



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 50 OF 2017

(Before D. K. N. Marete)

KOSGEI TOPPIAS.....1ST APPLICANT
JACOB RONO.....2ND APPLICANT
SAMMARY CHEPNGETICH.....3RD APPLICANT
JOHN KOECH.....4TH APPLICANT
KIMUTAI VICTOR.....5TH APPLICANT
NGENO WELDON.....6TH APPLICANT

VERSUS

COUNTY PUBLIC SERVICE BOARD BOMET.....1ST RESPONDENT
BOMET COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

This matter is an application by way of Notice of Motion dated 31st October, in 2017 in which the claimants seeks the following orders of court;

- 1. THAT this Application be certified urgent and its service be dispensed with in the first instance and it be heard ex-parte.*
- 2. THAT the 1st and 2nd Respondents be ordered to stay any intended or actual administrative action to lay off the Enforcement Officers until this matter has been heard and determined.*
- 3. THAT the Honourable Court be pleased to order the Respondents to issue the Applicants with confirmation letters Honourable Court Pending the hearing and determination of the suit brought against the Respondents by the Claimants/Applicants.*
- 4. THAT the court be pleased to issue stay orders of any nature which purports to lay off or terminate employment service of the claimants.*

5. *THAT the court to orders the respondents to reopen claimants officers which have locked.*
6. *THAT the court issue and certiorari order to quash the statement intending to lay off County Workers.*
7. *THAT it is in the interest of justice that the Orders sought herein be granted in order to prevent the ends of justice from being defeated.*

It is grounded as follows;

1. *THAT the County Public Service Board intends to terminate the services of the County workers.*
2. *THAT the 1st respondent has advertised the positions of the claimants*

The 1st respondent in a Replying Affidavit sworn on 8th November 2017 opposes the application for being devoid of merit.

The 2nd respondent in opposition to the application raises the 2nd Respondents Statement of Grounds of Opposition dated 7th November, 2017 the Replying Affidavit sworn on even date.

When this matter came to court for highlighting of written submissions on 5th December, 2017, Mr. Koskei, counsel for the 1st respondent raised a preliminary objection on the issue of a representative suit as in the present case. It was his case that the claimants in the circumstances have violated Rule 9 (2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides as follows;

9. (1) *A suit may be instituted by one party on behalf of other parties with a similar cause of action.*
- (2) *Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties:*

Provided that in appropriate circumstances, the Court may dispense with this requirement.

- (3) *The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.*

The respondents in opposition to the application and claim both dated 10th November, 2017 submit a case of non compliance with rule 9 (2) and (3) in that the consent document annexed to the claim is signed by six (6) claimants yet paragraph 15 of his Replying Affidavit purports to act for all county employees. This is set out as follows;

15. *THAT assuring (ushering?) in of the new Governor Bomet has brought fear and anguish to me and my colleagues, since there has been media pronouncements asserting that current employee employed during the tenure of the then Governor would (be) dismissed and or terminated from lawful service. The media pronouncement, marked 'SCK 06'*

The respondents further submit that the claimant has not attached to the statement of claim as schedule indicating the names of all the claimants, their addresses, descriptions and specific breaches of their claims as per Rule 9 (2) and (3) of the Employment and Labour Relations Court (Procedure) Rules. On this ground alone, the suit collapses and ought to be dismissed.

Lastly, the respondents submits that the application seeks to freeze the entire operations of the County Government and diminishes the lee way of the 1st respondent in managing disciplinary process of employees in her ambit. The frame of the application is too wide as to be deemed a fishing expedition which the court should not entertain or be party to.

The application should, on the above premises be dismissed with costs for being incompetent and devoid of merit.

Mr. Bett, counsel for the claimants in rebuttal submitted that rule 9 (2) and (3) and the preliminary objection thereof should be read alongside Article 159 of the Constitution – disregard for undue technicalities, Article 159 (2) (d) refers.

The essence of a preliminary objection in all proceedings is clear. The event of a positive finding on a preliminary objection serves to determine the suit *in toto*. The suit would not be sustainable on a finding in favour of preliminary objection.

In the circumstances, is the preliminary objection raised by respondents sustainable? My answer is yes. The claimants have brought out a suit in contravention of the rules of procedure. Such rules are mandatory in nature and intent. Rule 9 (2) and (3) is intended to clearly express the extent of the claim and therefore serve as a notice to the respondent of the extent of anticipated liability. It eliminates ambush and warns the respondent of the areas to address in defence. This would not fall into the criterion of undue regard to technicalities envisaged by Article 159 (2) (d) of the Constitution.

This application is therefore not sustainable. It must fail. I am therefore inclined to dismiss the application in its entirety for being incompetent, formless and devoid of merit. This being the situation, the entire suit collapses without apology.

I am therefore inclined to allow the preliminary objection and in turn dismiss the application.

The net effect of allowing the preliminary objection and dismissing the application is that the claim becomes struck out. It would no longer be sustainable in the circumstances.

I further order that each party bears their own costs of the application and claim herein.

Delivered, dated and signed this 15th day of December 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Bett instructed by Sigey Bett & Company Advocates for the claimants/applicants.
2. Mr. Mutai instructed+ by K. N Mutai & Partners Advocates for the 1st respondent.
3. Mr Matwere instructed by Andrew N. Matwere, Advocates for the 2nd respondent.