IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, J.A, ONYANGO OTIENO & DEVERELL, AG. JJ.A)

CIVIL APPEAL NO. 228 OF 2002

BETWEEN

GRACE NDEGWA & OTHERS ……. APPELLANTS

AND

HON. ATTORNEY GENERAL …….. RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Rimita, J) dated 22nd May, 2002

in

H.C.C.C No. 1649 of 2001)

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JUDGMENT OF THE COURT

The appellants in this appeal were former civil servants of different cadres in different Ministries. Their services with the Government of Kenya were allegedly terminated on or about 1st October, 2000. Some of them, about **1484**, felt aggrieved and formed an association called Kenya Retrenched Workers Association. Before that Association could be registered, the same workers appointed about eight of their members to deal with their counsel on matters pertaining to their intended suit. One of these was Grace Ndegwa. Using the name of the unregistered association but also attaching their own names, they sent through their counsel a notice to the Attorney General pursuant to **section 13 A (2) of the Government Proceedings Act Chapter 40** Laws of Kenya. That notice was followed by a plaint which was filed in their own names and which contained more plaintiffs than the ones whose names had been attached to the notice issued earlier on to the Attorney General. That plaint was accompanied by a verifying affidavit sworn by same Grace Ndegwa, the fourth plaintiff. Before that plaint was filed, the appellants had filed a suit at Nakuru High Court but that was immediately withdrawn and the suit which is the subject matter of this appeal was filed in Nairobi although the notice had stated that it would be filed in Nakuru. The respondent (The Attorney General) on receipt of the same notice wrote to the secretary to the Public Service Commission on 30th August, 2001 seeking instructions urgently on the claim. A copy of that letter was sent to the appellants' advocate. That plaint was amended and the amended plaint had **3525** plaintiffs. The respondent filed statement of defence on 24th October, 2001. On 9th April, 2002, the respondent filed notice of preliminary issues of law. That preliminary objection stated as follows:

"NOTICE OF PRELIMINARY ISSUES OF LAW.

TAKE NOTICE that the defendant will at the first hearing of this suit request the Hon. Court to hear and determine the issue of law namely:

1. The suit does not lie for non-compliance with s. 13 A of the Government Proceedings Act.

2. That the plaint is accompanied by an incurably defective and inadmissible verifying affidavit purportedly sworn by one GRACE NDEGWA on 1.10.01 sworn by one (sic)

Dated at Nairobi this 8th day of April, 2002.

Madahana J.W.

PRINCIPAL LITIGATION COUNSEL

FOR: ATTORNEY GENERAL."

That preliminary objection to the suit came up for hearing before the superior court (Rimita, J) who after full hearing sustained the preliminary objection on both points, struck out the entire suit and awarded costs to the respondent. That is the genesis of this appeal.

The memorandum of appeal contains fifteen grounds of appeal which we may sum up into three main grounds namely that the learned Judge of the superior court erred in law in striking out the entire suit on the basis that the notice of intention to sue that was issued under **section 13 A of the Government Proceedings Act Chapter 40** of the Laws of Kenya was invalid and no suit could be premised on it; that the learned Judge erred in law and in fact in failing to find that some of the prayers in the plaint did not require a statutory notice and fell within the proviso to **section 13 A of the Government Proceedings Act**; and that the learned Judge erred in law in striking out the suit on the basis that the verifying affidavit in support of the plaint before him was not sworn by a competent and authorized person.

The first part of the notice of intention to sue which was challenged by way of preliminary objection stated as follows:

"NOTICE TO THE ATTORNEY GENERAL PURSUANT TO S. 13. A (2) OF THE GOVERNMENT PROCEEDINGS ACT CAP 40 OF THE LAWS OF KENYA.

TAKE NOTICE that Kenya Retrenched Workers Association through their National and/or branch office intends to institute proceedings in the High Court at Nakuru against the Hon. Attorney General on behalf of the Public Service Commission and the Government of Kenya. The list of claimants has been annexed herewith."

The notice then proceeded to put down the circumstances giving rise to liability which were eight in total. It also stated when the cause of action arose which was on 1st October, 2000 and ended up with reliefs sought which were as follows:

"(a) A declaration that the retrenchment programe is discriminatory, defamatory, illegal, null and void.

(b) General damages.

(c) Payment of full benefits.

(d) **Costs of the suit."**

It was stated and was not in dispute that the Retrenched Workers Association was, as at the time the notice was issued, not a registered association. That being so, it could not sue and be sued and it goes without saying that it had no business giving notice of intention to sue. To that extent, the learned Judge was plainly right. However, that notice did not end with the association only. It went on and stated that there were claimants who were suing and annexed a list of these claimants together with the notice so that when the Attorney General got the notice, he was also made aware of the individual claimants who intended to sue him on behalf of the Public Service Commission. In short, he was put on guard that there were claimants who intended to sue him and their names were given. The learned Judge considered the same list of claimants but did not think it would affect the invalidity of the notice. He stated:

> **"Of course a list of 1,484 claimants the Association was to sue for was attached to the notice but in my view I do not think this would affect the invalidity of the notice."**

