



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**CAUSE NO 218 OF 2015**

**KINUTHIA ESTON MAINA**

**FREDRICK MBITHI**

**EDWARD KHASAKHALA**

**(Suing on behalf of themselves and 163 others being the ex-employees of)**

**COFFEE BOARD OF KENYA.....CLAIMANTS/APPLICANTS**

***VERSUS***

**COFFEE BOARD OF KENYA..... RESPONDENT**

**RULING**

1. The Notice of Motion application dated 9<sup>th</sup> January, 2015 seeks to set aside orders granted by Hon. Lady Justice Rawal given on 22<sup>nd</sup> June 2010 as follows;
  - a. That the suit in any event is not properly before the court.
  - b. That the application be and is hereby dismissed.
  - c. That the application to withdraw the suit be and is hereby allowed.
  - d. That no costs are granted.
2. The Claimant/Applicant also seeks to have the Application dated 11<sup>th</sup> February 2010 and the main suit be reinstated and heard on merit.
3. The Application dated 11<sup>th</sup> February 2010 sought to reinstate the Claimant's application dated 26<sup>th</sup> and 30<sup>th</sup> June 2008 to enjoin other Claimants/further employees of the Respondent who were not in the original suit when it was filed.
4. The application was dismissed in the absence of the counsel on record who failed to attend court on time. It is submitted that the dismissal prejudiced the Claimants/Applicants in that it locked them out of the case as a result of a mistake of their then former advocates.
5. The claim relates to unpaid and underpaid terminal dues, due to the Claimants arising out of a redundancy purportedly carried out by the Respondent. The basis of the claim is that the Respondent did not pay to the Claimants in accordance with the Collective Bargaining Agreement. This followed termination of employment of the Claimants.

6. When the application for reinstatement of the dismissed application came for hearing, the firm of Khaminwa & Khaminwa Advocates sent an Advocate who was not versed with the suit and she mistakenly requested the court to withdraw the case.

7. That there were no instructions by the then Advocates on record to withdraw the case and the advocate then appearing purely acted on her own accord and prejudiced the Claimants.

8. The case has never been heard on its own merits and the court should not let the Claimants suffer for the mistake of their previous Advocate. That the relevant Benefits and Terminal dues are constitutional rights of the employees and the Applicants urge the court to safeguard those rights and not allow same to be lost only due to a mistake of an Advocate.

9. The Applicant relies on Article 159(2) of The Constitution of Kenya 2010 which reads;

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

- a. Justice shall be done to all irrespective of status
- b. Justice shall not be delayed
- d. Justice shall be administered without undue regard to procedural technicalities and
- e. The purpose and principles of the constitution shall be protected and promoted

10. Applicants further rely on provision of the Employment and Labour Relations Act 2011 section 20(1) as amended which provides,

*“in any proceeding to which this Act applies the Court shall act without undue regard to technicalities”*

### **Response**

11. The Application is opposed and the Respondent submits as follows;

The application is devoid of merit, frivolous, misconceived and an abuse of the process of the court. That the suit was withdrawn by the plaintiffs Advocate acting as an agent and on the instructions of the plaintiffs. That there is no suit at the moment and reinstatement of the application will not serve any purpose as there is no suit before court. That the plaintiffs are guilty of laches and have come to court with unclear hands and are not deserving of the orders sought.

### **Issues for determination**

- I. Whether the court may vary/set aside the Honourable Court’s ruling dated 22<sup>nd</sup> June, 2010.
- II. Whether a withdrawn suit can be reinstated through an application or a fresh suit ought to be filed.

### **Issue 1**

12. It is submitted that the suit was withdrawn at the High Court pursuant to the provisions of order 24 rule 2(2) of the Civil Procedure Rules and the same cannot be reinstated.

13. We were referred to the case of **Juma Vs Khaunya & 2 Others [2004] eKLR** where the court held:

*“ The applicant seeks to have the order withdrawing the suit set aside an for an order reinstating the former suit. I have already pointed out that the suit was withdrawn pursuant to*

*the provisions of order XXIV rule 2 (2) of the Civil Procedure Rules though the plaintiff did not cite the above provisions when making the application. It is in my humble view that a suit which has been withdrawn pursuant to order XXIV of the Civil Procedure rules cannot be reinstated. A party has the option of instituting a fresh action”.*

14. The Court further stated;

*“This finding is on the basis of the provisions of order XXIV rule 4 of the Civil Procedure Rules which provides; if any subsequent suit shall be brought before payment of the costs of a discontinued suit upon the same or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid. The law under this order does not envisage a litigant to seek for an order of reinstatement”.*

15. In the present matter no order for costs was granted by the Judge before whom the application to withdraw the suit was made. **Juma Vs Khaunya** (Supreme) the court referred to the case of **Kenya Commercial Bank Ltd Vs Spicised Engineering Co Ltd [1982]eKLR at p.485** as follows;

*“A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side. An advocate has general authority to compromise on behalf of his client as long as he is acting bonafide and not contrary to express negative directions. In the absence of express direction, the order shall be binding. I am bound by this decision and I will adopt these statements of law. Consequently I am of the view that the suit was properly withdrawn”.*

16. The Court is persuaded by the reasoning in the authorities cited above and holds that a suit that has been withdrawn cannot be reinstated unless good reasons for the reinstatement are provided by the applicant.

17. In this case no such good reason has been advanced because the suit was withdrawn upon application made by the advocates on record. No evidence has been adduced to show that the advocate did not have the instructions to withdraw the suit.

18. In any event the suit having been withdrawn at the High court no suit existed to be subsequently transferred to this court. If anything a fresh suit ought to have been filed in this court.

19. This Application is aimed at evading the limitation period the cause of action having arisen on 30<sup>th</sup> July 2002 when the termination of the employment of the plaintiffs occurred.

20. Accordingly the Application to set aside the ruling of the High Court Judge Rawal J delivered on 22<sup>nd</sup> June, 2010 is refused.

**Dated and Delivered at Nairobi this 10<sup>th</sup> day of July 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**