



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.79 OF 2018

[Formerly Nyahururu High Court Case No.31 of 2017]

GEOFFREY NGARI KURIA.....CLAIMANT

VERSUS

MARTHA WANGUI KARANJA.....1ST RESPONDENT

JOSEPH WAGURA KARANJA.....2ND RESPONDENT

BUSARA FOREST VIEW ACADEMY LIMITED....3RD RESPONDENT

RULING

The respondents herein by Notice of Motion dated 17th September, 2019 are seeking for orders that proceedings herein be stayed until the case serialised as Nairobi HCC No.169 of 2013 involving the same parties be heard and determined.

The application is supported by the affidavit of the 2nd claimant, Joseph Wagura Karanja and on the grounds that in the year 2013 the claimant filed suit in the High Court at Nairobi in the Commercial and Admiralty Division HCC No.169 of 2013 against the respondents and which has not been determined and which raise similar issues as herein and which matter is at an advanced stage of hearing unlike the current suit which has not commenced hearing. The orders sought in the initial suit are the same and there is risk of the courts giving different orders therefrom.

The outcome of HCC No.169 of 2013 will have a bearing on the current case especially with regard to the shareholding and directorship of the 3rd respondent hence the need for stay of proceedings to await the outcome of the other suit.

In his affidavit Mr Karaja avers that the claimant filed HCC No.169 of 2013 in Nairobi and the current suit addressing the same issues and claims. The claimant is seeking the payment of his salaries from January, 1999, aggravated damages in compensation for an illegal and inhuman loss of employment. To avoid both courts issuing different decisions, the proceedings herein be stayed to allow the finalisation of the other matter earlier filed.

The claimant replied with his Replying Affidavit and avers that his current suit relates to termination of employment unlawfully and HCC No.169 of 2013 relates to a dispute arising from ownership of a company and directorship of the same. The prayers/orders sought in each case if different and not contradictory and there is no possibility of the court giving conflicting decisions.

The claimant also avers that HCC No.169 of 2013 was filed in the year 1999 and issue(s) in dispute have never been addressed and if the respondents were genuine and 3rd respondent be dissolved there would be no entity to pay the claimant his employment dues. The defence filed does not plead the issues now addressed in the instant application and thus should be dismissed with costs.

The respondent filed Supplementary Affidavit of the 2nd respondent and who avers that in **HCC No.169 of 2013, Nairobi** the issues raised relates to claims going back to the year 1995 and are similar to what is claimed herein and being the first court the claimant approached in a case serialised as **HCC No.3373 of 1995** the parties then agreed to subject the matter to arbitration in the year 1997 where there was an award on 4th January, 1998 and vide Misc. Appl.No.65 of 1999 the respondents applied to have the award set aside which was allowed on 27th February, 2012 and filed HCC No.169 of 2013.

By the claimant filing the current suit over the same matters, the respondents shall be prejudiced and only fair that proceedings herein be stayed and stood over generally until the other matter is addressed to finality.

The respondents as the applicants submitted that HCC No.169 of 2013 relates to the shareholding of the 3rd respondent under the ambit of the High Court as made under the Companies Act. the matter is at an advanced stage of hearing and logical to have it concluded and proceedings herein relating to the same parties over the same issues in dispute be stayed as held in the case of **R M F versus Interested Party S P Limited & M D Limited [2013] eKLR** and in **Nguruman Limited versus Bonde Nielsen & another [2017] eKLR**.

The respondents also submitted that matters herein are *sub judice* to those in Nairobi HCC No.169 of 2013 as the core of the dispute before the high Court relates to the 3rd respondent shareholding and which has a huge impact on the outcome of both suit and by filing the instant suit there is abuse of the rules. There should be stay of proceedings to allow for determination of the earlier filed matter which gives a full generis of the dispute between the parties.

The claimant submitted that there exists Nairobi HCC No.169 of 2013 between the same parties but there is no similarity in the issues or orders sought and where the respondents find similarly nothing stops them from making application to seek the striking out of the orders/prayers herein which are similar to the other matter before the High Court.

Should the court stay proceedings herein?

Both parties agree there is Nairobi HCC No.169 of 2013 and which relates to similar parties as herein.

On the pleadings herein, the claim initially filed under Nakuru High Court No.43 of 1999 and then under Nyahururu High Court No.31 of 2017 is premised on the facts that 8th March, 1988 the claimant was appointed in a Board of Directors as the had teacher of the 3rd respondent and by letter dated 29th December, 1998 he was relieved of his duties and that this was an illegality and is seeking general damages for unlawful dismissal and payment of all accrued benefits under his employment contract being;

Leave allowance from 1988 to 1999;

Notice pay for 2 months;

Unpaid salary for December 1998 and January, 1999;

Unpaid salary up to the time of judgement at Ksh.27,004 per month.

