Mwenda v SMEP Microfinance Bank Ltd (Miscellaneous Application E030 of 2025) [2025] KEELRC 924 (KLR) (24 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 924 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E030 OF 2025

BOM MANANI, J

MARCH 24, 2025

BETWEEN

EZRA KIRIMI MWENDA ..... APPLICANT

AND

SMEP MICROFINANCE BANK LTD ..... RESPONDENT

RULING

Background

1. The Applicant contends that he is an employee of the Respondent having served the Respondent for the last 16 years. He avers that he currently serves the Respondent in the position of Head of Finance and Strategy.

2. The Applicant avers that the Respondent suspended him from duty on 11th January 2025 for a period of 45 days. He says that the suspension has since been extended to 31st March 2025.

3. The Applicant contends that the Respondent has withheld his entire salary as a result of the aforesaid suspension. He contends that the Respondent's decision to withhold the whole of his salary violates its Human Resource Manual which entitles an employee on suspension to receive half salary.

4. The Applicant further avers that the Respondent has frozen his bank accounts pending completion of investigations against him. As such, he contends that he cannot access any funds from the accounts.

5. The Applicant also contends that the Respondent has suspended his medical cover. As such, he avers that he has been forced to settle his medical bills directly.

6. The Applicant avers that the Respondent's actions have exposed him to untold suffering and embarrassment since he cannot meet his financial obligations as and when they fall due. He for instance asserts that he is now forced to seek assistance from his relatives and acquaintances to pay his rent and

buy food for his family. He further avers that one hospital which offered a member of his family medical services has threatened to sue him for the outstanding medical bill.

7. The Applicant has consequently filed the instant miscellaneous application seeking the following orders:-

    a. An order directing the Respondent to unfreeze his accounts whose particulars are set out in the application.

    b. An order to compel the Respondent to release his half salary for the period of his suspension from duty.

    c. An order to compel the Respondent to reinstate his medical cover for the period of his suspension from duty.

    d. Costs of the application.

8. The Respondent has opposed the application through a preliminary objection. It contends that there is no proper suit to anchor the prayers in the application. It further contends that the Applicant is seeking to obtain final orders through an interlocutory application, a matter which is impermissible in law.

9. The Applicant filed an affidavit in answer to the preliminary objection. He contends that the objection is founded on a misapprehension of the law and is only intended to delay him from getting the reliefs which he seeks through the application.The Applicant contends that the law does not bar him from approaching the court through a miscellaneous application. He further argues that his application is anchored on Order 51 Rule 1 of the Civil Procedure Rules which allows filing of such application. The Applicant further argues that rule 7(3) of the Employment and Labour Relations (Procedure) Rules together with article 22(3)(b) of *the Constitution* permit him to approach the court in the manner he has done.

10. The Applicant contends that the orders which he seeks are for temporary reliefs. As such, he is not obligated to file a Statement of Claim, Petition or Plaint since it is not his intention to interfere with the ongoing investigations against him.

Analysis

11. The court is called upon to determine the following two issues:-

    a. Whether the Applicant has appropriately moved the court for the orders which he seeks.

    b. If the answer to the above question is in the affirmative, whether the orders the Applicant seeks should issue.

12. The practice before the Employment and Labour Relations Court (ELRC) is largely regulated by the Employment and Labour Relations Court (Procedure) Rules, 2014 (ELRC Rules). These rules address a number of matters including how one should approach the ELRC for reliefs.

13. Part II of the ELRC rules deals with the question of institution of suits and other proceedings before the ELRC. It prescribes three ways through which a party may commence proceedings before the court. These are by way of: a Statement of Claim; a Petition; and a Judicial Review Application. There is no mention of a Miscellaneous Application.

14. Rule 7 (3) of the ELRC rules which the Applicant asserts entitles him to move the court by way of a miscellaneous application actually deals with institution of suits through Statements of Claim. It makes no reference to miscellaneous applications.

15. Rule 10(3) of the ELRC rules which the Applicant might have intended to quote but ended up quoting rule 7(3) provides that notwithstanding anything contained in the rule, a person may seek to enforce any constitutional right and freedom or any constitutional provision in a statement of claim ''or other suit filed before the court.'' This rule is intended to deal with actions raising constitutional questions. Although a party who is litigating on such questions is required to file a Petition, he may nevertheless raise the questions through other forms of pleadings.

16. To decipher what is meant by the phrase ''or other suit filed before the court'', one needs to deploy the applicable cannons of interpretation. The ejusdem generis rule requires the court to interpret the aforesaid phrase so as to bring on board other methods for institution of suits which fall in the category of the methods alluded to under Part II of the aforesaid rules.

17. The methods for instituting suits referred to in Part II of the rules are: Statement of Claim; Petition; and Judicial Review Motion. The common denominator in the three is that they are all used to institute substantive proceedings.

18. A miscellaneous application is not used to institute substantive proceedings. As such, applying the ejusdem generis rule, it is not one of the instruments for commencing proceedings contemplated by the phrase ''or other suit filed before the court'' under rule 10(3) of the rules.

19. The Applicant has asserted that the instant application is filed pursuant to Order 51 rule 1 of the Civil Procedure Rules. However and as has been emphasized severally, the Civil Procedure Rules do not apply to proceedings before the ELRC as a matter of course. They only apply where the Employment and Labour Relations Court (Procedure) Rules have imported them (Prisca Jepngétich v Generation Career Readiness Social Initiative Limited [2021] eKLR).

