**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUITS NOS 357, 412 & 811 OF 1992 (CONSOLIDATED)**

**FRANCIS WAITHAKA NGOKONYO ........................1ST PALINTIFF**

**SUDI ABDALLA.........................................................2ND PALINTIFF**

**ANDREW MUGA.......................................................3RD PLAINTIFF**

**VERSU**

**KENYA POSTS .........................................................DEFENDANT**

**TELECOMMUNICATION CORPORATION.................DEFENDANT**

**RULING**

This and Civil Cases Nos 412 and 811 of 1992 were consolidated by order of this Court dated 2nd July 1992. The respective causes of action in all the three suits arose from similar and related circumstances, and, they all have the Kenya Posts and Telecommunications Corporation as defendant. The plaintiffs were all its former employees.

There is one common question in all the three suits, namely, whether each of the plaintiffs was validly and properly retired on public interest.

Before me are three applications seeking precisely the same orders, *viz* that the defences filed in all of the three cases be struck out for being scandalous, frivolous or vexatious, or are otherwise an abuse of the Court. The applications, like the suits in which they were brought, were consolidated. They are all expressed to be brought under order VI rule 13(1)(b), and (d), and rule 16 of the Civil Procedure Rules.

Striking out of a pleading is a draconian measure. The Court is therefore, obliged to act with caution and should be slow in deciding to order the striking out of any pleading.

In the case of *DT Dobie & Co (K) Ltd v Joseph Mbaria Muchina & another* Civil Appeal No 37 of 1978, Madan JA (as he then was) said as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

Although the learned Judge was considering a plaint, the same words may be applied with equal force to

a written statement of defence. Except in plain and obvious cases a Court should exercise its discretion in favour of a trial in all cases. That would enable each party to have his day in Court to ventilate his rights.

What are the facts upon which these consolidated suits and applications are based"

Francis Waithaka Ngokonyo (whom I shall hereafter refer to as the first plaintiff/applicant) was taken up as a pupil engineer by the East African Posts and Telecommunications Corporation, with effect from 18th June 1973, on designated terms and conditions. By then Posts and Telecommunication matters were under the East African Community, which thereafter collapsed. In 1975 the first applicant was promoted to become Executive Engineer and in 1977 as acting Senior Executive Engineer. He became Assistant Senior Executive Engineer on 1st November 1978, and Senior Executive Engineer on 18th December 1979, Principal Executive Engineer on 24th June 1980, in acting capacity, and about the same time, he was appointed Divisional Manager. He became Assistant General Manager, Data Processing, in or around 30th April 1990. That is the position he held as at 22nd July 1991 when he was sent on compulsory leave because of alleged persistent laxity, and later, on 22nd October 1991, was retired on public intrest.

In the course of his work, the 1st applicant received several letters of commendation and received certificates of good performance in his work. He also headed several departments from time to time.

Sudi Abdalla (whom I shall hereafter refer to as 2nd plaintiff/applicant), like the 1st applicant, was employed with the East African Ports and Telecommunications Corporation, in August 1971, as Trainee Assistant Telecommunication Controller Grade II. He was later substantively employed in that post, was promoted to the post of Senior Assistant Telecommunications Controller with effect from 1st May, 1977, became Traffic Officer with effect from 1st October, 1982, was on 8th June 1984 appointed to act as Chief Telecommunication Controller, a post which he was confirmed in November 1986, and in April 1990, he was appointed Area Manager, Nyanza region. He had worked in Nairobi and Nyeri before his appointment. That is the post he was holding at the time of his retirement on public intrest on 22nd October 1991.

Like the 1st applicant, the 2nd applicant received several letters of commendation and certificates of good work from the defendant/respondent from time to time.

Andrew Muga (whom I shall hereafter refer to as the 3rd plaintiff/applicant) was taken up as Clerical Officer in 1961, by the defunct East African Community, Posts and Telecommunication Department. In July 1963, he became Clerical Officer Grade II, Senior Clerical Officer in May 1964, Higher Clerical Officer in 1969, Assistant Accountant, in 1977. He became a Senior Accounts Officer, in 1981, Principal Accounts Officer in 1983, and in 1990 a Senior Assistant Manager, Accounts. It was while he served in that capacity that he was sent on compulsory leave in July 1991, and thereafter on 22nd October 1991 was retired on public interest.

Like his co-applicants, the 3rd plaintiff/applicant received several letters of commendation and certificates of good and distinguished service. The plaintiffs' respective cases are that in light of their long and distinguished service with the defendant and in the absence of any preceeding warning letters with regard to their performance, their retirements were actuated by malice. The defences filed in no way controvert the averments in the plaint, are scandalous, frivolous, vexatious and an abuse of the process of the Court. They should therefore, be struck out and judgment be entered in their favour.

