



Mugo v Technical Institute Group of Schools & another (Employment and Labour Relations Cause E428 of 2022) [2024] KEELRC 1210 (KLR) (17 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1210 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E428 OF 2022**

AN MWAURE, J

MAY 17, 2024

BETWEEN

PATRICK S. MUGO CLAIMANT

AND

TECHNICAL INSTITUTE GROUP OF SCHOOLS 1ST RESPONDENT

KULDIP SINGH 2ND RESPONDENT

RULING

1. The Respondents filed a Notice of Motion dated 5th December 2023 seeking the following orders that:-
 - a. spent
 - b. spent
 - c. the 2nd Respondent's name be struck out from the suit and the claim against the 2nd Respondent be discontinued unconditionally.
 - d. the costs of this Application be awarded to the Respondents

Respondents/Applicants' Case

2. The Respondents/Applicants aver that although the 2nd Respondent is a director of the 1st Respondent, he is separate and distinct from the 1st Respondent.
3. The Respondents/Applicants aver that the Claimant has sued the 2nd Respondent in his personal capacity as a director of the 1st Respondent which offends the legal principle in *Salmond v Salmond*.
4. The Respondents/Applicants aver that the presence of the 2nd Respondent in this suit is superfluous, will embarrass and delay the fast resolution of the dispute.



Claimant/Respondent's Case

5. In opposition to the Application, the Claimant/Respondent's advocate filed a replying affidavit dated 11th December 2023
6. The Claimant/Respondent avers that the Applicants raised initially the issues in this application orally before court and the court directed that it be canvassed during hearing. Therefore, this application is a delaying tactic intended to frustrate the hearing of the main suit after several prior failed attempts.
7. The Claimant/Respondents aver that the issues raised in the current application can only be resolved through the substantive hearing and not at an interim stage.

Respondents/Applicants' Submissions

8. It is the Respondents/Applicants submission that the suit against the 2nd Respondent, a known agent and director of the 1st Respondent which is a limited liability company cannot be sustained; as the Claimant failed to seek leave to proceed with the claim against the 2nd Respondent.
9. The Respondents/Applicants submitted that the Claimant's suit against the 2nd Respondent is frivolous, vexatious and a gross abuse of the process of court, and the same should be dismissed with costs.

Claimant/Respondent's Submissions

10. The Claimant/Respondent submitted that in a similar matter of *Ondicho Mesback Rakamba vs Kuldip Singh & 4 Others*, Petition 18 of 2017, the same Applicant sought he be struck out from the suit and the claim against him be discontinued unconditionally as he was not the Petitioner's employer. The court dismissed the application on grounds that the 1st Respondent therein was properly suited being the Managing Director of the 5th Respondent therein.
11. The Claimant/Respondent submits that the 2nd Respondent having admitted to be a director of the 1st Respondent, he is properly suited and is a relevant party to the claim.

Analysis and Determination

12. Having considered the application, affidavits and submissions on record, the issue for determination is whether the 2nd Respondent's name should be struck out from the suit and the claim against him be discontinued unconditionally.
13. In *Wago Roba Molu v Personal Systems Computer Limited* [2021] eKLR, the court held:

“Section 2 of the *Employment Act* (Act) defines an employer to mean 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.

In this regard, upon incorporation, a corporate entity, as the respondent herein, is capable of entering into all manner of contracts including, employment. Upon entering into an employment contract, such an entity is bound by the provisions of the *Employment Act* particularly in regards to the rights and responsibilities flowing therefrom. Where the employment period exceeds 3 months, such rights and responsibilities are to be reduced into writing. It is that written document that would constitute the employment contract



between the parties. The details of such an employment contract include, particulars of the parties, the job description, commencement date, place of work and remuneration.

Further, and more significantly, the employee would ordinarily be subject to the employer's directions, commands and/or rules.

In his testimony, the claimant admitted that the said Mr. Mahmood or his uncle would pay his salary. In addition, he stated that his place of work was Mr. Mahmood's residence in parklands area. It is notable that the claimant never at any one time stated or even remotely suggested that he rendered his services from the respondent's office premises. If anything, his entire testimony revolved around Mr. Mahmood. As a matter of fact, it was his testimony that it was the said Mr. Mahmood who verbally terminated his services.

On the other hand, the respondent asserted that it manages its daily operations from Regal Plaza and to this end, produced a lease agreement to confirm the same. The claimant was very clear in his testimony that he rendered his services from the residence of Mr. Mahmood and that the said house was situated in Parklands near Wambugu Hotel. Further, he never indicated whether or not he had ever interacted with RW1, an employee of the respondent.

The claimant in this case had the onus to prove his case on a balance of probability and in particular, that he was actually an employee of the respondent. This he failed to do.

It is therefore apparent that from the testimony of the claimant and evidence on record, it was the said Mr. Mahmood who was his employer and not the respondent.

It is common ground that Mr. Mahmood is a director of the respondent. In view of the fact that the evidence presented points to the fact that the claimant was employed by Mr. Mahmood, does that then make the respondent liable in this regard? The answer to this question lies in the principles of corporate personality as espoused in the celebrated case of *Salomon v Salomon & Co. Ltd.* [1897] AC.

It is trite law that a company is a separate legal entity and thus a juristic "person" in the eyes of the law. This was well elaborated in the *Salomon case* (supra).

In the case of *Victor Mabachi & Anor v Nurturn Bates Ltd* NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR, the Court of Appeal reiterated the principles set out in the Salomon case as follows, "A company as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."

14. In view of the foregoing, it is necessary to deduce whether the Claimant was under the control of the 2nd Respondent and whether the 2nd Respondent was directly involved in the matters raised in this suit and did he succeed to lift the veil.
15. The court finds no reason to deduce the 2nd respondent needs to be enjoined in this suit and that claimant lifted the corporate veil. The claimant has not presented any evidence to establish that the 2nd respondent was involved in this suit. The appointment letter given to the claimant by the respondent is issued by the 1st respondent even though it is signed by the 2nd respondent. It is proper for a Director to sign documents on behalf of the company.
16. The court finds no reason to enjoin the 2nd respondent in the suit while there is the 1st respondent who is a juristic person. The Court finds the application by the respondents dated 3rd December 2023 is merited and the 2nd respondent's name is struck out from the suit and the said suit is discontinued as far as the 2nd respondent is concerned and case can proceed if they wish as against 1st respondent.



17. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF MAY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

