



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO.48 OF 2019**

**KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**HOTEL WATERBUCK LIMITED.....RESPONDENT**

**AND**

**KUDHEIHA WORKERS..... INTERESTED PARTY**

**RULING**

The claimant, Kenya Hotels and Allied Workers Union filed application dated 19<sup>th</sup> July, 2019 under the provisions of articles 23, 36 and 162 of the constitution and section 4 and 74 of the Labour Relations Act and section 12 of the Employment and Labour Relations Court Act and seeking for orders that the suit should be heard on priority basis as the dispute herein relates to a recognition agreement where the respondent has declined to recognise the claimant and under section 74 of the Labour Relations Act all recognition disputes should be filed in court under certificate of urgency.

The application is supported by the affidavit of Joseph Kosima the national chairman of the claimant and who avers that the claimant has recruited 82 employees working with the respondent which is a 51% percentage stipulated under section 54(1) of the Labour Relations Act for recognition. Within article 36 of the constitution and section 4 of the Labour Relations Act the employees have a right to freely associate and join a trade union of choice.

The claimant has forwarded a draft recognition agreement proposing recognition and signing but the respondent has declined to comply necessitating this suit.

The respondent filed Objection to the Notice of Motion on the grounds that the claimant filed Cause No.10 of 2019 on 8<sup>th</sup> February, 2019 seeking similar orders in the current cause. There was a hearing and ruling on 8<sup>th</sup> July, 2019 and if the claimant was dissatisfied with the ruling there was liberty to file an appeal which has not been done and the suit cannot be revived through filing a new suit.

The respondent also avers that they are still pursuing the payment of costs awarded in the earlier suit.

The suit filed is vexatious and in abuse of court process and should be dismissed.

The claimant responded to the respondent's objections and on the grounds that in **Cause No.10 of 2019** the court did not go into the substance of the suit but dismissed both the Notice of Motion and the Claim on a technicality of commissioned affidavits. There was no defence filed by the respondent.

There is **Cause No.48 of 2019** which is not similar to any other suit and the issues herein have not been conclusively addressed.

The interested party was in agreement with the averments and submissions made by the respondent.

The sole purpose of the application and Notice of Motion herein is to have the suit heard on priority basis pursuant to the provisions of section 74 of the Labour Relations Act, 2007.

The respondent in opposition objected to the application and suit on the grounds that the claimant had filed Cause No.10 of 2019 on similar grounds and between the same parties and attached ruling dated 8<sup>th</sup> July, 2019. The court therein struck out the suit with costs to the

respondent.

The power of striking out is a summary process without a trial. The court has power to strike out a suit for a good cause. Some pleadings are fatal and thus not curable. The striking of suit being draconian must be on good basis and applied judicially and where there is no reasonable cause of action; the suit is vexatious or in abuse of court process. See **Kenya Commercial Bank versus Suntra Investment Bank Ltd [2015] eKLR**.

Once pleadings have been struck out, they no longer exist. They are removed. They are obliterated.

‘Striking out’ of suit or pleadings is not similar to ‘dismissal’ of suit as held in **Enock Kirao Muhanji versus Hamid Abdalla Mbarak [2013] eKLR**. On the one hand the rule of *res judicata* does not apply while in a dismissal the rule applies. A dismissal creates a lock out and a striking out allow for a re-opening on good basis.

The Ruling attached by the respondent in Cause No.10 of 2019 struck out the suit.

The claimant has moved the court in the current suit and therefore properly before the court.

**Accordingly, based on the orders sought for hearing on priority basis, the court shall proceed and give hearing directions. Costs shall be in the cause.**

**Delivered at Nakuru this 7<sup>th</sup> day of November, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....

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