



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC NO. 1911 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 23<sup>rd</sup> January, 2019)**

**NAHASHON ABUYA ZAKARIA.....CLAIMANT**

**VERSUS**

**WORLD PLASTICS COMPANY LIMITED.....RESPONDENT**

**RULING**

1. The Application before this Court is the one dated 11<sup>th</sup> May, 2018 and filed in Court on 29<sup>th</sup> May, 2018 through a Notice of Motion filed under Order 2 Rule 15 (1), (b) and (d) of the Civil Procedure Rules.

2. The Application seeks the following Orders:-

**1. THAT, the Civil Suit No. 1911 of 2017 be struck out.**

**2. THAT, the costs be provided for.**

3. It is grounded on the following grounds:-

**a) THAT the Claimant filed the instant claim on the 26<sup>th</sup> September, 2017 and thereafter filed another Civil Suit involving the same parties and same cause of action being Civil Suit No. 296 of 2017 Limuru which settled out of Court under WIBA for Kshs. 185,824/=.**

**b) THAT it is fair and just that Civil Suit No. 1911 of 2017 be struck out as it is an abuse of the Court process.**

4. The Application is supported by the Affidavit of **OSCAR AVEDI** sworn on 11<sup>th</sup> May, 2018 in which he reiterates the averments made in the Notice of Motion Application.

5. The Claimant/Respondent opposed this Application vide a Replying Affidavit filed in Court on 26<sup>th</sup> June 2018 deponed by **DONALD M. WEKESA** in which he avers that the instant Application is an attempt by the Respondent to defeat the course of justice and is as such unmerited.

6. He further avers that the Court is not seized of any evidence in support of the contention that the action has been extinguished and/or compromised between the parties.

7. It is however worth noting that the Claimant's Replying Affidavit is not dated neither is it sworn before a commissioner for oaths.

8. In disposing of the instant Application, the parties agreed to file written submissions.

**Claimant/Respondent's Submissions**

9. The Claimant/Respondent in his submissions urged the Court to dismiss the instant Application and hold that it fails to meet the spirit of Section 107 of the Evidence Act, Cap 80 Laws of Kenya.

10. Further that the Respondent/Applicant failed to annex to the Application any documentation in proof of the allegation that the Claimant/Respondent filed the alleged Limuru CMCC No. 296 of 2017 as alleged or at all.

11. The Claimant/Respondent submitted that the allegations of abuse of court process are serious in nature. For emphasis, he relied on the authority of **Graham Rioba Sagwe & 2 Others Versus Fina Bank Limited & 5 Others** and as such allegations must be supported by evidence which was not done in the instant Application.

12. It is submitted that failure to provide any proof, the Application must fail. The Claimant/Respondent urged the Court to dismiss the instant Application with Costs to the Claimant/Respondent.

**Respondent/Applicant's Submissions.**

13. It is submitted by the Respondent/Applicant that the Claimant's case is for recovery of general damages for pain, suffering and loss of amenities and special damages as a result of an industrial accident that occurred on 27<sup>th</sup> July, 2015.

14. It is further submitted that the instant Claim be struck out on account that the Claimant filed another civil suit involving the same parties and same cause of action which suit was settled out of Court under WIBA for Kshs. 185,824/=. For emphasis, the Respondent/Applicant relied on the case of **Employment & Labour Relations Court No. 230 of 2015 Edwin Maurice Baraza Versus Samani Construction Limited.**

15. The Respondent/Applicant urged the Court to exercise its discretion and dismiss the Claimant's claim.

16. I have considered the averments of both parties. The Applicants have submitted that this matter is already determined under WIBA through a civil claim filed in Limuru C.M's Court. The Applicants however failed to annex any pleadings or Judgement in the said CC 296/2017 from Limuru Law Courts.

17. The Applicants have definitely failed to support their contention with any evidence or annexure. The Application is therefore not proved. I find it unmerited and I dismiss it accordingly.

**Dated and delivered in open Court this 23<sup>rd</sup> day of January, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties