



**Okiro & 33 others v Rene Super Cleaning Services & another (Appeal E030 of 2021) [2023] KEELRC 1567 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1567 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**APPEAL E030 OF 2021**  
**CN BAARI, J**  
**JUNE 29, 2023**

**BETWEEN**

**JACK ODHIAMBO OKIRO & 33 OTHERS ..... APPELLANT**

**AND**

**RENE SUPER CLEANING SERVICES & ANOTHER ..... RESPONDENT**

*(Being an appeal against the Ruling of Hon. Stella Telewa (SRM) delivered on 30th July, 2021, in Kisumu CMC ELRC Cause No. 3 of 2018)*

**JUDGMENT**

1. This appeal arises from a Ruling rendered on 30<sup>th</sup> July, 2021, where the Trial Court struck out the Appellants' suit on the basis that the 1<sup>st</sup> Claimant and one other Claimant therein, could not testify on behalf of the other 33 Claimants.
2. The Appellants being aggrieved by the decision of the Trial Court, lodged this appeal on 17<sup>th</sup> August, 2021.
3. The appeal is premised on the following grounds:
  - i. That the Hon. Learned Trial Magistrate erred in both law and in fact by failing to direct her mind properly on the provisions of the *Employment Act, 2007*, the *Employment and Labour Relations Court (Procedure) Rules, 2016* and the provisions of the *Civil Procedure Rules, 2010*.
  - ii. That the Hon. Learned Trial Magistrate erred in both law and in fact in dismissing the Appellant's suit.
  - iii. That the Hon. Learned Trial Magistrate erred in both law and in fact in holding that the preliminary objection was merited when in actual sense there was no preliminary objection on



record raised by any parties in the suit in terms of the principles laid out in the case of *Mukisa Biscuit Ltd V West End Distributors Ltd* [1969] E.A 696: -

- iv. That the Hon. Learned Trial Magistrate erred both in law and in fact in holding that she did not have jurisdiction to hear and determine the suit therein contrary to the provision of Gazette Notice No. 6024 of 10<sup>th</sup> June, 2018.
  - v. That the Hon. Learned Trial Magistrate erred both in law and in fact and misdirected herself on the application of the *Civil Procedure Rules* in Employment and Labour Relations Court matter.
  - vi. That the Learned Trial Magistrate erred both in law and in fact in her ruling that the Appellants were not entitled to remedies sought in their respective claims.
  - vii. That the Hon. Learned Trial Magistrate erred both in law and in fact in dismissing the Appellant's suit on grounds that the same could not be heard on representative capacity, and that the suit could have been filed separately and later consolidated.
  - viii. That the Hon. Learned Trial Magistrate erred both in law and in fact in failing to consider the evidence on record more so on the causes of action of all the Claimants being similar in fact and in law.
  - ix. That the Hon. Learned Trial Magistrate erred both in law and in fact by dismissing the Claimant's entire suit on alleged grounds of law, when in actual fact, no law was laid out in the ruling or submissions of the Applicants.
  - x. That the Hon. Learned Trial Magistrate erred both in law and in fact in dismissing the Appellant's entire suit on non-existent preliminary objection. What was in the issue was case management and not a preliminary objection on law and the same could not in circumstance extinguish the case in its entirety.
  - xi. That the ruling of the Hon. Learned Magistrate is in the circumstance misconceived unfair and unjust.
4. Parties sought to canvass the appeal through written submissions, and submissions were filed for all parties.

### **The Appellants' Submissions**

5. It is submitted for the Appellants that the Learned Magistrate erred in law and fact by dismissing the entire suit on non-existent Preliminary Objection, and when the issue before it was case management related, and not a preliminary objection so as to extinguish a suit.
6. The Appellants submit that the application by the 2<sup>nd</sup> Respondent counsel was not supported by any law, but nonetheless, the Learned Magistrate went ahead to consider this and dismiss the suit on this basis, claiming that the Claimants should have filed suits separately and moved the court for their consolidation.
7. It is the Appellants' submission that they are not oblivious to the importance of case consolidation and that the opinion of the Learned Magistrate that the cases were to be consolidated, was not enough to strike out the entire suit. They placed reliance in the case of *Millicent Wairimu & Another v Johnson Nyaga Maina & 2 Others* [2017] eKLR to buttress this position.



8. The Appellants further submit that accompanying the statement of claim is authority to act dated 18<sup>th</sup> June, 2018, and filed in court on 8<sup>th</sup> August, 2018 together with the statement of claim, which prove that the Claimants complied with Rule 9(1) & (2) *Employment and Labour Relations Court (Procedure) Rules, 2016* and Order 1 Rule 13 (1) and (2) of the *Civil Procedure Rules, 2010*.
9. The Appellants submit that the causes of action of all the Claimants is similar in fact and law, and further submit that the Learned Magistrate erred by not allowing the two Claimants to testify on behalf of the others yet the guiding provisions of the law were followed to the letter.
10. The Appellants pray that the decision of the Trial Court be set aside and Kisumu Chief Magistrate Court, Employment Case Number 3 of 2018, be set down for hearing with the two Claimants on record testifying in a representative capacity to the others, and the prayers in the claim be granted.

