



**Karimi v Financial Access East Africa Limited (Cause E487 of 2023)  
[2024] KEELRC 1243 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1243 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E487 OF 2023  
NZIOKI WA MAKAU, J  
MAY 20, 2024**

**BETWEEN**

**MARY KARIMI ..... CLAIMANT**

**AND**

**FINANCIAL ACCESS EAST AFRICA LIMITED ..... RESPONDENT**

**RULING**

1. The 2<sup>nd</sup> Respondent/Applicant filed a Notice of Preliminary Objection dated 28<sup>th</sup> July 2023 against the entire Claim on the grounds that:
  - i. There is no substantive relationship between the Claimant and the 2<sup>nd</sup> Respondent that falls within the province of the *Employment Act*, 2007;
  - ii. The Claimant is not and cannot be an employee of the 2<sup>nd</sup> Respondent as contemplated by the provisions of Section 2 of the *Employment Act*, 2007;
  - iii. Parts 3 and 4 of the *Employment Act*, 2007 could not apply to the Claimant in its relationship with the 2<sup>nd</sup> Respondent, as none exists;
  - iv. Part 5 of the *Employment Act*, 2007 in respect to rights and duties in employment cannot apply to the Claimant as against the 2<sup>nd</sup> Respondent;
  - v. The rights and obligations of an employer and an employee as stipulated in Sections 41, 43, 44, 45, 46, 48 and 49 of the *Employment Act* cannot be construed as to exist between the Claimant and the 2<sup>nd</sup> Respondent in the present claim;
  - vi. The Employment and Labour Relations Court as contemplated, stipulated and constituted under Article 162(2) of *the Constitution* of Kenya, 2010 has no jurisdiction to hear and determine this claim as presented against the 2<sup>nd</sup> Respondent;



- vii. There was neither a contract of employment nor contract for service between the Claimant and the 2<sup>nd</sup> Respondent capable of being subjected to the provisions of the [Employment Act](#), 2007 and [Labour Relations Act](#), 2007 so as to fall within the jurisdiction of this Honourable Court;
  - viii. The claim against the 2<sup>nd</sup> Respondent is frivolous, malicious and an outright abuse of the court process;
  - ix. The claim against the 2<sup>nd</sup> Respondent to be struck out with costs.
2. In response and opposition to the Notice of Preliminary Objection, the Claimant/Respondent swore a Replying Affidavit on 14<sup>th</sup> August 2023 wherein she averred that the said preliminary objection is bad in law and unmerited as it raises factual issues, impure and unclear legal issues requiring the court's ascertainment. That the 2<sup>nd</sup> Respondent/Applicant has raised questions on whether the Claimant was its employee and her relationship with the 2<sup>nd</sup> Respondent, which require factual evidence that can only be adduced at the trial stage and cannot be determined through a preliminary objection. The Claimant further averred that she was duly employed by the 2<sup>nd</sup> Respondent, with clear duties as enumerated in her Employment Contract and that she was expected to report to the 2<sup>nd</sup> Respondent's CEO and not to the 1<sup>st</sup> Respondent. She argued that considering any person, including the 2<sup>nd</sup> Respondent, can be joined as a respondent so long as an allegation exists that the person infringed or threatens to infringe the claimant's fundamental rights, striking out the 2<sup>nd</sup> Respondent before these rights are adjudicated would deny her the right to prosecute infringement of constitutional rights in court. That including the 2<sup>nd</sup> Respondent as a party in this suit is thus justifiable and necessary to ensure the Claimant's grievances, including the infringement of her constitutional rights, are adequately addressed and justice is served.
  3. In response to the assertion that this Court has no jurisdiction over the 2<sup>nd</sup> Respondent to hear and determine this matter, the Claimant/Respondent averred that this Court is empowered with the requisite jurisdiction as under Articles 162 and 165 of [the Constitution](#) of Kenya. She asserted that the 2<sup>nd</sup> Respondent and its officers were out rightly involved during the recruitment, interview and hiring processes for her position as the Chief Operations Officer of the 2<sup>nd</sup> Respondent and that her salary was paid by the 2<sup>nd</sup> Respondent. That in many instances, she attended the 2<sup>nd</sup> Respondent's Board meetings to brief the board of directors and the advisory board on the performance of the 2<sup>nd</sup> Respondent and to further be accountable to the 2<sup>nd</sup> Respondent generally as indicated in her Employment Contract. The Claimant's case is that it is therefore evident that she is not a stranger to the 2<sup>nd</sup> Respondent who was its true employer and that she has a right to approach this Honourable Court to seek justice. She contends that any loss or damage resulting from the 2<sup>nd</sup> Respondent's participation in these proceedings up to the end is compensable by way of costs, unlike the severe loss the Claimant would suffer if the 2<sup>nd</sup> Respondent is struck off this suit. It was the Claimant/Respondent's averment that the instant preliminary objection is unmeritorious, an abuse of the process and meant to delay adjudication of the substantive suit herein and that it is in the interests of justice that the same be dismissed with costs.
  4. 2<sup>nd</sup> Respondent/Applicant's Submissions  
The 2<sup>nd</sup> Respondent/Applicant submitted that the gist of their Objection emanated from the amendment the Claimant made in her Memorandum of Claim and subsequent inclusion of the 2<sup>nd</sup> Respondent as a party to these proceedings. The Applicant argued that points of law need not be responded to by way of affidavit and that the Claimant's response to its Objection in her Replying Affidavit is misplaced in law. It was the 2<sup>nd</sup> Respondent/Applicant's submission that section 2 of the [Employment Act](#) describes an employer as, "...any person, public body, firm, corporation or company



