REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 38 OF 2003

J.A.O. ……..…… PLAINTIFF

VERSUS

HOMEPARK CATERERS LTD …….. 1ST DEFENDANT

DR. PRIMUS OCHIENG …….. 2ND DEFENDANT

METROPOLITAN HEALTH SERVICES …… 3RD DEFENDANT

RULING

This Ruling is made in the Chamber Summons dated 20th March 2003 filed in court on the same date. The said Chamber Summons is brought under Order VI Rules 13 (1) (a) (b) and (d) and was partly heard and partly determined by the Honourable Justice G.B.M. Kariuki who on 3rd December 2003 ruled in favour of the Respondent and refused to grant the applicant's prayers that the suit be struck out on the grounds that

(i) it is scandalous, frivolous and vexatious

(ii) it is an abuse of the court process.

The Learned Judge upheld the Respondent's preliminary objection filed on 23rd May 2003, and ruled that in the absence of affidavit evidence to support the above two contentions the application under Order VI Rule 13 (1) (b(and (d) was misplaced. The applicants were however allowed to argue the Chamber Summons on their prayer to strike out the suit on the ground that it

"discloses no reasonable cause of action."

Counsel for both sides appeared before me on 17th February and 17th March 2004 to argue this point. Lengthy submissions were made by counsel who also cited a number of authorities in support of their respective contentions. This being a case where the plaintiff alleges infringement or violation of human rights the court found it necessary to weigh the issues before it and consider each and every authority in considerable detail which in addition to some inadvertent administrative problems resulted in the delay in delivering this Ruling, which of necessity could only be written during the summer vacation. Patience on the part of both parties and their respective counsel is appreciated.

The issue before me is whether the Originating Summons as filed discloses any reasonable cause of action as required by law. Any arguments as to form as well as issues already considered and determined in the Ruling of 3rd December 2003 will therefore be disregarded in this Ruling.

Mrs. Nyakundi for the 1st Defendant/Applicant argued that the Originating Summons (hereinafter referred to only as "the O.S.") did not disclose any reasonable cause of action in so far as it is founded on the contention that the Plaintiff's employment was terminated on the strength of a medical report dated 2nd May 2002 when the actual date of the termination was 30th April 2002. Arguing further that the said documents

were unrelated and that her clients were not party to the medical examination and issuance of the medical report, Mrs. Nyakundi submitted that the real reason for the termination was prolonged absenteeism on medical grounds. To use her words, Counsel submitted that the Plaintiff was more often absent for medical reasons than at work.

Submitting on behalf of the 2nd and 3rd Defendants in the O.S., Mr. Mwiti argued that in order to decide whether or not the O.S. discloses a reasonable cause of action the court must look at the pleadings, the affidavit and sequence of events as appearing therein. He argued further that since the basis of the suit, as set out in the affidavit in support of the O.S. is that the Plaintiff's termination was grounded on the medical report which she claims to have been done without her consent and the disclosure (again without her consent) of her H.I.V. status, the issuance of the said report subsequent to the termination defeats any likelihood of a cause of action.

To emphasize this, Counsel relied on paragraph 6 of the Affidavit of Dr. Primas Ochieng which reads as follows

> "6. THAT on 2nd May 2002 the Plaintiff came to Metropolitan Hospital in the morning hours and Specifically requested to see me, and when I saw Her, she clearly and unequivocally informed me that the reasons for her visit to the hospital on that day were as set out here below, together with details of what transpired at the Metropolitan Hospital on that day: -
>
> a) That her employment with the 1st Defendant had been terminated.

b) That she therefore wanted to travel to and live in her rural home in Nyanza Province, and she needed her detailed medical report so that she could continue attending other medical facilities in her home area for continued treatment of her ailments, without having to repeat the medical examinations that had already been carried out at Metropolitan Hospital.

c) She specifically said that she needed the medical report for use in other medical facilities in her future medical treatment and care in order to avoid and save on further costs for similar tests elsewhere as she was now out of employment, and she expressly requested me to include all her medical details, including her HIV status, in the report that she was requesting for.

d) As at 2nd May, 2002 when the Plaintiff sought the detailed medical report from me, she already knew of her HIV status since she had, with her express consent, gone through the relevant testing and examination processes during the month of March 2002, and I had duly professionally informed her of the results as per the applicable medical practice and procedure relating to such matters.

e) That I prepared the Plaintiff's medical report on 2nd May, 2002 on the basis of the details contained in her Hospital Attendance Card already referred to hereinabove, and personally gave it to her. I specifically made the report in medical jargon as she had stated that she only needed it for use by other medical practitioners.

