



**Musyimi v Kobian [Kenya] Limited (Cause 399 of 2018)
[2023] KEELRC 650 (KLR) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 650 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 399 OF 2018
K OCHARO, J
FEBRUARY 24, 2023**

BETWEEN

MAKAU CAXTON MUSYIMI CLAIMANT

AND

KOBIAN [KENYA] LIMITED RESPONDENT

RULING

Introduction

1. The application before me by the Respondent expressed to be pursuant to Rule 17[1] and 23[a] and [b] of the Employment and Labour Relations Court [Procedure Rules], 2016 and all the enabling provisions of the law, by the Respondent seeks:
 - a. That this suit be consolidated with ELRC Cause Number 897 of 2018 Willice Odhiambo Vs. Kobian [kenya] Limited and hereafter, be carried on as one action.
 - b. This Honourable Court do give all necessary and proper directions as shall be necessary for the conduct of the said consolidated action.
 - c. The costs of and incidental to this application be costs in the said consolidated action.
2. The application is anchored on the prime grounds obtaining on the face of the application and supported by the affidavit sworn by Charanadhar Maganbhai Patel, on the 27th July 2022.
3. The application is opposed upon basis of the grounds of opposition filed on the 13th October 2022, and the replying affidavit sworn by the Claimant on the 13th October 2022.



The application

4. The Respondent contends that the Respondents in this suit and that in ERLC Cause Number 987 of 2018 – Willice Odhiambo Vs. Kobian [kenya] Limited are the same. The two suits which are pending involve similar questions of law and fact.
5. According to the Respondent/Applicant, consolidation of the matters is necessary to avoid duplication of proceedings and multiplicity of suits and for purposes of prudent use of the scarce judicial resources. The Respondent's witnesses in the matter are the same.

The response

6. The Claimant asserts that as much as the two matters are employment matters, it should not be forgotten that they relate to employment contracts of two individuals, contracts that are governed by the general privity of contract doctrine. The contracts for the Claimants in the two matters are independent from each other. Consolidating the two matters shall affront his right of access to justice.
7. The Claimant states that he has already testified and closed his case. The application for consolidation is only prompted by a desire on the part of the Respondent/Applicant to delay the conclusion of the matter. It is not explained why the application is being filed now, four years after the case was filed.
8. The Claimant alleges that when the matter came up for hearing on the 28th June, 2022, counsel for the Respondent/Applicant made an oral application to have this suit consolidated with ELRC Cause Number 987 of 2018, the Court dismissed the application.
9. It was further contended that when the other matter came up for hearing on the 28th June 2022 before Justice Dr. Jacob Gakeri, Counsel for the Claimant therein made an oral application for consolidation which was declined by the Court.

Determination

10. I have carefully considered the material placed before me by the parties, inclusive of their counsels' submissions and distil one broad issue for determination, whether the application has merit.
11. From the case numbers of the two matters, there can be no doubt that both of them were filed in the year 2018. From the time of their filing up to the date when the instant application was filed, a period of four years had lapsed. In this circumstance, reasonably, it was expected that the Respondent/Applicant does explain the non-action for all that time, in terms of bringing up an application for consolidation, interestingly, the affidavit in support of the instant application is too silent on the issue.
12. In my view, where it appears as it is in this matter that the application for consolidation was not made timeously, it behoves the party seeking consolidation to sufficiently explain the delay and where such an explanation is absent, court's discretion in favour of the Applicant shall not be available. I am minded to hold that I am unable to grant the Respondent's application as a result of lack of explanation on the delay which I consider too inordinate.
13. Pre-trial directions in this matter were taken way back 30th January 2019. The matter got slated for hearing for the 28th June 2022 a period of more than 3 years. The Respondent explains not, why the application for consolidation was not filed in the course of the three years.
14. When this matter came up for hearing on the 28th June 2022, Counsel for the parties indicated to court that they were ready to proceed with the matter. Counsel Kiragu for the Respondent indicated that he had witnesses to testify. Upon this premise, the Claimant's evidence was taken by the Court but



the Respondent's witnesses wouldn't be reached due to time constraints. The question that lingers in my mind is what changed? The Respondent was ready to have his case heard on that day. Suppose the Respondent's witnesses were heard, would we be having an application like the instant one? Definitely not. It is at this point that I say that the application is ill prompted, and only calculated to delay the final disposal of this matter.

15. By reason of the premises foregoing, I find the application lacking in merit. I hereby dismiss the same with costs.

READ AND DELIVERED THIS 24TH DAY OF FEBRUARY, 2023.

OCHARO KEBIRA

JUDGE

In presence of;

Mr. Sala for the Respondent/Applicant.

Mr. Mwinzi for the Claimant.

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.

OCHARO KEBIRA

JUDGE

