



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 99 OF 2017

BETWEEN

ABUD ABDALLA OMAR AND 28 OTHERS.....APPELLANTS

AND

KENYA PORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT

SALARIES AND REMUNERATION COMMISSION....2<sup>ND</sup> RESPONDENT

*(An appeal from a decision of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 19<sup>th</sup> September, 2017*

*in*

*E.L.R.C. Case No. 636 of 2017)*

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**JUDGMENT OF THE COURT**

1. The twenty nine appellants, through **S. M. Kimani & Co. Advocates** originally by a statement of claim dated 3<sup>rd</sup> August, 2017 sued Kenya Ports Authority (1<sup>st</sup> respondent) before the Employment and Labour Relations Court (ELRC) claiming several reliefs. The statement of claim was later amended on 4<sup>th</sup> September, 2017 to bring on board the Salaries and Remuneration Commission (SRC) which they described as a necessary party to the proceedings.

2. They sought *inter alia*, a declaration

***(a) A declaration that the recommendations if any, given by SRC to the respondent and the ensuing respondent's notice of allowances drawn by Middle Cadre Staff in Marine Services are null and void, and of no legal effect.***

***(b) A declaration that the allowances drawn by the claimants and fellow staff in Marine Services shall not be unilaterally abolished; for as long as their working conditions, and attendant risks and unique tidal requirements, remain unaltered.***

***(c) A conservatory order do issue to freeze and ultimately permanently suspend the implementation of the proposed harmonized operational extraneous allowances, pending the hearing and ultimate determination of this dispute.***

Contemporaneous, they filed a Notice of Motion pronounced to be filed under **Article 22, 23, 27, 30 and 41** of the Constitution of Kenya; **Section 5, 10, B and 27** of the Employment Act; **Rules 28 (1) (g) and 38**, ELRC (Procedure) Rules, seeking in the main a conservatory order

***c) A conservatory order is issued, initially for 14 days and thereafter as the court may order, or the parties may consent or agree, to freeze and generally suspend the implementation of the OEA as proposed in the impugned notice dated 13.7.17 on the grounds that the said notice is nullity for being i) unilateral, ii) retrospective, iii) discriminatory, iv) an unearned windfall to KPA administrative staff, v) for being uneconomical and vi) for not covering or providing for compensation for the unsocial hours worked and meal break hours foregone by the claimants and fellow middle-carde staff in Marine Services; pending the hearing interpartes of this application, and ultimately the action.***

3. The claim and application were filed during the trial court recess and it was placed before the duty Judge in Nairobi. Upon hearing the application ex-parte the duty Judge (**Nduma Nderi, J**) granted conservatory orders and directed that the application be served on Salaries Remuneration Commission (SRC) whose response was supposed to be filed within 14 days. The application was to be heard *inter partes* on 19th September, 2017 before the Employment and Labour Relations Court Judge in Mombasa.

4. When the matter came up for hearing before **Rika, J** it transpired that there was an earlier suit ELRC Cause No. 572 of 2017 which had been filed on behalf of 107 claimants challenging the same CBA. Essentially therefore the two claims were the same and the subject matter was the same. It also transpired that prayers for injunction sought in the earlier file had been denied.

5. **Mr. Okanga**, learned counsel appearing for the claimants in ELRC No. 572 of 2017 applied that the two claims be consolidated and the orders issued in ELRC No. 636 of 2017 to apply in both files.

6. **Mr. Munyao** who was appearing for the Respondent (Kenya Ports Authority) in both matters informed the court that some of the claimants in No. 636 of 2017 that is 19 of them were also claimants in 571 of 2017. It was only II claimants in 636 of 2017 who were not in the earlier case.

**Mr. Munyao** protested to the court that the duplication amounted to an abuse of the court process and resisted any attempt to consolidate the two suits and transposition of the conservatory order issued in ELRC 636 of 2017. Parties sought directions from the court on how to proceed. After hearing the parties on these preliminary issues, the court delivered the now impugned Ruling later that afternoon.

