



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2157 OF 2015

(BEFORE HON. JUSTICE MATHEWS N. NDUMA)

HILDA MUTHONI.....CLAIMANT

VERSUS

LEADING EDGE FOOD & ENTERTAINMENT

LIMITED t/a JOHN & JO'S RESTAURANT.....RESPONDENT

R U L I N G

1. The suit was brought vide a Memorandum of Claim dated 20th November, 2015 seeking a declaration that termination of employment was unfair and unlawful and payment of terminal benefits set out in the Memorandum of Claim including:-

- i. One month salary in lieu of notice.
- ii. Underpayments from 1st December 2010 to 4th August, 2015.
- iii. Grant of Certificate of Service, and
- iv. Costs of the suit.

2. The Respondent did not file a Memorandum of Response to the Claim but has instead filed preliminary objection to the proceeding of the suit which in brief attacks the factual basis of the suit and that the reliefs sought are misconceived and ought not to be paid.

3. The High Court in **Mukisa Biscuit Company vs West end Distributors Limited (1969) EA 696 at page 701** stated as follows:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues. This improper practice should be stopped.”

4. This is a classical case where the court process has been abused by raising factual contestations by way of a preliminary objection instead of filing a memorandum of response to the suit. This has led to filing of lengthy submissions and authorities and delay in hearing and determination of this suit on the merits. The case was filed on 4th December, 2015 and over two years later, we are dealing with completely misconceived preliminary objection. This practice must stop. To discourage it, the preliminary objection is dismissed with costs to be taxed and paid on all proceedings related to the preliminary objection.

5. The Respondent has not filed any response to the suit, the court deems the suit as undefended thus far and directs the same proceed to formal proof on priority basis. The Principal Judge to give directions accordingly.

Dated and Signed in Kisumu this 2nd day of May, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 30th day of May, 2018

Maureen Onyango

Judge

Appearances

M/s. Wairimu & Co. Advocates for Respondent

Mr. Ombeta & Co. Advocates for Claimant

Anne Njung'e – Court Clerk