who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company” and that the 2<sup>nd</sup> Respondent having interviewed the Claimant and managed the employment relationship does not give rise to an employment relationship between the parties. In this regard, the Applicant relied on the case of Benard Ochieng Oduor v Trade Winds Aviation Services Limited & another [2020] eKLR, in which Onyango J. agreed that the 2<sup>nd</sup> Respondent in the suit was not a necessary party to those proceedings since there was no employment relationship between the Claimant and the 2<sup>nd</sup> Respondent. The said Court went on to find that the preliminary objection filed therein had merit and was accordingly allowed to effect that the 2<sup>nd</sup> Respondent was removed from the proceedings. It was the Applicant’s submission that it had ably demonstrated that this Honourable Court can proceed with only the 1<sup>st</sup> Respondent as a party and determine the claim and that the Claimant has no recourse against the 2<sup>nd</sup> Respondent. It thus urged this Court to strike out the name of the 2<sup>nd</sup> Respondent from these proceedings with costs.

5. Claimant/Respondent’s Submissions

According to the Claimant/Respondent, the issues for determination by the Court are:

- a. Whether the 2<sup>nd</sup> Respondent’s preliminary objection meets the legal standard known to law and if it is merited.
- b. Whether the 2<sup>nd</sup> Respondent may be struck off the proceedings in light of the serious fundamental rights violations levelled against them by the Claimant.
- c. Whether the inclusion of the 2<sup>nd</sup> Respondent in the present claim is lawful and proper.

6. The Claimant/Respondent submitted the Court of Appeal, in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, laid down the principle as to what constitutes a preliminary objection to wit that for preliminary objection to be valid, it must be on the point of law and founded on facts that are not in dispute. Moreover, a preliminary objection would not be sustainable if evidence is required to be adduced to establish the facts. The Claimant further cited the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR in which the Supreme Court stated that the application of a preliminary objection to undisputed facts should lead to one conclusion: that the facts are incompatible with the point of law upon which the objection is founded. The Claimant/Respondent argued that the present preliminary objection is not hinged on any specific point of law but on contentious facts that cannot be entertained by this Court at this preliminary stage and that the Court should find that the 2<sup>nd</sup> Respondent’s preliminary objection has not met the legal standard for a preliminary objection.

