



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 720 OF 2017

MICHAEL MWAWAI MJOMBA.....CLAIMANT

VS

CENTRAL ELECTRICAL INTERNATIONAL LIMITED.....RESPONDENT

RULING

1. The subject of this ruling is a Preliminary Objection raised by the Respondent by notice dated 9th October 2017 and amended on 21st January 2019. The objection is based on the following grounds:

- a) That the Claimant's claim is *res sub judice*, incompetent, misconceived and devoid of any merit;
- b) That the claim is filed contrary to Section 6 of the Civil Procedure Act and the Court lacks jurisdiction to grant the orders prayed for;
- c) That the claim is a disguised attempt by the Claimant to have the Court adjudicate the issue of unfair and unlawful termination yet the same issue is being adjudicated in ***ELRC Cause No 430 of 2014: Amalgamated Union of Kenya Metal Workers v Central Electrical International Limited***;
- d) That the claim is bad in law, vexatious and an abuse of the court process;
- e) That the suit as drawn and filed is incompetent and fatally defective and should be struck out;
- f) That the claim is tantamount to trifling with the Court and is an abuse of the court process;
- g) That the claim against the Respondent should be dismissed with costs to the Respondent.

2. In a supporting affidavit sworn by the Respondent's Branch Manager, Mohamed Hamza on 21st January 2019, it is deponed that the Claimant's Union, the Amalgamated Union of Kenya Metal Workers filed ***Mombasa Industrial Cause No 430 of 2014*** on 9th September 2014, with the Claimant as one of the Grievants.

3. Hamza further depones that ***Mombasa Industrial Cause No 430 of 2014*** was later consolidated with ***Nairobi Industrial Cause No 148 of 2013*** and transferred to Nairobi where it was allocated ***Cause No 1618 of 2014***.

4. The objection was urged by way of written submissions. In the submissions filed on behalf of the Respondent on 5th March 2019, reference was made to the celebrated decision in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Limited (1969)*** where a preliminary objection was defined as one which:

“raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

5. The Respondent's objection is premised on the assertion that the Claimant's claim is *res sub judice* in view of ***Nairobi Industrial Cause No 1618 of 2014: Amalgamated Union of Kenya Metal Workers v Central Electrical International***.

6. The *res sub judice* rule is codified in Section 6 of the Civil Procedure Act as follows:

6.No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

7. In support of its objection, the Respondent filed a scanned copy of Memorandum of Claim in **Cause No 430 of 2014: Amalgamated Union of Kenya Metal Workers v M/S Central Electrical International Limited**. On the face of it, the issue in dispute in this cause is unlawful/unfair redundancy/victimization and lock out of the Claimant's members and refusal to pay salary arrears. Attached to the Memorandum of Claim is a list titled 'Workers Payment Records' with the Claimant in the current cause appearing as No 7.

8. I have looked at the Claimant's Memorandum of Claim in the current cause and find that the prayers sought are diametrically different from those sought in **Cause No 430 of 2014**. Additionally, the Claimant has not been specifically named as a Grievant in **Cause No 430 of 2014**. In fact, the Court was unable to see any relationship between the Memorandum of Claim in **Cause No 430 of 2014** with the list titled 'Workers Payment Records.'

9. In the upshot, the Court finds and holds that the Respondent has failed to establish a case of *res sub judice* and its Preliminary Objection is therefore without basis and is overruled with costs to the Claimant.

10. The Parties are directed to set down the main suit for hearing and disposal.

11. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF APRIL 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Otwere for the Claimant

Mr. Muumbi for the Respondent