



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. E6554 OF 2020**

**JOHN MUASYA.....CLAIMANT**

**VERSUS**

**SHELL AND VIVO LUBRICANTS KENYA LIMITED.....RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a notice of motion Application dated 21<sup>st</sup> January, 2021 seeking an order in the following terms: -

***1. That the Court be pleased to strike out the memorandum of claim filed and dismiss the suit as against the Respondent with costs.***

2. The application is premised on the grounds set out on the face of the Notice of Motion and in the supporting affidavit of Fred Gituku, the Human Resource Manager of the Respondent, the nub of which is that the claimant entered into a contract of employment with the respondent dated 25<sup>th</sup> June, 2014 and the contract was subsequently mutually terminated by a separate agreement dated 12<sup>th</sup> March, 2020.

3. That before executing the Agreement of Separation, the claimant was required to seek independent advice and the claimant took seven days to consider the matter and then returned and duly signed the agreement with the intention of the same being given effect by the parties thereof.

4. The respondent then in discharge of its obligations under the Separation Agreement paid the claimant the agreed separation package set out under paragraph 4; 4.1 and 4.1.1 to 4.1.6. The agreements are annexed to the application and marked '**FK3**' and **FK4**.

5. The claimant in compliance to the Separation agreement also duly handed over to the respondent as per annexure '**FK5**.'

6. The total separation package was Kshs 3,817,027 in full and final settlement of all claims of any nature which the claimant may have as against the Respondent arising out of the employment contract.

7. That the claimant has in blatant breach of the said separation agreement brought this suit against the respondent. That the suit is misconceived and an abuse of the Court process and the same be summarily struck out.

8. The claimant filed a replying affidavit sworn to by the claimant on 17<sup>th</sup> March, 2021 in which the claimant states that he was coerced into executing the separation agreement on 12<sup>th</sup> March, 2021 and therefore the said agreement is invalid and cannot be a bar to him to seek justice before a Court of law. The applicant filed a supplementary affidavit in rebuttal sworn by Fred Gituku on 30<sup>th</sup> April, 2021.

9. In the case of **Coastal Bottles –vs- Kimathi, Civil Appeal No. 21 of 2017**, the Court of Appeal held as follows: -

***“Whether or not a settlement, agreement or a discharge voucher bars a party thereto from making claims depends of the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”***

10. It cannot be in doubt therefore, the inquiry the Court is bound to enter into is one of interpretation of the agreement itself and any extraneous, factual circumstances that may lead the Court to invalidate the agreement.

11. It is my considered opinion and finding that such an inquiry cannot be held and concluded *in limine*. The Court must hear the parties on

the merits and demerits of the versions provided by each one of them.

12. The determination to be made is one of mixed facts and law and the issue cannot therefore be termed as a pure point of law to be disposed of at the earliest instance as was stated by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

*"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."*

This was followed up by the judgment of **Sir Charles Newbold** in the same case who stated that: -

*"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."*

13. Accordingly, the Court finds that this application is one meant to serve irregularly the place of a Preliminary Objection. It has been prematurely filed and is dismissed with costs.

14. The matter to proceed to full hearing on the merits of the case. It is so ordered.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of April, 2022.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. 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 18 of the Civil 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Luseno for Respondent

Mr. Ochieng for Claimant

Ekale – Court clerk`