



**Owiyo v Chartered Institute of Marketing Members Group Kenya & another
(Cause E296 of 2021) [2022] KEELRC 3944 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3944 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E296 OF 2021
JK GAKERI, J
SEPTEMBER 21, 2022**

BETWEEN

FREDRICK OWIYO CLAIMANT

AND

**CHARTERED INSTITUTE OF MARKETING MEMBERS GROUP
KENYA 1ST RESPONDENT**

CHARTERED INSTITUTE OF MARKETING 2ND RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion Application dated 19th May, 2022 seeking orders that:-
 - i. The claim against 1st, 2nd, 3rd and 4th Respondents herein be struck out.
 - ii. Costs of this Application and the claim be awarded to the 1st, 2nd, 3rd and 4th Respondents.
2. The Application is expressed under section 12(3) of the *Employment and Labour Relations Court Act*, Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of law.
3. The Application is supported by the affidavit of Charles Avutia dated 19th May, 2022.
4. The deponent states that the claimant had by an Amended Statement of claim filed an action against the respondents jointly and severally for unfair termination of employment.
5. That the 1st respondent, Mary Chege employed the claimant as Executive Officer of the Chartered Institute of Marketing-Kenya vide letter dated 5th April, 2006 wrongly stated as 5th April, 2016.



6. That the claimant was not an employee of the 1st respondent nor was there an employer/employee relationship between them.
7. That the claim against the 1st, 2nd, 3rd and 4th respondents discloses no reasonable cause against them and is frivolous, vexatious and an abuse of the court process.
8. That the claim is fatally defective, misplaced and fit for dismissal with costs and it is unnecessary for the 1st, 2nd, 3rd and 4th respondents to await full trial of the matter as it has no relation to them and the orders sought ought to be granted.
9. In his Replying Affidavit dated 27th January, 2022, the claimant/respondent depones that the application is premature with no arguable and triable issue.
10. That on 2nd June, 2021, the Claimant/Applicant filed an amended statement of claim curing the mistake made earlier by the advocate on record but substituting the parties with the officials as per the law.
11. The claimant depones that he is suing the officials of the Chartered Institute of Marketing Members Group, Kenya and Chartered Institute of Marketing in their own names.
12. That the amended statement of claim was served upon the Applicant/Respondent via email on 12th October, 2021 and all accompanying pleadings have been served and the memorandum of claim raises triable issues.
13. It is deponed that the Applicant/Respondents application lacks merit and should be dismissed with costs.

Claimant/Respondent's submissions

14. The claimant states that the Application herein was triggered by the amendment to the statement of claim following the respondents application dated 27th May to strike out Chartered Institute of Marketing-Kenya as a respondent which they later abandoned.
15. According to the Claimant, the sole issue for determination is whether the claimant has a cause of action against the respondents.
16. It is submitted that the Claimant was an employee of the Chartered Institute of Marketing Kenya which is an unincorporated association with no capacity to sue or be sued in its name. The decision in *Kituo cha Sheria V John Ndirangu Kariuki & another (2013) eKLR* is relied upon for the proposition that as a general rule, unincorporated associations sue or are sued through their registered or elected officials.
17. The Claimant submits that he can only sue Chartered Institute of Marketing Kenya through its officials and the chart of the Executive Board of Chartered Institute of Marketing Kenya 2019/2020 identifies the 1st to 5th Respondents.
18. It is further submitted that from the 1st to 4th respondents were Vice chairpersons of Chartered Institute of Marketing, Kenya when the cause of action arose and the 5th respondent is the acting chairperson of Chartered Institute of Marketing, Kenya and sat during the disciplinary hearing.
19. That the 6th respondent is sued in its name because it is incorporated by a Royal Charter in the United Kingdom and thus enjoys a legal personality.



20. It is submitted that the Claimant's duties included liaising with the 6th respondent and was discharged from his duties by the 6th respondent.
21. That in light of the foregoing, the claimant has a cause of action against the respondents.

Respondent/Applicants Submissions

22. The respondents urge that the jurisdiction of the court is founded on the employment relationship and cites the decisions in *Transport Workers Union V Euro Petroleum Products & another* (2019) eKLR and *Zarika Adoyo Obundo V Tai Shunjun & another* (2020) eKLR to submit that the Claimant had no employment relationship with the 1st respondent as alleged in the amended statement of claim.
23. It is submitted that in the absence of an employment relationship between the claimant and the 1st respondent or any of them, the claim discloses no reasonable cause of action against the respondents.
24. The decision in *Zarika Adoyo Obondo V Tai Shunjun & another* (2020) eKLR is relied upon to urge that without evidence of an employment relationship between the parties, the claim herein is unsustainable.
25. It is the Respondent/Applicant's submission that by amending the statement of claim in June, 2022, the claimant was making an admission that the respondents were indeed improper parties to the amended suit.
26. The Respondent/Applicant pray for thrown away costs of Kshs.40,000/= for the application.

