

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL NUMBER E370 OF 2024**

**MONICA AWUOR.....APPELLANT**

**VERSUS**

**THE BOARD OF MANAGEMENT**

**NAIROBI INTERNATIONAL SCHOOL..... RESPONDENT**

*(Being an Appeal from the Ruling and Orders of the Hon. P.K. Rotich (CM)*

*delivered on 29<sup>th</sup> November, 2024 in MCELRC Number E1903/2022)*

**CORAM**

***Before Lady Justice J.W.Keli***

***C/A Otieno***

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the Ruling and Orders of the Hon. P.K. Rotich (CM) delivered on 29<sup>th</sup> November, 2024 in MCELRC Number E1903/2022 between the parties filed a memorandum of appeal dated the 27<sup>th</sup> of December 2024 seeking the following orders:-

**a)The appeal be allowed.**

**b)An order be made setting aside the subordinate court’s Ruling and Order striking out the Appellant’s suit with costs to the Respondent and the same be substituted**

**with an order dismissing the Respondent's preliminary objection dated 19<sup>th</sup> May 2024.**

**c) The court do order amendment of the memorandum of claim dated 24<sup>th</sup> October 2022 to rectify any errors in the claim for the effectual and complete determination of the real questions in dispute between the parties herein.**

**d) Costs of the appeal be awarded to the Appellant.**

### **GROUNDS OF THE APPEAL**

2. The Honourable Trial Magistrate erred in law in misapprehending and misapplying the general principles in *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* 1969 E.A 696 in determining the Respondent's Notice of Preliminary Objection dated 19<sup>th</sup> May 2024.
3. The Honourable Trial Magistrate erred in law and in fact in entertaining and/or delving into issues of fact while making a determination on the preliminary objection raised by the Respondent.
4. The Honourable Trial Magistrate erred in law and in fact by failing to find and hold that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.
5. The Honourable Trial Magistrate erred in law and in fact by failing to find and hold that the legal threshold for striking out of pleadings had not been met or satisfied.

6. The Honourable Trial Magistrate erred in law and in fact in failing to find that a court of law may only strike out a suit where it discloses no semblance of a cause of action or defence and is incurable by amendment.
7. The Honourable Trial Magistrate erred in law and in fact in making a decision against Article 159 (2) (d) of the Constitution of Kenya 2010 that provides that justice shall be administered without undue regard to procedural technicalities.
8. The Honourable Trial Magistrate erred in law and in fact in disregarding and/or failing to consider the Appellant's submissions and legal authorities relied on in support thereof.
9. The Honourable Trial Magistrate erred in law and in fact in failing to fully analyze the Appellant's case and giving undue weight to the Respondent's case and least weight to the Appellant's case.
10. The Honourable Trial Magistrate erred in law and in fact in striking out the Appellant's suit dated 24<sup>th</sup> October 2022 thereby occasioning gross miscarriage of justice.

#### **BACKGROUND TO THE APPEAL**

14. The Appellant filed a memorandum of claim dated 24<sup>th</sup> October 2022 against the Respondent seeking the following orders: -
  - a. A declaration that the claimant's termination from employment was unfair, wrongful and unlawful.

- b. A declaration that the claimant was discriminated against based on her sex and pregnancy in violation of Section 5 (3), Section 46 (a) and 46 (g) of the Employment Act 2007, and Article 27 (5) and Article 41 (1) of the Constitution.
- c. An order for the respondent to pay to the claimant her statutory entitlements and/or terminal dues and compensatory damages as set out in paragraph 16 hereinabove.
- d. General damages for discrimination on account of pregnancy and sex.
- e. Interest on (c) and (d) above at Court rates.
- f. Costs of the suit.
- g. Any other relief that this Honourable Court may deem fit and just to grant.

(pages 9-12 of Appellant's ROA dated 29<sup>th</sup> April 2025).

15. The Appellant filed, alongside her memorandum of claim, a verifying affidavit, list of witnesses, witness statement and list of documents with the bundle of documents attached, all dated 24<sup>th</sup> October 2022 (pages 13-45 of Appellant's ROA).

16. The suit was opposed by the Respondent who entered appearance and filed a notice of preliminary objection dated 19<sup>th</sup> May 2024 (pages 46-47 of ROA).

17. In response to the preliminary objection, the Appellant filed grounds of opposition dated 31<sup>st</sup> May 2024 (pages 48-49 of ROA).

18. The court issued directions that the preliminary objection be disposed of by way of written submissions. The parties complied (pages 125-127 of ROA)

19. The Trial Magistrate Court delivered its ruling on the 29<sup>th</sup> of November 2024, allowing the Respondent's preliminary objection and striking out the suit for being incompetent (ruling at pages 128-129 of ROA).

### **DETERMINATION**

20. The appeal was canvassed by way of written submissions. Both parties filed.

21. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:-

*“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”*

22. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

*“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong,*

*because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.’’*

### **Issues for determination**

23. In their submissions dated the 10<sup>th</sup> of July 2025, the Appellant identified one issue for determination:

- i. Whether the learned trial Magistrate correctly applied the law and principles relating to the preliminary objection.

24. On their part, the Respondent identified the following issues for determination in their submissions dated the 11<sup>th</sup> of July 2025.

- i. Whether the appeal dated 27<sup>th</sup> December 2024 has merit.

25. The court finds that the issue for determination is whether the Learned Magistrate erred in law in striking out the suit.

### **Decision**

26. The appellant, vide a memorandum of claim dated 24<sup>th</sup> October 2022, sued the Board of Management of Nairobi International School, alleging unfair termination and discrimination on account of pregnancy and sex.

27. The respondent entered an appearance and filed a response dated 19<sup>th</sup> May 2024 to the claim, together with a notice of preliminary objection dated 19<sup>th</sup> May 2024, where the following grounds were raised-

- That the name of the Respondent (The Board of Management of Nairobi International School) should be struck out of the pleadings on account of the fact that it lacks legal capacity to be sued.
- The Respondent is not a legal entity that can be properly sued in the matter.
- That enjoining the Respondent in the suit is an abuse of court process and the suit should be struck out.’’

28. The Appellant in response, filed grounds of opposition to the notice of preliminary objection to wit:-

a. *THAT Order 1 Rule 9 of the Civil Procedure Rules, 2020 which is couched in mandatory terms makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.*

b. *THAT Articles 159(2)(d) of the Constitution of Kenya, 2010 provides that justice shall be administered without undue regard to procedural technicalities.*

c. *THAT the legal threshold for striking out of pleadings as held in several case law has not been met/satisfied.*

d. *THAT it is trite law that a Court may only strike out a suit where it discloses no semblance of a cause of action or defence and is incurable by amendment.*

e. *THAT at any rate, Courts of law are enjoined to sustain suits rather than terminate them on technicalities, unless the case appears hopeless and beyond redemption.*

f. *THAT the misjoinder alleged by the Respondent cannot be said to have rendered this suit so hopeless that it cannot be salvaged by an amendment of the Memorandum of Claim*

*which can be done at any time before judgment as per Order 1 Rule 10(2) of the Civil Procedure Rules.*

*g. THAT the Preliminary Objection was an afterthought designed to obfuscate and delay justice and should therefore be dismissed with costs.*

29. The trial court directed that the preliminary objection be canvassed first by way of written submissions. The trial court then delivered the impugned ruling dated 29<sup>th</sup> November 2024 striking out the suit as follows:- *‘The respondents avers that its name should be struck out of the pleadings herein as it capacity to sue and be sued.*

*The issue for determination is whether the BOG of Nairobi international School has locus standi to sue and be sued.*

*It's my findings that's BOG of Nairobi International School is not a legal entity capable of suing and being suing and being sued. It is therefore ordered that this suit is struck out as the same is incompetent.*

*The court, however, makes no orders as to cause considering the humble financial and social status of the claimant.’*

30. The appellant submitted that the issue under the preliminary objection was a misjoinder of parties the claim having been brought against the Board of Management and not the company Safe Haven Limited trading as Nairobi International school. That this being a private school it was erroneous to sue a Board of Management. The appellant submits that the issue of the company was not stated in the Preliminary Objection but in the submissions. That the facts of the employment had not been ascertained hence the Notice

of Preliminary Objection did not meet the threshold set out in the landmark case of Mukisa Biscuits Manufacturing Co. Ltd v West End n Distributors (9169)EA 696. The court established that the crux of the preliminary objection was joinder and legal capacity of sued party as per the grounds of objection, namely- *‘That the name of the Respondent (The Board of Management of Nairobi International School) should be struck out of the pleadings on account of the fact that it lacks legal capacity to be sued.;The Respondent is not a legal entity that can be properly sued in the matter.;That joining the Respondent in the suit is an abuse of court process and the suit should be struck out.’* In a standard claim of employment termination, the respondent is the employer. The appellant submitted that the joinder of the wrong party could be remedied by amendment and further relied on the provisions of Order 1 Rule 9 of the Civil Procedure Rules, 2010, which provides that:-*"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."*

31. The appellant submitted that Order 1 Rule 9 of the Civil Procedure Rules is couched in mandatory terms and makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. In *William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others* [2016] eKLR the Court of Appeal held that:-*"Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit."* The appellant further relied on the decision of the court in *Maureen Onsongo v EOH Limited an EOH/Copy Cat Limited*

Company [2021] eKLR Hon. Justice Dr. Jacob Gakeri while faced with a similar preliminary objection to the one filed by the Respondent had the following to say:

