REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

INDUSTRIAL COURTS

Cause 520 of 2011

PETER WANJOHI MUTHEE.....CLAIMANT

Vs.

BAYER EAST AFRICA LIMITED.....1ST RESPONDENT

BAYER ENVIRONMENTAL SCIENCES S A.....2ND RESPONDENT

RULING

Before this court is an application by way of Notice of Motion. The application is expressed to be under Section 12(4) of the Industrial Court Act 2011, Rules 16(1) and 28 of the Industrial Court (Procedure) Rules.

The said application sets out grounds in support and is further supported by the affidavit of Damaris Kimosop the Human Resources Manager of the 1st Respondent/Applicant.

The application seeks in the main, an order for costs against the claimant as well as the dismissal of the claim against the 2nd Respondent herein Bayer Environmental Sciences SA.

The application is opposed by the Claimant/Respondent.

The Notice of Motion traces with accuracy the justification for seeking the orders in prayers 1 and 2 of the application. The contention is that the 2nd, 3rd, and 4th Respondents at the time – Frans Labuschagne, Nadim Mohr, Sylvestre Jobic – were not proper parties and as a consequence when the Joinder was severed by the memorandum of claim, they were and are entitled to costs for defending the claim from 26th April 2011 to 13th October 2011 when the claim was amended. It is not in doubt that the 3 Respondents were parties to this suit. It is also not in doubt they remained as such until their removal vide the Amended memorandum of claim filed on 13th October 2011.

The Respondent/Applicant's counsel urges the court to order costs against the claimant for

misjoinder. The 3 respondents aver there was no basis for their inclusion in the suit.

The Claimant/Respondent has urged the court to disallow the application. The arguments are laid out in the submissions by the Claimant/Respondent's counsel. He states that the removal of the 3 Respondents was in pursuance of the pre-trial conference in terms of S.24(1) of the Industrial Court(Procedure) Rules 2010.

Rule 24(1) provides:

"The court shall give direction as may be necessary to enable parties to prepare for the hearing"

The directions envisaged under Rule 24(1) are not explicitly set out.

However, the Court is minded that such would include the preliminary issues such as settling the issues to be at the core of the dispute, the documents/exhibits to be relied on as well as attendant matter such as date, place and duration of the hearing and consequent orders. The court may also address the issues of standing and other rights. In the application the aggrieved parties have not stated what transpired at the stage when the directions were given.

Was it within the purview of the directions contemplated under the provisions of Rule 24(1)? In my mind the Court could not properly give such directions. It is neither the province or place for a Judge to give legal advice. Judges are arbiters in legal contests. A referee ideally cannot advise a contestant which rivals to keep in the ring or which rivals to keep out.

It is true that costs cannot be a whimsical exercise. Costs are ordinarily granted where it is deemed fit to grant them.

The 3 Respondents claim they have incurred costs and ought to be paid such costs.

The Application by the advocates for the Respondents is supported by an affidavit of Damaris Kimosop. She is the Human Resources Manager of the 1st Respondent Bayer East Africa Limited. She purports to swear the affidavit on behalf of the 3 respondents, Frans Labuschagne, Nadin Mohr and Sylvestre Jobic. No reason has been advanced as to why these three gentlemen are unable to do so on their own behalf. It is odd that the, costs they claim to have incurred are not being pursued by them but the 1st Respondent or an agent of the 1st Respondent. It would be anathemic to the administration of justice if we allowed busy bodies to clog the wheels of justice. The law is a double edged sword and cuts both ways. The award of costs would be proper if the matter was at close and participation had been full. It would be proper if the parties aggrieved had moved court. None of the above has been demonstrated.

The Court has been invited to dismiss the claim against the 2nd Respondent. The submissions by the Applicant do not demonstrate the absence of nexus between the 2nd Respondent and 1st Respondent. It is moot point that the 2nd Respondent and 1st Respondent seem to have joint interests as per the pleadings and documents in support of the rival contentions by the parties. Only a full trial would reveal the extent of the nexus, only a full trial would clarify the misty haze now facing the court as inquiry would of necessity have to be made on the rival contentions and suitable determination made.

In the case before me, the Respondents have cited a case from the High Court. It is of great persuasive value. The Hon. Justice H.P.G. Waweru found in favour of an applicant in HCCC 18 of 2008 Reported as **Donholm Rahisi Store v. East African Portland Cement Ltd. eKLR 2006**. The case, unlike this one, involved the aggrieved party and the party who erred in joining the aggrieved party. Since it is not on all fours, it does not aid the Respondents.

In the final analysis the application for removal of the 2nd Respondent fails.

The Notice of Motion therefore stands dismissed with costs.

Dated and **Delivered** at Nairobi this 30th day of July 2012

Nzioki Wa Makau
JUDGE