



REPUBLIC OF KENYA



KENYA LAW
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**APM Terminal Mombasa (Reitz) Limited v Magolo & another (Appeal
034 of 2021) [2023] KEELRC 1259 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1259 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 034 OF 2021**

M MBARÚ, J

MAY 4, 2023

BETWEEN

APM TERMINAL MOMBASA (REITZ) LIMITED APPELLANT

AND

FREDRICK ODUSI MAGOLO 1ST RESPONDENT

**SHEER LOGIC MANAGEMENT CONSULTANTS LIMITED 2ND
RESPONDENT**

*(Being an appeal against the ruling of the Hon. C. N. Ndegwa, Principal
Magistrate delivered on 13th May, 2021 in CMELRC No.269 of 2020)*

JUDGMENT

1. Following ruling by the Principal Magistrate in Mombasa CMELRC no 269 of 2020 delivered on 13th May, 2021 the appellant who was the 1strespondnet filed the instant appeal on the grounds that;
 - a. The learned magistrate erred in law and fact in dismissing the appellant’s application dated 17th August 2020;
 - b. The learned magistrate erred in law and fact in finding that the 1st respondent was under the direction and control of the appellant;
 - c. The learned magistrate erred in law and fact in finding that the appellant was a necessary party in the suit;
 - d. The learned magistrate erred in law and fact in ignoring the appellant’s Notice of Motion and submissions and consequently arrived as a wrong decision.



2. For these reasons, the appellant is seeking that the ruling be set aside and the same be substituted with an order striking out the Memorandum of Appeal against the appellant for failing to disclose any reasonable cause of action and payment of costs.
3. Parties attended and agreed to address the appeal by way of written submissions.
4. The appellant submitted that the 1st respondent filed suit against the appellant and the 2nd respondent seeking for various orders and under paragraph III(a) and III (c) stated that he had a contract with CDL, a company contracted by the appellant to hire employees on its behalf on 1st May, 2018. That the appellant then engaged the 2nd respondent to contract employees and on 1st July, 2019 the 1st respondent was hired by the 2nd respondent. the 1st respondent's claim is also that on 30th September, 2019 the 2nd respondent issued him with notice on the grounds that he was underperforming and his employment was terminated on 30th Cooter, 2019. The 2nd respondent filed a response and admitted to being the employer under a fixed term contract but employment was terminated for good cause.
5. The appellant filed application dated 17th August, 2020 seeking that the claim against them be struck out on the grounds that there was wrongful joinder in the suit as there was no employment relationship and the 2nd respondent had already admitted to the employment relationship. The 1st respondent filed a contract of employment dated 1st July, 2019 where the 2nd respondent is noted as the employer and the inclusion of the appellant is without any basis as held in *Nick Gitbinki Ndichu v Clerk, Kiambu County Assembly & another* [2014] eKLR that where there is no employment relationship as defined under Section 2 of the *Employment Act*, 2007 a non-party cannot be made to pay compensation for alleged unfair termination of employment. in this case, the ruling of the lower court that the appellant is a proper party as a respondent is in error of fact and law and such ruling should be set aside.
6. The 1st respondent submitted that he had worked for the appellant for a year when a new contractor was engaged, the 2nd respondent to contract the 1st respondent and other employees to work for the appellant and hence part of the employment relationship. The contract with CDL was for work for the appellant and the 2nd respondent expressly and impliedly employed the 1st respondent with the authority of the appellant and hence part of the employment relationship.
7. The learned trial magistrate made a proper finding in dismissing the appellant's application seeking that the suit against them be struck out since the employment relationship extended to them while the 1st respondent was working under CDL and under the 2nd respondent.
The 2nd respondent did not participate in these proceedings.
8. On the appeal and subject ruling of the learned magistrate delivered on 13th May, 2021 and findings thereof, this being a first appeal, the occur tis under a duty to assess the same and re-evaluate the findings and subject application and make own conclusions.
9. In the ruling of the leaned magistrate delivered on 13th May, 2021 the application by the appellant seeking that the claim against it be struck out for failing to disclose any reasonable cause of action was dismissed on the grounds that for the court to establish the real relationship between the 1st respondent and the appellant and 2nd respondent, it was necessary to retain the appellant as part of the proceeding and that a suit should only be struck out if it is so meek that is beyond redemption and incurable.
10. Who then should be a respondent in an employment and labour relations claim?



