



REPUBLIC OF KENYA



**Wanjiru v Board of Management T/A Shunem Girls High School & another
(Cause 84 of 2018) [2022] KEELRC 1116 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1116 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 84 OF 2018
DN NDERITU, J
JUNE 16, 2022**

BETWEEN

LUCY WANJIRU CLAIMANT

AND

**BOARD OF MANAGEMENT T/A SHUNEM GIRLS HIGH
SCHOOL 1ST RESPONDENT**

LAWRENCE KARANI 2ND RESPONDENT

RULING

INTRODUCTION

1. By way of a statement of claim dated 22nd March, 2018 the Claimant instituted this cause against the Board Of Management Shunem Girls' High School as the only Respondent claiming various reliefs as set out in that statement of claim.
2. In that statement of claim the said Respondent is described as "the proprietor and owner of Shumen Girls' High School-Lanet, a private boarding secondary school registered by the Ministry of Education."
3. In a memorandum of appearance dated 20th July, 2018 by the firm of Kimatta & Company Advocates the Respondent entered appearance and followed the same with an answer to claim dated 13th August, 2018.
4. In paragraph 2 of the said answer to claim the Respondent denied being the proprietor of Shunem Girls' High School.
5. In a reply to answer to claim dated 23rd August, 2018 the Claimant insisted that the Respondent was the proprietor and owner of the said school.



6. On 4th February, 2019 the Claimant was granted leave to amend the claim. The amended claim is dated 11th February, 2019 and was filed in court on 19th February, 2019.
7. In the amended statement of claim the Claimant named Shunem Academy Limited T/a Shunem Girls' High School and one Lawrence Karani as the 1st and 2nd Respondents respectively.
8. In the descriptive parts of the amended statement of claim the Claimant described the new Respondents as follows
 2. The 1st Respondent is a Limited Liability Company incorporated under the *Companies Act*, Cap 486 of the Laws of Kenya and the proprietor and owner of Shunem Girls' High School - Lanet, a private boarding secondary school registered by the Ministry of Education.
 - 2A. The 2nd Respondent is a male adult of sound mind residing and working for gain in Nakuru town and has leased Shunem Girls' High School from the 1st Respondent.”
9. There is an affidavit of service on record that both Kimatta & Co Advocates for the original Respondent, Board Of Management Shunem Gilrs' High School, and the new 2nd Respondent, Lawrence Karani, were served with the amended statement of claim.
10. Vide a notice to cease acting dated 30th June, 2021 signed by L.W. Gatu Magana for Kimatta & Co. Advocates, the said law firm ceased acting for the Board of Management Shunem Girls' High School, the original Respondent.
11. It is illustrative to note that up to this point there is no evidence of service of the amended statement of claim upon the new 1st Respondent, Shunem Academy Limited T/a Shunem Girls' High School, which for all intents and purposes is a different legal entity from the original 1st Respondent, Board Of Management Shunem Girls' High School.
12. When the matter came up in court for hearing on 27th October, 2021 Counsel for Claimant informed the court that the Respondents had been served.
13. The hearing proceeded and the Claimant (CW1) testified alone. Since the Respondents did not attend the Claimant closed her case and the court directed the Claimant's Counsel to file written submissions. The matter was reserved for mention on 24th November, 2021 and the court ordered that the written submissions be served (physically) upon the Respondents along with a mention notice.
14. On 24th November, 2021 the court noted that there was no evidence of physical service as ordered on 27th October, 2021 and fixed the matter for further mention on 15th December, 2021.
15. On 15th December, 2021 Mr. Mong'eri Advocate appeared for the 1st Respondent and informed the court that he had filed an application seeking, inter alia, to set aside the ex- parte hearing proceedings and all the consequential orders and prayed for stay of further proceedings in the matter including delivery of the pending judgment. The court ordered stay of proceedings pending the hearing and determination of the said application.
16. However, counsel for both parties in attendance indicated that they would engage in negotiations to compromise the said application and or indeed the entire cause.



17. Counsel for both parties were however unable to agree on a settlement and hence it was agreed that the Notice of motion dated 6th December, 2021 was to proceed to full hearing and disposal by way of written submissions.

ii. The Application

18. In the Notice of motion dated 6th December, 2021 the Respondent/Applicant prays for the following orders:-
1. That pending the hearing and determination of this application inter-partes, this Honourable Court be pleased to set aside the ex-parte proceedings and subsequent orders entered against the Applicant closing the Respondent's case and all other consequential orders thereto.
 2. That pending the hearing and determination of this application inter-partes, this Honourable Court be pleased to grant leave to the Applicant herein to file their response to the memorandum of claim out of time and the draft annexed response to memorandum of claim be deemed as duly filed upon payment of the requisite fees.
 3. That pending the hearing and determination of the application inter-partes, this Honourable Court be pleased to arrest its intended judgment in the current suit scheduled to be fixed on 15th December, 2021.
 4. That this Honourable Court be pleased to set aside the ex-parte proceedings in this matter and order the re-opening of the case herein to enable the Respondent prosecute his defence and cross examine the Claimant herein.
 5. That pending the hearing and determination of the suit, this Honourable Court be pleased to set aside the ex-parte proceedings and subsequent orders entered against the Applicant closing the Respondent's case and all other consequential orders thereto.
 6. That pending the hearing and determination of the suit, this Honourable Court be pleased to grant leave to the Applicant herein to file their response to memorandum of claim out of time and the draft annexed response to memorandum of claim be deemed as duly filed upon payment of the requisite fee.
 7. That pending the hearing and determination of the suit, this Honourable Court be pleased to arrest its intended judgment in the current suit to be fixed on 15th December, 2021.
 8. That this Honourable Court be pleased to be aside the ex-parte proceedings in this matter and order the re-opening of the case herein to enable the Respondent prosecute his defence and cross examine the Claimant herein.
 9. The costs of this application be provided for.
19. Along with the said application a memorandum of appearance dated 29th November, 2021 was entered by M/S Mong'eri & Co. Advocates for the 1st Respondent.
20. The said Notice of motion is supported by the affidavit of Humphrey Mwangi Ngubini sworn on 6th December, 2021.
21. The application is expressed to be brought under the provisions of Sections 1A, 1B, 3, and 3A of the Civil Procedure Act, Order 45 and 51 rule 1 of the Civil Procedure Rules, and Article 159(2) of the Constitution among other provisions.



22. In paragraph 1 of the supporting affidavit the said deponent avers that “ I am the Respondent herein hence competent to swear this affidavit.” This averment cannot be true as the parties to this cause are very clearly spelt out as per the amended statement of claim as illustrated in part I of this ruling.
23. The fact that the said deponent is not a party to this cause and has not established any basis upon which he has sworn the supporting affidavit is captured in the replying affidavit of the Claimant Lucy Wanjiru sworn on 3rd February, 2022.
24. The 1st Respondent has had occasion(s) to either withdraw the said offending supporting affidavit or clarify the same by way of a further or supplementary affidavit but no action has been taken.
25. In the circumstances, this court finds that the supporting affidavit sworn by one Humphrey Mwaniki Ngubini is false and not factual to the extent that he is not a party to this cause and he has not disclosed any other capacity in which he swore the said affidavit or provide any authority from either of the Respondents for him to swear the same.
26. In the circumstance, and without further ado, the said supporting affidavit is expunged from record as the same amounts to abuse of process of court.
27. The net effect of the above finding is that the Notice of motion dated 6th December, 2021 is not supported with a proper affidavit in support of the facts or grounds on the face of the same and as such the same must fail.
28. On the foregoing ground alone the said application is dismissed with costs to the Claimant.

iii. The Aftermath

29. Upon dismissal of the said application in part II of this ruling, this court is obliged to give directions on the way forward in this cause.
30. In another part of this ruling this court has found that after the statement of claim was amended there is no evidence of service of summons and the amended claim upon the new Respondents.
31. It is clear that the amendments to the claim brought into the cause new parties, especially the 1st Respondent, who are completely different legal entities from the original Respondents.
32. In the circumstances and in the interest of justice and fairness as envisaged under Articles 25(c), 48, 50, 159(2) of the Constitution , Sections 1A, 1B, 3 and, 3A of the Civil Procedure Act and Section 3 of the Employment and Labour Relations Court Act, this court, *suo motto*, issues the following directions and orders:-
 - (a) That the ex-parte proceedings in this cause so far and all consequential orders are hereby set aside.
 - (b) That the Claimant shall apply for fresh summons and serve both Respondents, along with the amended statement of claim, forthwith.
 - (c) That since the 1st Respondent has appointed M/S Mong’eri & Co. Advocates to act for it in this cause, the 1st Respondent may be served through the said Advocates.
 - (d) That the 2nd Respondent shall be served personally.
33. Once the above is done the matter shall then follow the usual court process and procedures to hearing and disposal.



iv. Disposal

34. This court has seen and read the able submissions by Counsel for both parties. However, in view of the foregoing findings and holdings of this court, I will not go into analysis of the same as that would be an exercise in futility because the subject application has been found to be incompetent and has been dismissed with costs to the Claimant for the reasons stated.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF JUNE, 2022.

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DAVID NDERITU

JUDGE

