



**Hamisi v Modern Coast Express Limited (Cause E071 of 2023)
[2023] KEELRC 3468 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3468 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E071 OF 2023
M MBARÚ, J
DECEMBER 19, 2023**

BETWEEN

MWAZITO MOHAMED HAMISI CLAIMANT

AND

MODERN COAST EXPRESS LIMITED RESPONDENT

RULING

1. The respondent, Modern Coast Express Limited filed Notice of Preliminary Objections dated 4 September 2023 on the grounds that;
 1. The court lacks jurisdiction as the issues raised by the claimant are sub judice, there being a similar active case before the Chief Magistrate Court: CMEL E130 of 2020 Mwazito Mohamed Hamisi v Modern Cast Express Limited which Memorandum of Claim seeks similar orders over the same subject as the present Memorandum of Claim.
 2. The claimant’s suit is frivolous, vexatious and an abuse of the process of the court hence ought to be struck out and / or dismissed with costs.
2. Both parties attended and agreed to address the objections by way of written submissions.
3. The respondent submitted that the claimant was employed by the respondent as the head of information technology at the respondent’s group of companies. In June 2020, the respondent received complaints regarding the management of IT and touching on the conduct of the claimant who was the head. Despite warnings, the complaints persisted leading to termination of his employment. the claimant filed Mombasa Chief Magistrate Cause E130 of 2020 on 12 November 2020 claiming there was unfair termination of employment and seeking payment of terminal dues.
4. Before the claim before the lower court could be heard and determined, the claimant filed this claim on 1st August 2023 on the same facts and seeking for similar remedies. Under paragraph 30 of the

Statement of Claim, the claimant lied to the court that there is no other suit pending and that previous proceedings had been withdrawn.

5. The two suits seek identical orders and arise from the same facts and hence offend the sub judice rule under Section 7 of the *Civil Procedure Act* as held in *Joseph Muriithi Njeru v County Government of Kirinyaga* [2020] eKLR. In the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission and 16 others* [2020] eKLR the Supreme Court defined the sub judice rule to mean that the purpose of the rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same subject matter. The claimant has filed a claim before the lower court and again before this court contrary to the sub judice rule which is an abuse of court process as both claims are based on the same cause of action and fact, plead for similar orders, regurgitate the same matters and relate to alleged unfair termination of employment. This claim should be dismissed with costs to the respondent.
6. In response, the claimant submitted that the claim herein was filed on 1st August 2023 seeking various declarations that the respondent had terminated his employment unfairly. The orders sought are outlined in the Memorandum of Claim. The objections herein are not proper in terms of the principles in the case of *Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd* [1969] EA as the facts raised require a call of evidence and not apparent from the record. There is no point of law raised that necessitates the objections herein.
7. The sub judice rule under Section 6 of the *Civil Procedure Act* relates to a similar suit or proceedings pending in another court involving the same parties over the same subject matter. The claimant has admitted that there was a previous suit in Mombasa EMEL E130 of 2020 *Mwazito Mohamed Hamisi v Modern Coast Express Limited* but he said the suit was withdrawn and Notice of Withdrawal filed in court on 31st July 2023. The allegation that there is another suit pending is not true. Such matter then cannot form a good basis for application of the sub judice rule or to sustain the objections made herein as held in *Celine Wambui Kiai v National Bank of Kenya & 2 others*. The claim herein is filed after the withdrawal of the earlier matter in Mombasa CMEL E130 of 2020 and the suit does not exist.
8. The claim that there is an abuse of court process is without merit and the objections herein should be dismissed to allow the claim herein to be heard on the merits.

Determination

9. The twin issues herein for determination are whether the claim herein is sub judice and whether there is an abuse of court process.
10. The claimant does not deny that he filed Mombasa CMEL No. E130 of 2020 *Mwazito Mohamed Hamisi v Modern Coast Express Limited*. Under paragraph 28(5) of the Memorandum of Claim, the claimant has pleaded that the only previous proceedings between the claimant and respondent being Chief Magistrate's Employment and Labour Relations Court Cause No. E130 of 2020 was withdrawn on account of jurisdiction and as such there exists no other proceedings in this matter between the claimant and the respondent over the same subject matter and the cause of action herein ...
11. Section 6 of *Civil Procedure Act* defines the sub judice rule as follows;

No court shall proceed with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.

12. The claimant submitted that Mombasa CMEL E130 of 2020 has been withdrawn as of 31st July 2023 for lack of jurisdiction in the lower court and before filing this claim on 1st August 2023.
13. Order 25 Rule 1 of the Civil Procedure Act and the rules thereto allow as follows;

At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
14. It is not clarified as to whether the Notice of Withdrawal of Mombasa CMEL E130 of 2020 was served upon the respondent herein or that the respondent attended and made objections to the withdrawal of suit or pleaded for payment of costs. Upon the withdrawal of such suit, it ceased to exist and application of such matter in defence does not apply.
15. Notice of Withdrawal of Suit takes effect and brings the proceedings to an end as against the respondent.
16. The suit herein is filed after the suit in Mombasa CMEL E130 of 2020 was withdrawn and hence a proper suit and therefore the claimant is not in abuse of court process.
17. Objections dated 4 September 2023 are without merit and are hereby dismissed. The court will hear the claim on the merits. Costs shall abide the outcome of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF DECEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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