7. In his Ruling, the learned Judge **Rika, J** found that cause No. 636 of 2017 under which conservatory orders were sought and obtained was an abuse of the process of the court; and that filing that cause was unnecessary given that it involved the same parties and the same subject matter. The Judge observed that the claimants in the subsequent suit had failed to make total disclosure to the court when they had their matter heard in Nairobi. The Judge found that the two causes could not be consolidated as that would be improper as that would be endorsing the tainted actions of the claimants in cause No. 636. The learned Judge consequently struck out cause Number 636 of 2017 and stated that the claimants in 636 of 2017 who were not in 572 of 2017 were free to apply within 14 days of the said Ruling.

8. The learned Judge also gave other directions on how the matter would proceed. For reasons best known to counsel in 636 of 2017, instead of applying to be joined as parties in 572 of 2017, they appealed against that decision vide the memorandum of appeal dated 1<sup>st</sup> December, 2017 raising not less than 11 grounds. Basically, the appellants were unhappy with the striking out of their case. The matter was canvassed by way of written submissions as well as oral highlights by both counsels. Submissions on behalf of the appellants were filed on 28<sup>th</sup> March, 2018 while those by the 1<sup>st</sup> respondents were filed on 13<sup>th</sup> April, 2018.

9. **Mr. Kimani**, learned counsel for the appellants' submissions revolved around the point that the learned Judge ought to have stayed the proceeding in 636 of 2017 under **section 6** of the Civil Procedure Act instead of striking out the same. He contended that the learned Judge erred in striking out the suit *suo moto* without giving them a hearing. He expounded the same issue in his oral highlight at the plenary hearing of the appeal and urged the court to reinstate ELRC 636 of 2017.

10. He was not however able to demonstrate to us any prejudice his clients had suffered given that they could still apply to be joined as parties in 571 of 2017.

11. On his part, **Mr. Mugambi**, learned counsel for the respondent, maintained that the filing of the subsequent suit was an abuse of the court process. He posited that the learned Judge had inherent powers during case management to make orders or give directions that would foster the overriding objective of speedy expeditious and proportionate disposal of cases. We have considered the matter before us, the entire record as well as the submissions of counsel and the cited cases.

12. We start by pointing out that what is challenged before us is the exercise of a Judge's discretion during case management. We do not need to rehash the purpose of case management here because we are confident that both counsel, being counsel with reasonable experience in conducting litigation knows exactly why case management is important. In fact, in our view, this is not a matter that should have been escalated to this Court by way of appeal. We say so because there is no evidence whatsoever that the learned Judge failed to exercise his discretion judiciously or judicially.

13. There is no dispute that the appellants/claimants in both matters were all workers in the marine industry who were affected by the CBA that they were challenging in court. The cause of action was clearly the same; the respondents were the same and indeed some 19 claimants were the same in both files. Was the Judge not entitled to clean up that confusion before wasting more of the precious court's time? The only thing we should concern ourselves with in this appeal is whether the appellants were prejudiced by the striking out of their suit. Were they left without remedy? The answer is a resounding no. Even the II who were not in 572 of 2017 were at liberty to be joined in the other suit. They did not stand to lose anything. In our view, the learned Judge was right in finding the duplication of the same matter an abuse of the process of court.

14. Instituting two suits over the same cause of action indeed and duplicating some of the litigants cannot be judicious use of court time. We reiterate that it is an abuse of the process of the court which must be frowned upon. Whether the earlier suit was a representative suit or not was peripheral and neither here nor there; What matters is that none of the parties with a grievance was going to be shut out of the justice system by the striking out of the suit. Their interests were catered for in 572 of 2017.

15. We think we have said enough to drive the point home that this appeal is totally devoid of merit. The same is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**Dated and delivered at Mombasa this 14<sup>th</sup> day of June, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**