



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 68 OF 2019

LUKAS MUKUNGA MUTUKU AND 30 OTHERS.....CLAIMANT

VERSUS

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....RESPONDENT

RULING

1. The Respondent filed a notice of Preliminary Objection dated 11/11/2019 in the following terms:
 - (i) That there is no Ruling or judgment in Cause No. 68 of 2019 whose execution ought to be stayed.
 - (ii) That there is no pending review on appeal pending hearing and determination in Cause No. 264 of 2017.
 - (iii) There is no claim accompanying the application in Cause No. 68 of 2019 upon which the application is anchored.
2. That the respondent seeks that the application be struck out and/or dismissed with costs as is incompetent, frivolous, vexatious and improper and therefore a waste of judicial time.
3. The Claimants/Applicants brought the Notice of Motion application dated 24/7/2019 under Certificate of Urgency.
4. The application was heard ex parte in the first instance on 29/9/2019 and was certified urgent and a return date for inter partes hearing set.
5. On 17/2/2020 the parties entered into a consent before Court in terms of which hearing and determination of the application was stayed pending hearing and determination of the preliminary objection.
6. The Court has carefully considered the papers filed by the claimants/applicants on 24/7/2019 and same comprise a Notice of Motion application dated 24/7/2019 in which the applicants accuse the respondent of having filed Kisumu Employment & Labour Relations Court No. 264 of 2017 without the authority of the claimant/applicants and that the claimants/applicants herein are no longer members of the respondent union and that the court do issue an interim order of stay of execution of the judgment in Kisumu Employment & Labour Relations Court Cause No. 264 of 2017 pending the hearing and determination of the application and the suit.

7. The court has upon consideration of pleadings as filed in this matter found that the Notice of Motion application dated 24/7/2019 is not anchored on any memorandum of Claim and therefore the Orders sought in the Notice of Motion are incapable of grant for lack of a substratum.

8. Indeed, the notice of motion application refers to a completely different suit being Kisumu Employment & Labour Relations Cause No. 264 of 2017 which was heard and determined by the Court and judgment delivered on 9/7/2019.

9. Simply, put, the application before Court is a veiled appeal against the judgment of the Court in another suit through the back door.

10. This application/suit is clearly a blatant abuse of Court process as stated by the respondents in their notice of preliminary objection.

11. Accordingly, the Court upholds the preliminary objection by the respondent union and strikes out the suit in its entirety with costs.

Dated and delivered at Nairobi this 11th day of March, 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

Mr. Atelo for Respondent/Objector

Ngala Awino & Co. Advocates for Claimants/Applicants

Chrispo: Court clerk