



**Nesser v Globology Limited & 7 others (Cause E033 of 2024)  
[2024] KEELRC 13551 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13551 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E033 OF 2024  
NZIOKI WA MAKAU, J  
DECEMBER 19, 2024**

**BETWEEN**

**CHRISTIAAN FRIEDRICH NESSER ..... CLAIMANT**

**AND**

**GLOBOLOGY LIMITED & 7 OTHERS & 7 OTHERS & 7  
OTHERS ..... APPLICANT**

**RULING**

1. The application before the Court is the 2<sup>nd</sup> to 8<sup>th</sup> Respondents' notice of motion application dated 30<sup>th</sup> October 2024. They seek to be struck out from these proceedings. The 2<sup>nd</sup> to 8<sup>th</sup> Respondents/Applicants assert that they are not the Claimant's employer as defined under section 2 of the *Employment Act*. They argue that the employment contract is between the Claimant and the 1<sup>st</sup> Respondent, not themselves, and therefore, it is improper for reliefs to be sought against them in this case.
2. In response, the Claimant/Respondent filed a replying affidavit sworn on 14<sup>th</sup> November 2024, in which he contends that the 2<sup>nd</sup> to 5<sup>th</sup> Respondents were directors of the 1<sup>st</sup> Respondent, while the 6<sup>th</sup> to 8<sup>th</sup> Respondents were trustees of the 1<sup>st</sup> Respondent with powers to allot, issue or apportion units. The Claimant asserts that in their roles as decision-makers, the 2<sup>nd</sup> to 8<sup>th</sup> Respondents were responsible for the events leading to the termination of his employment. He further maintains that this court has the power to lift the corporate veil, particularly in instances where the personal conduct of the 2<sup>nd</sup> to 8<sup>th</sup> Respondents directly impacted his employment relationship with the 1<sup>st</sup> Respondent. Additionally, the Claimant avers that there is a valid cause of action against the 2<sup>nd</sup> to 8<sup>th</sup> Respondents due to their misuse of their positions to his detriment. For these reasons, the Claimant contends that the application by the 2<sup>nd</sup> to 8<sup>th</sup> Respondents is an abuse of the court process and should be struck out with costs.
3. Both parties have filed written submissions in support of their respective positions.



4. 2<sup>nd</sup> to 8<sup>th</sup> Applicants/Respondent's submissions

The 2<sup>nd</sup> to 8<sup>th</sup> Respondents assert that as directors, shareholders, and trustees, they do not qualify as "employers" under the *Employment Act*, which defines an employer as an entity responsible for hiring, paying, and managing an employee. Additionally, they argue that the court's jurisdiction is limited to disputes between employers and employees, as outlined in sections 12(1) and 12(2) of the *Employment and Labour Relations Court Act*. Furthermore, the Respondents claim that in the absence of personal misconduct or legal breaches on the part of 2<sup>nd</sup> to 5<sup>th</sup> Respondents as directors, they are not liable for employment-related claims. Similarly, they maintain that the 6<sup>th</sup> to 8<sup>th</sup> Respondents, as trustees of an employee share option plan, do not have direct involvement in the terms of employment. The 2<sup>nd</sup> to 8<sup>th</sup> Respondents submit that the Claimant's allegations focus on their conduct in relation to their corporate roles, not their personal actions, rendering it inactionable under employment law.

5. As regards the legal basis for striking out the 2<sup>nd</sup> to 8<sup>th</sup> Respondents as defendants assert that the Civil Procedure Rules should apply in the absence of specific provisions in the Employment and Labour Relations Court Procedure Rules. They cite the cases of Micheal Adib Azzam v Zakhem Construction (K) [2022] eKLR and Francis Kimutai Bil v Kaisungu K Limited [2016] eKLR, where courts applied the Civil Procedure Rules to fill gaps in the Employment and Labour Relations Court Rules.

6. In further support of being struck out, the 2<sup>nd</sup> to 8<sup>th</sup> Respondents also rely on the courts consistent jurisprudence that barring direct involvement or misconduct on the part of individual directors, it is the company as a separate legal entity that is responsible for employment matters. They cite in support, the case of Wago Roba Molu v Personal Systems Computer Limited [2021] eKLR, where the court, in interpreting the definition of an employer under section 2 of the *Employment Act*, emphasized that directors signing employment documents on behalf of a company are not personally liable. Additionally, they rely on the cases of Mugo v Technical Institute Group of Schools & another (Employment and Labour Relations Cause E428 of 2022) [2024] KEELRC 1210 (KLR) (17 May 2024) (Ruling) and Kizito M Lubano v KEMRI Board of Management & 8 others [2015] eKLR both of which support the view that directors and shareholders, as representatives of the company, are not personally liable for employment disputes, and their inclusion in lawsuits without direct involvement is improper.

