



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. E045 OF 2021

BENARD BERRY OKEYO.....CLAIMANT

VERSUS

BBOX CAPITAL KENYA LIMITED.....RESPONDENT

RULING

1. By a Notice of Motion Application dated 30th August, 2021, brought pursuant to Sections 18(1)(b)(ii) & (2), 1A, 1B, and 3A of the Civil Procedure Act and Order 11 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules, the Applicant seeks the following orders:

i. THAT the suit CMELRC Cause 39 of 2020- Fredrick Otieno Odongo v Bbox Capital Kenya Limited pending before the Chief Magistrates Court be transferred to this Honourable Court for determination.

ii. THAT the suit CMELRC Cause 39 of 2020- Fredrick Otieno Odongo v Bbox Capital Kenya Limited be considered with the suit herein and the two suits be determined together

iii. THAT the Honourable court do make such other and further orders as it may deem fit, necessary and expedient in the interest of justice.

iv. THAT the costs of the application be provided for.

2. The application is supported by grounds on the face of the application and the affidavit of Vincent Macharia, the crux of which is that the instant suit and Cause No. 39 of 2020- Fredrick Otieno Odongo v Bbox Capital Kenya Limited, arise from the same set of facts being dismissal from employment for conspiring to defraud the Applicant.

3. Parties sought to canvass the application through written submissions and both parties filed their submissions.

4. The Applicant submitted that the claimants in the two suits are seeking a common remedy, which is compensation for unfair termination from the same Respondent and that the only difference is the quantum of the claims.

5. The Applicant further submitted that the motive of the intended transfer is to expedite proceedings in the two matters pursuant to Section 18 of the Civil Procedure Act, as the two matters are so closely related that it is in the interest of justice that they are consolidated and heard as one.

6. It is submitted that the witnesses in the matter are the same and the witnesses' statements of the Claimants are a replica of each other, and hearing the suit as one would minimize costs for the parties.

7. The Respondent/Claimant submitted that the application is incompetent, misconceived and an abuse of the court process.

8. The Respondent submits that the Applicant is seeking for orders that will affect a person who is not a party to the suit, as Mr. Fredrick Otieno Odongo, who is the Claimant in cause No. 39 of 2020, that is sought to be transferred, is not a party to this suit. It is further submitted that no notice has been issued to Mr. Fredrick Otieno Odongo to enable him participate in this application.

8. The Respondent submitted that the application herein lacks merit as it does not set out a case for transfer under Section 18 of the Civil Procedure Act.

9. It is submitted for the Respondent/Claimant that the application does not meet the threshold for consolidation as provided by law. He further submits that the Claimants in the two suits are separate and distinct persons and each signed a separate contract with the employer and that none was privy to other's terms of service.

10. It is further submitted that the cause of action in each suit is different and that the circumstances under which the employment relationship were severed are different and the prayers sought in each claim are different.

11. The Respondent submitted that consolidation will prejudice both Claimants rights to fair hearing. It is the Respondent's submission that consolidation and/or transfer will prejudice their right under Article 50 of the Constitution. He sought to rely on the holding in the cases of **Msagha v. Chief Justice & 7 Others Nairobi HCMCA NO. 1062 OF 2004** and **Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd (1915)**.

12. It is the Respondent's submission that the application be dismissed.

Determination

13. Section 18 of the Civil Procedure Act, provides as follows:

“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage

a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same;”

14. Rule 23 of the Employment and Labour Relations Court (Procedure) Rules, provides as follows in regard to consolidation of suits:

“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.”

15. The Claimants in the suits sought to be consolidated are different and distinct and the cause of action arose out of separate employment agreements (*See Mombasa HCCC No. 992 of 1994 Nyati Security Guards and services v Municipal Council of Mombasa*). That the Respondent is the same, is not sufficient reason to transfer and/or consolidate the two suits.

16. The Claimant in *C MELRC Cause 39 of 2020, Mr. Fredrick Otieno Odongo* that is sought to be transferred and/or consolidated with the instant suit, is not a party to this suit and application did not have an opportunity to participate in the application to consolidate his case with this one. If this application were to be allowed at this juncture, he will have been condemned unheard.

17. The court returns that no prejudice will be occasioned to the Applicant herein if the two suits are heard and determined separately in the respective courts where they have been filed. For this reason, I dismiss the application dated 30th August, 2021 with no orders as to costs.

18. The application to consolidate is dismissed.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16TH DAY OF DECEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Awuor H/B for Kieti LLP for the Applicant/Respondent

Mr. Onsongo present for the Respondent/Claimant

Ms. Christine Omollo-C/A