



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 774 OF 2012

(BEFORE D.K.N. MARETE)

JANET SYOKAU KASWII.....CLAIMANT

VERSUS

KATHONZWENI FINANCIAL

SERVICE ASSOCIATION..... RESPONDENT

RULING

This matter came to court vide a Memorandum of Claim dated the 8th May, 2012. The issue in dispute is therein cited as;

‘Wrongful, unlawful and unfair termination of employment of Janet Syokau Kaswii’

The respondent in a Respondent’s Memorandum of Reply and Counter-Claim denies the claim and raises a counter-claim thereof. He prays for a dismissal of the claim and judgement in favour of the Counter-Claim as follows;

- a. *Kshs.125,000.00*
- b. *Costs of the suit*
- c. *Interest on (a) above at Court rates from the date of filing suit till payment in full.*

He further issues warning of a notice of preliminary objections as follows;

10. *The Respondent gives notice that this claim as canvassed is fatally defective and will raise a preliminary point **in limine** seeking to have the same dismissed/struck out.*

On 27th November, 2012 the respondent further files a preliminary objection dated 26th November, 2012 as follows;

NOTICE OF INTENTION TO RAISE A PRELIMINARY OBJECTION

TAKE NOTICE THAT the Respondent will at the hearing hereof raise a preliminary objection for determination in limine and seek to have the Claimant’s entire claim struck out or dismissed for Reasons that;

1. **THAT** *the Claim as filed and canvassed in the claimant’s Memorandum of Claim dated 8th May*

2012 is fatally and incurably Defective in law and a such cannot stand or be ventilated before this Honorable Court.

2. **THAT** the suit contravenes mandatory provisions of law.
3. **THAT** the suit is fatally and incurably defective and cannot stand in law.
4. **THAT** the continued pence of the suit is an abuse of the process of this Honourable Court.
5. **THAT** the Claimant's Claim is misconceived, misdirected and misled and therefore the prayers sought cannot stand in law.
6. **THAT** the entire Claim herewith dated 8th May 2012 is an abuse of the process of this Court and ought to be dismissed with costs.

The matter came for hearing severally until the 22nd October, 2014 when the parties agreed to dispose of the matter by way of written submissions on the preliminary objection.

From the onset, one finds an anomalous attempt of disposing of a matter through a preliminary objection. The preliminary objection as originally cited or proffered in the response or even the actual embodiment of the preliminary objection is non-disclosure of its projection and intent. It does not clearly define and demonstrate in clear terms the limitations of law that support the preliminary objection. Instead, one is treated to an opaque presentation of issues which neither come out clearly as issues of law or fact. It is no wonder that the claimant in his written submissions rubbishes the respondent's attempt at a preliminary objection as follows;

1. *The respondent has filed a Preliminary Objection dated 26th November 2012. The Respondent in the Preliminary Objection seeks to have the Claimant's entire claim struck out and/or dismissed. The Preliminary Objection is based on 6 grounds which are at page 1 and 2 thereof. However instead of filing submissions based on the said grounds the Respondents filed submission based on new ground namely;*
 - a. *The Claimant has filed a suit against an entity unknown in law and incapable of being sued in the manner this suit is presented.*
2. *It is our submission that by not making submission based on the grounds set out in the Preliminary Objection dated 26th November 2012 the Respondent has abandoned the said Preliminary Objection. It is our further submission that the current objection which the Respondent has taken was not pleaded in the Memorandum of Reply and the Preliminary Objection and as such we urge the Court not to determine the same. In submitting so we rely in the general principle of law that a property is bound by its pleadings, see **Associated Electrical Industries – vs- William Otieno**, High Court Civil Appeal No. 421 of 1998, authority number 6 in the Claimant's List of Authorities. Ordinarily an unpleaded issue will not be determined by the Court. We refer the Court to the case of **Kenya Commercial Bank Limited –vs- Mwanzau & Another**, Court of Appeal, Civil appeal No. 274 of 1997 (Unreported), authority number 7 in the claimant's List of Authorities.*
3. *However if the Court is of the opinion that the said Preliminary Objection is well founded on the pleadings on record and that the Court has jurisdiction to determine it then it is further submitted that the said Preliminary Objection does not arise clear points of law fit for consideration as a preliminary objection. Why do we submit so? A Preliminary Objection was defined in the case of **Mukisa Biscuit Company – vs- Westend Distributors Limited (1969) EA 696 at page 701** which case was cited by the Court of Appeal in the case of **Nitin Properties Limited –vs- Jagjit Singh Kalsi & Another** authority number 5 in the Claimant's List of Authorities thus;*

