



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.364 OF 2017

Consolidated with

CAUSE NO. 234 OF 2017

CAUSE NO. 358 OF 2017

CAUSE NO. 359 OF 2017

CAUSE NO. 360 OF 2017

CAUSE NO. 361 OF 2017

CAUSE NO. 363 OF 2017

ISAAC MAKHOHA WAFULA in CAUSE NO.364 OF 2017

ELVINE STANLEY SIMIYU in CAUSE NO.234 OF 2017

VICTOR NYABOGA MATUNDA in CAUSE NO.358 OF 2017

WILFRED NYONGESA WABRILE in CAUSE NO.359 OF 2017

WILSON OBURENYI MUKUNA in CAUSE NO.360 OF 2017

SAM WAFULA MASINDE in CAUSE NO.361 OF 2017

LEORNARD KIPYEGON KOSGEI in CAUSE NO.363 OF 2017

VERSUS

KHETIAS DRAPERS LIMITED.....RESPONDENT

RULING

1. The respondent, Khetias Drapers Limited by application and Notice of Motion dated 25th June, 2018 and brought under the provisions of section 1A, 1B, 3 and 3A, 63E of the Civil Procedure Act and Order 12 Rule 7 and seeking for orders that;

The court be pleased to set aside, the entire court proceedings of 31st May 2018 and all its consequential orders.

The ex-parte orders of 31.05.2018 consolidating this suit and suits No's 658[368], 359, 360, 361, 363 and 364 of 2017 be varied set aside and discharged and each suit to be heard separately.

This court be pleased to order the matter to start de-novo and the applicant be allowed to participate in the fresh hearing.

Costs of this application.

2. The application is supported by the affidavit of Ronny Khisa and that of Bernard Kiprono Lang'at advocates and on the grounds that the failure by the respondent to attend at the hearing on 31st May, 2018 was not deliberate or intentional. The respondent's advocate was advised by his colleague, Bernard Kiprono Lang'at advocate based in Eldoret that the court was not sitting on the material day and on this basis failed to attend court.
3. The application for consolidation of suits in files numbers 358, 359, 360, 361, 363 and 364 of 2017 in court on 28th May, 2018 was never served by the claimant for the respondent to be able to respond thereto. The orders of consolidation were obtained by concealment of the fact that each claimant had a separate, distinct and stand-alone claim and on this basis for liability cannot be consolidated. The claims made are exorbitant and exaggerated and not obtainable in law.
4. Other grounds are that the respondent has an arguable defence to the claims and the failure to renew employment contract cannot form the basis of a claim for unfair dismissal of employment. The matter should be heard *de-novo* for the respondent to urge its case in the interests of justice. There will be no prejudice upon the claimant if the hearing commences afresh as the mistake or the respondent's advocate should not be used to punish the client
5. In the affidavit of Bernard Kiprono Langat he avers that on 30th May, 2018 he was called by the respondent's advocate to find out if the court was sitting the following day and based on information within his knowledge informed him that the court was away and learnt later that the court was actually sitting and the matter herein proceeded for hearing. The mistake and failure to attend arose from such information and shared in good faith.
6. In reply, the claimants filed a Replying Affidavit sworn by Isaac Makhoha Wafula the claimant and who avers that the application by the respondent is with malice and in abuse of court process. The court registry was open for the respondent to source information on the sittings of the court. The respondent opted without basis not to attend court and this should not be excused.
7. The respondent was served with all notices herein and failed to attend and returns to confirm service were filed in good time.
8. Under Rule 23 and 24 of the Employment Act [Employment and Labour Relations Court (Procedure) rules, 2016 the court can cause consolidation of suits which arise from the same cause of action or direct parties to file a test suit and this was done by this being the main cause as consolidated.
9. The respondents have no proof that they have made effort to peruse the court file to ascertain the records and the application made is meant to delay the course of justice and should be dismissed with costs.
10. The claimants also filed Supplementary Affidavit sworn by Samuel Oyugi Ondieki Advocate and who avers that the court consolidated the suits herein and cause No.364 of 2017 is the test suit. In the application, the claimants failed to include **Cause No.362 of 2017, Moses Wambuto Fwesa versus Khetias Drapers Limited** and which arose from the same series of claims. The respondent has since been notified of the consolidation and hearing notices issued and returns filed.
11. This court unlike any other court established under the Constitution, 2010 has its own Rules of Procedure, the Employment and Labour Relations Court (Procedure) Rules, 2016. Before application of any other rules, the Civil Procedure Act or the Rules thereto, recourse should be to the Rules applicable before this court. Any other rules should strictly be applied where the Rules applicable to this court do not provide for any particular procedure or process adequately or at all.
12. As submitted by the claimants, on 29th, May, 2018 there was a consolidation of suits herein and which includes Causes Numbers 358, 359, 360, 361, 363 and 364 of 2017. Such consolidation of suits is

allowed under Rule 23 of the Court Rules

that;

23. The Court may consolidate suits if it appears that in any number of suits—

(a) Some common question of fact or law arises; or

(b) It is practical and appropriate to proceed with the issues raised in the suits simultaneously.

