



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 321 of 2003

RESEARCH INTERNATIONAL EAST AFRICA LTD.APPELLANT

AND

JULIUS ARISI & 213 OTHERS RESPONDENTS

(Appeal from the order of the High Court of Kenya

irobi (G. B. M. Kariuki J) dated 13th day of October, 2003

in

H.C.C.C. NO. 429 OF 2003)

JUDGMENT OF THE COURT

This is an appeal against the ruling and order of the superior court (G. B. M. Kariuki J) dated 13th March, 2003 dismissing the appellant's application dated 20th May, 2003 seeking the striking out of the respondents' suit.

By a plaint dated 12th May, 2003 the 214 plaintiffs (respondents) averred that the appellant who was their employer had in breach of the Employment Act and the respective contracts of employment failed to provide various employment benefits to wit, fully paid annual leave or pay in lieu of leave, house allowance, rest on public Holidays or pay in lieu thereof, compensation for overtime worked, fully paid maternity leave in respect of female plaintiffs; one month salary in lieu of notice or one month salary in lieu of notice in the event of the appellant seeking to terminate the respondents' employment, severance/redundancy pay at the rate equivalent to 15 days wage/salary for every year of service and lastly rest day for every week. The respondents further averred, among other things, that the appellant had in breach of the terms of service compelled the respondents to convert their permanent employment into short term contractual employment for periods ranging between 4 days to 31 days. The reliefs sought in the plaint include, judgment for specified claim of each respondent being the value of the benefits claimed by each respondent – a total of Shs.109,135,862/50 for all the respondents and mandatory order restraining the appellant against terminating the respondents' employment. There is a verifying affidavit accompanying the plaint sworn by Julius Arisi, the first respondent.

The defendant (appellant) avers in the defence, *inter alia*, that it had already terminated the services of

92 of the 214 respondents on 12th May, 2005 which is the same date the suit was filed and of one of the respondent in April, 2003; that it had paid all dues of the 93 employees whose services had been terminated; that each respondent who had a separate contract with the appellant had not separately pleaded the terms of respective contract; that the appellant does not owe each respondent the sums claimed; that the plaint is fatally defective and that the suit is an abuse of the process of the court as the claims of the 38 specified respondents have been settled and 5 respondents had disowned the suit.

On 20th June, 2003, the appellant filed a chamber summons under *Order VII rule 1 (2) (3) and (10) and Order VI rule 13 (a) (c) and (d)* of Civil Procedure Rules (CP. Rules) for an order that the plaint be struck out on the grounds that:

- a. The plaint is fatally defective as it does not comply with the mandatory provisions of order 7 rule 1 (1). The plaintiffs have not sworn an affidavit to verify the averments in the plaint.***
- b. It is not sufficient for the first plaintiff alone to swear the verifying affidavit.***
- c. It is doubtful that the first plaintiff has authority from all the plaintiffs to institute the proceedings.***
- d. The action is an abuse of the process of the court in so far as some of the plaintiffs have settled any claims they may have had against the defendant”.***

The application was partly brought under *Order VII rule 1 (2) and 1 (3)* which provides:

“(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.

(3) The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with subrule 2 of this rule”.

On the question of the alleged fatal defect in the suit for lack of verifying affidavits by each of the plaintiffs, the superior court held, thus:

“Before the introduction of rule 1 (2) of Order VII Plaints were filed to commence suits without verifying affidavits.

The introduction of rule 1 (2) did not remove the validity or competence of the suit, if or where a verifying affidavit was not filed along with the plaint. All it did was to give the court power to strike out the plaint whose averments had not been verified as correct by the plaintiff through a verifying affidavit. Where as here, the number of plaintiffs is big, it is permissible, for one or more of the plaintiffs to file a verifying affidavit or affidavits on behalf of all the plaintiffs. Order VII does not out-law this. It is not mandatory that each one of the plaintiffs must file a verifying affidavit.

In the instant case, there was verifying affidavit by the 1st plaintiff who claims to have the authority of the other plaintiffs to swear it not only on his behalf but also on their behalf. The defendant contends that it is doubtful, that the first plaintiff has authority to swear the verifying affidavit on behalf of all the plaintiffs. At this stage of the proceedings, the determination of the question would call for evidence. As pleadings stand, rule 1 (2) of order VII seems, on the face of it, to have been complied with”.

Additionally, the superior court rejected the contention that the suit was an abuse of the process of the court.

There are six grounds of appeal. Mr. Kimani Kiragu, learned counsel for the appellant, however, abandoned the sixth ground and proceeded to argue the remaining five grounds together. The purport of the five ground of appeal is that the learned judge of the superior court erred in holding that the first plaintiff had authority from all the plaintiffs to institute the proceedings; that first plaintiff’s verifying

affidavit was sufficient and in holding that suit was not an abuse of the process of the court.