“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 in 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 occasion confuse the issues. This improper practice should stop”.

4. *It is our submission that the Preliminary Objection raised raises matter of evidence which require the Court to ascertain certain facts. These matters are for example whether the Respondent is an association, society of community based organization. No point of law arises. What is being sought in essence is for the Court to exercise its judicial discretion. This requires facts to be placed before the Court to enable it exercise such discretion, see the authority of **Mukisa Biscuit Company – vs -Westend Distributors Limited** cited above.*

The respondents have admitted the description of the respondent’s and entered appearance in the suit to appear for them as such. They cannot be heard to retreat and start running away in the middle of things. Moreover, the claimant/respondent argues and submits that the error was never intended and is *bona fide*. She seeks to rely on the authority of *Gailay & Roberts Limited –vs - Krishna & sons Limited* where the court held as hereunder in allowing an amendment to the suit;

“Accordingly, where there has been a bona fide mistake either of law or fact in commencing a suit in the name of a wrong person whether as Plaintiff or as Defendant, the court ought to allow the amendment rather than put the parties to the possible expense of a fresh suit. The mistake must be a bona fide mistake, such a where the party intends to sue the right person but, by a slip of the pen, a word is left out and a wrong name is given or if the title used is hat of a non-existing person or if the Plaintiff was under any reasonable misapprehension and the error result in a misnomer. A bona fide mistake made foolishly or carelessly but honestly is curable by amendment. It is not excluded from being a bona fide mistake merely because it was a result of negligence.”

I believe that this should be the case in the current circumstances.

Further, the claimant has by a Notice of Motion dated 21st February, 2014 and filed on 24th instant made an application and intimation at an amendment of the claim to incorporate the entirety of the issues belatedly made in this preliminary objection. In the interests of justice this should be had and determined to bring out a case of fair play to all parties concerned. The respondent’s invocation of the overriding objective of the Civil Procedure Act, Cap. 21 and the Industrial Court Act, 2011 would fall in place as these fail to breathe justice to the party reething from the rigmarole of this technicality.

The overriding/principle objectives of the Civil Procedure Act and Industrial Court Act emphasize expediency, ease and affordability of court process to litigants. This is besides the critical issue of justice to parties which must be observed at all times. These are as follows;

1A(1)The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, n the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) a party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B.(1) for the purpose of furthering the overriding objective specified in section !A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

- a. *the just determination of the proceedings;*

- b. *The efficient disposal of the business of the Court;*
- c. *The efficient use of the available judicial and administrative resources*
- d. *The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*
- e. *The use of suitable technology.*

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The Industrial Court Act provides the following as its principle objectives;

3.(1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious and Objective proportionate resolution of disputes governed by this Act.

(2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).

(3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.

These, at all times guide the courts on the requirement of facilitating the ends of justice in proceedings. Under no circumstances should a court merely be a spectator in circumstances where injustice would befall a party to litigation.

I also observe that allowing this preliminary objection would not entirely determine the issue but only change course so that it would resurface in another form. Moreover, a refusal to grant the preliminary objection as presented would not prejudice any of the parties or even the respondent proponent.

I am in the circumstances inclined to dismiss the preliminary objection with costs to the claimant.

Delivered, dated and signed the 24th day of April, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Kiplagat instructed by Kiplagat & Associates Advocates for the Claimant.
2. Mr. Kithi instructed by Kithi & Co. Advocates for the Respondent.