



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1666 OF 2013

BETWEEN

JAMES DAVIES NJUGUNA.....
CLAIMANT

VERSUS

SIMON MITHAMO (Sued as Chairman).....1st
RESPONDENT

NJERI ONYANGO (Sued as Secretary).....2nd
RESPONDENT

VINCENT SIMBA (Sued as Treasurer).....3rd
RESPONDENT

PARKLANDS SPORTS CLUB.....4th
RESPONDENT

RULING

The Respondents filed an application dated 6th December 2013, under Order 25 Rule 4 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, and all enabling provisions of the Law.

They seek stay of all proceedings in the Suit pending the payment of costs arising from Nairobi High Court Civil Case Number 198 of 2012.

The application is based on the affidavit of Jacob Omondi, General Manager of the 4th Respondent, sworn on 6th December 2013, and on grounds stated on the face of the application.

These grounds may be summarized as follows:-

- The claimant filed the High Court Suit touching on the same subject matter and involving the same parties as in the suit before the Industrial Court.
- The Respondents raised objection on jurisdiction at the High Court, which objection was upheld.
- The Claimant withdrew the High Court Suit, by a notice dated 9th October 2013.
- Cost arising from the said Suit which Respondents are entitled to are yet to be paid.
- The Respondents apprehend these costs may not be settled.

- It is in the interest of justice the Orders sought be granted.

The application is opposed through an affidavit filed by the Claimant. The Claimant concedes he filed and withdrew the High Court Suit. He subsequently filed his Claim in the proper jurisdiction, the Industrial Court. The application was heard on 30th January 2014.

Ms. Macharia for the Respondents submits that the High Court did not address the issue of costs. Order 25 of the Civil Procedure Rules allows the Industrial Court to stay its freshly filed proceedings, until the High Court costs are paid to the Respondents by the Claimant. The Respondents were not notified of the withdrawal of the Suit at the High Court. The Claimant has not made any undertaking that he will meet the costs. The Respondents rely on ***NBI HCCC No. 431 of 2010 between Patrick Kigera Mathia & Another (2011) e-KLR, KITALE HCCC NO. 33 of 2006 between Bernard Mutali v. Veronica Namalwa***, and ***NBI HCCC NO. 20 of 2005 between Aggrey Peter Thande v. ABN Amiro Bank & 2 Others***, in asking the Court to find, that the Court in which a fresh Suit has been initiated, ought to stay its proceedings, pending the payment of costs in the previous Suit, by the party who withdraws or discontinues, the previous Suit. The Respondents submit their application is properly brought before the Court.

Mr. Kingara for the Claimant holds that the Claimant was not obliged to notify the Respondents on withdrawal of the High Court Suit under order 25 of the Civil Procedure Rules, as that Suit had not yet been scheduled for hearing. The Rule states the Registrar shall certify the costs. The Respondents have made no request for certification. There is no order for costs made. Costs have not been awarded, and are unknown. The application is misconceived, and based on an apprehension. The Claimant lastly submits that the Civil Procedure Rules do not apply to the Industrial Court.

The Court Finds and Orders:-

1. The Civil Procedure Act, Cap 21 of the Laws of Kenya defines its scope of application under Section 1 (2), to cover proceedings in the High Court, and subject to the Magistrate's Courts Act Cap 10 the Laws of Kenya, to proceedings in Subordinate Courts.
2. "Court" under Section 2 of the Civil Procedure Act, refers to the High Court, or a Subordinate Court, acting in the exercise of its civil jurisdiction.
3. The Industrial Court of Kenya is not the High Court, or a Subordinate Court, which exercises civil jurisdiction, going by the above definitions.
4. The High Court is established under Article 165(1) of the Constitution. The Industrial Court is established under Section 4(1) of the Industrial Court Act No. 20 of 2011, in pursuance of Article 162(2) (a) of the Constitution of Kenya. It is a Court established by Parliament, with the status of the High Court.
5. Subordinate Courts are established under Article 169 of the Constitution. These Courts are listed under the Article, which goes further to clarify that Subordinate Courts include any other Court or Local Tribunal as may be established by an Act of Parliament, other than Courts established as required by Article 162 (2) of the Constitution.
6. The Industrial Court proceedings as stated by Mr. Kingara are not regulated by the Civil Procedure Act and Rules; they are regulated by the Industrial Court (Procedure) Rules 2010.
7. The Industrial Court is a specialized jurisdiction. It does not exercise civil jurisdiction, but a specialized jurisdiction, sometimes referred to as industrial justice system/jurisdiction. The Court deals with employment and labour disputes, and is also involved in quasi-judicial functions such as the registration of Collective Bargaining Agreements. It hears appeals from the Registrar of Trade Unions, and may also try Wage Offences. It acts as the enforcement mechanism for minimum Labour Standards. These are not functions that fit the description of civil jurisdiction.

8. In the ***Industrial Court Miscellaneous Civil Application Number 9 of 2013 between Francis Joseph Kimele v. the Teachers Service Commission***, this Court found that the Civil Procedure Act and Rules can only apply to the proceedings of the Industrial Court to the extent contemplated by the Industrial Court (Procedure) Rules 2010. This view was restated in the ***Industrial Court Cause Number 2194 of 2014 between Jeremiah Mutua Mutea v. the Standard Newspapers Limited*** in which the Court explained:

“The Industrial Court is principally regulated by the Industrial Court (Procedure) Rules 2010. The Civil Procedure Act and its Rules can only apply in the proceedings of the Industrial Court, to the extent contemplated by the specific Rules under the Industrial Court (Procedure) Rules 2010, such as Rule 31 on execution of decrees. Secondly the Civil Procedure Act and Rules may apply to the proceedings of the Industrial Court whenever the Industrial Court (Procedure) Rules 2010 are silent on certain procedural aspects. Judges of the Industrial Court have the discretion of calling on the aid of the Civil Procedure Act and Rules in appropriate circumstances.”

9. The application filed by the Respondents is incompetent as it invokes the Civil Procedure Act and Rules, while no attempt is made to explore and invoke specific procedural Rules of the Industrial Court, under which the application may properly have been made. It was the wrong premise for the Respondents to hold that the proceedings of the Industrial Court are regulated by the Civil Procedure Act and Rules.

10. Even if Order 25 of the Civil Procedure Rules was to be adopted by default or discretion by the Industrial Court, the Respondents have not placed any material before this Court to show there is an existing order on costs, or certificate of costs, given by the High Court. If such existed, the Industrial Court may have, applying its own procedural Rules, under the doctrine of comity of Courts, have stayed its proceedings, to ensure the civil proceedings at the High Court are fully exhausted. The Respondents have not given this Court any evidence that they have filed any bill of costs, pursued certification or execution of costs, or obtained any orders on payment of costs at the High Court.

For these reasons:-

- (a) The application filed by the Respondents dated 6th December 2013 is rejected.**
- (b) Proceedings before this Court to go on in accordance with this Court’s Procedural Rules.**
- (c) No order on the costs.**

Dated and delivered at Nairobi this 28th day of February 2014

James Rika

Judge