



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO 283 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JAMES AMBAYISI MUCHELLE1ST CLAIMANT

DEBORAH OMUHINDI AMBAYISI2ND CLAIMANT

VRS

THE GENERAL OF THE SALVATION ARMY.....1ST RESPONDENT

KENYA WEST TERRITORY2ND RESPONDENT

KENNETH HODDER3RD RESPONDENT

RULING

The application before me for determination is dated 8th August, 2016 and filed in court by the Applicant/Respondent on 10th August, 2016. The application is made under section 9 and 31 of the Advocates Act (Cap 16 Laws of Kenya), Rule 7(a) of the Employment and Labour Relations Court (Procedure) Rules, 2010, Order 2 Rule 15(1) (b) and (d) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The applicant prays for the following orders -

1. **THAT** the Memorandum of Claim filed on 27th July, 2015 be struck out for being unsigned;
2. **THAT** in the alternative the Memorandum of Claim filed on 27th July, 2015 be struck out for being drawn by a non-existent Law Firm and/or an unqualified person;
3. **THAT** the suit herein against the 1st, 2nd and 3rd Respondents/Applicants be dismissed for being void *ab intio*, being that it is based on a Memorandum of Claim that is unsigned and that is drawn by a non-existent Law Firm and/or an unqualified person;
4. **THAT** in the alternative the Suit herein against the 1st, 2nd and 3rd Respondents/Applicants be dismissed for being vexatious and/or an abuse of the Court process.
5. **THAT** the costs of this Application and of the Suit be borne by the Claimants/Respondents.

The application is supported by the grounds on the face thereof and the affidavit of KENNETH HODDER, the 3rd Respondent/Applicant. In a nutshell the grounds are that the suit was commenced by pleadings that are unsigned, supported by an undated, unsigned and unsigned verifying affidavit, and that it is filed by an unqualified person. Paragraphs 5, 6 and 7 of the affidavit of KENNETH HODDER capture the essence of the application in the following terms.

5. Our Advocates on record (formerly trading under the name Daly & Figgis Advocates) by a letter dated 12th September, 2015 wrote to the Law Society of Kenya seeking information as to whether:

a) The Law Society of Kenya has a record of the registration of the Firm "Obura-Obwatinya & Company Advocates."

b) Mr. Obura-Obwatinya, Advocate, had in the year 2015 taken out a Practising Certificate.

A copy of the letter dated 12th September, 2015 from Daly & Figgis Advocates to the Law Society of Kenya is annexed hereto and marked "**KH-2**".

6. The Law Society of Kenya, by its letter dated 14th October 2015 responded to the letter dated 12th September 2015, noting:

a) that they did not, as of the date of their Letter, have any record of any advocate practising under the name, "Obwatinya & Company Advocates".

b) that Mr. Obura Caleb Obwatinya, Advocate, the only advocate in the Law Society of Kenya's database whose name matched those of the firm that purportedly drafted the Memorandum of Claim, had not in the year 2015 taken out a practising certificate.

A copy of a Letter dated 14th October 2015 from the Law Society of Kenya to Daly & Figgis Advocates is annexed hereto and marked "**KH-3**".

7. On the strength of the Letter from the Law Society of Kenya, searches on the Law Society of Kenya's Advocates Search Engine, and advice from our Advocates on record I am persuaded that:

a) there was not legally, at the institution of the suit herein, a Law Firm known as M/S Obwatinya & Company Advocates, and as such a Memorandum of Claim drawn by it would be incurably defective and void ab initio;

b) Mr. Obura Caleb Obwatinya, Advocate, is the only Advocate whose name matches that of the Firm that is alleged to have drawn the Memorandum of Claim;

c) Mr. Obura Caleb Obwatinya, Advocate, had not at the time of drawing the Memorandum of Claim taken out a valid Practising Certificate;

d) Even if it were Mr. Obura Caleb Obwatinya, Advocate, who drew the Memorandum of Claim, the Memorandum of Claim would still be incurably defective for being drawn by an unqualified person.

e) The Memorandum of Claim on which the main Suit herein is founded is incurably defective for being drawn by a firm that is either non-existent or unauthorised to render legal services; or being drawn by an Advocate who at the time of drawing it was unqualified to do so; and for being unsigned;

f) The main suit herein is, for being founded on incurably incompetent pleadings, incurably incompetent, bad in law and void ab initio and lies to be dismissed.

The other ground in support of the application is that there is a suit on the same subject matter filed in the High Court at Kakamega as **Civil Suit No.7 of 2015** and therefore the claim herein is an abuse of court process.

The Claimants filed a replying affidavit of JAMES AMBAYISI MUCHELLE, the 1st Claimant in which he deposes that the application is frivolous and intended to demean the court. The 1st Claimant further

depones that the applicants have filed a similar application in Kakamega High Court Civil Case No.7 of 2015 citing existence of the current suit. Mr. Muchelle further depones that this court has jurisdiction to entertain this suit and that the suit filed in Kakamega High Court is a defamation suit falling within the jurisdiction of the High Court as this court has no jurisdiction to entertain the same.

It is further deponed that counsel for the claimant has now regularised his position and paid for a practising certificate, a copy of which has been annexed to the affidavit as Exhibit "JAM - 1". It is deponed that the applicants have not suffered any prejudice and that the issue of practicing certificate is a mere technicality that cannot override substantive justice as provided under Article 159 of the Constitution.

Determination

I have considered the application together with the grounds and affidavit in support of the same as well as the replying affidavit. I have further considered the submissions of the parties made in court.