*"27. As already observed, Order 1 Rule 9 of the Civil Procedure Rules is couched in mandatory terms on the issue of misjoinder and there is sufficient judicial authority on this point of law.*

*28. The Court is of the view that the appropriate remedy by the Respondent would have been to move the Court to have the name of the improperly joined party struck out of the proceedings.*

*29. Lastly, the misjoinder cannot be said to have rendered the suit so hopeless that it cannot be salvaged by an amendment of the statement of claim which can be done at any time before judgment as per Order 1 Rule 10(2).*

*30. In the final analysis, the preliminary objection dated 3rd August 2021 is dismissed with no order as to costs. Suit to be heard on merits." [Emphasis Added]*

32. Conversely, the Respondent submitted that it objected to the locus standi of the Respondent in participating in the suit as it lacked legal capacity to be sued. It relied on the decision in Hussein v Gediş Adan (interested Party) (Environment & Land Case E009 of 2024) [2025] KEELC 931 (KLR) the court considered that, 11. The issue whether or not a party has locus standi is a pure point of law and satisfies the criteria of what should be raised as a Preliminary Objection as established by the Court of Appeal in the Case of Mukisa Biscuit Manufacturing Co. Ltd-vs- West End Distributors Ltd (1969) EA 696 where Newbold, P, stated thus:-

*"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is usually on the assumption that all the facts pleaded by the other side*

are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion ---". Law JA in the same case also stated thus:-

"A Preliminary Objection consists of a point of Law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

*Locus standi goes to the jurisdiction of the Court to entertain the suit as it relates to the capacity of a party to sustain a suit. If a party lacks capacity, any suit commenced by such a party and/or against such a party is incompetent and null and void and cannot be sustained by the Court."*

33. The Respondent relied on the case of Komu v Principal Magistrates Court at Kerugoya & 2 others (Environment & Land Case E021 of 2023) [2024] KEELC 3319 (KLR) where it was stated that: "11. *Locus standi* is defined in *Black's Law Dictionary, 9th Edition (page 1026)* as "the right to bring an action or to be heard in a given forum". In the case of Alfred Njau and Others .. Vs.. City Council of Nairobi (1982) KAR 229, the Court held that;-"the term *Locus Standi* means a right to appear in Court and conversely to say that a person has no *Locus Standi* means that he has no right to appear or be heard in such and such proceedings". A claim that one has no *locus standi* challenges a party's right to be heard before a court and if a determination is made in the affirmative then this issue has the capability of disposing of the suit.

34. The Respondent contended that a claim that a party lacks locus standi therefore is a pure point of law and one that needs to be raised and determined at the earliest opportunity. That it is plain that if the suit had been allowed to proceed then any subsequent orders that would have issued as against the Respondent would not be enforceable on account of non-existence of the party and the proceedings would have been a mere academic exercise. This position is supported in the case of TJO (Suing as father and next friend of NM (Minor) v Riara Springs Girls' High School (Petition 468 of 2019) [2022] KEHC 15456 (KLR) which held as follows:"47. *The issue of the respondent's legal standing has not just arisen. The respondent in the replying affidavit raised it and the petitioner ought to have acted on it. No assumptions ought to be made on such matters. It is important for the court to be sure that in case of a successful judgment a party will not have challenges in executing it. The position is that the petitioner has failed to show that the respondent is legal entity capable of suing and being sued. For this lapse in the petitioner's case I have no option but to strike out the petition without going into the merits. The petition is struck out with no order as to costs*" That with the present appeal no material evidence or legal foundation has been placed before this Honourable Court to establish the legal capacity of the Respondent, and therefore the appeal discloses no triable issue.

35. The respondent further submitted that contrary to the Appellant's assertion that the Learned Magistrate delved in issues of fact this is false as a mere cursory look at the pleadings will determine that the Respondent is a private school owned by a Limited Liability Company, Safe Haven Limited trading as Nairobi International School. That the definition of a private school is clearly laid out in section 2 of the Basic Education Act No 14 of 2013 as a school

established, owned or operated by private individuals, entrepreneurs and institutions. In the present case, the school is registered and licensed as a private school to undertake matters relating to basic education and training as under sections 49 and 50 of the Basic Education Act No. 14 of 2013. Under section 55(1) of the Basic Education Act No. 14 2013, only public schools are required to establish a Board of Management which clearly does not apply to the Respondent being a private school, a fact well known to the Claimant/Appellant as a former employee. That the import of this is that the legal status of a private school and a public school is distinct. Whereas a public school can be sued in the name of the Board of Management or School Committee, a private school can only be sued in the name of the owner or the entity under whose name it is registered. That contrary to the Appellant's assertion that this is a simple misjoinder issue and that she should have been allowed to amend the pleadings we wish to counter this by pointing out that it is the responsibility of a litigant to ascertain the proper party to be sued before rushing a instituting a matter in court.

