



**REPUBLIC OF KENYA**

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

**CAUSE NO 451 OF 2015**

**DOCK WORKERS UNION.....CLAIMANT**

**VS**

**KENYA PORTS AUTHORITY.....RESPONDENT**

**RULING**

1. By an application brought by Notice of Motion dated 2<sup>nd</sup> May 2017 and filed in court on even date, the Respondent seeks orders to strike out the Claimant's claim.
2. The application, which is supported by the Respondent's Head of Litigation and Disputes, Turasha J. Kinyanjui is based on the ground that the claim is unsustainable by virtue of judgment delivered in *Mombasa ELRC Cause No. 448 of 2015: Mohamed Takub Athmani & 20 others v Kenya Ports Authority* on 29<sup>th</sup> February 2016 and appeal filed therefrom as *Civil Application No. 69 of 2015 (UR 58/15): Kenya Ports Authority v Mohamed Yakub Athmani & 19 others*.
3. In the affidavit in support of the application, the Respondent's Head of Litigation and Disputes, Turasha J. Kinyanjui depones that when the Claimant appeared *ex parte* before the Court on 8<sup>th</sup> July 2015, the Court directed *inter alia* that this claim be mentioned alongside *Mombasa ELRC Cause No. 448 of 2015: Mohamed Takub Athmani & 20 others v Kenya Ports Authority* on 24<sup>th</sup> July 2015.
4. Turasha further depones that when the matter came up for mention on 24<sup>th</sup> July 2015, the Court observed that the issues raised therein were similar to those in *Mombasa ELRC Cause No. 448 of 2015: Mohamed Takub Athmani & 20 others v Kenya Ports Authority* and ordered that this claim be kept in abeyance pending the hearing and determination of *Mombasa ELRC Cause No. 448 of 2015: Mohamed Takub Athmani & 20 others v Kenya Ports Authority*.
5. On 29<sup>th</sup> February 2016, the Claimant's claim against the Respondent in Cause No 448 of 2015 was dismissed and a subsequent appeal was also dismissed.
6. The Claimant's response is contained in a replying affidavit sworn by Leonard Rufus Ochieng on 29<sup>th</sup> June 2017. Ochieng depones that Rule 17(1) and (3) under which the Respondent's application has been brought does not expressly give the Court power to strike out claims for whatever reason.
7. It is further deponed that the affidavit supporting the application does not comply with Section 22 of the Employment and Labour Relations Court Act. Ochieng adds that the parties in *Cause No 448 of 2015* and in the instant case are different. Further the former cause only partially satisfied the reliefs sought in the current claim.

8. The single issue for determination in this application is whether the Claimant's claim in this cause is *res judicata* in light of ***Mombasa ELRC Cause No. 448 of 2015: Mohamed Takub Athmani & 20 others v Kenya Ports Authority***.

9. In ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi [2014] eKLR*** the Court Appeal restated that the essence of the principle of *res judicata* is to bring litigation to closure so that the same issues and parties do not keep showing up in court. Section 7 of the Civil Procedure Act bars a court from trying a suit whose subject matter has been substantially litigated upon by or on behalf of the same parties and conclusively determined by a court of competent jurisdiction.

10. In the submissions filed on behalf of the Claimant on 25<sup>th</sup> September 2017, an attempt was made to make a distinction between the parties in ***Mombasa ELRC Cause No. 448 of 2015: Mohamed Takub Athmani & 20 others v Kenya Ports Authority*** and those in the recurrent case. I have looked at the substance of the two claims and find that they are similar. Indeed, the only difference is that in *Cause No 448 of 2015*, the Claimant's members sued in their own names while in the present claim, the Claimant has sued in its own name but on behalf of the same members. This is a cosmetic variation which cannot survive the glare of *res judicata*.

11. In sum, the Court finds that the issues raised in the current cause have been substantively and conclusively determined in ***Mombasa ELRC Cause No. 448 of 2015: Mohamed Takub Athmani & 20 others v Kenya Ports Authority***. On this ground alone, the current cause was ill advised and is struck out.

12. Each party will bear its own costs.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> DAY OF MARCH 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ochieng for the Claimant

Mr. Ondego for the Respondent