



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1388 OF 2014

GEORGE ORITO KUYACLAIMANT

VERSUS

VEGI VEGI TWO THOUSAND AND SEVEN LIMITED RESPONDENT

RULING

1. On 4th May 2015, the respondent, Vegi Vegi Two Thousand and Seven Limited, filed application through Notice of Motion under Rule 16 of the Industrial Court Procedure Rules and seeking for orders that;

The suit herein be struck out and dismissed.

The claimant to bear costs of the suit and the application.

2. The application is supported by the annexed affidavit of Raju Shekhawat and on the grounds that the application is filed against a company that no longer exists having been dissolved and which lacks capacity to be sued. The suit is therefore incompetent as no order of the court can be made against a non-entity. That the suit is *res judicata* in that the claimant filed **Industrial Cause No.656 of 2012, George Orita Kuya versus Vegi Vegi Restaurant**, similar parties herein, the suit was heard with witnesses from each side testifying and final judgement delivered on 1st October 2013.

3. In the affidavit of Raju Shekhawat he avers that he is one of the former directors of the respondent who was served with the summons herein. He filed a statement of defence and at paragraph 6 to 15 admit that he was a former director of the respondent company that had employed the claimant but the respondent has since been dissolved vide Gazette Notice 4945 and dated 8th April 2013. The suit is also *res judicata* in that the claimant filed Cause No. 656 of 2012, the matter went to full trial and judgement delivered dismissing the same. The claimant has however continued to extract summons and served him despite knowing the dissolution of the respondent and the same matter having been addressed by the court and dismissed. The suit herein is therefore incompetent, vexatious and should be dismissed with costs.

4. In reply the claimant filed his Replying Affidavit on 3rd July 2015. He avers that the previous suit he filed struck out Vegi Vegi Restaurant as the competent party to sue and that is why he has now sued the respondent, Vegi Vegi Two Thousand and Seven Limited. He has sued the respondent as a former employee. Where the company does not exist, the directors or owners of the company can be sued and he has sought leave to sue as such. The suit is not *res judicata* as the claimant had filed **Cause No. 656 of 2012** against a different respondent. The respondent cannot in equity get advantage of his wrongdoings

and in the interests of fairness and justice he should get his terminal dues.

5. The claimant in his Replying Affidavit sworn on 3rd July 2015 at paragraph 5 states that;

The Applicant claims that the company is non-existent and therefore lacks capacity to be sued, in that matter the directors or owners of the company can be sued and I have accordingly sought leave of the honourable court to include as parties the directors of the respondent one Raju Shekhawat and a company known as Vegi Vegi Food Limited.

6. I have perused the file but no such leave has been granted. Even where such leave were to be granted, there is Gazette Notice No. 4945 and of 8th April 2013 that was published way before 18th August 2014 when the Memorandum of Claim herein was filed. Such notification in the Kenya Gazette dated 12th April 2013 was due notice to the public that the respondent stood dissolved. To therefore file suit against such a non-existent entity is a nullity *ab initio*. This cannot be cured through an amendment after the fact. This is a matter noted in the Statement of Response in the descriptive part and at paragraph 4 it is noted that the respondent entity does not exist. That in itself should have caused the claimant to move with haste to withdraw the suit or move the court with the necessary amendments and not wait until the respondent has filed their Notice of Motion and application as herein.

7. Without leave to amend the current suit and the same having been filed against a non-entity, the claim should not have commenced from the onset. It is struck out.

8. On the question of the suit being *res judicata* I note in **Cause No. 656 of 2012**, the claimant was by the claimant against Vegi Vegi Restaurant. I have had occasion to read the entire judgement in Cause No. 656 of 2012 and find the issue of the status of the respondent therein was extensively gone into by the court and it was held that the respondent [Vegi Vegi Restaurant] was a party non-suited as a party to be sued. This finding was arrived at upon the court assessment of the certificate of registration of Vegi Vegi Two Thousand and Seven limited, the respondent as herein and the claim under Cause No. 656 of 2012 against Vegi Vegi Restaurant. The court held;

I agree with the respondent's submissions on the subject. The law is clear that joinder to suits must be succinct, clean and clear. There can never be lapses those would be unsustainable if not out rightly outlandish as a legal practice. It would be impractical to defend or even execute judgement or other orders of court under such circumstances.

9. That said, to thus sue the respondent as herein with the background established in because No.656 of 2012 is to have a second bite at the same cherry as it were. Matters well canvassed in the same suit cannot form basis of a new suit. In any event to sue a non-entity as here where the respondent was dissolved way before the suit was filed and a matter that the court addressed in a judgement of 1st October 2013 is not a good legal practice that can find basis of reviving a claim with the application of article 159 of the constitution. The suit herein is thus *res judicata*. 10. The suit herein must suffer the logical consequence of dismissal. Costs are due to the respondent. However such costs are not owed to any known entity and shall not be awarded as to do so would be an exercise in futility.

I therefore allow the application herein dated 4th May 2015. The issues raised having the consequence of the suit being struck out and warranting a dismissal on the basis the respondent is non-existent, the total sum of this is that the suit should be dismissed with nobody in costs.

Delivered, dated and signed in open Court at Nairobi this 16th day of July 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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