Under Rule 2 of the [Employment and Labour Relations Court \(Procedure\) rules, 2016](#) a respondent is defined to mean;

“respondent” means a person against whom a suit has been instituted in the Court or who replies to any proceedings in Court;

11. In answering a similar question of who a respondent in a suit should be, the court in [Gladys Nduku Nthuki v Letsbego Kenya Limited; Mueni Charles Maingi \(Intended Plaintiff\)](#) [2022] eKLR held that the primary objective of Order 1 rule 10(2) of the [Civil Procedure Rules](#) are is to ensure that every necessary party is allowed to participate in court proceedings for the court to address all matters fully and completely. That;

... Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial...

12. In this case, the 1st respondent filed his Memorandum of Claim on 11th June, 2020 and claim that he first entered in to a contract of service with CDL on behalf of the appellant on 1st May, 2018. He was then employed by the 2nd respondent a company contracted by the appellant but the 2nd respondent terminated his employment on 30th October, 2019 and claimed for notice pay, unpaid leave days, pay for work during public holidays, compensation and payment of gratuity and service pay for years worked.
13. The 1st respondent attached his contract with CDL and with the 2nd respondent.
14. The 1st contract with CDL dated 1st May, 2018 is for a period of 7 months as a chine Operator stationed at APM Terminal Mombasa (REITZ). The contract is executed between the 1st respondent and CDL
15. The 2nd contract dated 1st July, 2019 is between the 1st respondent and the 2nd respondent as Machine Operator from 1st July, 2019 to 30th June, 2020. The contract is executed between the respondents herein.
16. Part of the legal requirements while formulating an employment contract pursuant to Section 10 (2) of the [Employment Act, 2007](#) is for the employer to give details of the name of the employer, job description, dates of employment, place of work, hours of work, remuneration and hours of work.

(2) A written contract of service shall state—

- (a) the name, age, permanent address and sex of the employee;
- (b) the name of the employer;
- (c) the job description of the employment;
- (d) the date of commencement of the employment;



- (e) the form and duration of the contract; (f) the place of work;
 - (g) the hours of work;
 - (h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;
17. As employers increasingly seek to focus on the core mandate of their industry, labour outsourcing has become a hot subject litigation and in the case of *Evans Osoro v Label Converters Limited* [2022] eKLR the court held that an employer is not expected to outsource its core functions and employees.
18. This is also addressed by the court in *Wrigley Company (East Africa) Limited v Attorney General & 2 others* [2013] eKLR we set the following parameters for an outsourcing arrangement were addressed as follows;
- a) Ordinarily employers are not expected to outsource their core functions;
 - b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
 - c) An employer will not be permitted to transfer the services of its employees without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
 - d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.
19. Even though the case here is not challenging outsourcing of labour, what comes out is that the appellant had CDL and the 2nd respondent hire employees and including the 1st respondent to work at their premises as a machine operator. It is purely an employer-employee relationship where the appellant enjoys the labours sourced by other entities but under arrangements distinct and separate from itself.
20. The provisions of Section 10(2) above addressed, the 1st respondent well aware of who the employer(s) are/were under his various contracts, and claims following termination of employment by the 2nd respondent being for notice pay, leave pay, pay for work during public holidays, compensation and gratuity pay, the inclusion of the appellant as a respondent in such matters is far removed from the core relationship in employment and labour relations. The claims made can well be addressed between the claimant and his employer, the 2nd respondent or CDL and not the appellant where he was placed by the employer and this was stated in his employment contract that his place of work would be at APM Terminal Mombasa (REITZ).
21. The attendance of the appellant in the proceedings as a 1st respondent is not necessary.
23. The appeal is found with merit and is hereby allowed and the ruling of 13th May, 2021 set aside and the appellant removed as a 1st respondent in the proceedings under Mombasa CMELRC no 269 of 2020.
- Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Japhet Muthaine

..... and

