



**Mutumba v Lieuxeying & another (Cause 89 of 2022)  
[2024] KEMC 175 (KLR) (28 March 2024) (Ruling)**

Neutral citation: [2024] KEMC 175 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS**

**CAUSE 89 OF 2022**

**PA NDEGE, SPM**

**MARCH 28, 2024**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 41(1) & 920, 47, 50**

**IN THE MATTER OF THE EMPLOYMENT ACT 2007, LABOUR RELATIONS  
ACT 2007, AND THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT**

**AND**

**THE ILLEGAL AND UNFAIR TERMINATION OF EMPLOYMENT  
CONTRARY TO SECTION 47 AND 87 OF THE EMPLOYMENT ACT**

**BETWEEN**

**DISHON DONALD MUTUMBA ..... CLAIMANT**

**AND**

**HELEN LIEUXEYING ..... 1<sup>ST</sup> RESPONDENT**

**HAOJUE HOLDINGS (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The defendants/applicants herein have taken out the Notice of Motion dated 14<sup>th</sup> November, 2023 and the same stands supported by the grounds set out on the face thereof. The applicants are seeking an order to the effect that the suit against the 1<sup>st</sup> Respondent be struck out, the 1<sup>st</sup> Respondent's name be struck out from the pleadings herein, and that the costs of the application be provided for.
2. In response, the claimant/respondent filed a Replying Affidavit sworn at Nakuru, by himself, on 11/03/2024 and put forward the following averments:
  - a) That the instant application is vexatious, incompetent, an abuse of the court's process and an afterthought aimed at spinning the wheels of justice in unending circles.



- b) That the entirety of the dispute commenced with a verbal sacking of the claimant herein by the 1<sup>st</sup> respondent which was communicated initially and further to the claimants business manager Ndakal in the following terms
- “Tell Dishon he is sacked and should not come to office.”
- c) That indeed the 1<sup>st</sup> respondent has filed a defense in respect to the claimant’s assertion of the verbal sacking and as such the resolution of the crucial issue cannot be swept below the carpet as the 1<sup>st</sup> respondent is trying to do with the present application as the issuance of such orders may have the consequences of setting in motion an unfair trial acting contra Article 50 of the *Constitution of Kenya* where the 1<sup>st</sup> respondent will not have an opportunity to defend herself of the claims nor the claimant will be in a position to ably assert his case.
- d) That the power of the court to strike out a party’s name cannot be whimsically be invoked in a situation where clear evidence has been led against a respondent like the 1<sup>st</sup> respondent herein who instigated the sacking hence the cause of action herein challenging the sacking.
- e) That no evidence has been led to show if the 1<sup>st</sup> respondent is an employee of the 2<sup>nd</sup> respondent and any assertion thereto remains unproved.
- f) That the nexus between the claimant and the 1<sup>st</sup> respondent is that the verbal pronouncement of sacking was communicated by the 1<sup>st</sup> respondent who by the time was supposedly exercising apparent authority of the 2<sup>nd</sup> respondent.
- g) That contrary to the assertions made, no proof has been tendered to confirm if all the salaries and benefits have been paid either by the 1<sup>st</sup> respondent or the 2<sup>nd</sup> respondent.
- h) That no affidavit has been filed by the 2<sup>nd</sup> respondent to confirm if they are willing to absolve and take responsibility of the actions of the 1<sup>st</sup> respondent that would necessitate the exit of the 1<sup>st</sup> respondent in these proceedings.
- i) That the applicant has come to court with unclean hands and as such is unworthy of any remedy known in law or in equity for reasons that the plaintiff is guilty of bad faith litigation.
- j) That the application be dismissed with costs.
3. The Motion came up for directions on 12/03/2024. Learned counsel for the Claimant/ respondent, Mr. Koome, informed the court that the application is a straightforward one and therefore prayed that the court considers it without any submissions from them. This court has thus considered the grounds stated on the face of the Motion as against the averments in the Replying Affidavit.
4. The brief background of the dispute is that the plaintiff/respondent brought a suit in the nature of an employee-employer dispute for unlawful/unconstitutional termination of employment against the applicants herein, vide the Memorandum of Claim dated 23<sup>rd</sup> May, 2022 and sought for various reliefs including general damages, a declaration of unfair and illegal termination and compensation. The applicants filed a joint response to the claimant’s claim to challenge the averments made in the memorandum of claim; and filed a counter claim; dated on 26/08/2022 and amended on 14/11/2023.
5. It is clear that the key issue for determination at this point concerns the striking out of the 1<sup>st</sup> respondent. The principles offering guidance to the court in determining whether or not to strike out and/or substitute the name of a party are encapsulated under Order 1, Rule 10 (2) of the *Civil Procedure Rules* (“the Rules”) and are as follows:



- i) Whether or not the party to be substituted or struck out is a necessary party to the suit; and
  - ii) Whether or not the presence of such party will assist the court in effectively adjudicating upon and settling all questions arising out of the suit.
6. Further to the foregoing, Order 1, Rule 3 of the Rules prescribes persons who may be joined as defendants in the manner hereunder:

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally or in the alternative, where, if separate suits were brought against such persons, any common law or fact would arise

7. From my perusal of the memorandum of claim, I note that the 1st applicant is sued as an employee/director of the 2nd applicant.<sup>1</sup> These descriptions were admitted in the amended respondents' response to claimant's claim filed by the applicants on 15<sup>th</sup> November, 2023.
8. While I am alive to the legal position that a corporate entity is separate from its directors and/or shareholders, I am also alive to the legal position that in employment cases such as the present one, the proper person to be sued as a defendant is the employer. The jurisdiction of an employment and labor relations court as provided for in Section 12(1) of the Employment and Labor Relations Court Act does not necessarily extend to disputes between or among employees.
9. That said, the question to be answered is whether the 1<sup>st</sup> respondent is a necessary party to the instant suit. I refer to the case of Green Square Limited Vrs Sheladia Associates & 2 Others [2017] eKLR where the court described a 'necessary party' in the manner to follow:

...The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore must be a question in the action which cannot be effectually and completely settled unless he is a party

10. Having perused the record and pleadings, I note that the nature of relationship between the applicants in the sense that the 1st applicant is an employee of the 2nd applicant, has been admitted. In view of the foregoing factors and unique circumstances, I take the view that whereas there is nothing to indicate a misjoinder of the 1<sup>st</sup> applicant, I find that the issues raised in the instant claim can be adequately ventilated without necessitating the presence of the 1st applicant as defendants to the suit. Furthermore, excluding the said applicant in the suit may greatly assist in ensuring the expeditious and efficient disposal of the respondent's claim. Consequently, I find merit in the Motion dated 14<sup>th</sup> November, 2023 and I hereby order that the suit against the 1<sup>st</sup> respondent/applicant be and is hereby struck out but with no orders on costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF MARCH , 2024.**

**ALOYCE -PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of:

..... n/a ..... for the Plaintiff/Respondent

..... Kibet ..... for the Defendants/Applicants

<sup>1</sup> See paragraph 1.2 of the Memorandum of Claim

