



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT MOMBASA**

**CAUSE NO. 95 OF 2019 CONSOLIDATING CAUSE E006 OF 2021**

**SAMUEL KIPYATOR KIPTALAM.....CLAIMANT**

**- VERSUS -**

**COUNTY GOVERNMENT OF KWALE.... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> November, 2021)

**RULING**

The claimant filed on 05.12.2019 the present suit cause 95 of 2019 by the memorandum of claim through Ngonze & Ngonze Advocates. The claimant is a Registered Clinical Officer in continuing service of the respondent. His claims and prayers include for salary withheld from 31.07.2019 at Kshs.152, 900.00 per month until payment in full and maximum compensation for the withholding of the salaries and costs. The claimant's case is that after intervention by the Court, the respondent resumed payment of the claimant's salary effective April 2020 but on half pay until November 2020. Further in view of the Covid 19 situation the claimant was granted leave to work from home effective 10.09.2020. The respondent has then withheld payment of the claimant's salaries again effective December 2020 prompting the claimant to file against the respondent Cause E006 of 2021 in which the claimant has claimed and prayed that the stoppage of salary is irregular, unfair, and unlawful; maximum compensation for the stoppage, stopped wages as at 08.01.2021 Kshs.305, 800.00 being two months' salaries, any further withheld salary at Kshs. 152, 900.00 per month until payment in full, payment of overtime worked, and costs.

The claimant has filed on 23.06.2021 in the present suits cause 95 of 2019 and in cause E006 of 2021 similar applications for consolidation of the two suits. The applications are under section 12 of the Employment and Labour Relations Court Act, sections 1, 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act, Order 51 rule 1 Civil Procedure Rules, 2010, Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 28, 39, 40, 47, 48, 50, 60, 64, 159, 162, 165, 169, 258, 259 of the Constitution of Kenya, 2010 and all other enabling provisions of law. The prayers are for:

1. ...(spent)
2. ... (spent)
3. That an order to issue to the effect that causes No. 95 of 2019 and E006 of 2021 both at Mombasa and between the parties herein be heard alongside each other on the same date.
4. That an order to issue that the to the effect that the evidence of the claimant in both causes subject hereof be taken de bene esse on 08.07.2021 or so soon thereafter as the Honourable Court shall direct.
5. That costs of the application be provided for.

The claimant's case is that the suits are between the same parties, separate but similar causes of action and the suits will be heard and determined efficiently and effectively if consolidated.

In Cause E006 OF 2021(both files being before Court concurrently for ruling on the similar applications for consolidation or hearing together) respondent has opposed the application by filing on 07.07.2021 the notice of preliminary objection through Muturi Gakuo & Kibara Advocates. The respondent states that the application dated 23.06.2021 and the entire suit in Cause E006 of 2021 be dismissed *in limine* with costs upon the following grounds:

1. The application and the entire suit herein is incurably defective, bad in law and cannot stand in law.
2. That Cause E006 OF 2021 is *sub judice* Cause 95 of 2019 between the parties and contrary to section 6 of the Civil Procedure Act,

Cap 21.

3. The suit is frivolous, vexatious, and an abuse of court process and a perfect candidate for dismissal.

In cause 95 of 2019 the respondent filed on 07.07.2021 the replying affidavit of Dr. Jumaa Salim Mbete, the Chief Officer in-charge of Health Services in the Kwale County. The affidavit stated as follows:

1. The Court ordered on 19.12.2019 that the claimant reports to his new work station at Kwale Subcounty Hospital, Samburu County.
2. On 14.02.2020 the claimant reported at his new station of duty and the respondent ordered immediate remitting of his salary per the contract of employment.
3. In August 2020 the claimant begun absconding duties from time to time. On occasions he reported at work he failed to work on the shift as expected. On 09.10.2020 he completely abandoned duty. Currently he has refused to report on duty. Alleged irregular, illegal, unfair and unlawful withholding of salary does not therefore arise.
4. It not true that the claimant was granted leave to work from home on account of his pre-existing condition and during the Covid 19 situation as alleged in the supporting affidavit. He has not provided any medical certificate on his pre-existing medical condition as alleged. His work as a registered clinical officer is inconsistent with working from home. Such officers have since been vaccinated against Covid 19 virus and should currently report at work.
5. The employer has the legal prerogative to transfer an employee like in the instant case. The claimant is not working and is undeserving of payment of salary as claimed.
6. The matters raised in the application be determined at the full hearing and not interlocutory stage.
7. The application be struck out with costs.

The parties filed their respective submissions on the applications. The Court has considered the submissions and the parties' respective positions. The Court finds as follows:

**First**, as submitted for the respondent, section 6 of the Civil Procedure Act provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. The Court finds that as submitted the essence of the *sub judice* rule is that the same cause of action is triable only in one legal proceeding before the competent court. By reason of the matters in the replying affidavit and by reason of the pleadings in E006 of 2021, after filing of cause 95 of 2019, further transactions and events accrued prompting the filing of the said cause E006 of 2021. The Court therefore finds that the cause of action in the two suits being different substantially, the *sub-judice* rule will not apply and the rule does not chain cause E006 of 2021 at all. The preliminary objection will collapse.

**Second**, rule 23 of the Employment and Labour Relations Court (Procedure) Rules provides that the Court may consolidate suits if it appears that in any number of suits:

- a. Some common question of fact or law arises; or
- b. It is practical and appropriate to proceed with the issues raised in the suits simultaneously.

In the instant case the parties are in a continuing contract of service. The issue of lawfulness of the transfer is in issue in the earlier suit while in the subsequent suit the issue is whether, subsequent to reporting per the impugned transfer, the parties have performed the contract of service per their respective rights and obligations. In view of the overlapping continuum in the causes of action and the continuing contract of service, the Court returns that the transfer is a common issue of fact and law and further, it is practical and appropriate to proceed with the suits simultaneously for the efficient, effective and complete determination of the disputes. As submitted for the applicant, the consolidation is in line with section 3 of the Employment and Labour Relations Court Act, 2011 that the principal objective of the Act is to facilitate the just, expeditious, and proportionate resolution of the disputes governed by the Act. The consolidation will therefore be allowed.

**Third**, the claimant clearly failed to invoke the clear rule on consolidation per the Court's rules of procedure and instead unnecessarily invoked and spread the straightforward applications to the cited numerous statutory and constitutional provisions. The court further considers that the claimant did not need to file a similar application in both suits and as urged for the respondent, that indeed amounted to an abuse of court process. On the other hand, the preliminary objection has failed and the replying affidavit has addressed substantive matters in the dispute best left for the full hearing. In such circumstances, each party will bear own costs of the preliminary objection and the applications.

For avoidance of doubt, the ruling applies to applications as filed in the two suits herein between the two parties respectively.

In conclusion the applications filed herein and each on 23.06.2021 and the preliminary objection filed for the respondent on 07.07.2021 are hereby determined with orders:

1. The preliminary objection is dismissed.

2. Cause E006 of 2021 and Cause 95 of 2019 both between the claimant and the respondent herein filed at Mombasa are hereby consolidated to be heard together and the lead filed to be in cause 95 of 2019.

3. Each party to bear own costs of the applications and the preliminary objection.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 26<sup>TH</sup> NOVEMBER, 2021**

**BYRAM ONGAYA**

**JUDGE**