Mr. Kimani Kiragu conceded at the outset that there is no basis for striking out the suit against Julius Arisi, the first respondent. He submitted in support of the appeal, among other things, that the purpose of *rule 1 (2) of Order VII CP Rules* is to make people assume ownership of their claims; that each plaintiff had an independent contract with the appellant, that it is only a plaintiff who can verify the correctness of his claim or expressly authorize the filing of a verifying affidavit; that the first respondent is not in a position to depone to what each of the plaintiffs is entitled to; that the verifying affidavit of the first respondent is totally inadequate for the claims of the others and that *Order VII rule 1 (2) CP Rules* requires that each plaintiff should swear an affidavit.

Mr. Amuga, learned counsel for the respondents, on the other hand, submitted, *inter alia*, that the concession that the entire suit should not be struck out is a good reason for dismissing the appeal; that *Order VII rule 1 (2) CP Rules* is silent as to whether each plaintiff should file a verifying affidavit; that there is no need for filing a verifying affidavit by each plaintiff as what is to be verified is the correctness of the averments and not their truthness; that the truthness of the claim is a matter for the trial; that the verifying affidavit of the first respondent is sufficient and lastly that the court has power to order each claimant to file a verifying affidavit instead of striking out the suit.

Rule 1 (2) and 1 (3) of Order VII CP Rules was introduced by Legal Notice No. 36 of 2000 of 5th May, 2000.

In ***Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another***, *Milimani Commercial Courts H.C.C.C. No. 810 of 2001* (unreported), the superior court (Ringera J, as he then was) quoted a commentary by J. V. O. Juma, J. appearing in a publication called HAKIMU as to the mischief that the new *rule 1 (2) and 1 (3) of Order VII* targeted partly thus:

“It is not uncommon these days to find that a plaintiff is represented by different firms of advocates. This arises as a result of ambulance chasing.

To try to put a stop to this kind of conduct, order VII was amended by adding a new sub rule 1 (2)

.....

It is hoped that the plaintiff will therefore, instruct one advocate as he or she will be required to swear an affidavit ...”.

That commentary on the purpose of *rule 1 (2) of Order VII CP Rules* is undoubtedly correct because Juma J was a member of the Rules Committee which promulgated the Rule. It seems from the commentary that the primary purpose of the rule is to avoid claims whether false or not being brought on behalf of a plaintiff without his express instructions.

The plaint was verified by a five-paragraph affidavit sworn by Julius Arisi, first respondent thus:

“1. I am one of the plaintiffs herein.

2. I have been authorized by all my co-plaintiffs to swear this affidavit on behalf of all the plaintiffs herein.

3. All the plaintiffs herein have read the contents of the plaint annexed hereto and they have all confirmed the averments therein to be correct and they have consequently authorized me to swear this affidavit to confirm that the averments are correct.

4. Consequently I make this affidavit to confirm that the averments made in the plaint annexed hereto are correct.

5. I make this affidavit conscientiously out of my personal knowledge and out of information given to me by my co-plaintiffs, believing the same to be true.”

It is true as submitted by the respective counsel that *rule 1 (2)* of *Order VII* CP Rules is silent whether each plaintiff in cases where there are numerous plaintiffs should file a verifying affidavit. Mr. Kiragu Kimani however contended that since words and expressions in singular include plural and vice versa as provided by *section 3 (4)* of the *Interpretation and General Provisions Act*, where there are numerous plaintiffs, each plaintiff is required to file a verifying affidavit to verify the correctness of the respective claims. Mr. Amuga referred to the case of *Patrick Thinguri & 1006 Others vs. Kenya Tea Development Agency Co. & Another* – H.C.C.C No. 26 of 2004 (unreported) where the superior court (Nyamu J.) in construing *rule 1 (2)* of *Order VII* CP Rules held:

“On the wording of the provision, I see no basis for requiring each plaintiff to verify the plaint because what is being verified is the correctness of the averments and not the truth. I consider that it is sufficient if one plaintiff verifies as has happened in this matter. The other plaintiffs may have to individually verify the truth in court but this is a different matter which does not arise here.

As regards the application of *Order 1 rule 12* I see no basis for each plaintiff to have given authority to the first plaintiff because the first plaintiff is not appearing, pleading or acting for the others. It is only where one or more of the plaintiff (sic) is doing any of the three functions is authority required under provisions of *Order 12 rule (1)* from each of the others. This is not the case here because they all have one advocate who is performing all the functions”

***Rule 12 (1)* of *Order I* CP Rules referred to, *inter alia*, permits anyone or more of the several plaintiff to authorize any other of them to appear, plead or act for such other in the proceedings. But *rule 12 (2)* of *Order I* emphatically provides:**

“2. The authority shall be in writing signed by the party giving it and shall be filed in the case.”