7. It was the Claimant/Respondent’s submission that this Court has jurisdiction to hear and determine any claim of violation or infringement of the Bill of Rights, including the right to fair labour practices. That having particularized the violations of fundamental rights by and under the authority of the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent must remain in the suit to allow the Claimant ventilate her issues upon which the Court shall make a determination. She thus urged this Court to allow the inclusion of the 2<sup>nd</sup> Respondent as there is a claim against them for the violation of the Claimant’s rights. In support of this submission, the Claimant/Respondent relied on the holding in the case of Rose Wangui Mambo & 2 others v Limuru County Club and 17 others [2014] eKLR that any person can be joined as a respondent so long as there is an allegation that the person infringed or threatens to infringe the petitioner’s fundamental rights.

8. The Claimant/Respondent argued that there is a growing model of corporate organizations where companies outsource their resources through an agent. That the same has resulted in the concept



of the triangular employment relationship (TER), also known as the tripartite agency relationship. She noted that a triangular employment relationship has been described as a non-standard form of work (NSW) as it deviates from the standard employment relationship (SER), which has a single employer and an employee. That the Kenyan employment framework focuses on SERs, envisages direct employment relationships with a single employer, and does not adequately cater to NSWs. According to the Claimant, the Kenyan framework is thus unable to deal with the unique challenges outsourced workers face in the determination of their employment status. She asserted that in the instant suit, this Court is called upon to consider whether the Claimant was an employee of the 2<sup>nd</sup> Respondent despite her entering into a contract of service with the 1<sup>st</sup> Respondent, who was the 2<sup>nd</sup> Respondent's agent. The Claimant/Respondent relied on the "control test" i.e. that a person is deemed to be in an employment status if the consumer of their services exerts control and determines their working hours, leave days, allowances and where to work from. That in the present case, it was the 2<sup>nd</sup> Respondent who was controlling her performance, providing the work-related resources and directly issuing to her all instructions and salary. That it is also a fact that she was interviewed and inducted into the 2<sup>nd</sup> Respondent's company by the directors and her job description and the organization structure described her as the COO of the 2<sup>nd</sup> Respondent.

9. Further, the Claimant/Respondent submitted that the agency agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent was merely a convenience arrangement to allow the 2<sup>nd</sup> Respondent, a foreign-based company in Amsterdam, Netherlands, to open its offices in Kenya. That notably, the 2<sup>nd</sup> Respondent CEO - Mr. Eelko Bronkhorst, was also the 1<sup>st</sup> Respondent CEO and the one who executed her contract of service. She argued that evidently, the corporate veil between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent was merely a legal technique of guaranteeing the 2<sup>nd</sup> Respondent compliance with the Kenyan laws. She also relied on the integration test as canvassed in *Christine Adot Lopeyio v Wycliffe Mwathi Pere* [2013] eKLR, where the Court opined that the integration test is when the worker is subjected to the rules and procedures of the employer rather than personal command and that the employee is part of the business, and their work is primarily part of the business.
10. The preliminary objection taken is one that does not fit within the mould of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (supra). The Court of Appeal for East Africa deprecated the increasing prevalence of unnecessary preliminary objections being raised. At page 701 Sir Charles Newbold, JA warned:

... The improper raising of points by way of preliminary objection does nothing but to unnecessarily increase costs and on occasion, to confuse the issues. This improper practice should stop."

11. His words seem to have fallen on deaf ears and have not had any effect as objections such as the one before me continue to be made. A preliminary objection can only be taken in clear cut cases and not where facts have to be ascertained. In this case, the Court will have to ascertain the employment relationships herein and whether the Claimant was an employee of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent or whether there was actually no employment relationship between the Claimant and the 2 Respondents. This preliminary objection was unnecessary and is dismissed with costs to the Claimant. Directions on the disposal of the suit will follow immediately upon the delivery of this Ruling.

It is so ordered.

Dated and delivered at Nairobi this 20<sup>th</sup> day of May 2024

**Nzioki wa Makau**

**JUDGE**



