



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E16 OF 2021

(Before D.K.N.Marete)

JAMES MAKURA M'ABIRA.....CLAIMANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION....RESPONDENT

RULING

This is an application by way of Preliminary Objection forming part of the Respondents Grounds of Opposition and comes out as follows;

1. THAT the Respondent's shall raise preliminary objection at the hearing of the application to the effect that the suit is not maintainable in law so far as;
 - a. It is misconceived, frivolous, vexatious and blatant abuse of court process and that there exists an appeal based on the same facts at the Court of Appeal –Nyeri vide Civil Appeal No.174 of 2020 which is yet to be heard and determined;
 - b. That this Honourable Court therefore lacks jurisdiction to handle the claimant's claim.

It raises an issue of lack of jurisdiction on the part of this court to entertain this petition and other antecedent applications thereto. This is on the ground that in the application and suit before court, the petitioner did not disclose that he had had another matter before this court which was dismissed on 18th July, 2020. This is Petition No.ELRC 008 of 2020. It was dismissed and subsequently, the claimant filed Appeal No.174 of 2020. It is the applicant's further submission that the issues in the petition, appeal and the claim herein are the same.

The applicant's further submission is that the Court of Appeal matter is alive and ongoing and therefore this matter is *res judicata* and as such its improperly before this court. This is adequate ground for a dismissal of this matter with costs, which, in the circumstances should be paid by the claimant's counsel in person.

The Respondent/Applicant further buttresses her case by seeking to rely on paragraph 18 of the Respondent's verifying affidavit, the averment that the claimant works with Gori & Co.Advocates.

The applicant in the penultimate seeks to rely on the authority of **Motor Vessel (Lilian S) vs Caltex Oil Ltd 1989 eKLR** to emphasize a case of lack of jurisdiction and the consequences thereof.

The Claimant/Respondent rubbishes the preliminary objection as misconceived and unknown in law. It is his submission that the petition referred to in the preliminary objection was heard and determined on merit. It was struck out but not dismissed as claimed.

It is his further submission that filing an appeal is not a fetter to jurisdiction and further that counsel for the Respondent seeks to adduce evidence through the back door. He prays that this application be dismissed with costs to enable him proceed with the prosecution of his application and claim.

This matter comes out in favour of the Objector/Applicant. The Claimant/Respondents would not have his cake and eat it. He has had a try in this cause through a petition which was struck out thereby occasioning an appeal on the same. This is not in dispute *inter partes*.

It therefore does not require any further evidence to support. It squarely falls within the parameters of authority of **Mukhisa Biscuits Manufacturing Company Ltd Vs West End Distributors Limited (1969) EA 696**, which provides thus;

“...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 off the suit...

Further,

“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 other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

I further agree with the Objector’s submission that the claimant has the choice of either withdrawing the appeal to pursue this claim or nothing. He cannot have it both ways. The choice is his.

I am therefore inclined to allow the objection with orders that each party bears the costs of the same.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr.Ondimu instructed by State Law Office for the Objector/Applicant
2. Mr.Gori instructed by Gori & Company Advocates for the Claimant/Respondents