



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1694 OF 2017

FRANCIS MEMBA.....CLAIMANT

VERSUS

JOEL YDUCHA.....RESPONDENT/APPLICANT

(Before Hon. Justice Hellen S. Wasilwa 27th February, 2020)

RULING

1. The Respondent/Applicant, Joel Yducha filed a Notice of Motion Application dated 28th June 2019 brought under *Section 3A of the Civil Procedure Act, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules and the inherent jurisdiction of the Court* against the Claimant, Francis Memba.
2. He seeks to be heard for orders that this Court stays any further proceedings in this Suit pending the hearing and determination of this Application and further strike out the Memorandum of Claim herein for being an abuse of the process of the Court. He also seeks for costs of this application to be provided for.
3. The Application is based on the grounds that: The Respondent was in an employment contract and that the Claimant's tenure of employment was marred with numerous instances of gross misconduct including absconding duty and harvesting products from the Respondent's farm without permission.
4. That following the misconduct, the Claimant was dismissed from employment on 15/12/2016 and paid his dues of Kshs. 16,000/= but he subsequently lodged a complaint alleging termination without notice, service pay, leave and public holidays.
5. The Respondent received the complaint notice from the County Labour Officer on 04/01/2017, which he responded to by attaching the notice and payment the Claimant had personally acknowledged by signing. Both parties appeared before the County Labour Officer and unconditionally agreed that what was owing to the Claimant was Kshs. 10,000/= which amount the Respondent fully paid and he received a certificate of payment dated 15/03/2017.
6. After the matter was settled and the Certificate of Payment issued, complaints that had been lodged with Kenya Human Rights Commission of non-payment of Kshs. 57,600/= and a demand for payment of Kshs. 633,965.76 from the Claimant's advocates were abandoned and the matter marked settled and closed.
7. That the present Claim therefore seeks to resuscitate a matter that was settled before the County Labour Officer and has been brought in bad faith as the Claimant has failed to disclose any of the above facts in the Statement of Claim.
8. The Respondent/Applicant states that it is only prudent and fair that the costs of this Application and the Claim be borne by the Claimant.
9. The Claimant/Respondent filed a Replying Affidavit dated 19th September 2019 denying that he was at any time issued with any warnings of his alleged misconduct by the Applicant.
10. He avers that the Applicant has failed to avail any evidence to support his allegations that the Claimant was involved in any instances of gross misconduct whilst under his employment. That the Applicant terminated his employment without cause on 12/12/2016 and not 15/12/2016 as claimed and admits he sought recourse at the labour offices after the termination.
11. Despite the labour office issuing demand to the Applicant to settle his dues, the Applicant wilfully failed to do so and he denies he entered into an agreement with the Applicant to settle all dues owed to him at a sum of Kshs. 10,000/=.

12. He avers that the signatures in the termination letter and certificate of completion do not only differ but are not his and that the application herein is another venture by the Applicant to deny him his dues and ought to be dismissed with costs to himself.

Respondent/ Applicant's Submissions

13. The Applicant submits that **Order 2 Rule 15 of the Civil Procedure Rules** empowers the Court to strike off claims, which is premised on the universally accepted principle that there must be finality to litigation and any dispute brought with the aim of defeating justice to parties must be struck out.

14. That there are two crucial considerations which the Court must always seek to balance in exercising the discretion to strike out pleadings: (i) the right of the Claimant to a fair trial; and (ii) the unfairness that would be occasioned to a party being dragged to Court when the case brought forth against him is clearly a nonstarter.

15. He submits that the agreement signed by the parties is binding upon both the Claimant and the Respondent and the Claimant should therefore be estopped from claiming further from him. That **Article 159(2)(c) of the Constitution of Kenya** mandates Courts and tribunals in exercising judicial authority, to be guided by alternative forms of dispute resolution including reconciliation, mediation and arbitration.

16. Further, in recognition of other modes of dispute resolution, the Employment Act extensively provides other forms of resolution of disputes before the Labour Officer under **Section 47 of the Employment Act** which provides that:-

'(1) where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may within three months of the date of dismissal present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under Section 87...

(2) a labour officer who is presented with a claim under this section shall after affording every opportunity to both the employee and the employer to state their case, recommend the parties what in his opinion would be the best means of settling the dispute in accordance with the Provisions of Section 49'

17. He cites the case of **Daniel Njuguna Muchiri –v- Sugar Bakery Limited (2019) eKLR** where the Court of Appeal held that:-

"The initiative to refer the matter to the labour officer was the appellant's own....Strangely, however, the appellant seems to invite us to totally ignore the agreement and consider the claim as pleaded.