7. Regarding their joinder in the suit, the 2<sup>nd</sup> to 8<sup>th</sup> Respondents emphasize that the Claimant has failed to demonstrate a legitimate reason for including them, as there is no privity of contract between them and the Claimant. They reiterate that the employment contract exists solely between the Claimant and the 1<sup>st</sup> Respondent, and the reliefs sought pertain specifically to this relationship. Consequently, they emphasize that the Claimant has no direct claim against them, and they are not necessary for the effective resolution of the case. In support of their position, the Respondents cite the case of Boniface Omondi v Mathare Youth Sports Association & another [2021] eKLR which in quoting Werrot and Company Ltd & others v Andrew Douglas Gregory & others [1998] eKLR enunciated the two tests for a necessary party as: (i) there must be a right to relief against the party in question, and (ii) it should not be possible to pass an effective decree without the presence of that party. Consequently, they submit that the court should strike out their names and award them costs of the suit.

8. Claimant's/ Respondent's submissions

In his submissions the Claimant identifies two key issues for determination:

- a. Whether the 2<sup>nd</sup> to 8<sup>th</sup> Respondents should be struck out from the proceedings.
- b. Who should bear the costs of the application.



9. On the first issue, the Claimant submits that under Kenyan law, officers or agents of a company are not shielded from legal obligations by the corporate veil. He asserts that the 2<sup>nd</sup> to 8<sup>th</sup> Respondents engaged in improper conduct, warranting the lifting of the corporate veil to make them personally liable. The Claimant points to his contract with the 1<sup>st</sup> Respondent, under which the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, as the board of directors, were responsible for supervising his functions and responsibilities. Additionally, he highlights a board resolution of 30<sup>th</sup> June 2021, which resolved that he would be a beneficiary of the 1<sup>st</sup> Respondent's ESOP (Employee Stock Ownership Plan). He further notes that the 6<sup>th</sup> to 8<sup>th</sup> Respondents serve as trustees of the 1<sup>st</sup> Respondent's ESOP. The Claimant submits that the actions of the 2<sup>nd</sup> to 8<sup>th</sup> Respondents led to a violation of his rights. He emphasizes that courts may disregard the corporate veil in cases of fraud, misconduct, or improper actions by directors or trustees. To support this, he cites the case of *Ricatti Business College East Africa Ltd v Kyanzavi Farmers Company Ltd* (Civil Appeal 325 of 2010) where the court held that:

“The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for the ends of justice. This jurisdiction may be exercised only in special circumstances where the Court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues.”

10. Further, the Claimant cites the case of *Ukwala Supermarket v Jaideep Shah & Kamal Shah* [2022] eKLR where the court held that:-

“The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as ‘A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.’

11. The Claimant submits that the 2<sup>nd</sup> to 8<sup>th</sup> Respondents are rightfully enjoined in this matter, as they are the individuals responsible for the events leading to the termination of his employment and the failure of the 1<sup>st</sup> Respondent to allocate him stock in the ESOP. Regarding costs of the application, the Claimant submits that they should be borne by the 2<sup>nd</sup> to 8<sup>th</sup> Respondents.

12. The application by the 2<sup>nd</sup> to 8<sup>th</sup> Respondents is to the effect that they have been improperly joined in these proceedings and they therefore seek to have their names struck out from these proceedings. They assert that they are not the Claimant's employer as defined under section 2 of the [Employment Act](#). They posit that the employment contract is between the Claimant and the 1<sup>st</sup> Respondent and not themselves. They assert that it is therefore improper for the Claimant to seek reliefs against them in this case.

13. The [Employment Act](#) at section 2 thereof defines an employer as follows:

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company; [underline provided for emphasis]

14. The Court is hesitant to ascertain issues such as the liability of the 2<sup>nd</sup> to 8<sup>th</sup> Respondents at an interlocutory stage. The averments in relation to the alleged involvement of the 6<sup>th</sup> to 8<sup>th</sup> Respondents in an alleged conspiracy to deny the Claimant employee benefits is a matter that cannot be determined in limine. I as such decline to strike out the 6<sup>th</sup> to 8<sup>th</sup> Respondents as there has to be an interrogation of facts to ascertain whether they are culpable or not. Should the Court find, after trial, that there was no



necessity in joining them, the Court would be able to mulct the Claimant in costs for the misadventure. The same to the 2<sup>nd</sup> to 5<sup>th</sup> Respondents.

15. The Court discerns that the 2<sup>nd</sup> to 8<sup>th</sup> Respondents are covered in the definition of the section 2 of the *Employment Act* contrary to their assertions. As such, their efforts to be excused from the proceedings must of necessity, fail. They entered appearance in one accord with the 1<sup>st</sup> Respondent clearly exhibiting nexus. The 6<sup>th</sup> to 8<sup>th</sup> Respondents have been stated to have a managerial role that was allegedly related to remunerative benefits.
16. The Court notes there is reference to the provisions of the *Civil Procedure Act*. These cannot apply in the face of clear provisions of the parent statute – the *Employment Act*. In the final analysis it is the finding of the Court that there is no merit in the 2<sup>nd</sup> to 8<sup>th</sup> Respondent’s motion and accordingly, I dismiss it with costs to the Claimant.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF DECEMBER 2024**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