Under the respondents application, annexure "JW1" is the Complaint with regard to Nairobi HCC No.169 of 2013 and the core of the dispute therein relates to the claimant herein as the plaintiff against the 1st respondent as the administrator of the estate of the late Johannes Karanja and the 2nd respondent together with *Busara Computer Point Limited as interested parties*.

The issue therein is that the claimant and the late Johannes Karanja were directors of a company known as the 3rd respondent formed to own and operate a school called Busara Forest View Academy and which the claimant was appointed as head teacher but then a dispute arose in the operations and shareholding of

the company and business resulting in various suits being filed and before a resolution in November, 1989 the 1st respondent wrote to the claimant letter relieving him his work duties as head teacher of the 3rd respondent. the claimant as a director continued to go to the school since the company had not passed such a resolution but on 27th January 1999 as the claimant was in his office a fundi was sent to break in and demotion a wall and to avoid a confrontation he left and made a report to the police but nothing could be done as the matter related to a civil dispute.

The claimant therein is seeking among others for a declaration with regard to the shareholding and directorship of the 3rd respondent; that the changes in the share portfolio and company share status and directorships of the 3rd respondent be cancelled; his earnings and profits be determined; any misappropriated funds be accounted for; the payment of the due salaries at ksh.27,000 per month from January, 1999.

From both suits it is apparent to that court that the parties started off under a business of the 3rd respondent wherein the claimant was the head teacher and such position was terminated following differences and dispute relating to shareholding and directorship of the same.

What then is the predominant issue herein? That of employment and labour relations or that of matters relating to companies in directorship and shareholding?

In addressing similar issues, in the case of **Lee Njiru versus J.K. Lokorio & another [2019] eKLR**

Pre-dominant Purpose Test to be used in determining the question of jurisdiction in a case such as the one at hand. I first enunciated this test in the

*Pre-dominant Test enunciated by the Court in **Suzanne Butler & 4 Others v Redhill Investments & Another [2017] eKLR. The rationale is as follows:***

At the same time, however, it is imperative that a Court should not approach jurisdiction in an ultra-technocratic fashion as an essentialist parsing of sticks in a bundle. Jurisdiction is a substantive standard aimed at ensuring only the right court or tribunal clothed with the legitimate mandate deals with a dispute or controversy. It is not a jurisprudential thaumatrope to keep litigants guessing to which Court their controversy belongs at the pain of having their timeously pleaded case struck out for not pigeon-holing their claim in the correct box. The correct approach to jurisdiction is one which treats the question functionally as opposed to technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis.

Though the matter herein is not the question of jurisdiction per se by allowing a stay of the proceedings herein to allow the finalisation of the matter before the High Court under HCC No.169 of 2013 the court is guided.

Therefore in **Mike Kipngetich Saina (Suing as the legal representative of the estate of the late Kipsaina Arap Tarus (Deceased) versus Rachel Tarus & 7 others [2018] eKLR** the court faced with a „mixed grill? kind of dispute looked at the main issue in dispute and held the matter was not one for the Environment and Land Court but for the High Court Probate and Administration.

In **Suzanne Achieng Butler & 4 others versus Redhill Heights Investments Limited & another [2016] eKLR** the court therein addressing a similar matter held that;

*... Would an employee who during the tenure of his employment borrowed money or took a mortgage predicated on the employment relationship upon contesting termination of his services split his claim among the various Court? This Court in the case of **Peter Mutisya Musembi & another v. National Bank of Kenya (2014) eKLR** borrowing from the Australian cases of **Dean Patty v. Commonwealth Bank of Australia 2000 FCA 1072** and **Philip Morris Inc. v. Adam P. Brown Male Fashions Ltd (1981) 148 CLR** became of the view that the argument that this Court*

and indeed other Courts of concurrent jurisdiction properly seized of a matter cannot adjudicate upon consequential or factual question which on the face of it appear to be within the exclusive jurisdiction of another Court in the same judicial tier would unreasonably emasculate and whittle down the inherent power of a Court of law to do justice without undue regard to technicalities.

In this regard therefore, the claimant's employment and labour relations claims premised on the predominate issue of his shareholding and directorship of the 3rd respondent, his employment dues claimed from the respondent by virtue of his employment as head teacher at the 3rd respondent, these issues now seized by the High Court under HCC No.169 of 2013, the respondent seeking for a stay of proceedings to have the same determined and whichever way the claimant's case secured by the stay of proceedings herein, the party to be a respondent and or interested party with regard to the dues in employment, if any, shall be addressed to conclusion.

Accordingly, application dated 17th September, 2019 is hereby allowed in the following terms;

(a) There is stay of proceedings herein to allow for the hearing and determination of Nairobi HCC No.169 of 2013;

(b) The court shall take bi-annual mentions for update starting with 23rd July, 2020.

(c) Costs in the cause.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBARU

JUDGE

In the presence of:

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