20. Nothing in the Employment and Labour Relations Court Rules, 2014 imports the application of Order 51 rule 1 of the Civil Procedure Rules to proceedings before the ELRC. As such, it was not open to the Applicant to invoke this provision in support of his application.

21. The Applicant has also contended that article 22(3) (b) of *the Constitution* entitles him to move the court through a miscellaneous application. However, the above provision relates to enforcement of constitutional rights.

22. The instant application does not seek enforcement of constitutional rights. None of the rights under the Bill of Rights has been expressly alluded to in the application. As such, the Applicant cannot fall back to the said article in *the Constitution* to justify moving the court through a miscellaneous application.

23. Innumerable judicial pronouncements have made it clear that a party cannot move the court for a substantive remedy through a miscellaneous application. He can only do so through the recognized methods for instituting substantive proceedings such as a Statement of Claim, a Petition or a Judicial Review Application.

24. In Riro v Kahonge & 3 others (Environment and Land Miscellaneous Application E077 of 2022) [2023] KEELC 16433 (KLR) (16 March 2023) (Ruling), the learned Judge expressed himself on the matter as follows:-

> ''In the impugned application, the Applicant is seeking injunctive orders against the Respondents. However, the application is not based on any substantive suit. Consequently, and based on the foregoing sections of the law, it is clear that the application is defective as the Applicant is seeking orders where there is no substantive suit.

> A suit can only be commenced by way of a miscellaneous [application] when all that a person wants is an order of court where the rights of the parties are not in contention, and where the discretion of the court is being sought or a procedural issue is sought to be endorsed.
>
> This is permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. Where there is a call to adjudicate on rights of parties, then it must be said that there is a "civil action" which must be commenced in the manner prescribed by the Rules, and not a miscellaneous application.''

25. In Norah Ndunge Henry & another v Abednego Mutisya & another [2022] eKLR, the learned Judge observed on the matter as follows:-

> ''As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating Summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be within a properly instituted suit.''

26. In Joseph Kibowen Chemjor v William C Kisera [2013] eKLR, the learned Judge whilst rejecting a miscellaneous motion as a mode of instituting the proceedings before him, observed on the matter as follows:-

> ''It is always advisable for a claimant to commence action by way of plaint unless there is a clear alternative provided by statute or the rules thereunder. Courts have had occasion to consider whether suits instituted by way of miscellaneous application are valid. Counsel for the respondent relied on the case of Peter Mwema Kahoro & Another vs Benson Maina Githethuki. In the said case the court (Azangalala J, as he then was) frowned upon a suit commenced by way of miscellaneous application. So too the court (Kasango J and Emukule J) in the case of Eutychus Muthui vs Apollo Nteere M'Abutu & 2 others. In this case the applicant commenced a suit inter alia to compel the defendant to produce certain records relating to a land parcel. The suit was struck out as incompetent with the court relying upon the court of appeal decision in Board of Governors Nairobi School v Jackson Ireri Geta Nairobi. A similar decision was made in the case of Kenya National Federation of Co-operatives vs Econet Wireless Kenya Limited & 3 Others.
>
> I am alive to the provisions of Article 159 (2) (d) of *the Constitution* which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be "pleadings", goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of "suit by a letter" which Mr. Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party.''

27. In Dorcas Njoki Mugo v Crispin Kienyu Kang'ethe & another [2021] eKLR, the learned Judge remarked on the issue as follows:-

> '' As a general rule suits are instituted by way of plaint unless the rules prescribe any other manner.''

28. In *Gitonga Muriuki & Co Advocates v Mhasibu Sacco Society Limited (Miscellaneous Civil Application E732 of 2022*) [2023] KEHC 23387 (KLR) (Civ) (12 October 2023) (Ruling), the learned Judge observed on the subject as follows:-

> ''Based on the above rules and authorities, I am satisfied that the Applicant ought to have anchored his Notice of Motion in a suit. Without a substantive suit, the Notice of Motion is not properly before this court, and the same simply cannot stand alone.''

29. In the instant case, the Applicant seeks orders to compel the Respondent to: lift the freeze imposed on his accounts; pay him half salary; and restore his medical cover. These are matters which require the court to adjudicate on the rights and obligations of the parties under the employment contract. As such, they seek substantive and not procedural remedies.

30. If the decisions and rules referred to above are to offer guidance to the court, such requests must be made through a substantive suit commenced through either a Statement of Claim or Petition or Judicial Review Motion. They cannot be the subject of a miscellaneous application.

31. The Applicant's counsel contends that the objection by the Respondent is meant to scuttle his client's right to access justice. However, this argument is without merit.

32. A litigant cannot move the court inappropriately only to assert that an objection to his wrong move is intended to impede his right to access justice. Nothing prevented him from exercising this right correctly as contemplated in law.

33. In Rajab Kosgei Magut v Nuru Jepleting Choge [2020] eKLR, whilst addressing similar complaints, the learned Judge observed as follows:-

> '' I am also of the view that an applicant cannot use short cuts to access justice where there are laid down procedures to be followed.''

Determination

34. The upshot is that I find that the instant application has been improperly used to commence the current proceedings. If the Applicant wished to move the court for the orders in the application on interim basis, he ought to have filed a substantive suit to accompany the application. As the record shows, he did not do so. As such, the application is defective and bad in law. Accordingly, it is struck out.

35. Each party to bear own costs.

DATED, SIGNED AND DELIVERED ON THE 24TH DAY OF MARCH, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI