



Pamba v Kenya Hospital Association for and on behalf of the Nairobi Hospital & another (Cause E614 of 2020) [2022] KEELRC 3874 (KLR) (20 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 3874 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E614 OF 2020
NZIOKI WA MAKAU, J
JUNE 20, 2022**

BETWEEN

ALLAN PAMBA CLAIMANT

AND

KENYA HOSPITAL ASSOCIATION FOR AND ON BEHALF OF THE NAIROBI HOSPITAL & ANOTHER RESPONDENT

RULING

1. The respondents/applicants filed a notice of motion application dated November 22, 2020 seeking to be heard for orders that
 - i. The suit/claim against the 2nd respondent be and is hereby struck out and
 - ii. The 2nd respondent be and is hereby removed from the proceedings and
 - iii. That the costs of the suit and this application be borne by the claimant.

The application is predicated on the grounds that the claim herein is an employment issue pitting a former employee against his employer, the 1st respondent and that the 2nd respondent is admittedly an agent of the 1st respondent, a disclosed principal; that the 2nd respondent was thus not employer to the claimant and accordingly cannot be sued under the *Employment Act*, 2007 in his own name as has been purported to be done herein. The applicants assert that the 2nd respondent herein being non-suited, this application seeks to have the said regularized accordingly and further because there is no justiciable cause of action disclosed and or claimable against the 2nd respondent in the amended statement of claim.

2. The application is supported by the affidavit of the 1st respondent's acting company secretary, Mr Maxwell Maina who depones that the 2nd respondent is the sitting chairperson of the board of management of the 1st respondent. He states that in discharging the functions of appraisal of the



probationary period of the claimant, the 2nd respondent was acting at the behest of and on behalf of the 1st respondent as its agent. He avers that this being a claim under section 12(1) of the *Employment and Labour Relations Court*, any reliefs issued under the *Employment Act*, which in any event have been prayed for are reliefs against an employer (the 1st respondent), and not the 2nd respondent.

3. In opposing the application, the claimant/respondent filed a replying affidavit dated December 1, 2021 averring that clause 4.16 of The Nairobi Hospital Board Charter does not provide any protection or limitation of liability for negligence of breach of the board member's duty of care to the hospital or to its stakeholders, or for acts or omissions not in good faith or which involve intentional misconduct or violation of the law. He avers that he has sued the 2nd respondent in his personal capacity, on account of his malicious and wrongful misconduct and gross violation of the law, procedures and guidelines of the 1st respondent, earned out in bad faith while purportedly discharging his duty as the chairman of the board of management of the 1st respondent. The claimant/respondent asserts that the malice and bad faith on the part of the 2nd respondent was further compounded by his deliberate failure to adhere to the timelines for review of the claimant's performance; to wit, after every two months and two weeks before the end of the probationary period as required. Furthermore, the 2nd respondent's purported evaluations were conducted in his absence and without his input despite written guidance given by the Human Resource Director and that the 2nd respondent further purported to recommend for his dismissal at the special meeting of the board of management of October 2, 2020 despite the same not being an agenda in the said meeting.
4. The claimant/respondent further avers that his evidently false and misleading end of probation evaluation and subsequent unlawful termination were the resultant consequence of his refusal to condone and participate in questionable and corrupt transactions and actions as directed by the 2nd respondent. He asserts that from the aforementioned instances and more to be disclosed during hearing of the main suit, it is apparent that questions to be settled including the personal allegations of gross misconduct and wrongful acts on the part of the 2nd respondent can only be effectually and completely settled if the 2nd respondent remains as a party to the suit. Notably, that the 2nd respondent is the sole author and engineer of the claimant's unlawful termination and his presence will help this honourable court determine the real matter in dispute. He also avers that there are several reliefs in the form of declaratory orders sought against the 2nd respondent in the amended statement of claim and who will not suffer any prejudice if he is put to task to defend his irregular and unlawful acts or omissions as he ought to. It is the claimant/ respondent's averment that the 2nd respondent's evaluation of his work performance as an agent of the 1st respondent shows a reasonable and proximate cause of action against the 2nd respondent arising from the claimant's relationship with the 1st respondent.
5. Oral arguments were made in respect to the motion by the two opposing sides. The counsel for the respondents/applicants submitted that it is established principle of common law that where a principal is disclosed you cannot move against an agent and that in this case the 1st respondent is a disclosed principal ad hoc the contract relationship. He referred the court to *Victor Mabachi & Another v Nurtun Bates Limited* [2013] eKLR; the Court of Appeal case of *City Council of Nairobi v Wilfred Kamau Githua t/a Githua & Associates* [2018] eKLR; and the case of *Manuel Anidos v Kinangop Wind Park (In Receivership) & 2 Others* [2019] eKLR. Counsel further submitted that their contention is that the 1st respondent having said that it is responsible for the 2nd respondent's actions, it as such own the negligence. That the claimant/ respondent quotes para 4.16 selectively and out of context and that the first paragraph of the charter states categorically that it is not in any way intended to replace applicable law. That the applicable law is that you cannot sue the agent where the principal is disclosed and that the charter thus does not apply.



6. Counsel for the claimant/respondent submitted that the principal is not a blanket provision that excludes an agent's misconduct and acts done in bad faith for liability. That section 4.16 of the charter titled "liability of board members" expressly provides there is no limit action of liability and that limitation is excluded where bad faith, intentional misconduct and violation of the law are in place. That it is therefor not a blanket immunity and that the applicant's contention if allowed would create an absurdity that an agent who declines to follow the law and deliberately ignores guidelines, an agent who disregards the rules of natural justice can simply say he is immune for liability. That in this case, the directors of the 1st respondent have a fiduciary duty to carry out their duties under the law and the hospital cannot shoulder such acts which it has excluded. He further submitted that the claim that the 2nd respondent is not the employer and so cannot be sued as far from the truth. That he wording of section 12(1)(a) is not couched in exhaustive terms and it is to include those aspects in section 72 and that the former provision provides for determination of disputes between employer and employee as is in this case. He argues that the 2nd respondent is trying to run away from his responsibilities and has not even bothered to swear an affidavit to remove himself from the matter. That it is only after hearing the matter herein that court can find that the 2nd respondent is either not to answer or is not liable.
7. In response, counsel for the applicants submitted that the claimant/ respondent has not cited any legal precedence in support of his submissions. He reiterated that the 1st respondent is a juristic person and can only act through agents and that the 1st respondent has taken responsibility of the 2nd respondent's actions as one of its agents. He further submitted that the court should only consider whether there is a reason for the joinder of the 2nd respondent and find that there is no basis to enjoin him unless there is personal vendetta against the 2nd respondent.
8. The respondents seek the removal of the 2nd respondent from proceedings herein on the basis that he was not the employer of the claimant. The definition section of the Employment Act, which is section 2, defines employer as follows:-

"employer" means 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; (emphasis mine)

9. The 2nd respondent is from all accounts per the pleadings before the court an employer for purposes of the law and is thus rightly before the court. He cannot shy away from his own actions which demonstrate his exercise of prerogatives of an employer. The cases of Victor Mabachi & Another v Nurtun Bates Limited and City Council of Nairobi v Wilfred Kamau Githua t/a Githua & Associates (supra) are distinguishable as the cases relate to commercial transactions between parties and agents of a disclosed principal. In the case of Manuel Anidos v Kinangop Wind Park (In Receivership) & 2 Others (supra) the issue therein related to the joinder of receiver managers of the company in receivership and this again is not on all fours as the case before me. The case before me falls squarely within the purview of section 2 of the Employment Act and therefore within the jurisdictional limits of this court. The foregoing is ample evidence that the motion before me is devoid of merit and is accordingly dismissed with costs to the claimant. Directions as to the hearing of the suit shall follow the delivery of this ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2022

Nzioki wa Makau

JUDGE