13. For the expeditious disposal of claims before the court, upon motion by the parties or on own motion, the court may order for consolidation of suit where there is a common question of fact or law and where it is appropriate to proceed in such suits simultaneously.

14. The application by the claim to consolidate suit thus addressed and on good grounds, was allowed and a consolidation effected to Cases Numbers 358, 359, 360, 361, 363 and 364 of 2017.

15. There is however no *test suit* as the consolidation was specific under Rule 23 and not under Rule 24. The claims must be urged on their merit. On this basis the claimants were heard as scheduled and on 31st May, 2018 when the respondent was absent and there was evidence of service.

16. The respondent has confirmed receipt of the hearing Notice for 31st May, 2018 which was served and the claimant filed returns to this effect and on which basis the court proceeded with the scheduled hearing. Such is allowed under the provisions of Rule 22 of the Employment and Labour Relations Court (Procedure) Rules, 2016 that;

22. (1) where a hearing notice was served on the parties and an affidavit of service has been filed, the Court may proceed with the case before it in the absence of any party thereto if—

(a) The party has indicated that it does not wish to attend the hearing;

(b) The party fails to appear for the hearing without providing any reasons; or

(c) the Court is not satisfied with the reasons forwarded to it by that party for non-attendance

17. In this regards, putting into account the hearing date was allocated by the court on 25th April, 2018 on the satisfaction that the respondent was invited and failed to attend and returns filed and on the scheduled hearing date the respondent had been served and accepted service and returns filed, there was good grounds to hear the claimants.

18. The averments by the respondent and the reasons set out therein as to why there was no attendance, the court as a public body is open to the public to make enquires. Each registry for the court is open and available to give information on all matters pending. There was no effort by the respondent demonstrated that other than calling a fellow advocate who had no basis to give information on the sittings of the court, relied on such information as against information which would have been well sourced from the court or its registry.

19. The above set out, on good basis and noting the suits as consolidated, the claimants in the Supplementary Affidavit set out one Cause in Number 362 of 2017 was left out and ought to be consolidated herein.

20. On this basis and now the court invited to address the question of consolidation;

Cause No.364 of 2017 is based on claims that on 19th October, 2017 the claimant was forced to sign a

new contract while he had contract was still in force and his employment was then terminated; Cause No.234 of 2017 being the main suit relates to the claimant's alleged termination of employment following falling ill on 24th July, 2017 and was then sent away upon termination of employment on 10th August, 2017; Cause No.358 of 2017 is premised similar facts as in Cause No.364 of 2017; Cause No. 359 of 2017 is premised on similar facts as Cause No.364 of 2017; Cause No.360 of 2017 is premised on similar facts as Cause No.364 of 2017; Cause No.361 of 2017 is premised on similar facts as Cause No.364 of 2017; and Cause No.363 of 2016 is premised on similar facts as Cause No.364 of 2017.

21. As noted above, Cause No.362 of 2017 is not part of the series consolidated herein. Where the cause of action relates to and is premised on similar facts as Cause No.364 of 217 there reason demands that the claimant therein moves the court as appropriate.

22. On the grounds set out above, to the extent that Cause No.234 of 2017 is fundamentally different from the other Causes as set out above, to this extent the order for consolidation is hereby varied to keep this Cause separate and distinct from the others.

23. Noting the above and in the interests of justice, the claimants shall be recalled for cross-examination under the order of consolidation and noting application of Rule

23 of the Court Rules. To start hearing *de-novo* will not achieve justice. Where the respondent is keen, perusal of the proceedings herein will give the necessary guidance.

24. As the respondent has offered to meet the due costs to the claimants and taking into account the analysis above and the facts of the respondent being absent from court on the scheduled hearing date the following orders shall issued

Accordingly, Application by the respondent and dated 25th June, 2018 is hereby allowed to the extent the orders of 30th May, 2018 are varied to the extent that;

(a) Cause No.234 of 2017 is to be removed from the consolidation herein and shall be heard separately and on its merits;

(b) The order for consolidation shall only remain and relate to Causes No. 358, 359, 360, 361, 363 and 364 of 2017;

(c) On good basis the claimant under Cause No.362 of 2017 can move the court as appropriate;

(d) Proceedings herein set aside to the extent the claimant witness shall be recalled for cross-examination;

(e) The respondent shall meet the due costs to the claimants herein to be assessed by the court before hearing can commence as above directed;

(f) Costs of the motion to the claimants.

Delivered in open court at Eldoret this 12th day of July, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistants: Nancy & Robert

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