



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 511 OF 2018**

**DOCK WORKERS UNION (K).....CLAIMANT**

**VERSUS**

**MOHAMED SHERIA.....1<sup>ST</sup> RESPONDENT**

**JOSEPH S. MAKORO.....2<sup>ND</sup> RESPONDENT**

**MATREDA MWAKIRETI.....3<sup>RD</sup> RESPONDENT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED**

**TRADE UNION CONGRESS OF KENYA.....INTERESTED PARTIES**

**RULING**

1. On 21<sup>st</sup> December 2018, the Claimant filed a Memorandum of Claim citing ‘unauthorised withdrawal of funds from the Claimant’s account’ as the issue in dispute.
2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Statement of Response and Counterclaim on 12<sup>th</sup> February 2019.
3. Thereafter, the Claimant filed a notice of withdrawal dated 24<sup>th</sup> May 2019 in the following terms:

*“TAKE NOTICE that the Claimant herein has wholly and entirely withdrawn the Claim against the respondents herein. It shall not make any further claim against the respondents on the same matter whatsoever.”*

4. On 27<sup>th</sup> May 2019, the Court made the following order:

*“Matter marked withdrawn in terms of notice dated 24.5.2019 and filed in court on even date.”*

5. The Respondents subsequently filed a Notice of Motion on 29<sup>th</sup> October 2019 seeking the following orders:

a) That the Court be pleased to review the *ex parte* order made on 27<sup>th</sup> May 2019 marking this matter as withdrawn so that the same states that it only relates to the withdrawal of the Claimant’s claim as contained in the Amended Statement of Claim dated 29<sup>th</sup> January 2019 which was the subject of withdrawal dated 24<sup>th</sup> May 2019;

b) That in the alternative, the Court be pleased to clarify that when the *ex parte* order was made on 27<sup>th</sup> May 2019, it only related to the withdrawal of the Claimant’s claim as contained in the Amended Statement of Claim dated 29<sup>th</sup> January 2019 and not the withdrawal of the Respondents’ counter-claim dated and filed on 12<sup>th</sup> February 2019;

c) That upon grant of prayer (a) and/or (b) above, the Court be pleased to direct that the Respondents’ counter-claim dated 12<sup>th</sup> February 2019 be listed for case management and/or pre-trial;

d) That in the alternative, upon grant of prayer (a) and/or (b) above, the Court be pleased to refer the dispute as contained in the Respondents' counter-claim dated 12<sup>th</sup> February 2019 to the Mediation Deputy Registrar for further directions in ***MSA Mediation No. 193 of 2019 arising out of MSA ELRCC No. 511 of 2018.***

6. The application, which is supported by the affidavit of the 2<sup>nd</sup> Respondent, Joseph Sialo Makoro is based on the following grounds:

a) On 28<sup>th</sup> January 2018, the Claimant filed its Amended Memorandum of Claim of even date and on 12<sup>th</sup> February 2018, the Respondents filed their Statement of Response and counter-claim of even date;

b) On 10<sup>th</sup> April 2019, the Court directed the parties, by consent, to attempt court-annexed mediation and upon all formalities being completed, the parties were directed to present their dispute before a court-appointed mediator in ***MSA Mediation No. 193 of 2019 arising out of MSA ELRCC No. 511 of 2018;***

c) Before the matter could come up before the court-appointed mediator, the Claimant filed a Notice of Withdrawal before this Court on 27<sup>th</sup> May 2019;

d) Had the Respondents been served to attend a mention for adoption, they would have pointed out to the Court that they have a counter-claim which they had not withdrawn;

e) The Respondents' counter-claim is in law a separate and distinct claim from that of the Claimant and is only filed in the same suit for purposes of expediency such that a withdrawal of the Claimant's claim cannot amount to a withdrawal of the Respondents' counter-claim;

f) Courts have upheld this distinction in numerous cases and parties have been granted costs of claims in addition to costs of counter-claims in appreciation that though they are filed and tried together, they are in law separate and distinct claims;

g) The Claimant's move was in bad faith because when the matter came up before the mediator in ***MSA Mediation No. 193 of 2019 arising out of MSA ELRCC No. 511 of 2018*** on 13<sup>th</sup> June 2019, the Claimant placed the notice of withdrawal dated 24<sup>th</sup> May 2019 and the court order issued on 28<sup>th</sup> May 2019 before the mediator, claimed that there was no longer a case to mediate on and used the same to topple the mediation, thereby making a mockery of the consent order made on 10<sup>th</sup> April 2019;

h) The error on the face of the record, to the effect that the order does not clearly state that it is the Claimant's claim that has been withdrawn as opposed to the Respondents' counter-claim, if left un-clarified or otherwise rectified, will lead to a breach of the Respondents' right to a fair trial under Article 50(1), right of access to justice under Article 48 and right to fair administrative action under Article 47 of the Constitution of Kenya, 2010 as the Respondents' claim by way of counter-claim will have been effectively dismissed or struck out without a hearing on merit and the Respondents driven away from the court of justice without a remedy;

i) This application has been made without unreasonable delay;

j) It is in the interest of justice that the orders sought herein be granted.

7. The Court was referred to the decision in ***County Government of Kilifi v Mombasa Cement Limited [2017] eKLR*** where the Court of Appeal stated the following:

***“it is safe to conclude that a defendant is permitted to raise a counterclaim against a plaintiff on any right and claim he may have against the plaintiff even where the subject matter or cause of action may be different from the original suit. The rationale is to avoid multiplicity of proceedings and claims based on same or different cause of action between parties to the suit.”***

8. I have looked at the Claimant's withdrawal notice dated 24<sup>th</sup> May 2019 and the consequent order issued by the Court on 27<sup>th</sup> May 2019, both of which I have reproduced above and find nothing to suggest that the Respondents' counter-claim has been interfered with in any way.

9. The withdrawal notice and the court order left the counter-claim intact as a cross suit and this application was unnecessary.

10. The only order to make therefore is to direct the parties to comply with pre-trial requirements with respect to the Respondents' counter-claim.

11. I make no order for costs.

12. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY FEBRUARY 2020**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ochiengfor the Claimant

Miss Ongeso for the Respondents

No appearance for the Interested Parties