



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 507 of 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 25<sup>th</sup> February, 2016)**

**GEORGE MUREITHI AND OTHERS.....CLAIMANT**

**VERSUS**

**KENATCO TAXIS LIMITED**

**( IN RECEIVERSHIP ).....RESPONDENT**

**RULING**

1. The Preliminary objection before Court is dated 14.01.2016 in which the Respondent states that the Cause be dismissed on the following grounds:

- 1. The Respondent being a Company under receivership is by virtue of Part VIII of the Employment Act No. 11 of 2007 an insolvent employer and any employee having a claim against an insolvent employer should invoke that part of the Employment Act and not file a suit in court.***
- 2. The Claimants have already invoked the procedure under Part VIII of the Employment Act 2007 and thus there exists parallel proceedings which is abuse of process of the Court.***
- 3. No leave of the High Court was sought before the institution of this suit yet the Respondent is a Company under receivership.***
- 4. The suit is a representative Suit but has been filed without leave of the Court.***
- 5. The Suit is therefore bad in law, incompetent and an abuse of Court process.***

2. The Claimants have filed grounds of opposition to the Preliminary Objection citing the following grounds:

- 1. The claims in the present suit do not arise out of debts owed to the Claimants by the Respondent as at the date of receivership in 1996 but are for claims that arose out of breaches in Contracts entered into with the Receiver and Manager in 2005,2006 and 2007. That the Claims arise out of dismissal letters to the Claimants by the Receiver & Manager to the newly contracted drivers in 2010 for “gross misconduct” and does not refer to “for the account of insolvency”.***

**2. On the ground 2 the Claimants allege that they are not aware of any such proceedings and put the Respondent to proof.**

**3. That leave of the High Court is not required since the claims do not arise out of pre-receivership debts but of latter day contracts.**

3. The Respondent cites that the grounds of opposition filed by the Claimants should be taken as their submissions to the Preliminary Objection as there is no provision in law for filing such in response to a Preliminary Objection.

4. The Respondent submits that the Employment Act at Part VIII provides for the correct procedure when employees whose employment has been terminated wish to claim against an insolvent employer. They state that the employer being insolvent, the Claimants should make an application in writing to the Minister of labour as provided in Section 66 of the Employment Act, who would then make payments out of the National Social Security Fund as specified in Section 68. The amounts payable are limited by Section 69. Once the Minister pays the employees, then he is subrogated to the rights of the employees as against the employer as provided in Section 72 which would allow the Minister to claim from the insolvent employer after receivership is lifted.

5. The Respondent further state that the Claim by the Claimants is only payable if they satisfy the Minister that the claim accrued by the time the insolvency arose. They state that a suit cannot be filed against the Respondent who is insolvent even if the employees continued to work for the Respondent in its insolvent state.

6. The Respondent states that the Claimants are abusing the process of the Court in that on their own admission they have invoked Part VIII of the Employment Act by making an application to the Minister and have proceeded to institute the present claim. There is therefore a duplication of claims one to the wrong forum and one in the proper forum. The letter to the minister relates to the same group of employees as this claim and the Claimants cannot be allowed to deny their own documents Appendix KM-KT in the statement of claim.

7. On the ground of leave to be obtained by the Claimants before filing suit, the Respondent states that such leave is mandatory and as such the cause is improperly before Court.

8. The Respondent has abandoned ground No. 4 of the Preliminary Objection.

9. The Claimants amended their claim and brought in the Receiver Manager as a party to the suit. The Respondent urges the Court to bear in mind that they remain in receivership and any orders against the Respondent would be against an insolvent employer and the Receiver's & Manager's liabilities still fall on the Respondent since the Receiver and Manager cannot pay out of their own pockets.

10. On the issue of apparent unfairness to employees raised by the Claimants in their submissions, the Respondent submits that insolvency status of the Respondent is unfair to the Employees and that is why Part VIII exists to protect employees and help them recover part of their claim.

11. The 1<sup>st</sup> issue to determine is in respect of Section 228 of Companies Act Cap 486 which states that:

***“When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose”.***

12. Leave of Court is mandatory as seen in the above provision couched in mandatory terms that no proceeding shall be commenced against the company unless leave of Court has been sought and subject to such terms as the Court may impose.

13. This was the finding in High Court **Misc Appl. 828/2006 Muturi & Apopo Advocates vs. Cyrus**

**Jirongo & Sololo Outlets Limited** where the Hon. J. Osiemo dismissed the Applicants application for failure to obtain leave of Court before filing the Application.

14. In relation to this claim, this is the starting point and I need not to go into the other issues raised in the Preliminary Objection because without leave of Court, this suit is a non-starter. I therefore allow the Preliminary Objection and strike out this claim for want of obtaining leave of Court before filing suit.

15. Those are the orders of the Court.

Read in open Court this 25<sup>th</sup> day of February, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kubai for Respondent – Present

Burugu for Claimant – Present