



Idha v Contractors (Cause 470 of 2018) [2022] KEELRC 1161 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 1161 (KLR)

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

CAUSE 470 OF 2018

AK NZEI, J

JUNE 30, 2022

BETWEEN

KHALID MBARAK IDHA CLAIMANT

AND

MODERN COAST BUILDERS & CONTRACTORS RESPONDENT

RULING

1. The suit herein was instituted by the Claimant on 1st August 2018 vide a Memorandum of Claim dated 18th July 2018. The Claimant alleges that his employment was unfairly terminated by the Respondent on 13th April 2018 and prays for compensation for unfair termination of employment and terminal dues, including one month salary in lieu of notice, unpaid leave and salary for the month of April 2018. The Claimant is also seeking to be paid punitive damages and costs of the suit.
2. The Respondent entered appearance on 14th September 2018 and filed a Memorandum of Response on the same date. The Respondent pleaded as follows at paragraph 3 of its Memorandum of Response:-

“the Respondent states that the claim filed herein is an abuse of the due process of this Honourable Court and does not lie in law and/or fact. The Respondent shall in limine raise a preliminary objection and apply for the claim to be struck out and dismissed with costs.”
3. On 10th February 2022, the Respondent filed a Notice of Motion dated 8th February 2022, seeking the following orders:-
 - a. that the Honuorable Court be pleased to strike out the suit against the Respondent/Applicant for lack of cause of action.
 - b. that costs of the application be in the cause.



4. The application sets out the grounds upon which it is based, and which are replicated in the affidavit of Christine Mfutu sworn on 8th February 2022 in support of the application. This is the application before me for determination.
5. It is deponed in the said supporting affidavit, inter-alia:-
 - a. that subsequently after the decision of terminating the Claimant/Respondent, the Defendant/Applicant called the Claimant/Respondent back to the office for a meeting.
 - b. that the Claimant/Respondent had several discussions with the Respondent/Applicant's management and later agreed on returning back to work, and the Respondent/applicant issued the Claimant with a notice of reinstatement dated 8th June 2018 as agreed at the meeting.
 - c. that the Claimant/Respondent failed to turn up for work, only for him to file the current suit against the Respondent/Applicant.
 - d. that the suit filed by the Claimant/Respondent lacks cause of action as he was already reinstated to his position with consent from both parties immediately after the discussions.
 - e. that the Claimant/Respondent lacks locus standi and any further subsistence of the suit herein is tantamount to wastage of the Court's time.
6. Annexed to the said supporting affidavit is a letter by the Respondent/Applicant to the Claimant/Respondent dated 18th June 2018 which reads:-

“RE: NOTICE OF REINSTATEMENT

Reference is made to your termination letter dated 13th April 2018 and to various discussions held between yourself and management. The company would like to formally notify you of your reinstatement to Modern Coast Builders & Contractors Limited effective 18th June 2018. Terms on your salary and other emoluments will remain identical to your terms prior to your leaving the company. Kindly resume your employment immediately.”
7. The application is opposed by the Claimant/Respondent who filed a Replying Affidavit on 24th February 2022, sworn by himself on the same date. In the said Replying Affidavit, the Claimant/Respondent: -
 - a. denied ever being called by the Respondent/Applicant or receiving a notice of reinstatement dated 18th June 2018 reinstating him back to work.
 - b. denied knowing Christine Mfutu, the deponent of the affidavit sworn in support of the application herein.
 - c. stated that he is a stranger to the contents of the notice of reinstatement dated 18th June 2018, and denied having seen it or even signing (on) such a letter. That the document was shown to him by his Advocates when being advised on the application herein (dated 8th February 2022).
8. The Claimant/Respondent further deponed that the letter is a fabrication by the Respondent/Applicant in a bid to deny the Claimant his right in the suit herein, and that the application is orchestrated to delay the suit and to defeat justice.
9. The Respondent/Applicant filed a further Affidavit on 20th April 2022, sworn by Christine Mfutu on 22nd March, 2022 and reiterated matters deponed to in the supporting affidavit and deponed that the termination letter had been withdrawn by the Respondent/Applicant at the Claimant's request.



10. Counsel for both parties filed written submissions on the application pursuant to the Court's directions in that regard, which I have considered.
11. The Respondent/Applicant's allegation that the Claimant/Respondent was reinstated back to his job on 18th June 2018 after having been terminated on 13th April 2018, and that the reinstatement followed meetings between both parties herein are matters of fact, which have been denied by the Claimant. A trial must, under such circumstances, be held as the truth and/or validity of such allegations and denials must be tested in a full trial. Striking out a suit on the basis of contested matters of fact will not be in the interest of justice.
12. Consequently, I find no merit in the Notice of Motion dated 8th February 2022. The same is dismissed with costs to the Claimant.
13. The suit shall be mentioned in court on 21/9/2022 for purposes of fixing a hearing date.
14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JUNE 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant/Respondent

..... for Respondent/Applicant