We deal first with the ground of non-compliance by the 2nd to 214th respondents with *rule 1 (2)* of *Order VII* CP Rules. We observe at the outset that the suit filed by the respondents is not a representative suit. That is to say that it is not a suit filed by Julius Arisi, the first respondent, on behalf of or for the benefit of the other 213 persons. Had this been a representative suit, then, there would be no doubt that Julius Arisi would be perfectly entitled to take any action in the suit on behalf of the other interested persons. Rather, the suit is filed by all the 214 persons through their advocate as authorized by *Order 1 rule 1* CP Rules. In that case, each of the plaintiffs is personally responsible for the conduct of his own suit. In our view, none of the 214 plaintiffs has any right to take any steps in the suit on behalf of any other plaintiff without an express authority in writing. Thus, Julius Arisi cannot take any step in the suit on behalf of all the other plaintiffs including filing a verifying affidavit unless he has been expressly authorized by any of the plaintiffs to so act as provided by *Order 1 rule 12 (1)* CP Rules. In this case, Julius Arisi deposes in the verifying affidavit that he has been authorized by all the co-plaintiffs to swear the verifying affidavit on their behalf and purports to verify the correctness of the averments in the plaint on behalf of the co-plaintiffs.

The appellant doubted that such an authority indeed existed. The learned Judge was of the view that the determination of the question whether Julius Arisi had authority from the other co-plaintiffs would involve calling for evidence. He accepted on the face value the statement of Julius Arisi that he had been authorized by all the co-plaintiffs. In our respectful view, the learned Judge overlooked *rule 12 (2)* of *Order I* CP Rules which requires that the authority, if granted, should be in writing and signed by the person giving it and, further that such written authority should be filed in the case. In the absence of such a written authority in the case file, the learned Judge erred in holding in effect that Julius Arisi had sufficiently verified the correctness of the averments in the plaint with the authority of and on behalf of the 2nd to 214th plaintiffs. The present case can be distinguished from the case of *Grace Ndegwa & Others vs. Hon. Attorney General* – *Civil Appeal No. 228 of 2002* (unreported). In that case, Grace Ndegwa swore the verifying affidavit on behalf of about 1484 plaintiffs. It was contended in *Grace Ndegwa’s* case that the verifying affidavit was defective because there was no authority signed by other

plaintiffs authorizing her to act on their behalf. There was however a document signed by most of the plaintiffs in that case authorizing Grace Ndegwa and seven other persons to deal with the advocates for the plaintiff. This Court found that document to be sufficient authority to Grace Ndegwa by the persons who had signed it.

In our view, the true construction of *rule 1 (2) of Order VII* Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover, the Grace Ndegwa's case (*supra*) and rule 12(1) of Order I CP Rules leave no doubt that one or more of the co-plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-plaintiffs with their authority in writing.

Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of *rule 1 (2) of Order VII* Civil Procedure Rules and that their suit was liable to be struck out by the superior court under *rule 1 (3) of Order VII* CP Rules.

The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule.

This Court has jurisdiction to make any order that the superior court could have made. We have considered whether the 213 respondents should be given another opportunity to comply with the rule. We have perused the pleadings. The appellant pleads that it has terminated the services of 93 of the plaintiffs and that it has paid 42 of them their dues. The appellant further pleads that the claims of 38 of the plaintiffs has been settled and that about 5 of them have confirmed in writing that they have no claims against the appellant. The appellant exhibited payment vouchers to verify that the claims of 42 of the respondents have been settled. We have also taken into account the fact that the limitation period in respect of the respondents' claims being based on contract has not apparently expired. In the circumstances, it would be prejudicial and costly to the appellant to allow the suit to be prosecuted in the present form. It is in the interest of justice that the plaintiffs' advocates now on record should streamline the claims by filing a fresh suit.

The ground that the suit is an abuse of court process has no merit. The fact that the claims of 38 of the respondents have been settled and that 5 of the respondents have withdrawn their claims after the institution of the suit does not render the suit an abuse of the court process. If the suit in respect of some of the respondents has been adjusted wholly by a lawful compromise, the appellant could have made an appropriate application in the superior court under *order XXIV* CP Rules.

Regarding the costs of this appeal, it is manifest that the predicament that has befallen the 213 respondents was caused by the misapprehension of the law by the respondents' former advocates. The 213 respondents are not to blame. In the circumstances, the court should not overburden them with costs.

For the foregoing reasons, we allow the appeal in respect of the 2nd to 214th respondents. The order of the superior court dated 13th October 2003 dismissing the appellant's application dated 20th May 2003 for striking the suit is set aside and substituted with an order allowing the application to the extent that the suit of the 2nd to 214th respondents is struck out. The suit of the first respondent is left intact. There will be no order for costs of this appeal in respect of the 2nd to 214th respondents and the costs of the appellant's application dated 20th May 2003. The appeal against the first respondent is dismissed with costs.

Dated and delivered at Nairobi this 27th day of April, 2007.

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR