



**Consumer's Pride Cafe v King'ori (Employment and Labour Relations Appeal E021 of 2022) [2023] KEELRC 2131 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2131 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E021 OF 2022  
ON MAKAU, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**CONSUMER'S PRIDE CAFE ..... APPELLANT**

**AND**

**JOSEPH GATATA KING'ORI ..... RESPONDENT**

*(Being an Appeal against the Judgment and decree of Hon. James Macharia Muriuki Senior Principal Magistrate Nyeri delivered on the 1st November, 2022 in CMELRC No.28 of 2020)*

**JUDGMENT**

1. The central issue in this appeal is whether an individual operating business under a name other than his own can competently be sued in the name of the Business. A brief facts of the case are that the respondent was employed as a chef by the appellant, in his business called Consumer's Pride Cafe. He worked from the year 2013 for a monthly salary of Kshs 11,000.00 net of statutory deductions. He worked until January, 2019 when he was allegedly dismissed and brought suit against the appellant for unfair termination of his employment. He sought several reliefs including compensation for unfair termination.
2. The entity sued filed defence raising a number of issues. First it denied the claim for unfair termination and averred that the respondent absconded. Secondly it averred that the suit was incompetent because the entity sued was just a business name which lacked legal personality. It therefore notified the respondent of its objection to the suit on that ground and prayed for the suit to be dismissed with costs.
3. After hearing the witnesses, the trial court (Hon.J.Macharia,SPM) made a partial judgment on 4<sup>th</sup> October, 2022 where he agreed with the appellant that the party sued was not juristic person and ordered the pleading to be amended to join the proprietor of the business. However, a challenge on the decision was made by the appellant by way of review and on 27<sup>th</sup> October 2022, the said decision was set aside by consent of the parties.



4. Subsequently, the court delivered its judgment on 1<sup>st</sup> November, 2022 in which he concluded that the suit was competent by dint of Order 30 Rule 9 of the Civil Procedure Rules which allows a sole proprietor to be sued in the name and style of his business as if it were a firm. He further observed that under Order 1 Rule 9, a suit is not defeated by reason of misjoinder or non-joinder of parties. The court went on to find that the appellant had unfairly terminated the respondent's employment and awarded him Kshs 101,200.00 being compensation, salary in lieu of notice and leave.

### **The appeal**

5. The proprietor of the appellant was aggrieved by the said decision and brought this appeal on the following four grounds;
  1. The learned trial magistrate erred in law and in fact in failing to appreciate that the claimant had brought the suit against a non-existent person, being a business name and which is not a juristic person capable of suing or being sued.
  2. The learned trial magistrate erred in law and in fact in failing to appreciate that the respondent lacked capacity to be sued and that the issue of capacity in which a party has been sued goes to the jurisdiction of the court and that once a party is not properly before court, the court lacks jurisdiction to deal with the matter.
  3. The learned trial magistrate erred in law and in fact in failing to appreciate that the issue of capacity in which a party has been brought to court, is not curable as it goes to the substance of the suit and which is different from joinder, misjoinder or non-joinder of a party, which is on the procedural law and whose defect can be cured under the law.
  4. The learned trial magistrate erred in law and in fact, in holding that the claimant had proven his case on a balance of probability and consequently awarding him the reliefs sought.

### **Submissions**

6. The appellant filed submissions on 16<sup>th</sup> March 2023. On the first ground, he submitted that the suit was against a non-juristic person and therefore incompetent. He contended that Order 30 Rule 9 of the *Civil Procedure* contemplates that any person trading in any name ought to be disclosed first and then the name or style of his business be added thereto. Consequently, he submitted that suing "Consumer Pride Cafe" without disclosing the proprietor rendered the suit incompetent.
7. He fortified the above submission by the case of *Juliana Akinyi Owino v Kiarie Shoe Stores* [2014] eKLR where the High Court held that a mere name registered under the *Business Names Act* Cap 499 does not clothe it with the requisite juristic personality in the absence of the owners. The court went to conclude that the drafters of the Order 30 of the *Civil Procedure Rules* intended that the Business name cannot sue or be sued in the absence of the proprietors.
8. As regards the second ground of the appeal, the appellant submitted that, in view of the fact that the entity sues had no legal capacity of being sued, the court lack jurisdiction to determine it. Further, the lack of legal capacity rendered the judgment a nullity.
9. On the third ground, the appellant submitted that the trial court erred by failing to appreciate that the issue of capacity in which a party has been sued goes to the substance of the suit and it cannot be cured. He went on to urge that the issue of capacity is different from that of misjoinder or non-joinder of parties which is a procedural one. He maintained that the lack of legal capacity renders a suit incurably defective while misjoinder or non-joinder can be cured.



10. Finally, the appellant faulted the trial court for holding that the respondent had proved his case on a balance of probability. He observed that the basis of the foregoing holding was that he had failed to produce the master roll to prove that the respondent had absconded work. However, he submitted that the trial court erred by failing to consider the master roll which he had produced as an exhibit and which is on page 27-28 of the record of appeal. He further submitted that the trial court failed to consider that the said payroll clearly indicated payment of the respondent's salary in February 2020 yet he claimed that his employment was terminated on 29th January, 2020. Finally he contended that the respondent did not adduce any evidence of any termination or dismissal, like a letter and as maintained that the alleged unfair termination was not proved and therefore the appeal ought to be allowed.
11. The Respondent, opposed the appeal vide his submissions filed on 28<sup>th</sup> April, 2023. In brief he submitted only on the issue of competence of his suit. He contended that the court was right in his judgment when he dismissed the appellant defence that Consumer Pride Cafe had no legal capacity and as such the suit was incompetent. He submitted that the appellant never raised the issues in his appeal during the trial.
12. The respondent contended that, during the trial; the appellant testified as the defence witness and admitted that he is an hotelier in Nyeri town and that respondent was his employee. Accordingly, the respondent submitted that the appellant was the proprietor/owner of the Consumer Pride Cafe and was properly sued in the name and style of the business he operates.
13. For emphasis reliance was placed on the High Court decision in *Alice Omedi t/a Joyce Wanjiku Njuguna v Equator Bottlers Ltd* [2022] eKLR where the court upheld Order 30 Rule 9 as the basis for suit filed against a business name. He urged this court to likewise dismiss the appeal considering Article 159 (2) (d) of the *Constitution* which requires that courts of law shall administer justice without undue regard to procedural technicalities.

### **Analysis and determination**

14. I have carefully considered the record of appeal, the impugned judgment and the submissions made herein. This being a first appeal, my mandate is to re-evaluate the evidence and make my own conclusions noting that I did not have the advantage of seeing or hearing the witnesses as they testified. Further, I should not interfere with a finding of fact by the trial court unless it is based on no evidence or a misapprehension of the evidence or if shown that the court acted on wrong principle in reaching his finding. (See *Ephantus Mwangi Mania & 87 others v Duncan Mwangi Wambugu* [1982-88] 1KAR 278.
15. The issues for determination are:
  - a. Whether the lower court suit was fatally incompetent.
  - b. Whether the respondent proved a case of unfair termination on a balance of probability.
  - c. Whether the award of damages was merited.

### **Incompetent suit**

16. The appellant's case is that the lower court suit was fatally incompetent and the judgment was a nullity because it was against a non-suited entity, Consumer Pride Cafe. In his view suing the said business name in the absence of the proprietor rendered the suit fatally incompetent. However, the respondent believes that the suit was competent since suing in the name and style of a business is allowed by Order 30 Rule 9 of the *Civil Procedure Rules*.



17. I have considered the rival contentions and the rules of procedure for this court. I have confirmed that the rules of procedure for this court, (ELRC Procedure Rules 2016) are silent on the matter in dispute. Therefore, I turn, to the [Civil Procedure Rules](#) and case law to resolve the matter.
18. Order 30 of the [Civil Procedure Rules](#) makes provision for filing of suits by or against firms and other persons carrying out business in names other than their own. Rule 1 allows any two or more persons claiming or being liable as partners to sue or to be sued in the name of the firm. Rule 2 clarifies that if the suit is filed by partners in the name of their firm, the plaintiff or their advocate shall on demand in writing by or on behalf of the defendant declare in writing within 7 days, the names and place of residence of all names constituting the partnership.
19. Rule 5, provides that where persons are sued as partners in the name of the firm, they are to appear individually in their own names but all the subsequent proceeding are to continue in the name of the firm sued. Lastly, Rule 9 provides that

“Any person carrying on business in a name other than his own name may be sued in such name or style as if it were a firm and so far as the nature of the case will permit, the rules under this order shall apply.”
20. There is no doubt that the above rule allows any person carrying on business to be sued in the name or style in which he carries the business as if it were a firm. My interpretation of Rule 9 above is that the suit should target the proprietor essentially but using his business name. In this case however, it appears that the respondent deliberately sued Consumer Pride Cafe as a body corporate and did not target the appellants (proprietors).
21. The foregoing opinion is based on the averment in paragraph 2 of the statement of claim which is copied below:-

“The Respondent is a restaurant incorporated under the Business Name Act under Laws of Kenya having its offices in Nyeri within the Republic of Kenya. (Service of summons to be effected via the claimant’s Advocates offices.”
22. Nothing in the foregoing pleading suggests that Consumer Pride Cafe was a mere business name operated by an unknown person. Even when a defence was filed challenging the competence and validity of the suit, annexing a Single Business Permit, from the County Government, the respondent was not moved. Instead, he filed a reply to the defence reiterating his averments in the suit and undermining the preliminary objection raised in the defence.
23. In my view, the claimant who was represented by counsel squandered a good chance to redeem his suit by way of amendment and joinder of the correct party. The case before the court is not about non-joinder which is a procedural question but rather legal capacity of the defendant which goes to the substance of the suit. Where there is no competent defendant, the suit is a nullity and it amounts to abuse of the process of the court.
24. In this case the trial court was made aware that a non-existent defendant had been sued. The respondent was also notified by the court when it made an order for amendment of the claim in a judgment delivered on 4<sup>th</sup> October, 2022 which judgment was subsequently reviewed and set aside by consent. What I am saying is that the suit was incompetent for want of a competent defendant. Consequently, the first ground of the appeal succeeds.



25. In view of the foregoing finding, I see no need of addressing myself to the other two issues for determination since both the suit and the impugned judgment were a nullity. In conclusion therefore, I allow the appeal, set aside the judgment by the trial court and substitute therewith, an order dismissing the suit with no costs because the defendant was non-existent. However, the appellant is awarded costs of the appeal.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

