



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 232 OF 2018

ANDREW NYAMBU MNGAMBWA.....CLAIMANT

VERSUS

LEISURE LODGE LIMITED.....RESPONDENT

RULING

1. By a Memorandum of Claim dated and filed in court 16th April 2018, the Claimant filed a claim against the Respondent, seeking compensation for unlawful and unfair termination of employment.
2. The Respondent responded to the Claimant's claim by way of a Response dated 30th May 2018 and filed in court on 4th June 2018.
3. The Respondent subsequently raised a Preliminary Objection by notice dated 27th November 2020 and filed in court on 1st December 2020. It is that objection that is the subject of this ruling.
4. The Respondent's objection is based on the following grounds that:
 - a. There is a judgment delivered by Rika J on 6th July 2018, in a similar matter being ***Mombasa ELRC Cause No 178 of 2015: Cosmas Barasa Jacob & 3 others v Leisure Lodge Limited***;
 - b. The parties herein are bound by the mandatory provisions of the Collective Bargaining Agreement (CBA) with the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers Union (KUDHEIHA), of which the Claimant was a member, which is duly registered and which sets out the terms and conditions of employment of its members and provides the relevant dispute resolution mechanisms therein, which are binding upon the parties without exception;
 - c. The Claimant's right to file a suit in the first instance is waived by the provisions of the CBA. The Claimant's suit herein is therefore premature, misconceived and is an abuse of the court process. The Respondent therefore prays that the same be struck out or be stayed to await the outcome of the dispute resolution mechanism under the relevant CBA.
5. The Claimant filed Grounds of Opposition on 3rd December 2020 stating:
 - a. That the Respondent's Preliminary Objection is not based on a point of law and the issue raised can only be determined by the Court upon hearing the matter;
 - b. That the Preliminary Objection is frivolous and an abuse of court process.
6. The objection was urged by way of written submissions. In its submissions filed on 17th May 2021, the Respondent reiterates its grounds of objection and states that if this suit is sustained, it will negate the employer's legitimate expectation that disputes between itself and its employees will be resolved in the manner agreed upon in the CBA.
7. The Respondent submits that pursuant to the decision in ***Cause No 178 of 2015: Cosmas Barasa Jacob & 3 others v Leisure Lodge Limited***, the Claimant ought to first exhaust the dispute resolution mechanism provided under the CBA negotiated between his union and the Respondent.
8. What constitutes a Preliminary Objection was set out in the famous case of ***Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA***. In that case, **Law JA** stated the following:

“...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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...”

9. My understanding of the Respondent’s objection is that because the Claimant has not exhausted the dispute resolution mechanism provided under the CBA, then his suit is premature.

10. That may well be so. However, applicability of the CBA to the Claimant in this case is a contested matter, more so because the copy availed to the Court is not executed. This is a matter on which evidence needs to be adduced.

11. What is more, even if the Court were to find that the Claimant has bypassed a dispute resolution mechanism, the thing to do would not be to strike out the claim but rather, to refer it to the correct forum.

12. That said, I find and hold that the Respondent’s Preliminary Objection is not well taken and therefore overrule it with costs in the cause.

13. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY JULY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Ms. Masinde for the Claimant

Ms. Kibe for the Respondent