



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 43 OF 2020

MAHMOOD ADAM MOHAMMED.....CLAIMANT

VERSUS

AFRICAN BANKING CORPORATION.....RESPONDENTS

RULING

1. The application before me is the Respondent's Notice of Motion dated 14th December 2020, vide which the Respondent/Applicant seeks the following orders:-

a) that this Court stays proceedings in the matter herein pending hearing and determination of the application.

b) that further proceedings in the matter herein be stayed pending settlement of the costs awarded to the Respondent Bank in Mombasa CM ELR Cause No. 654 of 2019; (Mahmood Adam Mohamed –vs- African Banking Corporation.)

c) that upon issuance of order (b) above and in default of settlement of the costs awarded to the Respondent Bank in Mombasa CM ELR Cause No. 654 of 2019 (Mahmood Adam Mohammed –vs- African Banking Corporation) by the Claimant within a period prescribed by this Honorable Court, then the Claimant be denied all audience of this Court until the stated costs are fully settled.

d) that costs of the application be provided for.

2. In the supporting affidavit and further affidavit of Kajuju Marete, a Legal Officer at the Respondent/Applicant Bank, sworn and filed in support of the application, it was deponed, *inter alia*:-

a) that the Claimant herein instituted in the Subordinate Court at Mombasa ELR Cause No. 654 of 2019 (Mahmood Adam Mohamed –vs- African Banking Corporation) against the Respondent.

b) that the cause of action in the said cause and the orders sought therein, were similar to those in the suit filed against the Respondent Bank in this Court.

c) that the Respondent Bank defended the suit in the Subordinate Court and raised a Preliminary Objection thereon, questioning the Subordinate Court's Jurisdiction to hear and determine the suit, and calling for the suit to be struck off with costs.

d) that vide its Ruling delivered on 28/02/2020, the said Court upheld the Respondent Bank's Preliminary Objection and struck off the Claimant's suit with costs to the Respondent Bank.

e) that costs payable to the Respondent Bank were subsequently assessed and certified by the Subordinate Court at ksh.90,550.00

f) That the assessed costs have not been settled to date despite demand.

3. On 28th January 2021, the Claimant/Respondent filed a Replying Affidavit in opposition to the application, but did not deny any of the core facts set out in paragraph 2 of this Ruling.

4. Parties were on 12th July 2021 directed by the Court to file written submissions on the application, and this was subsequently done.
5. Documents annexed to the supporting and further affidavits of Kajuju Marete, and which I have perused, include copies of the Memorandum of Claim filed by the Claimant in Mombasa CM ELR Cause No. 654 of 2019, the said Court's Ruling dated 28/5/2021 assessing the Respondent Bank's costs at ksh.90,550, a Certificate of Costs issued on 9/7/2021 and a demand letter by the Respondent Bank's advocates dated 15/7/2021.
6. I have noted that parties in the said Lower Court suit and parties in the suit before this Court are the same, and that reliefs that were being sought in the Lower Court suit are similar to the reliefs being sought in this Court.
7. The Respondent/Applicant's contention that it incurred costs in defending the Lower Court suit and that costs assessed thereon should be settled before the claimant can be allowed to proceed with the suit filed in this Court is not frivolous. Litigation is not a cheap undertaking, and institution of several and/or multiple suits over the same cause of action and against one defendant/respondent should be avoided. Where any of such suits is brought to a pre-mature end, either by an order of the Court in which it is filed or by withdrawal/discontinuance thereof by the party filing it, any costs ordered thereon should always be paid as a matter of priority unless the Court otherwise orders, and possibly before any subsequent suit involving the same parties and cause of action can be allowed to proceed.
8. Counsel for the Respondent/Applicant have in their submissions referred the Court to Order 25 Rule 4 of the Civil Procedures Rules which states:-
- “if a subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same or substantially the same cause of action, the Court may order a stay of such subsequent suit until such costs shall have been paid.”***
9. The Respondent has not demonstrated that it ever took out execution proceedings against the claimant towards recovery of the assessed and certified costs of the struck off Lower Court suit, and what the outcome of such process was.
10. Nevertheless, this Court is empowered, under Section 12(3) (viii) of the Employment and Labour Relations Court Act, to grant any relief as the Court may deem fit to grant.
11. In view of the foregoing, and having considered rival submissions filed by counsel for the parties herein, I am inclined to exercise the Court's discretion in favour of the Respondent/Applicant. The Notice of Motion dated 14th December 2020, is allowed in the following terms:-

a) the Claimant's suit/claim herein is hereby stayed pending payment by the Claimant to the Respondent/ Applicant of Costs in Mombasa CM ELR Cause No. 654 of 2019 (Mahmood Adam Mohammed vs- African Banking Corporation), assessed and certified by the said Court at ksh.90,550.00.

b) if payment of the said costs is not made within six (6) months from the date of this Ruling, the suit/claim will stand stayed for a further period of six(6) months, upon the lapse of which the suit shall stand dismissed if payment will not have been made within that period.

c) costs of the application will be in the cause.

12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF OCTOBER 2021

AGNES M.K. 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 M.K. NZEI

JUDGE

Appearance:

Mr. Khatib for Claimant/Respondent

Miss Gitari for the Respondent/Applicant