



**Odera v Garda World Kenya Limited (Cause 2437 of 2017)
[2022] KEELRC 1678 (KLR) (6 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1678 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2437 OF 2017
AN MWAURE, J
JUNE 6, 2022**

BETWEEN

ANTHONY LUMUMBA ODERA CLAIMANT

AND

GARDA WORLD KENYA LIMITED RESPONDENT

RULING

1. By the Notice of Motion dated the 14th day of February 2022 the respondent/applicant seeks the following from court;
 - a. The memorandum of claim dated the December 11, 2017 and filed by the claimant on the December 13, 2017 be struck out.
 - b. This application be heard on priority basis, prior to the hearing and determination of the main suit.
 - c. The costs and incidental to this application be borne by the claimant.
2. According to the applicant, the claimant has never been the employer of the claimant at any given point in time. The respondent says that the claimant's documents filed in support of his claim confirm that the claimant was employed by EARS Group Limited and subsequently the KK Security Group of Companies (KK Group) and not the Respondent.
3. The applicant says that although it bought shares in the KK Group in 2016 and became a shareholder therein, the mere acquisition of shares in a company (in this case the KK Group) and the applicant are separate and distinct legal entities and as such the change of shareholding does not affect its running. There was no initiation of transfer of employees including the claimant to the respondent.
4. That given the lack of employer-employee relationship between the claimant and the applicant, the Claimant's memorandum of claim does not disclose any reasonable cause of action against the



applicant and does not meet the statutory threshold provided under the [Employment and Labour Relations Court Act](#), 2011. The Application is supported by the supporting affidavit which reiterates the grounds in the motion.

5. The claimant/respondent filed a ground of opposition saying that the Respondent is guilty of laches, the remedy the applicant seeks is unknown to law, the application goes against the honourable court's direction issued on the 29th February, 2019 and that the court having certified the cause as ready for hearing, the applicant is estopped from challenging the said finding.

Respondent/Applicant's Submissions

6. The applicant/respondent submits that no employer employee relationship exists between it and the claimant. The Respondent was not an employee of the applicant which had not been registered at the time of the claimant's employment.
7. The applicant/respondent cites the case of [Casmir Nyankuru v Mwakikar Agencies Ltd](#) 2016 eKLR for the proposition that the jurisdiction of the Employment & Labour Relations Court as far as employment matters are concerned is limited by the existence of an employment relationship as defined in law and the court must always satisfy on this account before proceeding any further
8. The respondent argues that it is therefore imperative that with respect to a dispute relating to or arising out of employment, the dispute must be between the employer and employee. The respondent submits that whilst there was an acquisition majority of KK Security shareholding, which employed the claimant after the transfer of his employment services from EARS, the Claimant remained an employee of KK Securities and his salary was paid for over 10 years by KK Securities before filing the suit.
9. The applicant relied on, inter alia, the case of [Sigilai K Julius v Kenya Midland Sacco Limited](#) (2021) eKLR for the proposition that the Court can seek guidance from the [Civil Procedure Act](#) to fill the lacuna in the ELRC Act and the ELRC rules and accordingly strike out the pleadings for lack of jurisdiction owing to lack of employer employee relationship as contemplated by the law.
10. The applicant argues that the earlier P.O and the Application are distinct and must be treated as such and that it did not delay in filing the instant application. The Applicant was at liberty to file the application at any stage of these proceedings and in any event, it ensured that the application was filed before the matter was set down for hearing. The applicant/respondent prayed that the Notice of Motion be allowed as prayed.

Claimant's Submissions

11. The Claimant submits that by section 1(2) of the [Civil Procedure Act](#) the Act applies to the proceedings in the High Court only and not the Labour Court which exercise separate jurisdiction exercising specialized jurisdiction. The claimant cites the case of Supreme Court Pet. No 5 of 2015, [Republic v Karissa Chengo & 2 others](#) (2017) eKLR for the proposition that the Employment Court is a special cadre of court with sui generis jurisdiction and exercises different jurisdiction.
12. The claimant cited the Court of Appeal's case in [DT Dobie & Company \(Kenya\) Limited v Joseph Mbaria Muchina & another](#) (1980) eKLR for the proposition that summary remedy is only applied in a plain and obvious case when the action is one which cannot succeed or is in some way an abuse of the process of court. The claimant says that it is well settled that a statement of claim should not be struck out and the Plaintiff driven out from the judgment seat unless the case is unarguable and that it is not in practice of civil administration of courts to have preliminary hearing and urge the court to so hold.



Determination

13. I have looked at the application praying to strike out the claim, the grounds of opposition together with the submissions. The main ground given to support this prayer is that there is no employer and employee relationship between the respective parties.
14. The court has considered the grounds given by the applicant and the response by the claimant. The court is also aware that the applicant had filed a preliminary objection dated January 29, 2018 pleading that this court lacks jurisdiction to hear this matter as there is no employer and employee relationship between the claimant and the respondent.
15. Radido Judge ordered on the 26/2/2019 that the said Preliminary Objection dated the 29/1/2019 by the Respondent/Applicant be part of the hearing alongside the main suit.
16. This is essentially the same issue raised in the application dated February 14, 2022 as is evident under Paragraph 7 where the applicant says there was no employer/ employee relationship and goes ahead under paragraph 9 to assert that there is lack of jurisdiction as a consequence to hear the claim.
17. For reasons which are not readily explicable, the applicant/respondent denies in their submissions that the Application and the P.O concerns the same issue. But in the same submissions the applicant urges the court to strike out the claim on the basis that there is lack of jurisdiction as the respondent was not the claimant's employer.
18. The upshot of the foregoing is that the order which commends itself to the court is that the applicant can raise the point of objection at the hearing of the claim as earlier ordered by the court. To order otherwise would be in my view to tamper with the earlier orders given by Radido Judge without the appropriate application before the court.
19. Let the applicant first deal with the Preliminary objection during the hearing of the main suit.
20. In conclusion the Court is not inclined to strike the claimant's suit as prayed and so disallows it and instead orders the parties to mention the case before the DR on 5/7/2022 to take a hearing date of the main suit.

Costs will be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 6TH DAY OF JUNE, 2022.

ANNA NGIBUINI MWAURE

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 March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of *the Constitution* and the provisions of section 1B of the *Procedure Act* (chapter 21 of the Laws of Kenya) which impose on this court the duty of



the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE

