



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 29 OF 2020

KENYA UNION OF SUGAR PLANTATION

AND ALLIED WORKERSAPPLICANT/CLAIMANT

VERSUS

BUTALI SUGAR MILLS LIMITED..... RESPONDENT

RULING

1. The respondent filed a preliminary objection that the application dated 27/4/2020 is incompetent and fatally defective for offending the provisions of the Civil Procedure Act, Civil Procedure Rules and Employment and Labour Relations Court (**Procedure**) Rules 2016 and it be struck out with costs.
2. The objection is grounded on:-
 - (a) Section 19 of the Civil Procedure Act, 2010
 - (b) Order 3 Rule 1(1), Order 5 Rule (1) (1) and 1(3) and Order 6 (Rule 1 of the Civil Procedure Rules.
 - (c) Rule 5(1) of the Employment and Labour Relations Court (Procedure) Rules 2016.
3. The respondent filed written submissions in support of the preliminary objection on 14/8/2020 in which the objector submits, that the Notice of Motion Application dated 27/4/2020 is not accompanied by a Memorandum or Statement of Claim instituting a suit against the Respondent. This is the gist of the preliminary objection and the basis of citing violation of the Rules aforesaid.
4. The objector relies on the case of **Proto Energy Limited –vs- Hashi Energy Limited [2019] eKLR** where the Court held as follows:-

“As a general rule a suit can only be instituted by way of a plaint, petition or an originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of motion renders the entire suit defective.”
5. In their submissions the claimants/respondents state that the objection has been overtaken by events in that the respondents have since thereafter on 4/5/2020 filed a Memorandum of Claim and served the same to the Respondent on 22/5/2020.
6. The application was filed on 27/4/2020 and the objection was filed in Court on 8/5/2020.
7. It is therefore not in dispute that at the time the Notice of Motion application was filed on 27/4/2020 and considered by the Court online exparte on 28/4/2020 there was not in existence a suit upon which the Notice of Motion application was anchored.
8. Indeed this fact could not be discerned by the Court outright, when it considered the matter exparte and on email because of the limitation imposed on the judge by online applications where all the filed documentation iare sometimes not fully accessible to the judge
9. In this matter, the Court proceeded to consider and issue interim orders oblivious of the fact that the Notice of Motion filed on Certificate of Urgency was not accompanied by a Memorandum of Claim, a fact now conceded by the respondent herein.
10. The respondent proceeded to file a Memorandum of Claim thereafter on 4/5/2020 apparently to attempt to oviatethe fatal defect.

11. It is the Court's considered finding that a Memorandum of Claim filed on 4th May, 2020 cannot be the basis upon which a notice of motion dated 27/4/2020 and filed on the even date is validated.

12. The Notice of Motion when filed without an originating suit was fatally defective and in violation of Rule 4(1) of the Employment and Labour Relations Court (**Procedure**) Rules, 2016 which provides for the manner in which a dispute to the Court may be instituted as follows:

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“4(1) A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out-

13. This Rule is couched in mandatory terms.

The Court pays deference to the finding by the High Court in Proto Energy limited Case (supra).

14. The Court notes that Article 159(2) (d) of the Constitution is not a licence to parties to avoid adherence to the statutes and Rules of Court for these are the handmaidens of Courts in the proper administration of justice.

15. The Court of Appeal in **Kakuta Mainai Hamusi –vs- Peris Pesitobiko & 2 Others [2013] eKLR** upheld this venerable principle of administration of justice as follows: -

“We do not consider Article 159(2) (d) to be a panacea, nay a general whitewash, that cures and mends all the misdeeds and defaults of Litigation.”

16. This Court agrees wholly with the rendition of law and principle by the Court of Appeal.

17. In the present case the respondent ought to have withdrawn the Notice of Motion filed in disregard of law and procedure and originate the suit in the proper manner by way of a Memorandum of Claim accompanied by another notice of motion application.

18. Accordingly, the preliminary objection is upheld and the Notice of Motion filed on 24/4/2020 without an anchoring suit struck out with no Order as to costs.

Dated and delivered at Nairobi this 18th day of February, 2021.

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 15th 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

L.G. Menezes & Company Advocates for the Objector

Lincoln Aveza isagi Secretary General, Respondent/Union

Chrispo: Court clerk