Mr. Amollo for the Plaintiff/Respondent submitted at length in rebutting the contention that the O.S. discloses no reasonable cause of action. Having submitted as a

preliminary point that this was a test case in the constitutional development of Kenya, Mr. Amollo rightly submitted that a suit can only be struck out as disclosing no reasonable cause of action when it is so hopeless that the court cannot determine from the plaint or O.S. in this matter what relief the plaintiff seeks and where not even an amendment can cure the defect. Counsel cited D.T. DOBIE & CO. (K) LTD –vs- MUCHINA & ANOTHER [1982] K.L.R. 1 in support of this submission and also that the existence or non existence of "a reasonable cause of action" is to be decided when only the allegations in the Plaint are considered. That an allegation in a plaint refers to any point of law or fact fit to be decided upon by the court is in itself a reasonable cause of action. To this end Counsel submitted that examining the opposing affidavits of the parties or the circumstances of the dismissal is clearly an issue for trial. Counsel submitted that it is one thing to say a suit discloses no reasonable cause of action, the proof of which would support a striking out, and another to allege that an averment by a party appears to be false, which can never be a ground for striking out. Mr. Amollo also submitted that this suit, being one that bears a high degree of and public importance, and touching on fundamental rights should not be struck out on a question of whether a letter was related to another or not. Counsel concluded by asking the court to dismiss the application and refer the matter to the Chief Justice for a constitutional reference.

The issue of whether the Originating Summons was served upon the Attorney General was raised with the applicant and 2nd and 3rd Defendants arguing that this being a matter brought under the provisions of the Constitution of Kenya Practice and Procedure Rules of 2001 the Plaintiff must prove service upon the Attorney General. Having stated earlier that issues of procedure will not form part of this Ruling, I do not consider this

argument valid or relevant to the task before me, which is to determine whether or not the Originating Summons discloses a reasonable cause of action or not.

Ideally, this objection should be left to the judge hearing arguments on the constitutional aspects of the Originating Summons in the event that the present Chamber Summons is disallowed.

I am guided herein by the holding in the casing of D.T. DOBIE & CO. (Supra) that

> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment; The court ought to act very cautiously and carefully consider all facts of the case without embarking on a trial thereof, before dismissing a case for disclosing no reasonable cause of action ……"

The Court of Appeal in the above case exhaustively considered the principles that a court must apply in striking out a suit under ORDER VI Rule 13 (1) (a) and relied on almost all the leading authorities upon which those principles are established.

In expounding these principles the court, inter alia, defined a reasonable cause of action as one "with some chance of success when only the allegations in the Plaint are considered." Quoting Lord Pearson in DRUMMON – JACKSON –v- B.M.A. (1970) 1 WLR 688 the court defined a cause of action as

> "an act on the part of the Defendant
>
> which gives the Plaintiff his cause of

complaint."

As demonstrated in the said authority and the several others, followed therein, the precise meaning of what amounts to a reasonable cause of action is difficult to ascribe, hence the need to apply caution in applying ORDER 13 Rule 1 (a). Thus in PERU –vs- PERUVIAN CUONO COMPANY 36 Ch.D 489 Lord Chitty had the following to say

> "It has been said more than once that the rule is only to be acted upon in plain and obvious cases, and in my opinion the jurisdiction should be exercised with extreme caution."

Similarly, Swindfen Eady L.J. in MOORE –vs- LAWSON & ANOTHER 31 T.L.R. 418 found the power to strike out an action on this ground a very strong power indeed. According to His Lordship

> "It is a power which, if not be most carefully exercised might conceivably lead to a court setting aside an action in which there might really, after all, be a right, and in which the conduct of the defendant might be very wrong and that of the Plaintiff might be explicable in a reasonable way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon … Therefore unless the case be absolutely clear I do not think the statement of claim ought to be set aside as not showing a reasonable cause of action."

In his summing up, the Late Hon. Justice Madan ruled that it is relevant to consider all averments and prayers when assessing under Order VI Rule 13 whether a pleading discloses a reasonable cause of action. I stand guided by this summing up of His Lordship.

Contrary to what the Applicants would wish to convince the court, the Plaintiff's claim for relief on grounds of termination of employment is not what is primarily in issue. Other than the prayer for an order that the 1st Defendant's termination of her employment on grounds of her H.I.V. status violates her Constitutional right against discrimination, the Plaintiff complains also that

1) The 2nd and 3rd Defendants conducted an H.I.V. test on her without her consent and thus violated her constitutional right to privacy
2) The 2nd and 3rd Defendants disclosed the said H.I.V. status to the first Defendant without the Plaintiff's knowledge or consent thereby violating her constitutional right as to confidentiality
3) Inter alia, that the 2nd Defendant breached his professional and statutory duty to counsel her and disclose to her the said H.I.V. status.

For the said reasons the Plaintiff asks the court to find that indeed her constitutional rights have been violated and to make an order that she is entitled to reinstatement to work and/or damages.