Determination

27. The only issue for determination is whether the claim against the 1st, 2nd, 3rd and 4th respondents discloses a reasonable cause of action against them.
28. By a statement of claim dated 7th April, 2021, the Claimant/Respondent sued the Chartered Institute of Marketing, Members Group, Kenya and the Chartered Institute of Marketing alleging breach of service contract, *Employment Act*, failure to declare redundancy, non-issuance of KRA Tax deduction card, (P9A) for 2019 and Certificate of Service among other reliefs.
29. The Claimant urges that sometime on 7th June, 2021, he filed an amended statement of claim replacing the two respondents with another four as follows;

Mary Chege 1st Respondent
Phyllis Maitha 2nd Respondent
Emily Menge 3rd Respondent
Charles Avutia 4th Respondent
30. The amendment precipitated the application herein.
31. The gravamen of the Respondents/Applicants application is that there was no employment relationship between them and the Claimant and are thus not the proper respondents in the suit. That the claim against them is fatally defective and misplaced.
32. The Claimant's case is that since the employer – Chartered Institute of Marketing (CIM) Kenya Branch is an unincorporated association, his only recourse is to sue its officials, which is in the courts view a legitimate argument. That is however as far as the court is prepared to go.



33. The jurisprudence on suits by or against associations that have no legal personality such as clubs, societies and welfare associations among others is well established from as early as 1959 in *Fort Hall Bakery Supply Co. V Fredrick Muigai Wang'oe* (1959) EA 474.
34. In the words of Templeton J at page 475;
 - “A non-existent person cannot sue, and once the court is made aware that the Plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed.”
35. The action in the foregoing case was struck out since the Plaintiff was an unincorporated association.
36. A similar holding was made in *Voi Juakali Association V Sange & others* (2002) 2 KLR 474 where the court observed that the Plaintiff could only sue or be sued through its officials but overruled the preliminary objection.
37. In *Housing Finance Co. of Kenya Ltd V Embakasi Development Project* (2004) 2 KLR 548 at 554, Ojwang J. (as he then was) expressed himself as follows;
 - “It follows that the notion that an entity lacking legal personality can seek orders of the court or become the bearer of rights or liability declared by the court is totally inconsistent with the character and Modus Operandi of the courts in the common law system.”
38. Kimondo J. expressed similar sentiments in *Kituo cha Sheria V John Ndirangu Kariuki & another* (2013) eKLR as follows;
 - “As a general rule, unincorporated legal persons including societies, clubs and business-names can only bring proceedings through their registered or elected officials or in their proprietors names . . .”
39. The court is guided by the foregoing jurisprudence which it is in agreement with.
40. In the instant case, it is not in dispute that the Claimant was an employee of the Chartered Institute of Marketing (CIM) Kenya, Branch as attested by the letter of employment dated 5th April, 2005.
41. The letter has the letter head of the organization as well as the physical, postal and email addresses and telephone contacts.
42. The claimant was offered the position of Executive Officer of the organization and the letter is signed by the Honorary Secretary whose name is not specified.
43. The claimant accepted the offer on the same date.
44. This far, it is clear that the Claimant was an employee of the Chartered Institute of Marketing, Kenya Branch.
45. Significantly, a copy of the organization’s Constitution on record reveal that, its affairs are managed by the Executive Committee comprising 12 persons and the Executive Officer is the head of the Secretariat.
46. It is unclear who the current holders of the offices of the Executive Committee are.
47. The Claimant has sued the four respondents as officials of the organizations. However, there is no indication whether the respondents are the current officials of the former employer of the claimant



or who they are. As framed, the suit by the Claimant is against the four respondents in their personal capacities.

48. Needless to emphasize, since the Chartered Institute of Marketing, Kenya Branch is an unincorporated association and lacks legal personality to sue or be sued, it can only sue or be sued through its officials who must be named in the pleadings (See *Francis Karani Elijah & 2 others V Chairman (KANU) & 2 others* Misc. Civil Case No. 238 of 2002).
49. It therefore follows that the Claimant has no claim against the respondents in their individual capacities and the suit discloses no reasonable cause against them.
50. The foregoing notwithstanding, the court is of the view that striking out the suit at this stage is a draconian step and should only be resorted to as the last resort.
51. Consequently, the application dated 19th May, 2022 is disallowed subject to the Claimant/Respondent filing an application to amend his pleadings to sue the correct party or parties.
52. The Claimant/Respondent shall have 30 days to lodge the application failing which the suit herein shall stand struck out.
53. Parties to bear own costs.
54. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF SEPTEMBER 2022

DR. JACOB GAKERI

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 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 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 *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.

DR. JACOB GAKERI

JUDGE

