



**Opele v Biometric Technology & 3 others (Cause E350 of 2020)
[2022] KEELRC 3778 (KLR) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3778 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E350 OF 2020
SC RUTTO, J
AUGUST 19, 2022**

BETWEEN

FLORENCE KHAMALA OPELE CLAIMANT

AND

BIOMETRIC TECHNOLOGY 1ST RESPONDENT

ANTHONY MAINA 2ND RESPONDENT

JANE NYOKABI MAINA 3RD RESPONDENT

SAHAM ASSURANCE COMPANY KENYA LIMITED 4TH RESPONDENT

RULING

1. There are two Applications for determination before me. The first Application dated November 30, 2021, which was filed by the Respondents, seek orders to strike out the Claimant's amended statement of claim dated October 18, 2021 and to have the 2nd, 3rd and 4th Respondents struck off the claim. The second Application which is dated December 6, 2021, has been brought by the Claimant and it seeks to have the amended statement of claim regularized and be deemed as duly filed.
2. I will start with the Application by the Respondents. The Application is supported on the grounds appearing on its face and on the Affidavit of Mr Anthony Maina Mithanga. Briefly that: -
 - i. That pleadings closed on September 25, 2020, 14 days after the Respondent filed its Response and counterclaim;
 - ii. The claimant filed its amended statement of claim without seeking leave of the court as required under the Civil Procedure Rules;
 - iii. The 2nd, 3rd, 4th Respondents were wrongly joined as parties contrary to the *Employment and Labour Court Rules (2016)*; and



- iv. The 2nd to 4th Respondents are not the correct parties as they were not the claimant's employer.
3. The Application was opposed by the Replying Affidavit of the Claimant sworn on December 7, 2021. Briefly that:
- i. She filed the amended statement of claim when the plaint she had filed at the Magistrates court was struck out, on account that the issue raised therein would be more suitably dealt with by this court;
 - ii. The Respondents will not suffer prejudice in any way as the matter is in its preliminary stage;
 - iii. Article 159(2) of the Constitution states that justice shall be administered without undue regard to technicalities;
 - iv. The 2nd, 3rd and 4th Respondents are directors of the 1st Respondent and have been sued in their individual capacities and not as the employers of the claimant;
 - v. The joining of the 2nd, 3rd and 4th Respondents is not limited to them being directors of the 1st Respondent but as a result of the cause of actions which arose from their decisions in the running of the 1st Respondent; and
 - vi. No prejudice will be occasioned to the 2nd, 3rd and 4th Respondents by being party to the suit.
4. As stated herein, the second Application is by the Claimant and is supported by the grounds on its face and on her Affidavit, through which she avers that:-
- i. She filed a plaint dated June 29, 2020 in the Magistrates court against the 1st and the 5th Respondents claiming compensation for the hospital bill that she paid upon delivery;
 - ii. The plaint was struck out after a preliminary objection on grounds that she had filed a similar matter with the same issues before this Court;
 - iii. The magistrates court directed that the issues raised in the plaint would have been more suitably dealt with by this court hence necessitating the filing of the amended statement of claim;
 - iv. Though she filed the amended statement of claim out of time, the same cannot prejudice the Respondent in any way as the matter is still at its preliminary stage and she has supplied all the documents she is to rely on;
 - v. The issues raised in the amended statement of claim are serious legal issues hence she will be adversely prejudiced if the same is struck out; and
 - vi. Article 159(2) of the constitution states that justice shall be administered without undue regard to technicalities.
5. On April 25, 2022, the Court directed that both Applications will be canvassed by written submissions.

Submissions by the Respondents

6. The Respondents have submitted that Rule 13(4) of the Employment and Labour Relations Court Rules (2016), (hereinafter the Court's Rules), provide for closing of pleadings after service of Responses to pleadings. That under Rule 14(6) of the Court's rules, a party may only amend pleadings after close of the pleadings with leave of the Court. That the Claimant herein had filed the amended statement of claim without leave of the Court hence should be struck out. It was further submitted by the



Respondents that the amended statement of claim seeks to introduce another party, being the 5th Respondent.

7. In further submission, it was stated that the 2nd, 3rd and 4th Respondents are not proper parties to the suit. On this score, reliance was placed on the provisions of Rule 2 of this Court's rules and specifically on the definition of the term "party". That in this regard, the said parties are not correct parties to the suit and their names should be struck out as their participation only increases costs on their individual capacities. It was the Respondents' further submission that suing a director in his/her personal capacity defeats the principle that a corporate entity is a legal person capable of suing and being sued in its own name. That there was also no justification for including the 5th Respondent as a party to the suit as it was not her employer.
8. On her part, the Claimant submitted that the Application by the Respondent arises out of a procedural technicality which should not subvert the dispensation of justice. In support of this position, the Claimant sought to rely on the case of Local Building and Construction Limited vs Institute of the Blessed Virgin Mary Loreto Msongari & 2 others (2019) eKLR.
9. The Claimant further submitted that the amendment was done in good faith and it was necessary to help the Court facilitate the just determination of the real question in controversy between the parties.
10. It was the Claimant's further submission that a suit should not be struck out on the basis that a party has been wrongly joined in a suit. That the mistakes of an advocate should not be visited upon the client. The case of Belinda Murai & others vs Amos Wainaina (1978) LLR 2782 (CALL) was cited in support of this argument. That further, the amended statement of claim discloses a reasonable cause of action against all the Respondents.

Analysis and determination

11. At the outset, it is worth noting that the issues raised in the Claimant's Application are related to those raised in the Respondent's Application. Consequently, a determination of the Claimant's Application will resolve a portion of the Respondent's Application. That said, having considered both Applications, Affidavits, and submissions filed by the parties and the authorities cited therein, the following twin issues stand out for determination:-
 - i. Whether the Court should allow the Claimant's amended statement of claim filed out of time without leave?
 - ii. Whether the 2nd, 3rd and 4th Respondents should be struck off the suit?Whether the Court should allow the Claimant's amended statement of claim filed out of time without leave
12. The Respondents contend that the Claimant amended statement of claim was filed out of time after the close of pleadings without the leave of the Court. They submitted that by the time the amended statement of claim was filed, pleadings had closed and hence the Claimant required the leave of the Court before filing the same. It is on this basis that the Respondents called for the striking out the amended statement of claim.
13. Rule 13 (4) of this Court's Rules is in the following manner: -

“The pleadings in a suit shall close fourteen days after the service of a reply under paragraph (3) or, where a reply is not filed, fourteen days after service of a response to pleadings under paragraph (1).”



14. Notably, this is a near replica of Order 2 Rule 13 of the *Civil Procedure Rules, 2010*.
15. Rule 14 (6) provide for the requirement of leave in the following manner: -

“A party may amend pleadings before service or before the close of pleadings: Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.”
16. Again, this provision is similar in substance to the provisions of Order 8 Rule 1(1) of the *Civil Procedure Rules*.
17. Therefore, the Respondents’ submissions are true, to the extent that the pleadings in this matter should ideally have closed by September 25, 2020 being fourteen (14) days from September 11, 2020 after filing of the Respondents’ response to the statement of claim.
18. Accordingly, the Claimant was entitled to file her amended statement of claim on or before September 25, 2020, but the same was filed on October 18, 2020, clearly after close of the pleadings. The Claimant therefore required the leave of the court to file the amended statement of claim.
19. The Claimant allege that she filed her amended statement of claim after the suit she had filed at the Magistrate’s court, was struck out on grounds that that the issues raised therein, would be more suitably heard and determined in this Court and presumably, within the instant suit.
20. In the circumstances, should the said amended statement of claim be struck out?
21. The Claimant has urged that the issue raised by the Respondents is a procedural technicality which should not subvert the dispensation of justice.
22. In the case of *Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another vs Francis Babati Diwani & 2 others* (2014) eKLR, the Court observed as follows: -

“The question that the arises is this: what happens to a defence that is filed after 14 days from the date when the Defendant enters appearance considering that judgment cannot be entered until the matter is heard? Can such a Defence be struck out so as to allow the claim to proceed as if it is undefended?

