



**Areri v Multichoice Kenya Limited & another (Cause E1016 of 2021)
[2022] KEELRC 12761 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12761 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1016 OF 2021**

**M MBARŪ, J
APRIL 28, 2022**

BETWEEN

JUSTIN ABUGA ARERI CLAIMANT

AND

MULTICHOICE KENYA LIMITED 1ST RESPONDENT

NANCY MATIMU 2ND RESPONDENT

RULING

1. The respondents, Multichoice Kenya Limited and Nancy Matimu filed application dated February 16, 2022 seeking for order that the 2nd respondent (Nancy Matimu) be struck out from the claimant's memorandum of claim herein dated December 6, 2021.
2. The application is supported by the supporting affidavit of the 2nd respondent, Nancy Matimu and on the grounds that the 2nd respondent is not a necessary party herein and no specific relief is sought against such party and the questions for determination can be effectively and completely be determined without the presence of the 2nd respondent and therefore should be struck out.
3. In her affidavit, Ms Matimu avers that she is the managing director of the 1st respondent and not a necessary party herein and should be struck out. All rights and obligations arising from the contract of employment are enforceable by and against the parties to the contract which is between the claimant and the 1st respondent. As a director of the 1st respondent she is merely an agent of the company for purposes of execution of its decisions and as an agent cannot be held personally liable for any alleged acts or omissions of the 1st respondent.
4. The claimant in the memorandum of claim has admitted that the 2nd respondent issued him with letter of summary dismissal dated November 27, 2020 on behalf of the 2nd respondent and in acting as an agent of the 1st respondent should not be



5. enjoined as a party herein. The claim herein can be determined without the presence of the 2nd respondent who should be struck out.
6. In reply, the claimant filed his replying affidavit and avers that he has sued the respondents jointly and severally over acts and transactions in the same series which the 2nd respondent performed in person in violation of his rights and fundamental freedoms. The 2nd respondent is a necessary party herein.
7. The claimant also avers that the 2nd respondent is the one who committed the series of acts of breach of his fundamental rights and freedoms under the guise of acting for and on behalf of the 1st respondent. the acts of the 2nd respondent and giving rise to the suit is that she confiscated his lap top and ordered him out of the office premises, the 2nd respondent suspended him from employment and then determined the disciplinary process and sat on appeal which rendered the entire process defective.
8. While the claimant was resident in Kisumu, the 2nd respondent issued letter dated November 12, 2020 requiring the claimant to be at Nairobi on November 13, 2020 to be able to access the confiscated laptop and information that he would use in his defence in the disciplinary process. Such was with intent to deny the claimant a fair hearing all enforced by the 2nd respondent.
9. For the court to be able to effectively and completely adjudicate the matter, the 2nd respondent is a necessary party herein.
10. Both parties attended and made oral submissions and filed lists of authorities.

Determination

11. The single issue for determination is whether the 2nd respondent is a necessary party herein.
12. In employment and labour relations disputes, a claimant is allowed to file suit against a respondent or respondents in accordance with the [Employment and Labour Relations Court \(Procedure\) Rules, 2016 \(the Court Rules\)](#) and which court rules defines a respondent to mean;

“Respondent” means a person against whom a suit has been instituted in the court or who replies to any proceedings in court;
13. This definition is further expanded under the [Constitution of Kenya](#) (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 that;

“Respondent” means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;
14. The definitions under the two regimes are not in conflict or a contradiction. Under the court rules, a claimant is under rule 7 allowed to file suit through a memorandum of claim, a constitutional petition or judicial review proceedings save, under rule 7(3) a claimant is at liberty to move the court under a memorandum of claim to seek the enforcement of any constitutional rights and freedoms.
 - (3) Notwithstanding anything contained in this rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the court.
15. The rationale is to ensure the tenets of section 3 and 20 of the constitutive legislation for the court, the [Employment and Labour Relations Court Act, 2011](#) are met by ensuring the court is able to hear a party expeditiously and without undue regard to technicalities and go to the substantive issue at hand. Such objective is entrenched under article 159 of the [Constitution, 2010](#).



16. In his memorandum of claim dated December 5, 2021 the claimant has sued the respondents and has claimed for various orders including a finding that there was breach of his fundamental right and freedoms when he was denied the right to a fair hearing, fair administrative action, fair labour practices and the right to privacy. That his employment was unfairly terminated and should be paid damages and compensation by the respondents.
17. Whereas the claimant has the right to decide who the respondent(s) to his claim should be and such right is secured under the court rules, the contra to such right is that where an unnecessary party herein is enjoined, at the final determination of the
18. suit, where he is not able to make a good case against such party, costs are due. Such then balances such right. The right due cannot be determined at this stage until the court is able to hear the main claim on the merits.
19. To remove the 2nd respondent at this stage would therefore deny the court the opportunity to hear the matter on the merits and made a determination.
The 2nd respondent shall remain a party herein.
20. Application dated February 16, 2022 shall not be allowed save costs shall follow the cause. The claim shall be heard on the merits.

DELIVERED IN COURT AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

M. MBARU JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

Judgement: E1016 of 2021