What are the averments in the plaint" Each plaintiff/applicant has averred *inter-alia*, that he has had a

long career with the defendant, that in the course of it he rose through the ranks, that he worked with dedication, and distinction as a result of which he earned numerous promotions and assignments and that at no time had he been warned or punished for any wrong doing, nor had he been guilty of any. Consequently, the accusation of “persistent laxity” is *mala fide* and not a proper basis for retiring him on public interest. Each plaintiff then proceeds to itemize particulars of loss and damage he has suffered or stands to suffer because of the premature retirement.

The defendant’s respective written statements of defence in all the three cases are similarly couched. In paragraph 2 the defendant admits the plaintiffs worked for it in various capacities and rose through the ranks as alleged in the plaint, and apparently, that their work was good at least for sometime, but denies they are entitled to benefits particularized in the plaint. I believe the denial appears to have been based on a misconceived reading of the averments in the plaint with regard to them. The plaintiffs could not have been working without salary, provision of a house or in *lieu* thereof payment of a house allowance, or that they were not entitled to those other benefits which in any case evidence tendered is clear about.

Paragraph 3 of the plaint is not talking about the present time, but what the plaintiff used to receive while in the defendant’s employment and before they were retired.

The defendant has averred that the plaintiffs were properly retired under s 17(c) of the Employment Act cap 226 Laws of Kenya and are therefore not entitled to any relief.

S 17(c ) of the Employment Act deals with summary dismissal on account of willful neglect to perform any work, or if performed, the work is so performed carelessly or improperly. The applicants’ case is that the section is irrelevant. They were retired prematurely and not dismissed. Moreover, they so contend, the letters of commendation and certificates of good work they had received before retirement negate the application of the section.

Order VI rule 13 Civil Procedure Rules makes provision for summary procedure in the determination of suits. It is a procedure which, if employed, denies a party the opportunity of calling oral evidence. The power must therefore be exercised with extreme caution.

The applicants term the defences filed against their respective cases as being scandalous, frivolous or vexatious or are otherwise an abuse of the process of the Court. Scandalous implies a pleading, which is merely made for the purpose of abusing, or prejudicing the opposite party’s case. Any indecent or offensive matters are scandalous, and so are words or allegations, which are unnecessary but merely intended in a way to slight the opposite party. In the defences filed there are no allegations made which may be termed as scandalous. Nor can I find averments, which are merely intended to embarrass the applicants or to delay the trial of their cases. The Judge handling a matter has no right to tell or dictate the parties on how to frame their cases. He however, has the duty to decide whether a particular pleading is embarrassing. He must base his decision on the facts and circumstances of each case. A statement in the written statement of defence that a party had been dismissed or retired from his employment on public interest because of persistent negligence in his work in no way can be termed as being embarrassing. It may be untrue but certainly not embarrassing on the face of it.

Nor can it be said at this stage that the matters averred to in the defences are frivolous. Frivolous implies petty or lacking in *bona fides*. Allegations touching on good faith require evidence to establish. The only evidence the applicants have at this stage are documents which show the respondent’s past impression on their work. As yet this Court does not have any evidence touching on their performance at or immediately before their retirement. The employer having alleged persistent negligence, there is clearly the need to be given a chance to adduce evidence in proof thereof. It may or may not succeed in doing

so. It is hard to say here and now. I cannot call upon them nor, could I, adduce evidence in that regard. The stage has not been reached for doing that.

The applicants have also alleged that the defences filed by the respondents are vexatious, that is to say intended to annoy them. No evidence on that score was adduced. The applicants appear to have left it to the Court to infer that a denial of the claim, in the face of earlier letters of commendation to them from it and numerous certificates of good work, amounts to an act or statement whose intention is merely to annoy, no clear inference can be raised to that effect from the facts and circumstances of this case as they stand presently.

Finally, the applicants allege that the defences filed are an abuse of the process of the Court. In general terms, abuse of the process of the Court by a party arises where the party is guilty of misrepresentation, fraud or by the gaining of an unfair advantage by the use of a rule of procedure. There could be other acts, but they, in general terms, hinge around the above.

In our case, what statement or statements has the defendant made in its pleadings which may be termed as amounting to an abuse of the process of the Court" It has responded to certain allegations made by the applicants. The applicants contend that it is not being candid. They want this Court to say as much. But it is not possible nor would it be proper for the Court to say so on the basis of the evidence available to it at this stage.

Moreover, a Court is enjoined to eschew any attempt to try a case by affidavit evidence. Examination, cross-examination and re-examination of witnesses in a contentious matter has always been viewed as the best way to resolve matters in controversy. Shortcuts often-times leave parties dissatisfied.

Considering all the foregoing, I am disinclined to grant the prayers sought. I dismiss the applications.

Costs in the cause

Orders accordingly.

Dated and delivered at Nairobi this 29th day of September 1992.

**S.E.O BOSIRE**

**JUDGE**

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions. Read our Privacy Policy | Disclaimer