



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 346 OF 2014**

**PETER KAILI ..... CLAIMANT**

**VERSUS**

**MALKEN HOUSING SYSTEMS LIMITED ..... RESPONDENT**

**RULING**

By Notice of Motion dated 25<sup>th</sup> April 2014 and filed on 28<sup>th</sup> April 2014 and brought under the provisions of section 3, 12 and 20 of the Industrial Court Act and Article 41 and 159(2) (b) of the Constitution and seeking for orders that the court dismiss the suit *in limine* as the claimant has failed to disclose a reasonable cause of action known in law as against the respondent and thus the suit is scandalous, frivolous and an abuse of the court process. This application is supported by the annexed affidavit of Abigail Mueni, the Human Resource manager of the respondent. The claimant responded to the application through the Replying Affidavit sworn by Peter Kaili the claimant.

The application is based on the grounds that on 1<sup>st</sup> February 2011 the respondent retained the services of the claimant by a letter of appointment on a monthly remuneration of Kshs.15,000.00 being a basic pay of kshs.12,000.00 and house allowance of Kshs.2,500.00 per month. On 16<sup>th</sup> December 2013 the claimant served his resignation notice and indicated that he had no claim against the respondent with regard to the payment of any dues and the respondent acknowledged the resignation and settled all what was due to the claimant who then signed the clearance certificate in confirmation that there were no outstanding dues owing. On 14<sup>th</sup> January 2014 the claimant without justification wrote a demand letter addressed to the respondent claiming that he was unfairly terminated. Suit was filed on 5<sup>th</sup> March 2014 stating that the respondent wrongfully dismissed the claimant and should pay him kshs.3, 240,000.00. That the suit is ill-conceived as the claimant did voluntarily resign from his position and cannot claim for years remaining on his contract of employment with the respondent. That the suit should be dismissed with costs to the respondent. Both parties filed their written submission with regard to the application dated 7<sup>th</sup> July 2014 and 16<sup>th</sup> July 2014 for the respondent and claimant respectively.

In the supporting affidavit, Abigail Mueni states that the claimant was the employee of the respondent until his voluntary resignation on 16<sup>th</sup> December 2013. All terminal dues were paid to the claimant. The claim is therefore misconceived as the claimant cannot seek for years not served and the suit filed as CMCC 476 of 2014 by the claimant is supported by falsified documents of treatment. That the suit has no basis in law or constitution and should be dismissed with costs to the respondent.

In submission the respondent stated that the claimant in his suit has not disclosed any reasonable cause of action as held in **Time magazine international Limited & 2 Others versus Rotich & another [2000] KLR 544** where the court held that a claim must have a cause of action with some chances of success. That the claimant herein has misled the court on his claim as he voluntarily resigned and all his dues

were paid. The claim is scandalous and an abuse of the court process and should be dismissed as it is only meant to inconvenience and cause the respondent prejudice. The claim does not demonstrate any triable issues, the employer/employee relationship was extinguished by the resignation and there is no claim for wrongful termination.

The respondent also submitted that section 36 of the Employment Act makes provision for issuance notice or payment in lieu of such notice and by the resignation letter, the claimant terminated his employment. Article 41 of the Constitution gives the right to fair labour practices and in the interests of justice the respondent has undertaken their responsibility towards the claimant where the resignation was voluntary. The claimant has filed CMCC 476 of 2014 using falsified documents, a fact not disclosed to this court as an indication that the suit is not filed in good faith and should be dismissed with costs.

In reply, the claimant stated that he was forced by the respondent's supervisor one Waliot to write the resignation letter after being threatened that his salary or dues would not be paid if he did not resign. The respondent had always wanted him dismissed through issuance of warning letters. There was undue influence to resign which then vitiated the letter written by the claimant and thus an illegality that should not be sanctioned by the court. That there is a good claim that should be allowed to proceed to address the illegality committed by the respondent and in the interest of justice the claim should be heard by dismissing the application filed by the respondent.

The claimant also submitted that a suit can only be dismissed in the clearest of cases that is weak beyond redemption as held in **Daniel K. Gichuhi versus Consolidated Bank Ltd [2014] eKLR**. When a party is applying to strike out a suit, matters of evidence should not be gone into as this is part of evidence that should be determined at the trial. That in this case there are triable issues with regard to the validity of the resignation letter done by the claimant and the case should be heard on its merits. The examination of the evidence should take full course and have the claimant examined on the issues raised at the hearing. That the application should be dismissed and the matter fixed for a full hearing.

The respondent's contention is that the suit filed by the claimant fails to disclose a reasonable cause of action known in law as against the respondent, the suit is scandalous, frivolous and vexatious and an abuse of the court process. A suit with no *reasonable cause of action* is a suit tantamount to lacking in having any chance of success or an issue of complaint. To therefore seek for such a suit to be dismissed it must be granted only in the clearest of cases with extreme caution as a litigant should not be driven from the seat of justice without being heard. This summary procedure can only be adopted when it can be clearly seen that a claim is on the face of it *obviously unsustainable* as held in **Francis Kamande versus Vanguard Electrical Services Ltd, civil Appeal 152 of 1996**.

The respondent's submission in this case is that there are no triable issues as the claimant voluntarily resigned his position with them and all terminal dues were paid. On his part the claimant alleges that he was forced to resign. My reading of section 35 of the Employment Act is that it creates a very wide scope in terms of termination of employment even where either party has given notice through resignation or otherwise. That party whether an employee or an employer is covered by section 35 (4) of the Act which is outlined as;

***(4) Nothing in this section affects the right—***

***(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or***

***(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.***

Therefore what the claimant now raises in his Replying Affidavit, even without going into the merits of his case cannot be wished away at this point. Where the claimant is seeking to challenge the *lawfulness or fairness of the termination* there is a reasonable cause of action based in law that the court must address. To terminate the proceedings at this point without the court calling evidence in this regard would be to

circumvent the cause of justice and create injustice at the very seat of justice. This is not the purpose of the Court.

I need to add the words of Sir Charles Newbold in *Mukisa Biscuits Manufacturing Co. Ltd versus Westend Distributors Ltd at page 710*;

*The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and on occasion, confuses issues. This improper practice should be estopped...*

the suit should be heard by call of evidence. Parties will be heard on merit.

Application dated 25<sup>th</sup> April 2014 by the respondent is hereby dismissed. Costs to the claimant.

Read in open Court at Nairobi this 30<sup>th</sup> Day of July 2014.

**M. Mbaru**

**JUDGE**

In the presence of:

Court Assistant: .....

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