



Kenya Hotels & Allied Workers Union v Nyando Enterprise t/a Merry Land Hotel & another (Cause E069 of 2024) [2025] KEELRC 283 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 283 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E069 OF 2024
NZIOKI WA MAKAU, J
FEBRUARY 5, 2025**

BETWEEN

KENYA HOTELS & ALLIED WORKERS UNION CLAIMANT

AND

NYANDO ENTERPRISE T/A MERRY LAND HOTEL 1ST RESPONDENT

ERICK NYAMUNGA 2ND RESPONDENT

RULING

1. The issue for determination is the Preliminary Objection dated 21st November 2024 by the Respondents seeking to be struck out from these proceedings. They argue that the 1st Respondent is a non-existent, unregistered entity that cannot sue or be sued. The Respondents also argue that there is no privity of contract between the Claimant's members and the 2nd Respondent, asserting that the employment contracts, the CBA dated 3rd May 2019, and the agreement dated 5th February 2024 were signed between the Claimant and the 1st Respondent, referred to as "Nyando Enterprise, Merryland Hotel" and "Merry Land Hotel Ltd. "
2. In Response the Claimant filed a replying affidavit sworn by Mr. Erick Ngame, its Nyanza Branch Deputy Secretary. The Claimant contended that preliminary objection is misleading, claiming that the 2nd Respondent had, in fact, represented the 1st Respondent in several matters, including conciliation at the Ministry of Labour, registration of the collective bargaining agreement before the court, and handling of labour-related matters affecting the Claimant's members.
3. The Claimant further argued that the issues raised in the Preliminary Objection could be resolved by amending the pleadings to accurately reflect the name of the 1st Respondent. To which they requested a period of 7 days to file an amended claim. Both parties have filed written submissions in support of, and in opposition to, the Preliminary Objection.



1st and 2nd Respondent's Submissions

4. The Respondents submit that their inclusion in this case is a clear instance of both misjoinder and non-joinder of parties. They assert that the 1st Respondent is unknown to them, as the entity they are aware of is registered under the Business Names Act as Hotel Merryland, Certificate No. 184854. They further submit that the 2nd Respondent is the director of Nyando Enterprises Ltd, which is the sole proprietor of Hotel Merryland hence he bears no liability for the acts of either Nyando Enterprises or Hotel Merryland. Additionally, the Respondents emphasize that the 2nd Respondent neither employed the Grievants nor participated in the CBA dated 3rd May 2010, making his inclusion in the case legally unfounded.
5. To support their position, the Respondents cite Order 1 Rule 10 of the *Civil Procedure Rules*, which allows the court to strike out improperly joined parties or add parties at any stage of the proceedings. In view of the foregoing the Respondents submit that proceeding with the suit as currently constituted would result in an unjust and worthless judgment. Consequently, they urge the Court to:
 - a. Strike out Nyando Enterprise t/a Merry land Hotel as a party to the case;
 - b. Strike out Erick Nyamunga as a party to the case;
 - c. Substitute the 1st Respondent with Nyando Enterprises Limited t/a Hotel Merryland;
 - d. Grant the Claimant leave to amend its pleadings and serve them upon the new Respondent and;
 - e. Order that costs be in the cause.

Claimant's Submissions

6. The Claimant submits that the Respondents are being disingenuous with respect to the 1st Respondent's identity. It asserts that the 2nd Respondent represented the 1st Respondent in negotiations for the CBA and took part in the conciliation, without raising any objection to its name. Nevertheless, the Claimant urges the court to grant him 7 days to amend its pleadings to reflect the 1st Respondent's correct name, "Nyando Enterprises Limited t/a Hotel Merry Land," in accordance with Rule 14(6) of the Employment and Labour Relations Court Rules.
7. Regarding the 2nd Respondent the Claimant submits that he has been properly sued under section 2 of the *Employment Act*, which defines an employer to include any agent, foreman, manager, or factor of a company that has entered into a contract of service to employ any individual. The Claimant further cites *Justine Nyambu v Jaspa Logistics* [2017] eKLR, where the court held that officers or agents of an employer are not shielded from legal obligations by the corporate veil in the context of employment law in Kenya. In opposition to the 2nd Respondent's striking out, the Claimant draws attention to his deceitful actions, particularly falsely promising salary increments to its members. The Claimant argues that this conduct justifies the lifting of the corporate veil to hold him liable for compensating its members.
8. The Claimant relies on the case of *NSSF Board of Trustees v Khan Holding Limited & 2 others* [2006] eKLR, which cited the holding in *Jones & another v Lipman & another* [1962] 1 W.L.R 833, to the effect that the corporate veil could be lifted to hold the directors accountable if they were using the company as a disguise to avoid recognition by the eye of equity. Consequently, the Claimant urges the court to permit the amendment of the 1st Respondent's name and to reject the invitation to strike out the 2nd Respondent.



9. The Court has considered the pleadings and submissions by parties and distils that the issue for determination is whether the 1st Respondent's name could be amended to reflect the correct entity and whether the 2nd Respondent should be struck out of the suit. The Claimant has conceded it did not cite the correct 1st Respondent hence the request to amend once an objection was taken. The Respondents seem to acquiesce to the change in the 1st Respondent's name. The Court therefore accedes to the request to have the name of the 1st Respondent amended to reflect the correct party – Nyando Enterprises Limited t/a Hotel Merryland.
10. In relation to the second issue, the joinder of Mr. Erick Nyamunga, the Court has the following disposition. The *Employment Act* under section 2 defines an employer to include any agent, foreman, manager, or factor of a company that has entered into a contract of service to employ any individual. The Respondent concedes the 2nd Respondent is a factor of Nyando Enterprises Limited t/a Hotel Merryland the 1st Respondent herein. The inclusion of Mr. Erick Nyamunga is therefore not outrageous. The Court is yet to make any determination on the aspects that could amount to "piercing the corporate veil" to expose the true actions of the shareholders involved. That said, it will be an issue to be determined at trial and if the Claimant improperly cited Mr. Erick Nyamunga as a party then the Court will make a decision on the same at the end of trial. Presently he continues to be a party in the suit. The objection succeeds to the extent the name of the 1st Respondent is changed to reflect the correct nomenclature of the 1st Respondent, an incorporated entity. There is no order as to costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF FEBRUARY 2025

NZIOKI WA MAKAU, MCIArb.

JUDGE

