



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 298 OF 2016

JOHN MWANIKI

CLAIMANT

v

JOSHUA IRUNGU

1ST RESPONDENT

COUNTY GOVERNMENT OF LAIKIPIA

2ND RESPONDENT

RULING

1. The Claimant commenced legal proceedings against the Respondents on 12 August 2016 alleging that his dismissal through a letter dated 6 June 2016 was unconstitutional and unfair.
2. Simultaneously filed with the Statement of Claim was a motion under urgency seeking several interim injunctive reliefs.
3. The Court certified the motion urgent and also enjoined the Respondents from advertising or recruiting a person to hold the office of County Secretary, County Government of Laikipia pending *inter partes* hearing of the application.
4. The motion was served upon the Respondents and on 1 September 2016 they filed a replying affidavit sworn by the Acting County Secretary, List of Authorities to be relied on and a Response to the Claim.
5. At the same time, the Respondents filed a Notice of Preliminary Objection on the grounds
 1. This suit is *sub judice*, as the matters in it are also directly and substantially in issue in another suit, which was filed before it, and which is still pending;
 2. The 1st Respondent is irregularly and unlawfully enjoined in this proceedings and which misjoinder is actuated with malice and aimed at embarrassing him and constitutes an abuse of the Court process;
 3. The Claim is fatally and incurably defective and bad in law as there is no breach of law, due process or does not constitute unfair dismissal as alleged;
 4. The continued pendency of the suit is an abuse of the process of this Honourable Court.
6. The Claimant, when served with the Notice of the Preliminary Objection filed his grounds of opposition on 5 September 2016.

7. When the motion was called out for hearing on 5 September 2016, the Court directed that the preliminary objection be taken first, and the parties made oral submissions thereto.

8. The Court has given due consideration to the submissions and also examined the pleadings and documents on record.

Law on preliminary objection

9. The law on preliminary objections was set out long ago in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) 696.

10. As to the nature of a preliminary objection Law, JA held that

a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

11. Sir Charles Newbold, P on his part was of the view that

a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues.

12. The principles as set out decades ago have remained sound law even in this day of our transformative constitution which decries Courts administering justice on procedural technicalities.

13. The Court will examine the grounds advanced by the Respondents in light of the aforesaid legal principles.

Sub judice and abuse of court process

14. Making a determination as to whether the Claimant instituted another suit in which the substance of the cause of action is similar or the same as the instant Cause would necessarily require the Court to go beyond the pleadings in this Cause.

15. Economical and judicious use of precious judicial time and public policy of course decry a litigant filing a multiplicity of suits in which the anchor cause of action is the same, but in my humble view, such action ought to be challenged through an appropriate motion supported by an affidavit and/or documentation.

16. Of course, a Court can on its own motion call for a suit which is claimed to be based on substantially the same cause of action, but the justice of the case would require the Court to hear appropriate addresses from the litigants rather than looking at the file in chambers and drawing inferences therefrom.

Misjoinder

17. It is trite law that a suit should not be defeated merely on the misjoinder or lack of joinder of an appropriate party.

18. The Respondents contend that the joinder of the 1st Respondent was (is) actuated by malice and meant to embarrass him.

19. In the Court's view, to demonstrate malice, the party alleging the malice must demonstrate the same.

20. Such demonstration can only be achieved through presentation of evidence of the malice and ascertainment by the Court of proof of malice.

21. The Court also notes that in the Statement of Claim, there are allegations of the 1st Respondent purporting to exercise contractual and/or legal powers/functions he did not have.

Fatally defective Cause

22. The third limb of challenge was that the Cause was fatally and incurably defective because the Respondents had not breached any law in dismissing the Claimant.

23. Unfair dismissal and violation of several constitutional rights are at the core of the Claimant's cause of action, and therefore the Court does not for a moment understand how the merit or gravamen of the Claimant's cause of action can be determined on a summary basis without a hearing of the Cause on the merits.

24. In my considered view, the purported preliminary objections by the Respondents do not meet the legal threshold as there are facts yet to be ascertained. It was also improperly raised.

25. The upshot of the foregoing is that the Court dismisses the preliminary objection dated 31 August 2016 with costs to the Claimant.

Delivered, dated and signed in Nakuru on this 15th day of September 2016.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Wanjala instructed by Gumbo & Associates

For Respondents
Advocates

Mr. Wanjao/ Mr. Mwangi instructed by Wanjao & Wanjau

Court Assistant

Nixon