



**REPUBLIC OF KENYA**

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

**CAUSE NO.119 OF 2015**

**ALEX LUTUNGU MUTANGE.....CLAIMANT**

**VERSUS**

**KANINI HARAKA ENTERPRISES LTD.....RESPONDENT**

**RULING**

The ruling herein is with regard to application and Notice of Motion filed by the respondent, Kanini Haraka Enterprises Ltd on 2<sup>nd</sup> July, 2018 and seeking for orders that;

- 1. The suit filed herein by the claimant be struck out*
- 2. In the result, the suit against the respondent be dismissed with costs to the respondent.*

The application is support by the affidavit of Steve Opar, advocate for the respondent and on the grounds that the matter herein was concluded having been fully negotiated and settled between the parties though a conciliation process by the Labour Officer the matter having been compromised, settled and paid, this suit subsequently filed is in gross abuse of the process of this court. The claimant is now seeking to be compensated twice and the suit should be struck out.

In his affidavit, Mr Opar avers that the claimant filed the Memorandum of Claim on 14<sup>th</sup> May, 2015 and on 5<sup>th</sup> November, 2015 the respondent entered appearance and a reply to the claim. Before the reply was filed, on 5<sup>th</sup> August, 2015 the court directed parties to report tot eh Labour Officer for conciliation. On 28<sup>th</sup> October, 2015 parties attended before the labour officer where each was given a hearing. The respondent was then directed to pay the claimant a sum of Kshs.18, 200.00 in settlement. Such monies were sent to the labour officer on 2<sup>nd</sup> November, 2015 and the respondent got an acknowledgement thereof.

Mr Opar also avers that following such settlement of the claim through conciliation the suit herein was compromised. To maintain he suit herein is in abuse of court process and should be struck out.

In reply, the claimant filed his Replying Affidavit and avers that on 5<sup>th</sup> August, 2015 the court directed parties to proceed for conciliation and on 28<sup>th</sup> October, 2015 arties attended before the labour officer and were given a hearing. A decision was made for the claimant to be paid Kshs.18, 200.00 which the claimant received.

The claimant also avers that though he received payment in settlement, he was dissatisfied and opted to maintain the suit. In the claim there was claim for unfair termination of employment, underpayment, and salary for days worked in March and annual leave. The conciliator only addressed the issues of pay for days worked and for annual leave days due and omitted to award of unfair termination of employment and underpayments. As a result the claimant has come back to court seeking redress.

Both parties made their oral arguments in court.

Determination

On 19<sup>th</sup> June, 2015 the court seized of the matter herein referred parties to conciliation and to report back on 3<sup>rd</sup> July, 2015.

The matter was mentioned again on 4<sup>th</sup> November, 2015 and a report made that parties had not fully agreed with the findings and recommendations of the conciliator and for that the court directed the respondent to file defence and witness statements by 13<sup>th</sup> November, 2015 and matter be mentioned on equal dates for further directions.

On the due date time was extended for the respondent to comply and a new date allocated for 20<sup>th</sup> November, 2015. The court then allocated parties a hearing date for the 24<sup>th</sup> March, 2016. The matter could not be reached on the allocated hearing date.

Section 15 of the Employment and Labour Relations Court Act, 2011 allow for conciliation over disputes emanating from employment and labour relations;

*15. Alternative dispute resolution*

*(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.*

Conciliation is one such method where parties can be referred by the court, upon application or by mutual agreement to address the matters in dispute through conciliation. The court referred the parties to conciliation. There was mutual compliance.

In this regard, the court has addressed itself with regard to conciliation and received returns that the conciliator, Labour Officer Naivasha findings and recommendations and settlement was not accepted fully by the claimant.

The court has since issued hearing directions and the respondent has complied by filing a defence.

As such the court has already addressed itself to the question of conciliation and the subsequent outcome of it and by directing parties to file List of Agreed Issues has essentially been due to the fact of failure to fully agree. Where the claimant is dissatisfied with the outcome of the conciliation process, he cannot be closed out from this court and must be given a fair hearing to urge his concerns, claims and unsettled issues.

For the claimant to undertake the process he has now opted to take, such is not in abuse of court process. On 4<sup>th</sup> November, 2015 when the court received the report from the conciliation process and issued directions herein for the matter to proceed for hearing, at that point, where the respondent had questions with regard to the conciliation process just concluded, that would have been the best opportune time and moment to challenge subsequent proceedings.

The respondent was directed to file defence and complied. I take this to be part of the process in ensuring each party herein is given a fair hearing.

I however wish to bring to the attention of the claimant the provisions of Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Where no action to taken to fix the matter for hearing, the court has the power to issue a show cause notice and dismiss the suit.

**Accordingly, application dated 2nd July, 2018 is declined. Costs in the cause.**

**Delivered in open court at Nakuru this 2<sup>nd</sup> day of October, 2018.**

**M. MBARU JUDGE**

In the presence of: