



REPUBLIC OF KENYA



**KENYA LAW**  
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**Malakwen v Oloibe & 2 others (Petition E007 of 2021)  
[2022] KEELRC 13120 (KLR) (7 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13120 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
PETITION E007 OF 2021  
NJ ABUODHA, J  
NOVEMBER 7, 2022**

**BETWEEN**

**STEPHEN KIBET MALAKWEN ..... PETITIONER**

**AND**

**FRED KIBET OLOIBE ..... 1<sup>ST</sup> RESPONDENT**

**KENYA SEED CO. LTD ..... 2<sup>ND</sup> RESPONDENT**

**BOARD OF DIRECTORS KENYA SEED COMPANY LIMITED .... 3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. The preliminary objection raised by the 1<sup>st</sup> and 3<sup>rd</sup> respondent and the interested party is dated January 14, 2022 and it is filed against the petition dated February 12, 2021 on the following grounds which I will quote verbatim;
  - i. The petition is defective in so far as
    - a. The 1<sup>st</sup> respondent and the interested party have no personal interest in the subject matter of the dispute and being agents of a disclosed principal have been wrongly joined in their personal capacity as both respondent and interested party, which misjoinder unreasonably exposes them to the unnecessary burden of incurring legal expenses and the risk of having to obey court orders that have nothing to do with them individually even if they happen to leave office during the pendency of this matter.
    - b. The interested party never applied to be enjoined in these proceedings as an interested party and it is completely irregular that he was joined as aforesaid without application, notice and or consent.



- c. The 3<sup>rd</sup> respondent has no distinct legal identity making it capable of suing or being sued in its own name and even if it had, which it does not, the board of directors of the 2<sup>nd</sup> respondent whether as group or individuals, function as agents of a disclosed principal and have no personal interest in the subject matter of this suit and the said board is now exposed to the burden of incurring legal expenses and the risk of having to obey court orders in proceedings that should rightly be between employer and employee, *ie* the petitioner and the 2<sup>nd</sup> respondent.
  - ii. The 1<sup>st</sup> and 3<sup>rd</sup> respondents and the interested party will seek to have their names struck out from the entire petition with costs to compensate them for both the legal expense that they have incurred and for the unnecessary nuisance of litigation.
  - iii. The said preliminary objection is based on the following matters of fact and law;
    - a. Besides being the managing director for the time being, and therefore a board member of the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent has no personal or individual interest in or concerning the employment of the petitioner or the dispute herein
    - b. Besides being the ICT manager for the time being of the 2<sup>nd</sup> respondent, the interested party has no personal interest on or concerning the employment of the petitioner or the dispute herein.
    - c. The board of directors of the 2<sup>nd</sup> respondent has no legal personality so as to be capable of suing or being sued in its own name and it should therefore be struck out of these proceedings with costs.
    - d. In any case, the 3<sup>rd</sup> respondent board of directors of the 2<sup>nd</sup> respondent have no personal interest in or concerning the employment of the petitioner or the dispute herein and should therefore be struck out of these proceedings with costs.
2. The petitioner filed an affidavit in reply to the preliminary objection on 31<sup>st</sup> May 2022 where he averred that the joinder of the 1<sup>st</sup> and 3<sup>rd</sup> respondents as parties was justified on the basis that the 1<sup>st</sup> respondent initiated the unlawful and unjustified actions against his employment in the 2<sup>nd</sup> respondent.
3. As regards the enjoinder of the 3<sup>rd</sup> respondent, the petitioner argued that company's board of directors controls the company's mind and can be joined in a suit against the company and as such, the 3<sup>rd</sup> respondent had an interest and also has the legal capacity to be joined in this suit.
4. Concerning the interested party, the petitioner conceded to his name being struck out from the petition without any orders.
5. It was thus deposed by the petitioner that the 1<sup>st</sup> and 3<sup>rd</sup> respondents have been rightly joined in the instant petition.
6. On the June 6, 2022, the court directed the parties to file submissions on the preliminary objection within 14 days. The court has perused the record and found only submissions by the applicant.
7. On behalf of the 1<sup>st</sup> and 3<sup>rd</sup> respondents, and the interested party, counsel for the said parties submitted that the said parties were mere agents of the 2<sup>nd</sup> respondent acting in the following capacities,
  - a. The 1<sup>st</sup> respondent is the managing director of the 2<sup>nd</sup> respondent
  - b. The 3<sup>rd</sup> respondent is the board of directors of the 2<sup>nd</sup> respondent



- c. The interested party is the ICT manager of the 2<sup>nd</sup> respondent.
8. It was further submitted that the above parties are all agents of a disclosed principal and that any actions taken by the 1<sup>st</sup> and 3<sup>rd</sup> respondents, have been taken for and on behalf of the 2<sup>nd</sup> respondent and not on their own behalf. To buttress this position, counsel cited the following cases; Civil Appeal No 206 of 2008 *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another* [2016] eKLR and *Amos Tum Kiptoo & 2 others V PM Wandabwa & 9 others* [2007] eKLR.
9. Further it was urged that this court does not have the jurisdiction to hear a petition between the petitioner and the 1<sup>st</sup> and 3<sup>rd</sup> respondents and the interested party because there is no employer-employee relationship between any of these parties and that as such, the said parties ought to be struck out from these proceedings
10. Finally, the court was urged to uphold the preliminary objection with costs.
11. The petitioner has conceded that the interested party in this petition should be struck out from the case and as such this limb of the preliminary objection therefore succeeds and to this point, this court only needs to determine one issue in this matter which is whether the PO is merited.
12. A preliminary objection, as was held in the case of *Mukbisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696,  
“... is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
13. The applicants have filed the instant preliminary objection on the grounds that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have been sued despite the lack of the employer employee relationship between them and the petitioner.
14. Misjoinder of parties means a joinder of a party who ought not to have been joined either as a plaintiff or as a defendant and is provided for under order 1 rule 9 of the *Civil Procedure Rules* which states:  
“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
15. The Court of Appeal in the case of *William Kiprono Towett & 1597 others v Farmland Aviation Ltd & 2 others* [2016] eKLR held that –  
“Most critically order 1 rule 9 of the *Civil Procedure Rules* (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.”
16. A reading of the order 1 rule 9 of the *Civil Procedure Rules* reveals that non-joinder of necessary parties or misjoinder of parties in a suit is an irregularity which does not go to the root of a suit. In my view, this is an irregularity which can be cured by an amendment and this cannot render a suit fatally defective.
17. In the end, I find that the preliminary objection does not raise any pure point of law and thus without merit. I hereby dismiss the preliminary objection dated January 14, 2022 with costs.

**DATED AND DELIVERED AT ELDORET THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2022**

**ABUODHA NELSON JORUM**



## JUDGE ELRC