In my view, an omission to fully comply with a provision of the Rules is an irregularity which except in very clear cases, may be cured. Striking out of a pleading, especially where the Rule does not expressly provides so, which has been filed out of time is an extreme measure which is resulted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court.

The court ought to look at the issues raised in a holistic manner before making a decision as to whether it can strike out a pleading which has been filed contrary to the provisions of the Rules.

I say so because the Rules themselves allow the court, in appropriate cases, and upon such terms as the justice of the case may require to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules.



The approach of the court should therefore not to strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objective set out in the Civil Procedure Rules and Article 159 of the Constitution.”

23. The position enunciated above resonates with the determination by the Court of Appeal in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & others (2013) eKLR, thus: -

“It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”

24. The position taken by the Courts in the above decisions, indicate that the provisions of procedural law should not be adhered to at the altar of substance, rather, regard should be had to whether the striking out will be in conformity with the Court’s overriding objective and Article 159 of the Constitution.

25. Section 3 of the Employment and Labour Relations Court Act provides that the principle objective of this Court is to facilitate the just, expeditious, efficient and proportionate resolution of disputes. The said provision is couched as follows: -

“3 (1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.

(2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).

(3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.”

26. In this case, and taking into account the Court’s principle objective as well as the provisions of Article 159 of the Constitution, I am convinced that it is in the interest of justice that no prejudice would be suffered by the Respondents if the amendment to the statement of claim is allowed. This is coupled with the fact that the Respondents have a corresponding right to amend their response.

27. In concluding this issue, I wish to borrow the expression of Madan JA in D T Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another [1980] eKLR where the learned Judge stated thus: -

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”



28. In following with the above determination, I am in favour of sustenance rather than striking out of the amended statement of claim.

Whether the 2nd, 3rd and 4th Respondents should be struck off the suit?

29. Turning to the second issue as to whether the 2nd, 3rd and 4th Respondents should be struck off the suit, the Respondent has urged that they have been wrongly enjoined in the suit as they do not fit the definition of the term “party” in this Court’s Rules.

30. On the other hand, the Claimant contends that the said parties have been sued in their individual capacities and not as her employers.

31. In this regard, Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) provides that: -

“The court may at any stage of the proceedings, either upon or without the application of either part, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendants, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

32. It is therefore clear from the above provision that the Court may on its own motion or on Application of any party to the proceedings order the striking out a party who the Court finds was improperly joined.

33. I have carefully considered the initial claim as well as the amended statement of claim and I note that there is no cause of action disclosed against the 1st to the 4th Respondents. I do not think they are necessary parties the suit.

34. The main dispute appears to be between the Claimant and the 1st Respondent who was her employer. Indeed, the share of blame attributable to the said parties has not been particularized in the claim. Therefore, the bone of contention between the Claimant and the 1st to 4th Respondents is not evident.

35. It is also trite that directors are generally not personally liable on contracts purporting to bind their company. No doubt, this is the position of the law ever since the celebrated case of *Salomon vs Salomon & Co (1897) A C, 22*.

36. As I have stated herein, the claim discloses no cause of action against the 2nd to 4th Respondents in their own personal capacity. In view of the foregoing, I strike out the 2nd, 3rd and 4th Respondents as parties herein.

Orders

37. In conclusion, it is my finding, holding and order that: -

- i. This Court admits the Claimant’s amended statement of claim hence the Claimant’s Application dated December 6, 2021 is allowed to that extent.
- ii. The Respondent’s Application dated November 30, 2021 is allowed partially to the extent that the 2nd, 3rd and 4th Respondents are struck off the suit.

38. Each party shall bear its own costs for the Applications.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.



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STELLA RUTTO

JUDGE

Appearance:

Ms Mukamo for the Claimant

Mr Kigata for the Respondents

Court Assistant Abdimalik Hussein

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 15th March 2020 and subsequent directions of 21st April 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 had 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 Civil 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.

STELLA RUTTO

JUDGE

