



Wambui v Maina Wang’Ombe t/a Salvage Services Ltd (Civil Suit E338 of 2021) [2024] KEMC 145 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEMC 145 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT E338 OF 2021
PA NDEGE, SPM
JULY 18, 2024**

BETWEEN

MARY WAMBUI CLAIMANT

AND

MAINA WANG’OMBE T/A SALVAGE SERVICES LTD RESPONDENT

RULING

Background

1. The claimant herein brought a suit vide a Statement of Claim dated 17th December, 2021 claiming Kshs. 360.559/88, costs and interests against the respondent Maina Wang’ombe T/a Salvage Services Ltd. The brief facts of the case are that the claimant was employed by the respondent as cleaning field officer and garbage collector as from June, 2018 up to 13th August, 2021 (a period of 38 months) when the Respondent unlawfully terminated the said contract. That on 13.08.2021, the claimant complained about the delay in payment of salary for the months of May, June and July, 2021 as a result of which the claimant was unfairly summarily dismissed contrary to Section 45(i) of the [Employment Act](#), which then necessitated this employment and labor dispute now in court.
2. The respondent filed his Response to Statement of Claim dated 07/02/2022, wherein at paragraph 2, he raised a preliminary objection, on a point of law that the respondent sued herein, i.e. himself, is distinct from Salvage Services Ltd which is a body corporate with separate legal personality capable of being sued in its own name.
3. Directions were taken on 14/05/2024, that the preliminary objection (PO) be canvassed by way of written submissions. Pursuant to the directions, both parties herein filed and exchanged their written



submissions. Learned counsel for the respondent, relied on the impressive authority of Justice Ringera in *Omondi v National Bank Of Kenya Ltd & Others* [2001] 1 EA where the judge stated as follows:

As regards whether the plaintiffs have locus standi to institute this suit, I am in complete agreement with the submissions made by the Defendants' advocates that they do not. It is a basic principle of Company Law that the Company has a distinct and separate personality from its shareholders and Directors even where the Directors happen to be the sole Shareholders (see *Solomon and Co. Ltd* [1897] AC. The property of the Company is distinct from that of its Shareholders and the Shareholders have no proprietary rights to the Company's property apart from the shares they own. From that basic consequences of incorporation flows another principle: only the Company has capacity to take action to enforce its legal rights.

4. Relying on the above decision, learned counsel for the Respondent submitted that the claimant herein was employed by Salvage Services Ltd, therefore her claim should be against the Company and not its director who is also an employee of Salvage Services Ltd. He therefore urged this court to dismiss the Statement of Claim with costs to the Respondent.
5. For the claimant, it was submitted that the respondent did not produce the contract of employment which could have indicated the employer. That the preliminary objection be dismissed and otherwise the claimant be allowed to amend her Statement of Claim to reflect the proper Respondent in this suit.

Analysis and Determination

6. I have carefully considered the Preliminary Objection and read submissions by both parties and the one issue that emerges for determination is whether the Preliminary Objection is meritorious. The Notice of Preliminary objection is anchored on the basic principle of company law, that a company is distinct from its owners (the shareholders), or directors. A Preliminary Objection was well settled in the *Mukisa Biscuits Manufacturing Co. Lts v West End Distributors Ltd* (1969) EA 696 to mean: -

So far as I am aware, 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.

7. Further Sir Charles Newbold, JA stated in the same case that: -

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.

8. It is evident that a Preliminary Objection, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.



9. In the case of *Oraro v Mbaja* (2005) 1KLR 141, the Court held that

“anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

10. It has been submitted that the suit is herein offends the basic principle of company law. That the respondent herein cannot be sued in place of the company and therefore not a simple joinder or misjoinder of parties issue as argued by the learned counsel for the claimant. The Court is only required to determine what the law says and whether indeed the suit herein offends the basic principle of company law as held in the case of *Omondi v National Bank Of Kenya Ltd & Others* [2001] 1 EA. All that the Court is expected to do is determine what the law says and this means that the same raises a pure point of law.
11. As per the description of Preliminary Objection in the *Mukisa Biscuits case (supra)*, the Court finds that the said ground raised by the Defendant meets the test of what amounts to a Preliminary Objection. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere. The Court is now left to determine whether the same is merited
12. Going by Justice Ringera’ decision cited herein, and as the Claimant’s counsel appears to concede, I do hereby find merit in the PO The claimant clearly described the Respondent at paragraph 2 of his Statement of Claim to be a male adult of sound, and trading under the name and style of Salvage Services Ltd. She therefore knew from the outset that the respondent was a director or shareholder of a limited liability company. The abbreviations ‘Ltd’ are only used for limited companies and the claimant ought not to have confused that with a trade or business name. She was represented from the outset. This is therefore not a case of joinder or misjoinder. It is a case of suing the wrong party.
13. The upshot of the foregoing is that the Preliminary objection raised herein succeeds. The respondent cannot be sued in his ow name. He is the sole defendant herein. Even if I strike his name out, this suit shall not be left standing as there shall be no respondent left. I accordingly have no other option but to order that the Statement of Claim be struck out with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY/PHYSICALLY AT NAKURU THIS 18TH DAY OF JULY, 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of; -

Claimant’s counsel: Nd

Respondent’s Counsel:

Claimant:

Respondent:

