



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 91 OF 2016

(Before D. K. N. Marete)

STEPHEN JUMA NDEGE.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITEDRESPONDENT

RULING

This is an application dated 10th April, 2017 and seeks the following orders of court;

- 1. This Honorable Court do set aside the order made on 13th March 2017 for not hearing the Respondent's defense.*
- 2. The matter was wrongfully filed in the Kericho Court and same should be transferred to Nairobi*
- 3. Costs be in the cause.*

The application is grounded as follows;

- 1. THAT the Respondents were in Court on the 13th March 2017 hence they ought to have been given a hearing.*
- 2. THAT the no appearance of a parties' advocate does not affect the rights of a litigant who is present in Court*
- 3. THAT the Claimant's last place of employment before termination was Nakumatt Village Market.*
- 4. THAT all the witnesses of the Respondent are at Nakumatt Village Market and not Kericho.*
- 5. THAT the Respondent finds it costly and inconvenient to attend the Kericho Court.*
- 6. THAT the filing of the suit in Kericho Court is malicious with evil intentions against the Respondent.*

The Claimant/Respondent in his Replying Affidavit sworn on 2nd June, 2017 rubbishes and opposed the

application and prays that the same be dismissed with costs.

The applicant in her written submissions submits that problem in this cause borders on delay, absence of witnesses and even advocates. She urges the court to take judicial notice of the fact that neither the parties nor their advocates hail from Kericho or its environs. They are Nairobians.

The Respondent further raises issues of mischief in the filing of this cause at Kericho whereas the claimant worked for the Respondent at Village Market, Nairobi and therefore rendering Nairobi as the convenient place of filing the matter.

The Respondent therefore goes on to submit this application should be allowed and the case starts *denovo* and the claimant ordered to meet the costs before further commencement of hearing in order to obviate an abuse of the process of court.

The Claimant/Respondent did not file any written submissions in opposition to the application. Instead, he, at the hearing of the application on 21st July, 2017 prayed for a determination of the application on the basis of his pleadings

The Claimant/Respondent in his Replying Affidavit aforesaid argues that the application is mischievous a total abuse and travesty of procedure of this court.

He further argues that this application is brought out in bad faith and with a view to protracting and delaying the determination of this matter.

Again, he further submits, the application is irretrievably defective in that it is based on the wrong provisions of the law. Order 12 rule 7 of the Civil Procedure Rules only makes provisions for setting aside in cases where judgement has been entered or the suit has been dismissed. He puts it thus;

5. THAT Order 12 Rule 7 of the Civil Procedure Rules is also inapplicable in the instant matter for the simple reason that the proceedings and indeed the hearing on 13th March 2017 were not Ex-parte as is the mandatory pre-requisite in Order 12 Rule 2 (a); the court record shall confirm that there was Counsel who held brief for Respondent's Advocate and applied for an adjournment in the presence of the Respondent's witnesses, which application was declined. It is trite law that in such circumstances the proceedings are not ex-parte and further that an advocate who holds brief for another is deemed to have full instructions to deal with the matter.

Further, the date of 13th March, 2017 had been taken by consent of the parties. No attempt was made by counsel for the respondent to inform the claimant's counsel of the clash in dates and diarisation. This is expressed as follows;

7. THAT between 22nd February 2017 to 12th March 2017 the Respondent's Counsel had more than ample opportunity to write and/or call the Claimant's advocates to inform them of the purported clash on 13th March 2017 between the Milimani and the instant matters purportedly curtailing their attendance. They opted to remain silent knowing fully well that the Claimant, his Advocates and the Respondent's witnesses were travelling to Kericho for the hearing and then craftily apply for an adjournment on the basis of the advocate's unavailability in order to scuttle the hearing. The Honourable Court shall also note from the record that the Milimani Court case was not mentioned at the point of applying for the adjournment.

The Claimant/Respondent submits that the respondent acts *malafides* in her allegations that this courts orders on 13th March, 2017 were draconian or that the filing of the matter in Kericho was sinister.

12. THAT the Respondent is being very dishonest in its challenge as regards the propriety of this Honourable Court to determine the instant matter in light of the fact that in the numerous previous pleadings herein, to wit Response to the Memorandum of Claim and various witness statements, the respondent has submitted to the jurisdiction of this Court and indeed never questioned it at any

point only to now as an afterthought wake up with this unfounded challenge when the matter is at the penultimate stage.

Notwithstanding the parties respective cases, I am reminded of the authority of **Kenyatta Maita Mwawashe vs. Plan International Kenya, Industrial Court of Kenya at Mombasa, Cause No.5 of 2014** which this court applied in the matter of **Peter Ochola Omburo v Inter-Diocesan Properties Limited [2016] eKLR** where Rika, J. in upholding the place of the employee in a determination of the seat of employment proceedings observed as follows;

4. There is no requirement under the Industrial Court Act and the Industrial Court (procedure) Rules, 2010 for filing of employment and labour disputes in the geographical jurisdictions where they are deemed to arise.

5. Until recently the Court was located entirely in Nairobi, with Judges travelling out of station on circuits. The question of transfer has therefore not arisen in the past. The circuits aimed at bringing justice close to the people, easing the cost of litigation to the disempowered.

6. The judges of the Industrial Court traditionally determined the geographical place of the trial, on the basis of the convenience of the Employee. Sections 15 and 18 of the Civil Procedure Act are completely irrelevant.

7. However Plan International is a Worldwide Organization with a presence in many Cities and States, as borne out in its letterhead. It was submitted by the Claimant that the Respondent has a presence in Mombasa. The Claimant has since leaving employment settled in Mombasa. As a former employee seeking terminal benefits and compensation from the Respondent, the Court must exercise its discretion in his favour, as to the place of the trial”

This lays emphasis on a practice where the employees residence or other convenience dictates the place of suit.

So where does the application tilt in the circumstances? This is simple and obvious. My perception of the matter is that of an idler applicant who looks for every excuse to cover and circumvent her malevolence in prosecuting her matter. This should be condemned.

The Claimant/Respondent comes out succinctly in raising a case against the application. The result would not require any genius to forecast.

I am therefore inclined to dismiss the application with costs to the Claimant/Respondent. And I so order.

Delivered, dated and signed this 17th day of October 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Langat holding brief for Nyaberi instructed by Nyaberi & Company Advocates for the Respondent/Applicant.

2. Mr. Maina instructed by Edwin Maina & Associates Advocates for the Claimant/Respondent.