



REPUBLIC OF KENYA



Muli (Suing as the legal representative to the Estate of Benedict Muli Kasukali) v Kitundu Day & Boarding (Appeal E006 of 2022) [2025] KEELRC 715 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 715 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E006 OF 2022
B ONGAYA, J
MARCH 7, 2025**

BETWEEN

**SOLOMON MULWA MULI (SUING AS THE LEGAL REPRESENTATIVE TO
THE ESTATE OF BENEDICT MULI KASUKALI) APPELLANT**

AND

KITUNDU DAY & BOARDING RESPONDENT

*(Being an appeal from the ruling of the Hon. G. Sagero, Senior
Resident Magistrate in ELR Cause No.006 of 2021 at Makueni)*

JUDGMENT

1. The appellant was dissatisfied with the ruling of the trial Court delivered on 28.09.2022 by the Hon. G. Sagero, Senior Resident Magistrate, in ELR Cause No. E006 of 2021. The respondent filed in the trial Court the notice of preliminary objection dated 26.10.2023 through Nduva Kitonga & Company Advocates and upon the following grounds:
 - a. The claim in this suit is the same claim filed before Milimani CMELR Case No. 609 of 2019 Benedict Muli Kasukali –Versus-Kitundu Day & Boarding Primary School.
 - b. The suit before the Court in Milimani is between the same parties litigating under the same title.
 - c. The Court at Millimani has jurisdiction to hear and determine the same claim filed before the Court
 - d. The instant suit be struck out with costs.
2. The said Milimani CMELR Case No. 609 of 2019 Benedict Muli Kasukali –Versus-Kitundu Day & Boarding Primary School was filed of the memorandum of claim dated 27.10.2021 and by the claimant therein in person. At paragraph 2 the claimant pleaded thus, “The Respondent is a School carrying on



business in Nairobi....” At paragraph 8 it was pleaded that the cause of action arose in Nairobi within the jurisdiction of the Honourable Court.

3. The suit subject of the ruling in the instant appeal was filed for the appellant through Ojienda & Company Advocates by the Memorandum of Claim dated 07.10.2021. It was pleaded that the respondent was a public school carrying on business in Mbooni-West Sub-County, Makueni County. The claims and prayers were similar to the ones in the suit filed in Milimani. The respondent filed the defence and pleaded that it would raise a preliminary objection that a similar suit had been filed at Milimani. The appellant filed a response to the defence stating that whereas the Milimani suit had been filed, the same had been withdrawn in its entirety before filing the suit at Makueni.
4. The respondent filed the notice of motion dated 10.06.2022 praying for an order that the suit be struck out for being sub-judice and costs be awarded to the respondent. The grounds were similar to those in the preliminary objection. In opposing the application, the appellant filed the replying affidavit sworn on 20.06.2022 and exhibited the notice to withdraw the suit at Milimani dated 04.08.2020. The respondent’s supplementary affidavit by Michael Kitisya sworn on 06.07.2022 states that on 06.04.2021 the claimant’s advocates wrote to the respondent’s advocates confirming that they would not proceed with the suit in the Milimani Court and the notice withdrawing the suit was served after the defence in the Makueni suit had been filed.
5. In allowing the application, the trial Court in the ruling dated 28.09.2022 found that the appellant had failed to provide a receipt showing that the notice to withdraw had been filed and no order was exhibited to show that the withdrawal had been perfected accordingly. The trial Court found that the Makueni suit was therefore trapped by section 6 of the *Civil Procedure Act* thus, “No court shall proceed with trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.” The trial Court also found that the reason for withdrawal of the suit was that the claimant in the Milimani suit had become deceased and in which case, the proper action with respect to the surviving or continuing cause of action was for the legal representative to apply for substitution per order 24 rule 3(1) of the Civil Procedure Rules, 2010. The trial Court further considered that the appellant had failed to disclose in the memorandum of claim at the Makueni suit that a previous suit had been filed in Milimani.
6. The appellant’s appeal is that the learned trial Magistrate erred in law and fact by dismissing the memorandum of claim; in finding that the withdrawal of the suit in Milimani was not in conformity with order 25 rule 2(2) of the Civil Procedure Rules; in finding that the Court had not sanctioned the withdrawal of the Milimani suit; in finding that the notice of withdrawal was invalid; and, erred in finding that the appellant had failed to plead about the Milimani suit in the memorandum of claim instituting the Makueni suit.
7. It is submitted for the appellant as follows:
 - a. Article 159(2)(d) of the *Constitution* provides that justice shall be administered without undue regard to procedural technicalities. The appellant is being denied the right to a fair hearing on account of technicalities as to whether the Milimani suit had been withdrawn. The appellant’s case raised serious issues and the ruling denied the appellant the right to access justice.
 - b. Order 25 rule 2(2) requires the Court to sanction withdrawal of the suit. Any procedural deficiencies in the withdrawal process did not prejudice the respondent and should not have barred the filing of a fresh claim any deficiencies could be cured under sections 1A and 1B of



the *Civil Procedure Act* obligating the courts to facilitate just, expeditious, proportionate and affordable resolution of disputes. The exhibited notice to withdraw was sufficient evidence of withdrawal of the suit. Any oversight in presentation was technical.

- c. It was an excusable mistake for the appellant to fail to plead that there existed another suit between the parties, the Milimani suit. In any event the appellant had sufficiently disclosed the fact of withdrawing the suit at Milimani.
8. Counsel for the respondent did not file the submissions on the appeal and instead informed the Court that Counsel had filed an application to cease acting dated 24.02.2025.
 9. The Court has considered the submissions made for the appellant. The Court finds that there was no doubt that the suit at Milimani was for withdrawal. The imperfections in obtaining the withdrawal order or receipt upon filing the withdrawal notice were all curable by way of taking appropriate steps. The Court further finds that the failure to plead that there had been the Milimani suit between the parties was curable or had been sufficiently disclosed. The Court finds that any prejudice to the respondent flowing from withdrawal of the Milimani suit and amending the Makueni suit to plead the previous suit were both capable of mitigation through award of costs. In such circumstances, the court considers that the trial Court's decision to strike out the suit was drastic as it amounted to removing the appellant from accessing justice in circumstances that the mistakes in issue were curable and the award of costs would sufficiently mitigate any prejudice to the respondent. The respondent did not oppose the appeal and each party to bear own costs of the appeal.
 10. In conclusion the appeal is hereby allowed with orders:
 - a. The ruling delivered by the trial Court subject of the appeal is hereby set aside together with orders and consequential processes flowing therefrom.
 - b. Each party to bear own costs of the appeal.
 - c. The Deputy Registrar to cause the Court file be returned to the Machakos Sub-Registry forthwith.

Signed, dated and delivered by video-link and in court at Nairobi this Friday 7th March, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE

