Kenya Union of Domestic, Hotels, Education Institutions & Hospitals v Eastleigh High School (Employment and Labour Relations Cause 354 of 2015) [2024] KEELRC 787 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 787 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 354 OF 2015

MN NDUMA, J

APRIL 11, 2024

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS & HOSPITALS ..... CLAIMANT

AND

EASTLEIGH HIGH SCHOOL ..... RESPONDENT

RULING

1. The applicant in the application dated 16/8/2023 seeks for an order in the following terms:-
    1. Spent
    2. Spent
    3. That this Honourable court be pleased to reinstate this matter which was struck out on 8th June 2023 on a technical ground and leave be granted to the applicant to amend their pleadings.
    4. That upon hearing and determination of this application this Honourable court be pleased to grant leave and leave is hereby granted to allow the claimant to amend the Memorandum of Claim by changing the name of the respondent from "Eastleigh High School" to "BOM Eastleigh High School" in line with the provisions of the *Basic Education Act*.
    5. That upon hearing and determination of this application and upon leave being granted the matter be set down for pre-trial and subsequent hearing in the shortest time possible given the age of the matter.
    6. That costs of the application be in the cause.

2. The application is premised on grounds 1 to 8 set out on the face of the application and buttressed in the supporting affidavit of Aloyse Wangira Okoba, an advocate for the claimant/applicant.

3. The applicant deposes that, the firm of advocates was appointed on 15/2/2017 to represent the claimant after the suit had already been filed.

4. That negotiations to resolve the issues in dispute ensued until 21/4/2022 and during the time parties did not place much attention to the pleadings and in particular the Memorandum of Claim.

5. That the firm had intention to amend the pleadings on 27/4/2023 but did not do so since it was unable to communicate to the court because their device failed.

6. That the grievants have been waiting for justice for over 7 years since they were rendered jobless in 2015 when their jobs were taken away by an outsourcing company and have not been paid their dues.

7. That this was a costly mistake on their part and pray the court to condone them and be generous on the technicality.

Response.

8. The application is opposed by the respondent who deposes that judgment was delivered in this matter on 8th June 2023, the parties having proceeded on the merits of the case by way of written submissions.

9. That in the judgment, the court found 'inter alia' that:

> In the present matter, the respondent does not exist. The claimant has not taken any steps to withdraw the Memorandum of Claim and/or amend it to sue the proper respondent that exist legally with capacity to sue and be sued. The suit is therefore struck out subject to the law of limitation of actions."

10. The issue is that the claimant sued "Eastleigh High School" instead of "Bom Eastleigh High School" in line with the provisions of the *Basic Education Act.*

11. The respondent deposes that the application is too late in the hour and the court having rendered a final judgment is functus officio and the suit is res judicata.

12. That the issue of legal personality was brought to the attention of the claimant on 22/8/2016 in the respondent's response to the Memorandum of Claim.

13. That the claimant union, the applicant herein failed and or neglected to amend its pleadings, until when the suit was struck out on 7/6/2023. That this is not an excusable mistake/or error on the part of the advocate. It was a glaring fatal omission on the part of the claimant/applicant the union and its advocates.

14. That the respondent would suffer great prejudice if the suit is reinstated after having been concluded in a judgment of the court.

15. That the application be dismissed with costs.

Determination.

16. The suit was filed on 11/5/2015 and took over eight (8) years to be heard and determined by the court in its judgment delivered on 8/6/2023.

17. The suit was struck out in the judgment on the basis that the respondent, "Eastleigh High School" was a non-existent legal entity. This issue was brought to the attention of the claimant/applicant in the respondent's statement of response to the Memorandum of Claim dated 22/8/2016.

18. The claimant/applicant failed to take any steps to amend the Memorandum of Claim and sue the correct respondent until the matter proceeded by way of written submissions following agreement of the parties and the judgment of the court on the merit was delivered accordingly.

19. The court considered the case of *Evans Otiende Omollo versus School Committee Union Primary School and another* [2015] eKLR in which the court held:-

> The parties described as defendants herein do not exist as they are not legal entities under the Basic Education Act capable of being sued or to defend the suit. Having found that the four named defendants are non-existent as entities capable of being sued, the court finds that to allow the suit as filed to continue to further hearing could be an abuse of the court's process."

20. In the present case, the court found,

> "Allowing the suit to proceed in its present form would be abuse of court process" and proceeded to strike out the suit.

21. The court has considered the finding of the court in the case of *Kigasie Kivai - v- Ernest Opesi Kivai and 4 others* [2021] eKLR where the court found as follows: -

> "The factors taken into account or considered for the purpose of reinstatement of suits are numerous, and were addressed in *Ivite - v- Kyumbi* [1984] KLR per Chesoni J. as follows: -
>
> > The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay. Justice is to both the plaintiff and defendant, so both parties to the suit must be considered and the position of the judgment too, because it is not easy task for the documents, and, or witness may be scarce and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that it will be prejudiced."

22. Having considered the above legal premise, the circumstances of the present case is even more grave. The suit was struck out after having been heard on the merit. The respondent did not appeal the judgment of the court on the legal and factual issues determined in the judgment of the court.

23. The application for reinstatement is a disguised appeal against the judgment of the court. The court finds that it is *functus officio* in its matter and the suit is resjudicata as against the same parties.

24. As was stated in the judgment of the court, the claimant/applicant had only one option after the judgment of the court, and that is to bring a new suit against the correct party. A suit cannot be amended after final judgment of the court has been rendered. This is the situation in this case.

25. The application to reinstate and amend the suit is misconceived and an abuse of the court process. The claimant union had more than eight (8) years to do what it is trying to do too late in the hour.

26. Allowing this application would result in great prejudice and injustice to the respondent.

27. Accordingly, the application lacks merit and is dismissed with costs to the respondent.

DATED AT NAIROBI THIS 11TH DAY OF APRIL, 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Wangira for claimant/applicant

Mr. Cheche for respondent

Mr. Kemboi, Court Assistant