



**Osumba v Living Walls Africa Limited & another (Cause E395 of 2023)
[2023] KEELRC 3335 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3335 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E395 OF 2023
SC RUTTO, J
DECEMBER 20, 2023**

BETWEEN

EDWINA OSUMBA CLAIMANT

AND

LIVING WALLS AFRICA LIMITED 1ST RESPONDENT

RMM BUILDS LIMITED 2ND RESPONDENT

RULING

1. The 1st Respondent/Applicant has moved this Court *vide* a Notice of Motion Application dated 25th September 2023, seeking the following orders:
 - a. That the Claimant's claim against the 1st Respondent/Applicant namely Living Walls Africa Limited be struck off from the claim for misjoinder.
 - b. That the Claimant's claim against the 1st Respondent/Applicant be struck out for being frivolous and vexatious as it discloses no reasonable cause of action against it.
 - c. The cost of this application be awarded to the 1st Respondent/Applicant.
2. The Application is grounded on the annexed Affidavit of Mr. Nicholas Kariuki, sworn on 25th September 2023. Briefly, Mr. Kariuki who describes himself as 1st Respondent's Director avers that:
 - a. The Claimant is neither an employee of the 1st Respondent nor has she ever received a contract of employment from the company. The Claimant has also not brought any evidence to show that she was a permanent and pensionable employee.
 - b. Whilst the 1st and 2nd Respondents may share some Directors/shareholders, they are two separate legal entities, with very distinct areas of trade and have never traded in a way to create assumptions that they were joint venture.



- c. The 2nd Respondent is not operating under the 1st Respondent's name and neither has the 1st Respondent taken over the assets, employees and business of the 2nd Respondent as stated by the Claimant.
 - d. The 1st Respondent has never filed the Claimant's returns. The P9 form presented by the Claimant had a typographical error on the Employer's name and every other detail on the form including the pin belongs to the 2nd Respondent.
 - e. No liability of whatever nature would or should lawfully be attributed to the 1st Respondent/Applicant for the nature of the claim herein for reasons that the Claimant is not an employee of the 1st Respondent and therefore, the 1st Respondent cannot be liable.
 - f. Looking at the pleadings, the Claimant does not disclose any cause of action against the 1st Respondent.
3. Upon being served with the Application, the Claimant responded by filing a Replying Affidavit, sworn on 4th October 2023, in which she avers that:
- a. The Application is misconceived and lacks merit.
 - b. There is no misjoinder on the part of the 1st Respondent as she explained the reasons why she sued the 1st Respondent.
 - c. She was categorical at paragraphs 4 and 5 of the Memorandum of Claim that there was an arrangement between both the 1st Respondent and the 2nd Respondent which they were not privy to as employees and it appeared that there was a joint venture.
 - d. Her salaries were processed by the two Respondents and the P9 form for tax returns was issued by the 1st Respondent.
 - e. If she was to sue the 2nd Respondent only, they would claim in their defence that she was employed by the 1st Respondent. To avoid that technicality, she sued both of them so that they could tell the court their nature of engagement and who her employer was.
 - f. The court will need to hear from both Respondents in order to determine who between them is liable.
4. The Application was canvassed by way of written submissions which I have considered.

Analysis and Determination

5. Flowing from the Application, the grounds in support thereof and the rival submissions, the singular issue that stands out for determination is whether the 1st Respondent is a proper party to this suit.
6. The Claimant has averred at paragraph 4 of the Memorandum of Claim that both Respondents were her employers and that it is apparent that the two companies are a joint venture and that the 2nd Respondent currently operates under the 1st Respondent's name. The Claimant further avers that her tax returns were filed by the 1st Respondent. To this end, she annexed a copy of her P9 form which indicates her employer's name as "Living Walls Africa Limited", the 1st Respondent herein.
7. The 1st Respondent has refuted this position and maintains that the 2nd Respondent is not operating under its name and neither has it taken over the assets and business of the 2nd Respondent. With regards to its name appearing on the Claimant's P9 form as the employer, the 1st Respondent has termed the same as a typographical error.



8. From the record, the Claimant's letter of appointment dated 7th August 2020, was issued by the 2nd Respondent. Further, the Claimant was terminated by the 2nd Respondent. On the other hand, the Claimant's P9 form in respect of 2022 indicates that her employer is the 1st Respondent.
9. I must say that the information contained in the Claimant's P9 form with regards to who her employer was, is so crucial as it implies that her tax deductions were being remitted by the 1st Respondent.
10. In my considered view, the 1st Respondent's contention that the said P9 form has a typographical error on the employer's name does not hold for the reason that the said form is generated based on the remittances to the Kenya Revenue Authority hence it is an official document. Besides an employer's details in a P9 form is too significant to amount to a typographical error.
11. What's more, the 1st Respondent despite asserting that all the other details in the P9 form are accurate save for the name of the employer, did not prove as much, say by providing its pin Number to distinguish it from the one appearing on the P9 form.
12. Therefore as it stands, it cannot be stated without doubt that the Claimant was not an employee of the 1st Respondent. As I see it, this is a grey issue and it is for this reason that Order 1 Rule 7 of the [Civil Procedure Rules](#) comes into play.
13. The total sum of my consideration is that the issue of joinder cannot be determined at this juncture through Affidavit evidence. Prudence requires that such an issue be determined upon taking evidence from all parties.

Orders

14. Accordingly, the 1st Respondent's Motion Application dated 25th September 2023, is declined with an order that costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Odhiambo for the Claimant

Ms. Wangechi instructed by Mr. Issa for the 1st Respondent/Applicant

No appearance 2nd Respondent

