



**Wambua v Savannah Cement Limited (Cause E004 of 2022)  
[2023] KEELRC 2157 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2157 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
CAUSE E004 OF 2022  
MA ONYANGO, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**JOSEPH MUTHUSI WAMBUA ..... CLAIMANT**

**AND**

**SAVANNAH CEMENT LIMITED ..... RESPONDENT**

**RULING**

1. Vide a preliminary objection filed within its response to the claim herein, the Respondent seeks the dismissal of the Claimant's suit on grounds that the same is incompetent as there is a similar pending suit between the same parties on the same subject matter to wit, Nairobi ELRC No 469 of 2019. The Respondent annexed copies of the Memorandum of Claim in the said suit which confirms that the same is a duplicate of the instant suit, the only difference being that it was filed in Nairobi in 2019 while the instant suit was filed in Machakos in 2022.
2. The Claimant admits filing the second suit but explains that the Nairobi suit was filed before the registry in Machakos was operationalized. That he was unable to obtain a hearing date in Nairobi due to backlog in Nairobi where preference was given to older suits.
3. That when the court in Machakos was operationalized in 2021, he filed an application to transfer the said suit to Machakos for hearing and determination but instead of granting his orders, Nzioki Wa Makau J who heard the application struck out the case on grounds that it was filed in a court without territorial jurisdiction and directed the Claimant to file a fresh suit in Machakos. The Claimant avers that he applied for the said orders but the court file has been unavailable. That this is the background to the filing of the instant suit in Machakos.
4. The foregoing explanation was made in submissions of the Claimant in response to the Preliminary objection. The Respondent did not file submissions.



5. It is trite law that submissions are not pleadings and facts contained in submissions are not admissible as evidence. The Claimant ought to have filed either an affidavit or a response to the Memorandum of Defence to plead the facts it has set out in the submissions.
6. The foregoing notwithstanding, the explanation by the Claimant if true, would mean that the preliminary objection would be based on facts that do not reflect the correct position. It is thus not a proper case for a preliminary objection. It would also have been helpful if the Respondent filed submissions either confirming or denying the explanation given by the Claimant.
7. I hasten to add that according to section 6 of the *Civil Procedure Act*, where two suits have been filed in respect of the same cause of action, the second suit is to be stayed, not dismissed. Section 6 of the *Civil Procedure Act* provides:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

8. In view of the foregoing, I will dismiss the preliminary objection but order that the Nairobi file, which it is obvious has not yet been heard, be traced and sent to Machakos for perusal by the Judge before setting down this suit for hearing purpose I direct that a copy of this ruling be served upon the Deputy Registrar, ELRC Nairobi.

**Orders accordingly.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023**

**MAUREEN ONYANGO**

**JUDGE**

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**MKS E004 OF 2022 RULING**

