anti-Corruption and Economic Crimes Act, 2003 tasked with the function of investigating the extent of loss or damage to any public property and institute civil proceedings for recovery of the same or for compensation as laid out in Section 7(1) (h) (i) of the said Act. Counsel reiterated the contents of its replying affidavit. It was submitted that KEMRI is a State Corporation established under section 12(1) of the Science and Technology Act Cap 250 laws of Kenya and as such is a public body within the meaning of Section 7 of the Anti-Corruption and Economic Crimes Act, 2003. It was submitted that it was not in dispute that the defendants were employees of KEMRI, trustees of the trust and signatory to its bank accounts; that being a trust the defendants were mandated to comply with the provisions of the Retirement and Benefit Act and specifically section 38 which provides that no scheme funds shall be paid to a trustee and it was clear that the amount that was paid out was made to both defendants and various individuals who were not beneficiaries or had no link to the KEMRI scheme which was illegal.

Counsel further submitted that the trustees were appointed by KEMRI on basis that they were its employees and to manage the trust on its behalf; that it is trite law that some of the duties of a trustee is to properly administer the trust bestowed upon him and that by abusing their position as trustees and unlawful benefit from the trust one of the remedy available would be to seek for compensation for losses or restitution of profits; that KEMRI being the appointing authority to the scheme had a duty to ensure the trust is not mismanaged and is carried out in the best interest of the of its members and hence can bring an action to recover any misappropriation of funds as provided under Section 7 (1) (h) (i) of the Anti-Corruption and Economic Crimes Act, 2003; that the use of ANY in the said section referred to so long as public property is lost whilst under the care and control of a public body and has power to institute civil proceedings. The respondent further submitted that it had locus standi in instituting this suit as the Civil proceedings against the defendants are pertaining money which is public property as per the definition section 45(1) of the Anti-Corruption and Economic Crimes Act, 2003 and the same is under a scheme run by KEMRI which is a public body.

Counsel sought to refer to the NSSF Act section 38(2) which provides that; ***“all sums due to the fund shall be recoverable as debts due to the board of Trustees, and without prejudice to any other remedy shall be a civil debt recoverable summarily.”***Counsel argued further that the monies due to NSSF are recoverable as debts due to the Board of trustees; that NSSF is a public body within the meaning of section 2 of section of the Anti-Corruption and Economic Crimes Act, 2003 and any money misappropriated by its trustees may be recovered by the commission on its behalf that further in section 51 of the same Act provides that a person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the said loss suffered and that section 53 (3) provides that an amount for which a person is liable under section 51 and 52 to a public body may be recovered by the public body or by the commission on its behalf. In concluding counsel submitted that the plaintiff had locus standi to institute the recovery proceedings and urged the Court to dismiss the applicant’s application with costs.

The issues for determination are;

- i. Whether the applicant has Locus Standi to institute this suit?
- ii. Whether the plaint should be struck out?

In this application the 1st defendant has raised the issue of plaintiff’s locus standi in filing this suit. Black’s Law Dictionary defines Locus Standi as ***“the right to bring an action or to be heard in a given forum”***. In the case of **NJAU-VS-COUNCIL OF NAIROBI, KLR (1983) 625 the Court of Appeal** defined the term locus standi in the following manner;

“Locus Standi literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus means that he has no right to appear or be

heard in such and such proceedings”.

The Plaintiff has defended its Locus in filing suit by arguing that KEMRI is a State Corporation and a public body by virtue of the fact that it is established under The Science and Technology Act, Cap 250 Laws of Kenya and that all public bodies including KEMRI are subject to the Anti-Corruption and Economic Crimes Act. It argues further that Section 45 (1) of ACECA deals with protection of public property which states that public property **means real or personal property, including money, of a public body or under the control of, or consigned or due to a public body**”. It argued further that since there is no dispute that KEMRI is a public body then the scheme which was under KEMRI control fails within the definition of public property.

I find that under Section 7 (1) (h) (i) of the ACECA Act the Plaintiff has the mandate to take up any action such as this one as Section 45 (3) defines **public property as real or personal property including money of a public body or under the control of, or consigned or due to a public body**. Since the applicant does not deny that KEMRI is a public body. I find that the Plaintiff has a Locus to file suit and is empowered under the ACECA Act to bring this action on behalf of the public in cases of any suspected Economic Crimes.

I find further that the plaint as drawn is not scandalous or vexatious or an abuse of Court process. The Plaintiff has pleaded that as a Corporate body established under the provisions of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 and it brings this suit pursuant to the provisions of the said Act for recovery of money belonging or due to the Kenya Medical Research Institute Retirement Benefits Scheme (hereinafter **“the Retirement Scheme”**) which is a retirement benefits scheme duly registered under the Retirement Benefits Act 1997 for the benefit of members who are employees or the Kenya Medical Research Institute (hereinafter **“KEMRI”**) which is a public body of virtue of being a state Corporation within the meaning of the State Corporations Act (Cap. 446).

The particulars of fraud, breach of trust, negligence and loss of Kshs 509,002,643.80/= have been pleaded and particularized by the Plaintiff. The Plaintiff’s claims is that as a body with authority under ACECA it has the authority under the provisions cited to sue for restitution of the said sum of money which was wrongfully and fraudulently lost. One cannot term this as scandalous nor vexatious nor is it an abuse of the Court process.

In the case of ***DT Dobie and Company (Kenya) Ltd V Joseph Mbaria Muchina and another Civil Appeal Number 37 of 1988 (1982) KLR***, the Late Madam J. A stated that;

“a pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the Plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved”.

In the case of ***Francis Kamande v Vanguard Electrical Services Ltd. Civil Appeal Number 152 of 1996(Tunoi, Shah and Pall JJA)*** stated that no suit can be dismissed unless it is so hopeless and it is plainly obvious that it discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment. I find that the Plaintiff’s suit is not hopeless, it is not scandalous, vexatious, and frivolous nor an abuse of the Court process. The application dated **23rd December, 2010** is dismissed with costs to the Plaintiff/Respondent.

Dated, signed and delivered on the **15th** day of **September 2014**

R.E. OUGO

JUDGE

In the presence of:-

.....**For the 1st Defendant/Applicant**

.....**For the Plaintiff/Respondent**

.....**Court Clerk**