



REPUBLIC OF KENYA



**Musau v Adrian Kenya Limited (Cause E167 of 2024)
[2024] KEELRC 2203 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2203 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E167 OF 2024
JK GAKERI, J
SEPTEMBER 18, 2024**

BETWEEN

STANLEY KALILE MUSAU CLAIMANT

AND

ADRIAN KENYA LIMITED RESPONDENT

RULING

1. Before the Court for determination is the Respondent's Notice of Motion dated 31st May, 2024 seeking orders that:-
 1. Leave be granted to the Respondent to amend its defence.
 2. The Claimant's suit against the Respondent be struck off.
 3. Costs be provided.
2. The Notice of Motion is based on the grounds set out on its face and the Supporting Affidavit of Benard W. Njoroge sworn on 31st May, 2024 who deposes that he is the Managing Director of the Respondent and authorised to swear the affidavit.
3. The affiant deposes that the Respondent did not engage the Claimant as an employee and no salary was paid as alleged.
4. The affiant further deposes that although the Respondent filed a defence dated 22nd April, 2024, it is desirous of amending the same.
5. The affiant deposes that the Respondent is the wrong party to be sued, the suit is fatally defective and ought to be struck out.



Response

6. In his Replying Affidavit sworn on 24th June, 2024, the Claimant deposes that he was employed by the Respondent/Applicant company on a one (1) year fixed term contract effective 1st August, 2023 as the Group Commercial Director at a monthly salary of Kshs.654,631.63.
7. The Claimant further deposes that the Respondent/Applicant comprises Adrian Kenya Ltd, Jos Hansen East Africa, Jos Hansen Tanzania and Jos Hansen Zambia and his place of work was the Respondent's Head Office and Jos Hansen East Africa Office.
8. That although payslips were issued, no payment was effected hence the instant suit.
9. That although the Respondent denies paragraphs 5 – 9 of the claim, it admits that the separation was mutual.
10. The affiant deposes that the averments by Mr. Benard W. Njoroge in paragraphs 4, 6 and 7 of the Supporting Affidavit are untrue and intended to delay the hearing of the suit.
11. That the application is an afterthought and made in bad faith.

Applicant's submissions

12. By 12th August, 2024 when the Court retired to prepare this ruling, the Applicant had not filed its submissions even after having been accorded 14 days effective 12th July, 2024.

Respondent's submissions

13. As to whether the Claimant was an employee of the Respondent/Applicant, counsel for the Claimant submits that evidence on record showed that indeed the Claimant was employed by the Respondent effective 1st August, 2023 at Kshs.654,631.63 per month and the parties entered into a mutual separation agreement dated 22nd December, 2023 which acknowledges the existence of an employment relationship between the Claimant and the Respondent.
14. As regards the striking out of the suit, counsel urges that the Claimant stands to suffer irreparable harm as his dues are unlikely to be paid and his right to fair labour practices will be violated.
15. That the instant application is actuated by bad faith as it seeks leave to amend the defence and striking out of the suit simultaneously.
16. Concerning leave to amend the defence, counsel submits that the applicant had not met the threshold for the same to be granted.
17. Reliance was made on the decisions in Uchumi Supermarkets Ltd & another V Sidhi Investments Ltd Appel No. 192 of 2018 and Joseph Njoroge Mbugua (suing under Power of Attorney) PA 74/5/19 HCCC No. 14 of 2020.
18. Counsel prays for dismissal of the application with costs.
19. The singular issue for determination is whether the Applicant's Notice of Motion dated 31st May, 2024 is merited.
20. It is common ground that the Claimant/Respondent filed the instant suit against the Respondent in early March 2024 and the Respondent/Applicant filed a defence dated 22nd April, 2024.



21. Subsequently, the Claimant filed a response to the Respondent/Applicant's statement of defence on 7th May, 2024.
22. It is unclear as to what precipitated the instant application.
23. Puzzlingly, the Applicant is seeking two reliefs that appear contradictory in that it seeks leave to amend its statement of defence and simultaneously have the Claimant's suit struck out.
24. Concerning the striking out of the suit, the Applicant contends that the Respondent is a corporate entity distinct and separate from its directors and shareholders and/or subsidiaries and attaches copies of the Claimant's payslips as evidence to show that the Claimant's salary was paid by another company or employer.
25. It is trite law that a company is a legal entity, a body corporate distinct and separate from its members and managers or directors as held by the House of Lords in the famous decision in *Salomon V Salomon & Co. Ltd (1897) A.C. 22* and restated in legions of decision.
26. Intriguingly, the applicant has neither provided a copy of its certificate of registration nor the list of directors or shareholders and at any rate the Claimant's action is against the Respondent and none of the members or shareholders are enjoined as a parties.
27. Significantly, the copies of payslips provided by the applicant cannot avail the Respondent in any respect as they are not a contractual documents.
28. Whether or not a person is an employee of another can only be determined on the totality of the evidence before the Court and not at the interlocutory stage. The issue is wholly dependent on the evidence availed by the parties.
29. See *Grain Pro Inc Ltd V Andrew Waithaka Kiragu (2019) eKLR*.
30. Similarly, the applicant's argument that it is not the proper party to the suit appears misplaced, the Applicant has not provided any evidence in support of the claim or demonstrate why it could not have been the Claimant's employer.
31. To the issue whether the Claimant's suit against the Respondent should be struck out on account of want of proper party to the suit or an employer-employee relationship between the parties, the Court returns that the applicant has not provided any credible evidence to justify such an outcome.
32. As regards amendment of the statement of defence by the Respondent has not provided any reason to justify or amend to the statement of defence.
33. The Supporting Affidavit merely states that;

“We had filed a defense dated 22nd day of April, 2024. We now seek leave of the Court that the amended defence be duly admitted (Attached is a copy of the amended defense – bn – 1)”.
34. The Claimant/Respondent avers and submits that the applicant has not demonstrated it has met the threshold of amending its defence.
35. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016;

A party may amend pleadings before service or before the close of pleadings;



Provided that after the close of pleadings, the party may only amend pleadings with the leave of the court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.

36. Whether or not to allow an application to amend pleadings involves the exercise of judicial discretion which must be exercised judiciously depending on circumstances of the individual case.
37. In the instant case, the Applicant/Respondent has not cited any reason, excuse or justification for the grant of leave to amend its statement of defence.
38. Indeed, neither the grounds on which the Notice of Motion is based nor the Supporting Affidavit provide any reason or ground for the amendment.
39. In the circumstances of this case, the Court is constrained to agree with the Claimant/Respondent's submission that the instant application is an afterthought designed to delay determination of the instant suit.
40. In the upshot, the Applicant/Respondent's Notice of Motion dated 31st May, 2024 lacks merit and it is accordingly dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2024.

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