In support of the above prayers the Plaintiff has sworn an affidavit of 21 paragraphs. I find that paragraph 18 is of utmost importance in that it states as follows:

> "18. I swear this application (read affidavit) in support of my plea to this Honorable Court for redress and relief from (read for) the violation of my human rights."

I find that this paragraph more than anything else removes any doubt as to what the Plaintiff's cause of action is namely "redress and relief for the violation of my human rights.

Having identified the cause of action my next task is to consider whether or not the same constitutes a reasonable cause of action for the purposes of Order VI Rule 13 (1) (a). Taking the above into consideration, is the Originating Summons so hopeless that it ought to be dismissed as unsustainable or without a chance of success? Without a chance of success is not the same as "unlikely to succeed" as seen in the celebrated case of MOORE –vs- LAWSON (1915) 3` T.L.R. 48 where the Court of Appeal in England held, inter alia, that

> "where the statement of claim (read plaint) discloses some cause of action or a question fit to be tried whether a question of law or equity or of fact or

mixed law and fact the mere fact that the case is weak or may not be likely to succeed is no ground for striking out the pleading as disclosing no reasonable cause of action." (emphasis my own).

Hence, a court of law will be hesitant to strike out a pleading where the same raises an arguable, difficult or important point of law as seen in the English Cases of WYATT –vs- PALMER (1899) 2 QB 106 where there were important and complicated matters to be tried; and DYSON –vs- A.G. [1911] KB 410 in which there were serious questions of general importance.

To determine whether the plaintiff's cause of action is sustainable with a chance of success, I have found it necessary to examine, and have examined, the Plaintiff's cause of action (as previously identified) against the legal provisions under which the Originating Summons has been brought and have found that

a) As regards Section 70 of the Constitution of Kenya, the presumed cause of action does not lie;

b) As regards Section 74 I find that if indeed the dismissal from employment can be said to have been as a result of her being H.I.V. positive then by inference such treatment could, if proven, amount to inhuman treatment.

c) As regards Section 82 the treatment complained of in the Originating Summons is not one envisaged under this Section since the acts complained of were not committed by the

Defendants whilst acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

d) As regards Section 84, I find that the same does apply in the Plaintiffs' favour in that it expresses itself as being available to any person who "alleges that

any provisions of Sections 79 to 83 is being or likely to be contravened in relation to him"

and that such person may apply to the High Court for redress."

According to Order 3 Rule 4 sub rule 1 of the Civil Procedure Rules of the Supreme Court of England Vol.1, 2003, the striking out procedure has been stated to apply to pleadings which are unreasonably vague, incoherent, vexatious and obviously ill-founded and which do not amount to a legally recognizable claim or defence. Order 3 Rule 4 sub-rule 2 of the said Rules goes further to say that a statement is suitable for striking out where it raises an unwinnable case and where its continuance is without any benefit to the Respondent and would result in wastage of resources on both sides.

Given the above, the nature of this case, the universality of the H.I.V./AIDS pandemic and the development of human rights jurisprudence together with the ongoing attempts at the harmonization of the relevant conventions with domestic law, I would be most hesitant to overlook the positive features of the Originating Summons which give it the required degree of "reasonableness", sufficient in my view, to give the required life

support or to breath life into the action however weak the chances of a constitutional reference may prove to be if at all. I choose to be guided by the 2001 English decision of FARAH –vs- BRITISH AIRWAYS PLC The Times, Jan 26, 2001 where it was held that

> "It is not appropriate to strike out a claim
> in an area of developing jurisprudence since,
> in such areas, decisions as to novel points of
> law should be based on actual findings of fact."

Although not binding on this court I find the said decision useful in so far as it relates to this case in circumstances where the treatment of H.I.V./AIDS patients by doctors, hospitals employers and others has been put under legal scrutiny with a view to moulding attitudes and public policy such that the same would be free of discriminatory tendencies.

In conclusion therefore, I find that this suit as filed does disclose a reasonable cause of action and is therefore not suitable for striking out on the ground that it does not. It follows therefore that the Chamber Summons dated 20.03.03, having been unsuccessful on the other two grounds fails in its entirety and is fit for dismissal. The same is hereby dismissed with costs to the Respondent. As regards the Respondent's request for a reference, I am afraid I cannot make such an order in the present application. The Respondent ought to move the court under appropriate motion under Rule 10 (a) and (b) of the Constitution of Kenya Practice and Procedure Rules of 2001.

Orders accordingly.

Delivered, Dated and Signed at Nairobi this 3rd day of September, 2004.

M.G. Mugo

Ag. Judge

In the presence of:

Rachier & Company Advocates for the Plaintiff/Respondent
Mrs. Nyakundi for 1st Defendant/Applicant
Mwiti for 2nd and 3rd Defendant/Applicant