In our mind, as clearly spelt out in **section 72 of the Interpretation and General Provisions Act Cap 2** Laws of Kenya, in a case where a form is prescribed by a written law (as is the case here where a form of the notice of intention to sue is prescribed), all instruments or documents which purport to be in that form shall not be void by reason of a deviation from the form if the same document does not affect the substance of the document or is not calculated to mislead. We reiterate that the courts in dealing with situations such as was before the learned Judge have a duty to look into the spirit of the document and whether the document served its purpose. In this case, the Attorney General was, as we have stated, made aware of the claimants and their names were forwarded to him together with the notice so that he was fully aware that the claimants were not the Association as such but individuals whose names were spelt out to him. The purpose of the notice was satisfied and we do not think that the learned Judge was right in his view that the list of claimants sent to the Attorney General together with the notice did not affect the invalidity of the notice. That list was part of the notice and had to be read together with the notice as one document and if that had been done, then the effect of the list would have been clear.

The next point that was taken up in the preliminary objection was that the notice stated that the suit would be filed at Nakuru and in fact one was filed there but was withdrawn. The learned Judge of the superior court was prepared to "ignore that bit of notice" but as the claimants in that notice were **1,484** who were to file the suit against the Attorney General whereas the suit filed in Nairobi had initially **2,701** claimants and the Association was not made a party, he found that there was no relationship between the notice and the suit in Nairobi. In our view, the relationship was that the initial **1,484** claimants whose names were attached to the notice remained the same and were also claimants in the suit filed in Nairobi so that if there was any doubt on the number of people suing in the suit before the superior court, it would only be entertained in respect of the additional numbers but not the original claimants.

Further, we also note that one of the reliefs sought was a declaration that the retrenchment programe is discriminatory, defamatory, illegal, null and void. That declaratory relief was sought by all the claimants in the original plaint, and in the amended plaint **section 13 A (1) of the Government Proceedings Act** does not cover such a relief which means that the appellants needed not issue notice of intention to sue in respect of declaratory relief as by dint of **section 13 A (3)** reliefs such as those seeking declaration are not covered by provisions of **section 13 A (1)**. That being the case, the court could not strike out parts of the reliefs sought and leave other parts. Neither could the court on account of the number of claimants strike out the case brought by some claimants and sustain other parts as some of the claimants in the amended plaint though they had not issued notice, yet under the proviso to **section 13 A (3) of the Government Proceedings Act**, were entitled to sue for the declaratory relief without complying with the provisions of **section 13 A (1) of the Government Proceedings Act**.

In a situation such as obtained here, what commends itself to us would have been for the entire case to go to full hearing as technicalities would in the end result into injustice to the entire case.

That leaves only one matter to discuss and that is whether the verifying affidavit sworn and signed by the fourth appellant, Grace Ndegwa, was valid for the purpose of this suit. The learned Judge in considering this point found that the verifying affidavit was defective as it did not comply with **Order VII rule 2** in that whereas Grace Ndegwa purported to have sworn that affidavit with the authority of all

the appellants, that authority is lacking as what she referred to as the authority did not authorize her to appear, plead or act for the other appellants and in any case, it was not signed by all the appellants. We have perused the document that was signed by most of the original claimants (appellants) and which appointed Juma Kiplenge and Associates as advocates for the appellants. That document also makes it clear who were authorized to deal with the same advocates in respect of the suit. Grace Ndegwa is one of the eight people who were authorized by the appellants to deal with the advocates for the appellants. In that scenario, it is not surprising that she signed the verifying affidavit on the basis that she was authorized to do so by the appellants who authorized her to instruct their appointed advocate. As to the finding of the learned Judge that not all appellants signed the purported authority, we again reiterate that that cannot be a proper ground for denying justice to those who signed the same authority.

Before we allow the appeal, as we are inclined to do, we need to make it clear in a parting shot that as was clearly stated by the predecessors of this Court in the case of **Mukisa Biscuit Co. vs. West End Distributors (1969) EA 696**, the practice of applying guillotine to cases through preliminary objection before the full hearing should be discouraged. As Madan, J.A (as he then was) stated in the case of **D.T. Dobie Co. Ltd. vs. Muchina & Others – Civil Appeal No. 37 of 197 (unreported),** a plaint can be struck out only if the claim is incontestably or hopelessly bad. Otherwise, as he said further-

> **"A court of justice should aim at sustaining a suit rather than terminating it by a summary dismissal. Normally, a law suit is for pursuing it."**

The facts the above two cases were addressing may have been different from the ones in the present suit, but the principle is the same and that is that as far as possible, a case should be heard on its merit, and terminating cases on technicalities should be discouraged. We do not say that in appropriate cases a party should not seek to have a case struck out by way of a preliminary objection or by way of a substantive application. Rules are there to allow the same to be done, and the Civil Procedure Rules and all other rules for ensuring orderly conduct of cases have to be complied with fully, but in such cases, the court should ensure that where, as in this case, the spirit or purpose of a document is clear, a litigant should be allowed to pursue his substantive claim so long as no prejudice will be suffered by the other party.

In view of the foregoing, we allow the appeal, set aside the orders of the superior court and remit the suit to the superior court for hearing. We make no order as to costs, as the appellants are largely to blame for the situation which gave rise to the preliminary objection.

Dated and delivered at Nairobi this 12th day of November, 2004.

R.S.C OMOLO

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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AG. JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR