**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1818 OF 2014**

***(Before Hon. Lady Justice Maureen Onyango)***

**JULIANA MUTISYA.....1ST CLAIMANT**

**CATHERINE NJERU.....2ND CLAIMANT**

**EMILY ONGAGA.....3RD CLAIMANT**

***VERSUS***

**NATIONAL GENDER AND EQUALITY COMMISSION.....1ST RESPONDENT**

**THE ATTORNEY GENERAL.....1ST RESPONDENT**

**RULING**

The Application before me for determination is the 1st Respondent's Notice of Motion dated 21st November, 2019 seeking the following orders:

1. Spent.

2. That there be ordered stay of the hearing schedules for 26th November, 2019 and all further proceedings pending hearing and determination of this Application.

3. That the Statement of Claim dated 15th October 2014 be struck out and or dismissed for being moot and overtaken by events.

4. That the costs of this application be awarded to the 1st Respondent.

The application is based on grounds that:

1. The entire Statement of Claim is overtaken by events as there is no surviving dispute to be resolved by this Court and continuing hearing it would be an academic exercise as the 3 Claimants were reinstated by the Order of 4th February 2015. Further that:

   a. The 1st Claimant served out of her 5 year contract that ended on October, 2017 and was paid her dues.

   b. The 2nd Respondent and 3rd voluntarily resigned from employment and were paid all dues.

2. The dispute contained in the Statement of Claim or the final prayers sought are no longer justifiable or available to Respondents and this Court cannot entertain or give any effectual relief to the Respondents in the circumstances.

3. The Statement of Claim cannot be cured by any amendment and that the Court in its Ruling delivered in October 2018 dismissed the application for leave to amend the claim. Any belated application for amendment by the 2nd and 3rd Respondents to introduce new claims would be barred by limitations *viz* section 90 of the Employment Act having been brought 3 years after voluntary resignations done in April 2015.

4. It will be an unnecessary waste of funds to call the Applicant,

a constitutional commission, to defend the case merely for academic purposes.

5. The Respondents set down this claim for hearing on 26th November 2019 but did not make any diligent attempt to salvage the case yet they were at all times overtaken by events.

The Application is supported by the Affidavit of Betty Sungura- Nyabuto, the 1st Respondent's Secretary/CEO, sworn on 21st November, 2019 in which she reiterates the grounds in the application.

In response to the application, Julian Mutisya the 1st Claimant herein swore an affidavit on 17th December 2019 on her own behalf and that of the other 2 claimants.

The affiant denies that if the matter proceeds to trial it will amount to an academic exercise. She depones that the Commission maliciously levelled an accusation against them to the effect that they had been involved in corrupt practices as a consequence of which they were terminated.

She confirms that following the hearing of an interlocutory application they were all reinstated back to employment. She submitted that a ruling in respect of an interlocutory application does not amount to a final decree unless so stated and that unless the ruling indicated that the suit had been determined with finality, a judgment is to be expected.

She deposes that the 3rd Claimant appeared for an interview before another constitutional commission where she produced the Ruling herein but was asked for final judgment in the suit. She avers that unless they get a final determination to the effect that the termination was unlawful, then their record will have a permanent mark to wit they were dismissed on account of corrupt practices which has a negative implication to their professional careers.

She avers that the declaration that the termination amounted to unfair/unlawful termination cannot be said to be overtaken by events. She further avers that if the Respondent concedes that its action was unlawful, they are willing to record a consent to the effect and a further order marking the matter as settled.

She avers that they also sought for compensation for unfair/unlawful termination and that this cannot be said to be overtaken by events.

**1st Respondent's Submissions**

The 1st Respondent submitted that the resignations materially altered their case and that the application to amend the claim was dismissed. Further, that in the Ruling delivered on 12th October, 2018 the Court held that the Order of the Court dated 4th February, 2018 addressed all the issues in the Memorandum of Claim.

It submitted that the existence of a dispute is the primary condition for the court to exercise its judicial function as held in **Republic v National Employment Authority & 3 Others ex. Parte Middle East Consultancy Services Ltd [2018] eKLR**.

It argued that the final prayers in the Memorandum of Claim, were overtaken by events by the twin events of the reinstatement order of 4th February, 2015 and the eventual expiry of contract and resignations. It argued that once the Court ordered reinstatement with no loss of earnings the Court gave full relief to the Claimants and they resumed work.

It argued that none of the reliefs claimed are capable of being granted for a second time as the employment no longer exists. It averred that the order of 4th February, 2015 binds the Court since it was not challenged either by review or appeal. It relied on the case **of Daniel Kaminja & 3 Others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR** where the Court held that an issue is considered moot when it ceases to present a justiciable controversy by virtue of the superseding events.

It submitted that any judgment cannot operate to grant any actual relief because the Claimants already received and enjoyed all possible reliefs in the claim. It argued that the Claimants are at pains to demonstrate the outstanding issues.

It averred that the claim can also not be cured by any amendment and that any new suit to introduce new claims would be brought after 3 years in contravention of the limitation under section 90 of the Employment Act. It relied on the case of **D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR** where the Court held that no suit should be summarily dismissed unless it is hopeless, discloses no reasonable cause of action and is weak beyond redemption.

It submitted that this being an adversarial system, it is not for the Court to force a party to amend its pleadings to inject life into moot pleadings. For emphasis, it relied on the case of **The Town Council of Ol Kalau v Nganga General Hardware CA 269/1997**.

It submitted that the present claim having been overtaken, it is a stranger to whichever suit the Respondents intend to bring at the hearing and that there is no proper case against it.

It submitted that it is inimical to public policy to require the waste of public funds to defend this suit that is moot. In conclusion, it submitted that though judicial power to strike out pleadings is discretionary, it has demonstrated that there is sufficient ground for striking out the claim on ground that it is moot. It urged the Court to down its tools and strike out the claim with costs.

**Claimants' Submissions**

The Claimant submitted that the Ruling delivered on 4th February, 2015 ordered that they be reinstated to employment but it was not a final determination of the suit. They reiterated that the court could not have made a final determination at the interlocutory stage.

They submitted that the Court of Appeal in **East African Industries v Trufoods Ltd (1972) EA 420** held that an application for injunction is not to decide the issues of fact but to weigh the strength of each side's propositions.

They also cited the Supreme Court decision in **Richard Nyagaka**

**Tong'I v Chris Munga N. Bichage & 2 Others [2015] eKLR** where the Court held that a judgment determines the rights and obligations of the parties. They argued that the fact that they were reinstated does not mean that they cannot prove entitlement to damages and that such issue ought to be determined after evidence is adduced. They urged the Court to dismiss the application.

**Determination**

The issues for determination are whether there is any surviving cause of action following the reinstatement of the Claimants by the orders issued on 4th February, 2015 and whether the suit should be struck out.

In the Ruling delivered on 4th February, 2015 Nzioki wa Makau J. held that reinstatement is not a final remedy and that the Respondent could initiate processes under its Human Resource Manual to remedy any breaches it found within its workforce. Consequently, the Court granted the Claimants orders under prayer 3 and 4 of the Notice of Motion dated 15th October, 2014.

Prayers 3 and 4 sought orders that:

> *"3. The Respondents herein be and are hereby restrained by themselves or their servants, agents, officers or any other persons acting on their instructions howsoever from interviewing, outsourcing, employing or in any other way whatsoever deploying any other persons to undertake the duties of the offices previously held by the Claimants in the 1st Respondent pending the hearing and determination of this suit.*
>
> *4. A mandatory injunction against the 1st Respondent do issue directing the 1st Respondent to reinstate the Claimants to their respective employment positions."*

It is now the 1st Respondents case that the entire Statement of Claim is overtaken by events as the Claimants were reinstated and that they have since voluntarily resigned or their contract lapsed. The Respondent further avers that the Claimants were paid all their dues. Therefore, there is no actual dispute for judicial determination.

The Claimants confirm that they were reinstated upon the hearing of their interlocutory injunction. They however aver that the determination of their interlocutory application did not amount to a

final determination of the Court.

The Claimants in their Memorandum of Claim sought inter alia, a declaration that the termination by the 1st Respondent was unfair, an order for reinstatement and in the alternative maximum compensation in damages for unfair termination. In their submissions dated 19th April, 2018 to their application dated 6th September, 2017 the Claimants submitted that they sought to amend the claim because the original claim had been overtaken by events upon their reinstatement by the Court.

This Court in its Ruling dated 12th October, 2018 held:

> ***"In the draft amended claim it is stated at paragraphs 33 and 34 that the 1st and 3rd Claimants resigned from employment in April 2015 and September 2015 respectively…I find that the orders of the Court dated 4th February, 2015 addressed all the issues in the Memorandum of Claim and the amendments sought are not consistent with the claim as filed. An employee who has resigned from employment cannot seek prayers for terminal dues in the same claim in which the employee seeks the prayers of reinstatement as in the memorandum of claim herein."***

In addition to the above, the mandatory injunction issued on 4th February, 2015 had the effect of entirely determining the claim. The Claimants tactically sought to amend the original claim as they were aware that they had already been reinstated as prayed in the claim, and that the alternative remedy could not be granted. Their subsequent resignations also mean that they were not eligible to seek further reliefs such as compensation. The Claimants argued that a suit cannot be determined in the interlocutory stage. This may be correct in most cases. However, there are a lot of circumstances when it happens like in the instant case and very validly so.

The Court of Appeal in **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** held:

> *"The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation*

*should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage.*

*If authority were required for the above proposition, they are countless. In* ***SHEPHERD HOMES LTD V SANDAHM [1971] 1 CH. 34,*** *Megarry, J. stated:*

*"[I]t is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation…"*

It is my finding that it would be purposeless for the Court to hear the suit herein as the employment status of the Claimants have changed as a result of their reinstatement and subsequent resignation and or lapse of contract. I therefore agree with the 1st Respondent that there is no dispute that would require any further hearing and determination of the main suit as currently premised.

With respect to whether the suit should be struck out, Order 2 Rule 15(1) of the Civil Procedure Rules provides:

**(1) 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.**

I do not think the suit herein would fall under any of the circumstances envisaged under Order 2 Rule 15(1). This suit as filed would not have been subject to striking out under this provision. It is only after the events that occurred subsequent to the filing of the suit that the cause of action has become redundant.

I would thus decline to strike out the suit as prayed in the application herein but instead declare that the issues raised in the suit have since been resolved so that there is no need to hear the case as there is nothing more to decide. For this reason, I would declare the suit abated. I would however still award costs to the Claimants as against the Applicant herein in view of the fact that they were the successful party, having been reinstated by the court. The costs would however be limited to instructions fees disbursements and court attendances only.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**