36. The respondent further relied on the case of Mavoko Land Development Company Limited v Mlolongo Catholic Church & 2 others [2022] eKLR the court opined as follows: "47. *The 2nd defendant having denied legal capacity to be sued, it behooved the plaintiff to lead evidence name. on the legal capacity of the 2nd defendant to be sued in its The plaintiff did not do so. In Janto Construction Company Lid v Enock Sikolia & 2 others [2020] eKLR it was stated thus; "The claimant has a duty of ascertaining the legal status of a party intended to be sued. The reason being that it is only those entities which persons which can successfully sue or be sued. Instituting legal proceedings against a non-legal either natural or legal entity renders the suit a non-starter."* Further, in the case of TJO (Suing as father

and next friend of NM (Minor) v Riara Springs Girls' High School (Petition 468 of 2019) [2022] KEHC 15456 (KLR) (Constitutional and Human Rights) (18 November 2022) (Judgment), the Court agreed with the sentiments in Maurice Ooko Otieno v Mater Misericordiae Hospital in which the court rightly captured the inescapable legal position by stating thus: "*48. The law requires that a suit be brought against a legal entity. This is an individual, a limited liability company, the Attorney General - on behalf of government department, certain parastatals and or co-operations. Mater Misericordiae Hospital has not been described as a limited liability company. It therefore has no legal capacity to be sued. The plaintiff required to find out what the status of the said hospital is. If it is a business name or a firm then order 29 CPR requires to be complied with. If it deals with trustees, Executors and administrators then order 30 CPR required to be looked into.*"

37. The respondent stated that it dissociates itself with the Appellant's averment that a suit can only be struck out where it fails to disclose a cause of action since the lodging of a suit against a wrong party or non-legal party is also a clear ground for striking out pleadings as evidenced in the aforementioned legal authorities. Finally, that the Appellant cannot be aided in his appeal under Article 159(2)(d) of the Constitution of Kenya since the institution of a suit against a non-legal entity is not a mere procedural issue but a conscious decision made by a party who ought to have known better and therefore the suit can only suffer the fate of being struck out with costs. In the case of Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR, the Supreme court stated as follows; "In the Law Society case, this Court reiterated its earlier decision when it warned itself on a blanket invocation of Article 159 thus: "*Indeed, this Court has had occasion to remind litigants that Article 159(2)*

*(d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by- case basis".*

### **Final Decision**

38. The court having considered the positions of both parties and on perusal of pleadings and documents before the lower court, finds that in paragraph 3 of the response to the claim what was denied was enjoinder of the board of management of the respondent stating it was not a legal entity. That to the mind of the court amounted to a case of misjoinder. The respondent then proceeded to respond on merit to the issues raised in the claim. The court finds that the misjoinder could have been cured by way of amendment of the claim to omit the word, 'Board of Management'. The suit was not helpless as it attracted defence on merit. The court upheld the decision in William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others [2016] eKLR where the Court of Appeal held that: "*Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.*" The claimant had filed a copy certificate of service which indicated that she was employed by Nairobi International School (page 24 of ROA). The respondent filed letter of offer of employment titled 'Nairobi International School' and signed for Safe Haven Limited T/A Nairobi International School; and the employment contract ( at page 38 of ROA) indicating employer as Safe Haven Ltd. The respondent also filed the aforesaid certificate of service stating the appellant was employed by Nairobi International School. The court finds that

from the pleadings and documents before the trial court the fact of who was the employer was not ascertained hence the preliminary objection did not meet the threshold in Mukisa Biscuit Manufacturing Co. Ltd-vs- West End Distributors Ltd (1969) EA 696 where Newbold, P, stated thus:-

*‘A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion ---’.* Law JA in the same case also stated thus:-

*"A Preliminary Objection consists of a point of Law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit. ‘’* The court for the foregoing reasons holds that the trial court erred in striking out the suit based on misjoinder of parties when the same could have been cured by amendment of pleadings as it was evident from the documents before the court that the Nairobi International school had indicated to the appellant in its documents (certificate of service) that it was the employer and had responded to the claim substantially.

39. The appeal is allowed and the Ruling and Orders of the Hon. P.K. Rotich (CM) delivered on 29th November, 2024, in MCELRC Number E1903/2022 are set aside and substituted with a ruling that the Notice of Preliminary Objection dated 19<sup>th</sup> May 2024 is disallowed with costs to the claimant in the cause. The suit is reinstated and remitted to the trial court for proceeding and determination before any magistrate other than Hon P.K Rotich.
40. Costs of the appeal are awarded to the appellant.

41. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup>  
DAY OF SEPTEMBER, 2025.**

**J.W. KELI,**

**JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellant – Mugwe.

Respondent: Ms. Achieng h/b Wahome.

ORIGINAL