



Owiti v Highlights Travel Ltd t/a BCD (Employment and Labour Relations Cause E699 of 2021) [2024] KEELRC 229 (KLR) (13 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 229 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E699 OF 2021
AN MWAURE, J
FEBRUARY 13, 2024**

BETWEEN

JOHN MARKS OWITI CLAIMANT

AND

HIGHLIGHTS TRAVEL LTD T/A BCD RESPONDENT

RULING

1. The respondent filed a preliminary objection dated 4th September 2023 seeking the following:
 - a. This suit was withdrawn by the claimant under order 25 Rule (1) of the civil procedure rules.
 - b. This court lacks jurisdiction to determine the application as there is no suit.
 - c. The application is an abuse of court process.
2. There is a notice of withdrawal of suit dated 15th December 2021 by HMS Advocates LP on behalf of the claimant. There is also a letter dated 12th January 2022 from another appointed firm known as Hunamba & Ayieiko advocates for the claimant requesting for a consent signed by the respective parties which apparently led to the withdrawal of the suit. The request is to the deputy registrar. The said consent has not been availed to court and despite diligent search in the court file and in the online platform the same was not found and so is not clear what the terms of the consent entail.
3. Further the claimants advocate filed a notice of withdrawal of the suit dated 16th December 2021.
4. Thereafter from emails availed to court the advocate of the claimant, the claimant and the respondents advocate continued to pursue settlement up to early 2022. It is not clear why there would be continued communication on settlement if at all the suit had been withdrawn.
5. In one of the emails dated 12th January 2022 the claimant wrote to the advocate whom he refers as Charles and asked him “to advise him status of follow up or items 2, 3 & 5 and also about a property



HHL (BOD) property which he had surrendered.” The advocate responded and said he would follow up items 2, 3 & 5 which he had unadventurously assumed were concluded. This was communication between the advocate and the claimant after the said withdrawal notice.

6. On 12th January 2022 the claimant’s advocate then wrote to the claimant and informed him he would not represent him again and he should take his file.
7. The court is convinced from the evidence on record the claimant was not a party to the withdrawal of his suit by his then advocate.
8. The court is persuaded by the trite law in relation to preliminary objection that it is only applicable where it deals purely on points of law and do not require the court to exercise its discretion or to take evidence. In the case of *Mukbisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 966. The court held “ a preliminary objection consist of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit such examples are an objection to the jurisdiction of the court or limitation of time or a submissions that parties are bound by the contract giving raise to referring the dispute to arbitration.
9. Order 25 rule 1 of the *Civil Procedure Rules* provides that a plaintiff may withdraw a suit wholly or partially after serving all the defendants and such withdrawal shall not be a defence to any subsequent action.
10. Alongside by providing this is not a purely point of law the said order 25(1) does not bar any action that may arise thereafter. In this matter the claimants avers he was not consulted by his advocate before the suit was withdrawn. There is also no proof of service of the notice to withdraw on the respondents.
11. Even after the said withdrawal the parties continued to pursue settlement and in one communication the reference was to mark the matter was settled but not withdrawal. The said claimant’s advocate in one email admitted he had overlooked some unsettled issues and would pursue the same.
12. Guided by section 3A of the *civil procedure act* which states:

“ nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
13. Having considered this application and the rival submissions by the applicant dated October 2023 and claimant’s submissions dated 22nd October 2023 the court holds the preliminary objection is not merited and is dismissed accordingly.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF FEBRUARY 2024.

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ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email.



They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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ANNA NGIBUINI MWAURE

JUDGE

