



**Mbugua v Baobab Beach Resort & Spa (Cause E096 of 2022)
[2023] KEELRC 1208 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1208 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E096 OF 2022**

M MBARŪ, J

MAY 4, 2023

BETWEEN

PHILIP MBUGUA CLAIMANT

AND

BAOBAB BEACH RESORT & SPA RESPONDENT

RULING

1. The ruling herein relates to application dated March 13, 2023 filed by the respondent, Baobab Beach Resort & Spa and preliminary objections by the claimant dated March 21, 2023.
2. The respondent's application is premised on the provisions of Section 6 and 12 of the [Employment and Labour Relations Court Act](#) and Rule 23 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) and Article 162(2)(a) of [the Constitution](#) and seeking for orders that;
 1. Spent.
 2. The court be pleased to consolidate this suit with eight (8) suits previously instituted by the claimant herein and pending before the Chief Magistrate Court at Kwale between the parties herein or the parties under whom they litigate, and in which matters in issue are directly or substantively in issue herein namely,
 - a. CMCC No E20 of 2020 – Kwale
Philip Mbugua v Jedidah W Murungi & Silvester Mbandi
 - b. CMCC No E18 of 2020 – Kwale
Philip Mbugua v Tuphosa Atieno & Silvester Mbandi
 - c. CMCC No E14 of 2020 – Kwale
Philip Mbugua v Judy Atieno & Silvester Mbandi



- d. CMCC No E15 of 2020 – Kwale
Philip Mbugua v Jedidah W Murungi & Silvester Mbandi
- e. CMCC No E16 of 2020 – Kwale
Philip Mbugua v Habibaa Amani & Silvester Mbandi
- f. CMCC No E19 of 2020 – Kwale
Philip Mbugua v Miriam Dayo & Silvester Mbandi
- g. CMCC No E17 of 2020 – Kwale
Philip Mbugua v Felistus Kimunyi & Silvester Mbandi
- h. CMCC No E29 of 2020 – Kwale
Philip Mbugua v Eddah Wanjiku & Silvester Mbandi
- i. CMCC No E22 of 2020 – Kwale
Philip Mbugua v Susan Owino & Silvester Mbandi

3. Upon consolidation, the court be pleased to transfer the 8 cases at Chief Magistrate Kwale court and the counterclaims made by the respective defendants to Mombasa Employment and Labour Relations Court for hearing and this file be the lead file.
4. In the alternative, the court be pleased to join the defendants in the 8 cases as respondents in this case and leave be granted to them to file their independent or joint responses to the Memorandum of Claim.
5. In further alternative, the court be pleased to stay this suit for want of jurisdiction, pending the hearing and determination of the previously instituted cases listed above.
6. Costs of the application.
7. The application is supported by the Supporting Affidavit of Louis Nambiro the human resource manager of the respondent and on the grounds that the claimant filed 8 cases against 8 female workers who complained of sexual harassment leading to termination of his employment by the respondent and the subject of the claim herein. The 2nd respondent in all the 8 suits was the general manager of the respondent and there exists common questions of fact and law in this claims and counterclaims to warrant a consolidation. For the court to be able to determine the truth, right to make complaints, impropriety or otherwise with regard to the various complaints made against the claimant herein and relating to alleged sexual harassment of women employees and claim of libel in the counterclaims, a transfer and consolidation of these files will be necessary as otherwise, this court lacks jurisdiction to hear and determine this matter.
8. In his Supporting Affidavit, Nambiro avers that unless the suits are consolidated the court will not have jurisdiction because the matter is directly and substantively in issue in other suits filed in Kwale and the matter is directly and substantially the same. The claimant is the same in all the suits against the same respondents which were filed on March 9, 2022 before this suit. the court cannot make adverse findings against the respondents without giving them a right to be heard and a transfer and consolidation of this suit with suits filed at Kwale Magistrates Court is necessary.
9. Nambiro also avers in his affidavit that the respondent applied to be joined as a respondent in the suits filed at Kwale Chief Magistrates court but the application was disallowed on September 22, 2022 and



there is an appeal against the same in Civil Appeal No164 of 2021 *Baobab Beach Resort & Spa v Philip Mbugua & 2 others*.

10. Consolidation of suit in this court is regulated under Rule 23 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#):
 23. The Court may consolidate suits if it appears that in any number of suits—
 - (a) some common question of fact or law arises; or
 - (b) it is practical and appropriate to proceed with the issues raised in the suits simultaneously.
11. Consolidation of suits must be with regard to claims filed with the court which raise a common question of fact or law or where it is practical and appropriate to proceed with issues raised in the suits simultaneously. The suits must first be lodged with the court. A common thread must run and exist within the same suits.
12. A superior court cannot be enjoined from undertaking its original mandate to allow a subordinate court address a matter. Principally, it should be the other way round. As much as the claimant is the same in all the suits filed in the subordinate court and has also moved this court as herein done, the jurisdiction of this court properly invoked, this being the only matter so far filed by the claimant before this court, this court will proceed and hear the instant claim on the merits.
13. The Chief Justice Gazetted special magistrates to hear employment and labour relations claims through Gazette Notice No6024 of June 10, 2018 for ease of access to justice but not to restrict the constitutional mandate of this court to hear and determine all employment and labour relations disputes within the Republic. A claim therefore filed before a magistrate's court should be heard within the confines of its mandate and this court should hear and determine employment and labour dispute within its jurisdictional mandate. A consolidation of claims between a superior court and a subordinate court even where such relates to employment and labour relations will mar the clear boundary between a superior court and a subordinate court and the intention of Article 162(2) ((a) of [the Constitution](#) will have no meaning.
14. The respondent has made effort to address various other matters before the subordinate court leading to Civil Appeal No 164 of 2021 *Baobab Beach Resort & Spa v Philip Mbugua & 2 others* I believe in appreciation that there is a clear distinction between a subordinate court whose decisions are subject to appeal to the superior court and which appeal ought to proceed on the merits. To allow the orders as couched would then mean placing all claims now already progressed before the lower court with this claim. Despite the claimant being the same in both courts, his decision to commence litigation as he has herein done, he should be heard on the merits particularly in the instant claim.
15. Application dated March 13, 2023 is hereby dismissed. costs shall abide the outcome of the main claim.
16. On March 6, 2023 court issued directions for parties to close pleading within 14 days and allocated a hearing date for March 27, 2023 which was adjourned to allow hearing of the instant application.
17. Time to close pleadings is extended by 14 days. A hearing date shall be issued in court upon delivery of this ruling.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Japhet Muthaine

..... **and**

