

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
APPELLATE DIVISION
CIVIL APPEAL NO. E643 OF 2024

**BOARD OF GOVERNERS
CONSOLATA SCHOOL.....1st APPELLANT
CATHOLIC DIOCESE OF NAIROBI.....2nd APPELLANT
FATHER PETER OCHIENG.....3rd APPELLANT
CONSOLATA FATHERS.....4th APPELLANT**

VERSUS

LILIAN ADHIAMBO OGADA..... RESPONDENT

***(Being an Appeal from the Ruling of Hon C.K Cheptoo (PM)
delivered on the 3rd day of May, 2024 in the Milimani Commercial
Court CMEL NO E04A OF 2023)***

ARISING BETWEEN

LILIAN ADHIAMBO OGADA
CLAIMANT

VERSUS

**BOARD OF GOVERNERS
CONSOLATA SCHOOL.....1st RESPONDENT
CATHOLIC DIOCESE OF NAIROBI.....2nd RESPONDENT
FATHER PETER OCHIENG.....3rd RESPONDENT
CONSOLATA FATHERS.....4th RESPONDENT**

J U D G M E N T

A. Introduction

1. This appeal challenges a ruling delivered by **Hon C.K Cheptoo** dated 3rd May 2024, in **Nairobi Commercial Court CMEL case No E04A of 2023**, where the learned trial Magistrate dismissed the Appellants application dated 13th March 2023 seeking to have the respondent suit struck out and simultaneously allowed the respondents application dated 21st June 2023 seeking to be allowed to further amend her memorandum of claim to substitute the 1st appellant and also to enjoin the 2nd, 3rd and 4th respondents herein within 14 days of the said ruling date. Each party were to bear their own costs.

B. Background Facts

2. The respondent had filed a suit concerning unfair labour practice; wrongful termination and/or arbitrary, unfair, summary and unlawful dismissal from employment. She sought for damages to the tune of **Kshs 1,519,921.15/=** and exemplary damages on an aggravated scale for breach of **Articles 25, 27, and 41 of the Constitution of Kenya 2010** as against the 1st appellant. In response the 1st respondent did file a notice of preliminary objection stating that the court lacked jurisdiction to hear the suit and in their

statement of response denied all the averments made by the respondent and put her to strict proof thereof.

3. They further denied any wrong doing and insisted that the respondent voluntarily resigned from her employment and thus had no basis to demand for any damages from the appellant. As a follow up to the statement of response filed, the 1st appellant filed their notice of motion application dated 13th March 2023, seeking to have the suit struck out on the basis that the 1st respondent was not a legal person capable of being sued. The respondent too filed her Chamber summons application dated 21st June 2023 seeking to amend the memorandum of claim filed so as to enjoin the 2nd to 4th appellants.
4. It is the simultaneous/joint ruling of these two applications that triggered this Appeal filed vide the memorandum of appeal dated 27th May 2024, which raised the following grounds of appeal, namely;
 - a) ***That the Honourable court erred in law and fact in finding that the appellant is a legal person with capacity to sue or be sued.***
 - b) ***That the Honourable court failed in law and fact in finding that since the claimant had entered into a contract of employment with Consolata school, then it was possible for the claimant to sue consolata school in the same name and fail***

to consider that such agreement cannot confer legal capacity.

- c) That the Honourable court erred in law and fact when it relied on Order 2 Rule 15 of the Civil Procedure Rules in deciding that the claimant's suit should not be stuck out.***
- d) That the Honourable court erred in law and fact in finding that the fatal defect of suing a non-legal entity could be cured by amendment of the statement of claim.***
- e) That the Honourable court erred in law and fact in finding that the board of governors consolata school, Catholic Diocese of Nairobi Consolata shrine and Father Peter Ochieng, Director Consolata Westland's should be joined as Defendants alongside the Appellant in the suit.***
- f) That the Honourable court erred in law and fact in finding that summons to enter appearance be issued against the board of governors Consolata school, Catholic Diocese of Nairobi Consolata shrine and Father Peter Ochieng, Director Consolata Westland's.***

5. The Appellant's proposed that this appeal be allowed and the impugned ruling be set aside in its entirety substituting the same with an order allowing their application dated 13th March 2023.

C. Analysis & Determination

6. I have considered this appeal and the impugned ruling. I have also considered the submissions filed, the decisions relied on, and perused the trial court's record. This being a first appeal, it is by way of a retrial, and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see **Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123**) & **Peters Vs Sunday Post Limited (1968) EA 123**).
7. Though not raised by either of the parties hereto, the undisputed fact is that this appeal arises from the decision of the trial court sitting under special jurisdiction granted by the chief justice to hear and determine employment and labour relations disputes. As a corollary, all appeal which arise from the said court should be filed before the High court-employment and labour relations divisions (ELRC) a specialized superior court with High Court status, established under **Article 162(2) of the Constitution**. It resolves disputes regarding employment, labor relations, unions, and fair practices.
8. **Section 12 of the Employment and labour relations Act, No 234B** of the law of Kenya provide that;

Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

9. This appeal therefore ought to have been filed before the Employment and labour relations division of the High court . In the case of **Joseph Muthee Kamau & Another Vs David Mwangi Gichure & Ano (2013)** the court succinctly settled this point in the following words;

“when a suit has been filed in a court without jurisdiction it is a nullity. Many cases have established that; the most famous being Kagenyi Vs Musirambo (1968) E.A 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the courts pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not

operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing. Also see Pheonix of E.A Assurance company limited Vrs S.M Thiga T/A Newspaper services (2019) eklr.

C. Disposition

- 10.** This Appeal therefore lacks merit on the basis that it was file before the wrong court without jurisdiction to hear and determine the same.
- 11.** The appeal is therefore stuck out and is dismissed.
- 12.** The respondent will have the costs of this Appeal assessed at ***Kshs.120,000/=*** all inclusive.
- 13.** It is so ordered.

Dated, signed, and delivered in open court at **MARSABIT** this **17th** day of **MARCH, 2026.**

FRANCIS RAYOLA OLEL
JUDGE

Delivered on the virtual platform, Team this **17th** day of **MARCH, 2026.**

In the presence of: -

N/AAppellant
N/A Respondent
Mr. JarsoCourt Assistant

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