



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 47 OF 2019

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

JULIET WAMIRI.....CLAIMANT/APPLICANT

-VERSUS-

JAMES R. NJENGA, HON. STEWARD MADZAYO, ALICE KYALA,

BENSON KAARIA, ACHIYA ECHAKARA & HELLEN KOMBO,

MS. RHODA AHONOBADHA AND GEN JEREMIA KIANGA

(Sued as Registered Trustees of AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

RULING

1. Pending before me for determination are two Applications.

2. The first Application is the Notice of Motion Application dated 6th March, 2020. The same is brought under Certificate of Urgency and under the provisions of Section 20 (1) of the Employment & Labour Relations Court Act and Rules 17(1) & 19 of the Employment & Labour Relations Court (Procedure) Rules, 2016. Seeking Orders that:-

1. The Claimant's suit herein be and is hereby struck out.

2. Each party to bear its own costs of this Application and the entire Claim.

3. The Application is premised on the grounds that:-

a) The issues raised as read together with the prayers sought in this Claim have been compromised and/or overtaken by events.

b) The continued pendency and or prosecution of this claim is a waste of Court's and parties' scarce resources, an academic moot and an exercise in vain.

c) It is in the wider and overriding interests of justice that these proceedings be terminated.

4. The Application is further supported by the Affidavit of **BATRAM M. MUTHOKA**, the Respondent's Chief Executive Officer sworn on 6th March, 2020, in which he reiterates the averments made in the Notice of Motion Application.

5. In response to the Application, the Claimant filed her Grounds of Opposition dated 21st September, 2020 raising the following grounds:-

i. The course of action in this matter is not yet concluded as there exists various disciplinary actions commenced on the backdrop of the transfer decision and which ought to be fully ventilated by this Honourable Court.

ii. The Claimant has filed an Application seeking to amend the Claim which application seeks to have the real issues between the parties concluded and determined accordingly in the suit herein.

iii. Granting of the Application herein would seriously expose the Claimant to unfair labour practices as the real issues between the parties would remain undetermined.

iv. The Respondent's decision to unilaterally withdraw the transfer decision and subsequently seek to strike out the Claim herein has been brought in bad faith.

v. The Application herein does not act to further the overriding objective of the Court herein.

6. The second Application is the Notice of Motion Application 23rd June, 2020 filed by Claimant/Applicant. The Application is filed under Section 12 of the Employment and Labour Relations Court Act and Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules. Seeking the following Orders that:-

1. This Honourable Court be pleased to grant the Claimant leave to Amend their Claim, in terms of the draft Amended Statement of Claim annexed herewith.

2. Costs of this Application be in the cause.

7. The Application is premised on the grounds that:-

a) The Statement of Claim herein was filed on 29th January 2019 seeking permanent injunction to cause or effect the transfer of the Claimant from her current position to Respondent's Branch Manager, Mombasa.

b) On 13th December 2019, the Respondent proceeded and revoked the letter of transfer which action had the effect of making the issue of transfer as having been spent and not subject to further litigation or orders thereon.

c) During the period between the date of transfer to the date of its evocation, the Respondent has engaged in systematic acts of unfair labour practices which the Honourable Court has been seized of and requires that a definitive and permanent pronouncement is made by the Court despite revocation of the transfer.

d) There is no prejudice that has been or that the Respondent stands to suffer if the Application herein is allowed.

e) The amendment, to the extent that they seek to insert better particulars to the Claim and relevant prayers sought is made in the interest of justice and accords or seeks to further the provisions of Rule 14 (7) of the Employment and Labour Relations Court (Procedure) Rules.

f) The basis of the amendment is to bring into focus the real question or issues in controversy for determination by the Court.

8. The Application is further supported by the Affidavit of **JULIET WAMIRI**, the Claimant herein sworn on 23rd June, 2020 in which she reiterates the grounds on the face of the Notice of Motion Application.

9. In response to the Application dated 23rd June, 2020, the Respondent filed a Replying Affidavit deposed by **BATRAM M. MUTHOKA**, its Chief Executive Officer on 6th July, 2020, in which he maintains that the issues that the Claimant seeks to raise in her Amendment are res-judicata as the same has been dealt with conclusively by this Honourable Court vide its Ruling of 10th December, 2019.

10. He further averred that the intended amendments sought by the Applicant only seeks to portray the affiant as a person who constantly breaches Court Orders, which assertion has been made in bad faith and without any factual basis.

11. The Affiant maintains that the Application as filed is frivolous, vexatious and an abuse to the Court process and is only aimed at derailing the Court process.

12. In conclusion, the Respondent urged this Honourable Court to find the Application devoid of merit and to proceed and dismiss it with costs to the Respondent.

13. Parties agreed to dispose of the Applications by way of written submissions.

Submissions by the Parties

14. The Claimant/Applicant submits that the Respondent's action of withdrawing her transfer letter is likely to expose her to unfair labour practices. She further maintains that the issue is not spent therefore necessitating the need for the proposed amendments to the Statement of Claim. It is on this basis that the Claimant avers that the doctrine of res-judicata does not apply to its case.

15. The Claimant further maintained that continuing with the disciplinary actions violates her right to fair labour practices as protected under the provisions of Article 50 (1) of the Constitution of Kenya, 2010.

16. The Applicant further submits that the application sought do not amount to a new cause of action as contended by the Respondent herein but rather that she merely seeks to ventilate claims that arose during and are connected to her transfer that is not a different suit from what is

before this Honourable Court. To buttress this argument the Claimant cited and relied on the case of **Mose Ondieki Vs Vice Chancellor, Maasai Mara University & 3 Others (2018) eKLR** where the Court opined that an Application for leave to amend ought not be defeated by reason only that a new cause of action is being introduced.

17. The Claimant/Applicant in her submissions further maintained that the proposed amendment seeks to avoid multiplicity of suits and that Courts have discretion to allow the same. For emphasis, the Claimant cited and relied on the case of **Mose Ondieki Vs Vice Chancellor, Maasai Mara University & 3 Others** (supra).

18. In conclusion, the Claimant/Applicant urged this Honourable Court to find merit in its Application and to allow it in terms of the reliefs sought therein. The Claimant further argued that the Respondent's Application to strike out her Claim is devoid of merit and to accordingly dismiss it with costs to the Claimant.

Respondent's Submissions

19. The Respondent on the other hand submitted that in view of the developments in this matter, issues raised and prayers sought in the Claim have been compromised.

20. It is further argued that the substratum of the Claim having been diluted and dissipated and there is no cause of action for determination before this Court for parties to litigate over. It is on this basis that the Respondent maintains that there are no more triable issues to proceed for hearing and no reasonable cause of action and therefore need to allow its Application dated 6th March, 2020. To buttress this argument the Respondent cited and relied on the case of **Mombasa H.C Misc Civil Suit No. 72 f 2005; M/S Bandari Enterprises (K) Ltd Vs Musinga & Co. Advocates** where the Court dismissed a suit for lack of substratum and no reasonable cause of action. The Court went on to state that such a suit is frivolous and vexatious and ought to be dismissed with costs.

21. In conclusion, the Respondent urged this Honourable Court to find merit in its Application dated 6th March, 2020.

22. With regards to the Claimant's Application dated 23rd June, 2020 the Respondent maintained that the issues the Claimant seeks to introduce vide her proposed amendments, this Court has already pronounced itself on the process therefore making the issue res-judicata. For emphasis the Respondent cited and relied on the case of **Kisumu HCCC No. 120 of 2010; ERI Limited Vs Equatorial Commercial Bank & Another** on the doctrine of res-judicata.

23. The Respondent further maintains that the Application by the Claimant seeking to amend her Claim is purely an afterthought, is made in a bid to perennially oppress it and is aimed at micro managing its affairs, which ought not to be encouraged by this Honourable Court. The Respondent further maintains that the Application is an abuse to the Court process and ought to be dismissed with costs to the Respondent. For emphasis the Respondent cited and relied on the case of **Kassan Vs Bank of Baroda (Kenya) Limited (2002) eKLR**.

24. In conclusion, the Respondent urged this Honourable Court to find the Claimant's Application to amend her statement of Claim as fatally defective, incompetent and an abuse to the Court process and proceed to dismiss it in its entirety with costs to the Respondent.

25. I have examined the averments of the Parties herein. In the Respondent's application dated 6/3/2020, they sought to have the Claim struck out on the ground that the Court has already made a determination on the issues in the Main Claim.

26. The Respondents in response on the other hand to the Claimant's application to amend the Claim aver that these issues are already res judicata the issues having already been determined.

27. I have made various rulings in this Claim as follows:-

1. Order barring transfer of the Claimant to Mombasa and also not harassing the Claimant in any way which the Respondent aver they complied with fully.

2. Order barring the Respondents from further instituting disciplinary action against the Claimant vide a letter dated 31/7/2019 or any other way harassing or victimizing the Claimant herein directly or indirectly.

28. In stopping the above action, the Court noted that it was aimed at intimidating and harassing the Claimant.

29. The Court also directed that the Parties proceed with the Main Claim.

30. The issue of stoppage of the Claimant's transfer was thus stopped and another officer posted to Mombasa.

31. In the intervening period, the Respondent attempted to institute disciplinary proceedings against the Claimant, which this Court also stayed.

32. The Claimant's position is that the stayed disciplinary proceedings have never been conclusively resolved as this exposes the Claimant to unfair labour practices.

33. The Claimant wishes to amend her Claim to bring out these issues which resulted from the revoked transfer and which the Applicant avers that unless conclusively resolved, she stand to be treated unfairly.

34. From the pleadings herein, the issue of the transfer was done conclusively. However, any action after this transfer or emanating from the transfer if at all should be dealt with within this Claim.

35. I am not able to reach a conclusion that the Claim is fully dealt with due to many other applications that were raised after the initial orders of this Court. I am only able to determine that after hearing this Claim conclusively and therefore the application to strike out this Claim is denied.

36. On issue of amendment to the Claim, I will allow the amendment only to the extent that the Claimant/Applicant will not introduce new issues unless they arise primarily from the orders given herein.

37. In the circumstances, I allow application to amend the Claim so long as no new matter not related to this Claim/Application are brought in.

38. Costs in the Claim.

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

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wafula holding brief Millimo for Respondent – Present

Ogembo for Claimant – Present