



**Macharia v Kenya Railways Corporation (Cause 1050 of 2021)
[2023] KEELRC 1063 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1063 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1050 OF 2021**

L NDOLO, J

MAY 4, 2023

BETWEEN

DUNCAN NDEGWA MACHARIA CLAIMANT

AND

KENYA RAILWAYS CORPORATION RESPONDENT

RULING

1. On December 17, 2021, the Claimant filed a claim against the Respondent seeking relief for unfair termination of employment.
2. Subsequently, the Respondent filed a Notice of Motion dated October 28, 2022, seeking an order for dismissal, withdrawal and/or striking out of the Claimant's Memorandum of Claim and the entire suit against the Respondent.
3. The Respondent further asks the Court to stay proceedings in Nairobi MCELRC E1721 of 2021.
4. The Motion is supported by an affidavit sworn by the Respondent's Counsel, Omwenga Perister Kwamboka and is based on the following grounds:
 - a) That the Claimant has filed before this Court a Memorandum of Claim dated September 27, 2021, which was allocated Nairobi ELRC No E1050 of 2021;
 - b) That the Claimant has similarly filed before the Nairobi Chief Magistrate's Court a Memorandum of Claim, also dated September 27, 2021, which was allocated Nairobi MCELRC No E1721 of 2021, which is still pending determination before that Court;
 - c) That the present claim is an affront to the mandatory provisions of the principle of sub judice owing to the pendency, before the Chief Magistrate's Court at Nairobi, of MCELRC No E1721 of 2021, where the parties are the same and the prayers sought are directly and substantially similar;



- d) That in the premises, the instant Memorandum of Claim and the entire suit against the Respondent is misconceived, frivolous, scandalous, vexatious and a gross abuse of the court process;
 - e) That the Respondent is justifiably apprehensive that unless the application is allowed as prayed, the Claimant will proceed to prosecute both matters before different courts, to the Respondent's prejudice;
 - f) That unless this application is allowed as prayed, the two courts will proceed to simultaneously adjudicate on the matter with the possibility of rendering two conflicting judgments in respect of the same matter;
 - g) That there is good and sufficient cause to allow the application as prayed;
 - h) That it is in the interest of justice that the Memorandum of Claim as well as the entire suit be dismissed with costs to the Respondent.
5. The Claimant's response is by way of a replying affidavit sworn by her Counsel, Caroline Karwithia on November 16, 2022.
 6. Counsel for the Claimant accuses Counsel for the Respondent of misleading the Court and states that Nairobi MCELRC No E1710 of 2021 then filed at the Chief Magistrate's Court was withdrawn on January 28, 2022.
 7. Counsel for the Claimant depones that subsequent to filing of Nairobi MCELRC No E1710 of 2021, the Respondent filed a Preliminary Objection dated November 30, 2021, objecting to the jurisdiction of the Magistrate's Court on the ground that the Claimant's monthly salary was above Kshs 80,000 and thus beyond the jurisdiction of the Magistrate's Court as donated by Gazette Notice No 6024 of 2018.
 8. Counsel adds that the Preliminary Objection was not served on the Claimant and was not prosecuted by the Respondent.
 9. The Claimant's Counsel states that she came across the Preliminary Objection on the e-portal and in acknowledging the import of Gazette Notice No 6024 of 2018, filed a notice to withdraw Cause No E1710 of 2021, under Order 25 Rule 1 of the *Civil Procedure Rules*. She states that the withdrawal notice was duly served on the Respondent on February 10, 2022.
 10. Counsel points out that apart from filing a Memorandum of Appearance and a Preliminary Objection, the Respondent had not filed a defence or any documents in Nairobi MCELRC No E1710 of 2021. She maintains that this suit stood withdrawn as at January 28, 2022, when the notice of withdrawal was filed.
 11. According to the Claimant's Counsel, Nairobi ELRC Cause No E1510 of 2021 is the only pending matter. She asserts that under Order 25 Rule 1 of the Civil Procedure Rules, no leave or court endorsement was necessary to give effect to the withdrawal.
 12. I directed the parties to file written submissions on the Respondent's application. However, at the time of writing this ruling, only the Respondent had complied.
 13. The Respondent submits that the suit filed at the Magistrate's Court had not been withdraw and was therefore still active.
 14. In her replying affidavit sworn on November 16, 2022, Counsel for the Claimant insists that that neither leave nor court endorsement was necessary to give effect to the withdrawal notice filed by the



- Claimant. In its written submissions, the Respondent makes reference to a number of decisions with a contrary holding.
15. In *Church Road Development Company Limited v Barclays Bank of Kenya Limited & 2 others* [2006] eKLR it was held that:
- “...Even though the plaintiff would not need the approval of either the defendant or the court to withdraw his suit, pursuant to the provision of Order 24 Rule 1, until the said notice is endorsed by the Deputy Registrar, so as to render it a part of the court record, the suit would not have been withdrawn.”
16. In *Joseph Ndung’u Njoroge v Lilian Atieno Siwolo* [2015] eKLR it was held that:
- “...the act of filing a notice of withdrawal or discontinuance of suit is not sufficient. There must be an endorsement by the Deputy Registrar, which act is not merely administrative but is judicial and holds judicial or legal consequences.”
17. I do not find anything in Order 25 Rule 1 of the Civil Procedure Rules to cause me to hold a different view. The fact is that the case filed at the Magistrate’s Court remains active in the judicial system, much like the one filed in this Court.
18. This Court does not see any difficulty hindering the Claimant from properly withdrawing the suit at the Magistrate’s Court. Moreover, the Court notes that in her replying affidavit, Counsel for the Claimant refers to Nairobi MCERLC No E1710 of 2021 as being the case filed at the Magistrate’s Court, while the Respondent’s issue relates to Nairobi MCERLC No E1721 of 2021.
19. In view of this confusion and also being minded to render substantive justice, I will desist from striking out the Claimant’s claim before this Court at this stage. This will allow the Claimant an opportunity to clean up his litigation trail. This matter will be mentioned for further directions within the next thirty (30) days.
20. I will also not make any order as to costs at this stage.

DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF MAY 2023

LINNET NDOLO

JUDGE

Appearance

Miss Karwithia for the Claimant

Miss Omwenga for the Respondent