There is nothing unlawful about parties to a dispute resorting to alternative methods to resolve that dispute. Indeed the Constitution in Article 159 (2) (c) encourages the promotion of such initiatives. In turn the Employment and Labour Relations Court Act, 2011 in section 15 allows for conciliation over disputes emanating from employment and labour relations...

And so it is that the conciliation made before the labour officer in this matter on 21st October, 2009 cannot be ignored. The appellant initiated it, both parties were involved; it was not made 'without prejudice', the appellant pleaded it, testified on it; and received part payment under it. In those circumstances, the trial Court did not err in finding that the appellant was estopped from denying the settlement. The Appellant would have done better enforcing the settlement rather than filing a fresh suit. To do so, in our view, would be in abuse of Court process".

18. That since the Reconciliation Agreement signed before the Labour Officer is for all intent and purposes a Contract, the same cannot be disregarded unless the Claimant demonstrates that there exists vitiating factors necessitating its cancellation, which he has not. He relies on the case of **Fatuma Hassan –v- Sports Management Board [2019] eKLR** where the Court held that:-

"...I wish to further find that an agreement signed after conciliation to settle a dispute becomes a binding contract between the parties or the persons they represent. The agreement can only be set aside on the basis of a vitiating factor like mistake, fraudulent misrepresentation, coercion or undue influence. The foregoing was the reasoning in George Okoth v Kui Yi Co. Limited [2018] eKLR when in dismissing the suit it was held that the dispute had already been resolved through conciliation and the settlement agreement was binding on the parties.

In the instant suit, I see nothing in the material presented to the Court by the parties that warrants me to depart from the said decision. The dispute was resolved vide the Settlement Agreement dated 18.8.2014 between the claimant's union and the respondent in the context of Collective Bargaining under the Labour Relations Act and the parties herein are bound by the same. The agreement was not a proposal to them by the Conciliator but a binding Settlement Agreement between the parties herein, which has not been set aside. Consequently, I find and hold that the Respondent herein has no choice but to honour the agreement by assessing the dues agreed under the said Settlement Agreement and pay the same to the Claimant forthwith since the claimant has alleged that the suit herein was necessitated by the default on the part of the respondent to honour the settlement Agreement. Holding otherwise would defeat this Court's constitutional duty of encouraging ADR as provided under Article 159(2)(c) of the constitution.

Having found herein above that the dispute was resolved through conciliation under section 68 of the Labour Relations Act, the Court is estopped from adjudicating upon the same afresh. I therefore adopt the Agreement of the parties..."

19. He finally submits that the Claimant has without proof made allegations on general and vague terms that the signature on the Agreement is a forgery stating that the Evidence Act provides that he who alleges must prove.

20. That without any evidence either from the County Labour Officer denying the existence of such pleadings **Reference No. ML/NBI/LD.64** or report from the DCI, he prays that the Claimant's allegations be dismissed. Most importantly, he prays that the Memorandum of Claim herein be struck out with costs to the Respondent for being an abuse of the process of the Court.

Claimant/Respondent's Submissions

21. The Claimant submits that the law on striking out pleadings was summarised by the Court of Appeal in its ruling in **Kiranga Estates Limited –v- National Bank of Kenya Limited (2017) eKLR** that:-

“It is not for nothing that the jurisdiction of the Court to strike out pleadings has been described variously as draconian, drastic, and discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the Court must not drive away any litigant from the seat of justice, without a hearing however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two vital considerations.”

22. That the principles that guide the Courts in exercising its discretion on striking out pleadings are provided for under **Order 2 Rule 15 of the Civil Procedure Rules** which reads as follows:-

‘At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.’

23. That under **Order 2 Rule 15(2)**, no evidence is admissible on an application under sub-rule 1(a) and that it should be evident from the pleadings being sought to be struck out, that no reasonable cause of action has been disclosed.

24. He submits that the Applicant's assertions are not substantiated with any evidence and are based on documents acquired by fraudulent means and that the Applicant has further failed to adduce even one of the alleged notices of his misconduct.

25. He contends that his Claim is not an abuse of the Court process as issues of evidence have been raised including whether the Claimant was lawfully terminated or not, whether the Respondent paid the Claimant his dues or the authenticity of the signature on the documents. That the issues above among others can only be determined by going into the merits of the claim at trial.

26. I have examined the averments of both Parties. The Claimant denies signatures the Applicant relies upon to submit that he had agreed to settle the matter as alluded. The onus of proving that the signatures are authentic lies upon the Respondent.

27. In the circumstances, I find that at this stage, it will be harsh and draconian putting the Claimant at a disadvantage of being condemned unheard if the application will be allowed. I find the application not merited. I dismiss it accordingly.

28. Costs in the cause.

Dated and delivered in open Court this 27th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwangi holding brief Waiganjo – Present

Respondent – Absent