



**Kilonzo v Avacare (K) Limited & 2 others; Pharmaceutical Society of Kenya & another
(Interested Parties) (Cause 611 of 2019) [2023] KEELRC 1839 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1839 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 611 OF 2019
BOM MANANI, J
JULY 13, 2023**

BETWEEN

ELIZABETH MWENDE KILONZO CLAIMANT

AND

AVACARE (K) LIMITED 1ST RESPONDENT

SHIVAPRASAD CHEMUDUPATI 2ND RESPONDENT

POOJA TRIPATHI 3RD RESPONDENT

AND

PHARMACEUTICAL SOCIETY OF KENYA INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

RULING

1. The claimant was employed by the 1st respondent under a fixed term contract for a term of one year. The contract was to run between July 30, 2018 and July 30, 2019. The claimant contends that the contract was prematurely terminated on January 17, 2019 when the 1st respondent dismissed her from employment.
2. Together with the 1st respondent, the claimant has sued the 2nd and 3rd respondents for their alleged role in the process that led to her dismissal from employment. In the memorandum of claim, these two respondents are described as the Country Head and Directors of the 1st respondent respectively. Nowhere in the memorandum of claim does the claimant suggest that the 2nd and 3rd respondents were her employers.



3. The claimant accuses the 2nd and 3rd respondents of subjecting her to verbal abuses and threats to injure her career. The two respondents are accused of subjecting the claimant to discriminatory treatment thereby causing her emotional anguish that left her with suicidal thoughts.
4. The three respondents filed a joint defense dated October 15, 2019. At paragraph 3 of the defense, the respondents expressed the position that the 2nd and 3rd respondents had been wrongly sued as they had no employment contract with the claimant.
5. Against this background, the 2nd and 3rd Respondents filed the application dated December 14, 2022. Through the application, the two respondents have sought that their names be struck off the record of the case. The basis for their application is that they have never had an employment relation with the claimant. Therefore, the suit against them having been instituted as an employment dispute before the Employment and Labour Relations Court (ELRC) is bad in law. It is the position of the two respondents that the ELRC has no jurisdiction to entertain the claimant's action against them.
6. On their part, the claimant and 1st respondent take the position that the 2nd and 3rd respondents are properly impleaded in the action. In their view, the two respondents acted as agents of the 1st respondent in the impugned process. As agents of the 1st respondent, the law considers the two respondents as employers of the claimant. Consequently, their inclusion in the suit is valid.
7. Whilst acknowledging that the 2nd and 3rd respondents were its directors and therefore its agents, the 1st respondent contends that it is not responsible for their excesses whilst executing their mandates as its directors. They ought to carry their own cross.
8. Further resistance to the application is premised on the definition of the term "employer" in the [Employment Act, 2007](#). The Act defines the term "employer" to include "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".

Analysis

9. It is not in dispute that directors of a company stand in the position of agents of the company. As agents of the company, directors act for and in the name of the company. Their actions are considered as actions of and by the company. The directors shoulder no personal liability for acts done for and in the name of the company ([Valentine Opiyo & another v Masline Adhiambo T/A Ellyams Enterprises](#) [2014]eKLR).
10. Further, in the law of agency, an agent of an undisclosed principal can be sued for acts done on behalf of the principal as if he was the principal. However, the position is different when one is acting as an agent of a disclosed principal. In the latter case, no action may be brought directly against the agent in respect of transactions undertaken in the name and on behalf of the principal ([City Council of Nairobi v Wilfred Kamau Gitbua t/a Gitbua Associates & another](#) [2016] eKLR).
11. As well, the principle of privity of contract precludes one from instituting legal proceedings against individuals who are not parties to a contract in a bid to enforce contractual rights and obligations under the contract. There is no cause of action against the latter in the circumstances.
12. Being separate legal persons, directors of a company are not considered as parties to contracts entered into between the company and third parties except in their capacity as agents for the company. Therefore, the principle of privity of contract protects them from suits in respect of such contracts.



13. The definition of the term “employer” in the *Employment Act* to include the agents of the employer must, in my view, be conceptualized in the context of the above principles of the law of contract and agency law. I do not think that the said definition necessarily departs from or is at cross purposes with the general principles discussed above.
14. In my view, expansion of the term “employer” under section 2 of the *Employment Act* to include the employer’s agent, foreman or manager is meant to address scenarios where individuals hold themselves out as employers when, as a matter of fact, they are agents, foremen or managers of undisclosed employers. In such case, the agents, foremen or managers may be properly sued as if they were the employers. Absent disclosure of particulars of the actual employer on whose behalf they act, such agents, foremen or managers stand in the position of the employer in terms of section 2 of the *Employment Act, 2007*.
15. In my view therefore, the general principle that an agent cannot be sued for acts done for and in the name of a disclosed principal applies to employment contracts entered into under the *Employment Act, 2007*. Action against the agent can only be brought in respect of such contracts if the principal (true employer) is undisclosed.
16. In the suit before me, it is not disputed that at the time of the impugned acts, the 2nd and 3rd Respondents were directors of the 1st Respondent. As directors of the 1st Respondent, the two Respondents were, prima facie, acting as agents of the 1st Respondent whose involvement in the transaction was known to the Claimant. The 1st Respondent was therefore a disclosed principal. Therefore, the 1st Respondent is liable for the acts of the 2nd and 3rd Respondents which were, prima facie, done for and in its name. Clearly, a suit by the Claimant against the two Respondents in their personal capacities is misconceived.
17. It is argued that aside from the infringements allegedly arising from breach of the employment contract, the 2nd and 3rd Respondents have been sued for violating other rights of the Claimant. That may be true. However, the concern of the 2nd and 3rd Respondent is whether such action can be instituted against them before the ELRC, there being no employment relation between the Claimant and the two Respondents.
18. The Court of Appeal appears to have taken the view that for the ELRC to have jurisdiction over a dispute, the matter must have stemmed from an employer-employee or labour relation. The court does not have jurisdiction over a matter where there is no employment or labour relation between disputants (*National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR)).
19. In the case before me and having considered the implications of the definition accorded to the term “employer” under section 2 of the *Employment Act*, it is clear to me that the 2nd and 3rd Respondents, being agents of the 1st Respondent who was their disclosed principal, were not the Claimant’s employers. The 1st Respondent was the disclosed employer of the Claimant. In the premises, there has not been an employer-employee or labour relation between the Claimant and the 2nd and 3rd Respondent to provide a basis for invoking the jurisdiction of the ELRC.
20. I have considered the position expressed by the 1st Respondent that it cannot be held liable for the acts that were committed by the 2nd and 3rd Respondents in excess of their powers as agents and directors of the 1st Respondent. That may be true. However, if the Claimant contemplates action against the latter two Respondents in this respect, then such action is not considered as one that arises from an employment or labour relation between the Claimant and the two Respondents. Rather, it is an action



by an aggrieved party against a tortfeasor outside an employment or labour relation. Such action can only be filed either at the Magistrate's Court or High Court but not the ELRC whose jurisdiction is constrained as indicated above.

Determination

21. Upon careful analysis of the matter, I arrive at the conclusion that the action by the Claimant against the 2nd and 3rd Respondents is bad in law. The two Respondents have been wrongly included in these proceedings.
22. Consequently, I strike out their names from the record of the case.
23. Costs of the application are granted to the 2nd and 3rd Respondents.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF JULY, 2023

B. O. M. MANANI

JUDGE