### **The 2<sup>nd</sup> Respondent's Submissions**

11. The 2<sup>nd</sup> Respondent submits that going by the definition of a representative suit under the *Black's Law Dictionary*, 9<sup>th</sup> Edition, the Appellants' suit is not a representative suit.
12. It is the 2<sup>nd</sup> Respondent's submission that there being 34 Claimants, each ought to be able to take the stand and prove by way of tangible evidence that they entered into alleged individual employment contracts with the Respondents.
13. It is the Respondent's submission that it would not be impracticable to call all the Claimants one by one, for reason that the doctrine of privity of contract requires that a contract cannot confer rights or impose obligations on any person other than the parties. It sought to rely in the holding in *Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & Another* [2015] eKLR to support this assertion.
14. The Respondent submits that Article 50 of *the Constitution* confers every person the right of a fair hearing and that it would be unjust for one Claimant to testify on behalf of the others.
15. It is submitted that the representative party cannot adequately protect the interests of the other Claimants by virtue of the distinctive nature of contracts and because of the doctrine of privity of contract, the suit cannot be said to be a representative suit.
16. The Respondent finally submits that the Trial Court did not err in its Ruling, but had instead, properly analysed all the facts and the law, and made a proper analysis hence properly averting an assertion that would have led to travesty of justice.

### **Analysis and Determination**

17. I have considered the Appellant's Record of Appeal together with the submissions by both parties. The grounds of appeal are summarized as follows:
  - i. That the Hon. Learned Trial Magistrate erred in both law and in fact by failing to direct her mind properly on the provisions of the *Employment Act*, 2007, the *Employment and Labour Relations Court (Procedure) Rules, 2016* and the provisions of the *Civil Procedure Rules, 2010*.
  - ii. That the Hon. Learned Trial Magistrate erred in both law and in fact in holding that the preliminary objection was merited when in actual sense there was no preliminary objection on record raised by any parties in the suit in terms of the principles laid out in the case of *Mukisa Biscuit Ltd v West End Distributors LTD* [1969] E.A 696: -



- iii. That the Hon. Learned Trial Magistrate erred both in law and in fact in holding that she did not have jurisdiction to hear and determine the suit therein contrary to the provision of Gazette Notice No. 6024 of 10<sup>th</sup> June, 2018.
18. The appeal before court is a first appeal. For this reason, the role of this Court is to re-evaluate, re-assess and re-analyse the record of appeal and determine whether the conclusions reached by the learned Trial Court are to stand or not. (See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR).
19. The Counsel for the 2<sup>nd</sup> Respondent raised an issue before the Trial Court during a pre-trial hearing objecting to the intention of the Claimants to call only two of the 34 Claimants to testify on behalf of the other Claimants. His oral application as captured in the record of appeal is as follows: -
- “That all the 34 Claimants be invited to testify and not the 1<sup>st</sup> Claimant, Jack Odhiambo Okiro alone who had been given authority to testify on behalf of all the rest of the Claimants”
20. Rule 9 (1) & (2) of *Employment and Labour Relations Court (Procedure) Rules, 2016*, provides as follows: -
- “A suit may be instituted by one party on behalf of other parties with a similar cause of action...
- ...Where a suit is instituted by one person, that person shall in addition to the statement of claim file a letter of authority signed by all the other parties.”
21. Likewise, Order 1 Rule 13 of the *Civil Procedure Rules* states: -
- “(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
- (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”
22. In *John Kariuki & 347 Others v John Mungai Njoroge & 8 Others* Nakuru HCCC No. 152 of 2003 (unreported) the Court held thus: -
- “The plain reading of the above rule (Order 1 rule 12 Civil Procedure rules) is that where a party requires another party to appear, plead, or act on his behalf he has to give the authority in writing before such a person filing suit can claim to be representing such person. The said written authority has to be signed by the person giving the authority and must be filed in court where the suit is to be filed.....”
23. It is not disputed that the cause of action in the matter is the same and the claims and orders sought relate to the same issues for all the 34 Claimants.
24. The record supports the Appellant’s position that they filed together with their statement of claim, authority to act granted to Jack Odhiambo Okiro and Nashon Otieno.



25. It is my considered opinion that the Claimants, as correctly submitted complied with the requirements of Rule 9 (1) & (2) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, and the assertion that the two Claimants could not testify on behalf of the 32 others cannot stand.
26. On the issue of jurisdiction, it is settled that jurisdiction is everything and without which, the court should down its tool.
27. Under Gazette Notice No. 6024, the Chief Justice conferred delegated jurisdiction on the Magistrates Court in respect of Employment matters as follows: -

“In Exercise of the powers conferred by section 29 (3) and (4) (b) of the *Employment and Labour Relations Court Act, 2011*, and in consultation with the Principal Judge of the Court, the Chief Justice appoints all Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective areas of jurisdiction:

1. Disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act, 2007*) where employees gross monthly pay does not exceed KSh. 80,000.00 as commenced and continued in accordance with the *Employment and Labour Relations Court (Procedure) Rules, 2016.....*”
28. The Claimants’ statement of claim, carries claims ranging between Kshs. 120,000 to Kshs. 179,000 for all the 34 Claimants. The pecuniary jurisdiction of the Magistrates Court in respect of employment matters is thus way below the claims lodged by the Claimants per the gazette notice referred to in the foregoing paragraph.
  29. I thus uphold the decision of the Trial Court to the effect that it has no jurisdiction to hear and determine the Appellants’ claim.
  30. The dismissal of the Appellants’ suit is upheld on the ground that the claims are beyond the pecuniary jurisdiction of the Trial Court as delegated under Gazette Notice No. 6024 of 10<sup>th</sup> June, 2018.
  31. The appeal is dismissed with no orders as to costs.
  32. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29<sup>TH</sup> DAY OF JUNE, 2023.**

**C. N. BAARI**

**JUDGE**

**Appearance:**

Ms. Chumo h/b for Mr. Kirwa for the Appellants

Mr. Onsongo present for the 2<sup>nd</sup> Respondent

N/A for the 1<sup>st</sup> Respondent

MS. Christine Omolo - Court Assistant.