It is not in doubt that both Kakamega High Court Civil Case No.7 of 2015 and the claim herein arise from the same cause of action. In the plaint filed in Kakamega High Court the Plaintiffs are JAMES AMBAYISI MUCHELE as 1ST PLAINTIFF and DEBORAH OMUHINDI AMBAYISI as 2ND PLAINTIFF. The cause of action as pleaded at paragraph 5, 6, 7, 8, 9 and 10 thereof and the pleadings in the claim herein at paragraphs 5 to 20 of the claim arise from the same set of facts. The prayers in Kakamega HCCC No.7 of 2015 are as follows -

- i. Compensation for forced resignation, humiliation and suffering.
- ii. Denial of annual leave since 2001 until when forced to resign.
- iii. Defamation of character.
- iv. Damages for loss incurred by the plaintiffs on their investment in Kigunga farm.
- v. General damages for the disturbance to the plaintiffs' children education and costs incurred.
- vi. General damages for undergoing embarrassment, degradation and immeasurable loss in the eyes of the public, mental and psychological torture and costs of the suit.
- vii. Special damages of Kshs.30,000/- monthly from the time we were forcefully made to resign.
- viii. Any other relief deemed just and lawful by this court.

The prayers in the claim herein are as follows -

- (a) A declaration that the respondents action of seeking to transfer the claimants to Mwikali Corps on disciplinary grounds without affording them a chance to be heard is null and void and as such they be and are hereby reinstated and retained at Kigunga Corps.
- (b) A declaration that Undertakings entered into by an officer of the Salvation Army (see Appendix no JA-11) and the Officer Separation Grant Release Form (see Appendix no.JA-6(b)) seeking to demean the claimants, deny them remuneration and/or their right as employees is null and void and hence unconstitutional.
- (c) Accrued leave for 13 years $13 \times 21 \times 24, 551/26 = \text{Kshs.}257,786/-$
- (d) Service Gratuity for 20 years $= 20 \times 15 \times 24,551/26 = \text{Kshs.}5,283,281/-$.
- (e) Loss of future earnings for 14 years $24,551 \times 12 \times 14 = \text{Kshs.}4,124,568/-$

(f) 12 months compensation for unfair termination = 12 x 24,551=294,612/-

(g) Any other relief this court may deem just.

The fact that the plaint was amended to include other defendants and a prayer for defamation does not change the subject matter thereof which still remains the same as the facts giving rise to the suit herein.

Under Article 165(5) the High Court does not have jurisdiction to hear matters reserved for this court under Article 162(2). Since the claim by the Claimants in Kakamega HCCC No.7 of 2015 arises from an employment relationship, the High Court does not have jurisdiction to hear the same, including the claim of defamation which, as pleaded, is also alleged to have arisen in the course of employment.

The claimants herein should therefore instead of filing another claim in this court while Kakamega HCCC No. 7 of 2015 was pending in court, applied for the suit in Kakamega to be transferred to this court for hearing and determination. Filing a fresh suit herein while the suit in Kakamega High Court is pending in court is an abuse of court process as was held by the court of Appeal in JETLINK EXPRESS LIMITED v EAST AFRICAN SAFARIS AIR EXPRESS LIMITED NAIROBI CIVIL APPEAL NO.281 of 2009 while citing with approval the decision in the South African Case of BEINOIS v WIYLEY 1973 S.A. 721 (SCA) as follows -

'What does constitute an abuse process of Court is a matter which needs to be determined by the circumstances of each case. There can be no all encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of truth are used for purposes extraneous to that objective''

The above case was also cited with approval by the court in MAHATKUNO ROBLE & 4 OTHERS v PERMANENT SECRETARY MINISTRY OF DEFENCE & ANOTHER [2016]eKLR.

I therefore find that the filing of this claim while Kakamega HCCC No.7 of 2015 filed by the Claimants herein is still pending is an abuse of court process.

The second issue for determination is whether the suit is bad in law for being filed by an unqualified person and for being void *ab initio* for the fact that the Memorandum of Claim is unsigned, drawn by a non-existence law given and or unqualified person.

The Claimants have not denied that at the time of filing suit, their counsel did not hold a valid practising certificate. The argument by counsel for the Claimant's is that section 34 of the Advocates Act cited by the Respondent does not override the provisions of Article 159 of the constitution.

In the decision of the Supreme Court in **National Bank of Kenya Limited v Anaj Warehousing Limited [2015]eKLR**, the Supreme Court held that -

"The facts of this case, and it is clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes."

Although the decision of the court related to instruments or documents of conveyance, the court made a finding at paragraph 64 as read with paragraph 66 that section 34 of the Advocates Act is a procedural technicality when it observed that -

The Appellate Court made the assumption that, since the Law Society of Kenya did publish annually a list of names of duly-licensed advocates, the public would know if a particular advocate

had not taken out a practising certificate. How far does this assumption represent the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers? We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practicing certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practising certificate.

The court's obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010 Article 48), and in that regard, requires the fulfilment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution: "justice shall be administered without undue regard to procedural technicalities."

I therefore find that the mere fact that counsel for the claimants did not hold a valid practising certificate at the time of drawing the Memorandum of claim does not render the claim herein incurably defective and subject to striking out. It is this court's opinion that the verifying affidavit accompanying the memorandum of claim salvaged it and cured the technicality.

Conclusion

As I have already observed above, the filing of this suit is an abuse of court process having been filed during the pendency of Kakamega HCCC No.7 of 2015 in which the cause of action arises from the same facts as this suit. As I have already observed the High Court does not have jurisdiction to hear the said suit by virtue of Article 165(5) of the Constitution. The option available to the claimants is to transfer the said suit to this court and not to file another suit.

For this reason, I strike out this suit for being an abuse of court process. I will however make no orders for costs.

Dated and signed and delivered this 16th day of March, 2017

MAUREEN ONYANGO

JUDGE