



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 824 OF 2019

ELIZABTH AYOTI SIMIYU.....CLAIMANT

VERSUS

CBRE EXCELLERATE CRES (PTY) LIMITED...RESPONDENT/APPLICANT

RULING

1. The respondent/Applicant filed a Chamber Summons application dated 28/8/2020 praying for an Order in the following terms:-

(a) That the Honourable Court be pleased to Order that the applicant be struck out from the suit.

(b) That in the alternative, the suit be dismissed for lack of a Cause of action against the applicant.

2. The application is premised on eight grounds denoted in the body of the Chamber Summons application and the Supporting Affidavit of Gent Johannes Saaiman, the Human Resource Director of the Respondent sworn in South Africa on 24/8/2020.

3. The applicant deposes that the claimant was employed by **CBRE Corporate; Outsourcing (PTY) Limited** as she admits at paragraph 4 of her replying affidavit sworn on 4/9/2020.

4. The claimant has elected to sue, CBRE Excellerate Cres (PTY) Limited acompany incorporated and carrying its functions within the Republic of South Africa.

5. The applicant deposes that it is not a necessary party in the determination of the suit.

6. That Order 1, Rule 3 of the Civil Procedure Rules, 2010 prescribes who ought to be joined as a defendant in any suit thus:-

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

7. The applicant states that it has no nexus whatsoever with the claimant and therefore no right to relief arises between itself and the claimant.

8. The applicant deposes that reliefs contemplated under Section 49 of the Employment Act, 2007 are only against an employer and not any uncovered third party. That the applicant has no necessity to defend this suit since no relief may be obtained by the claimant against it.

9. That the application be allowed with costs.

10. The claimant filed a replying affidavit sworn on 4/9/2020 in response to

the application and deposes that the respondent is the proper defendant in this suit since at the time of termination of her employment existed an employer-employee relationship between her and the applicant in that:-

(a) The claimant was employed as a facilities Manager by CBRE Corporate Outsourcing (PTY) Limited on 6/12/2018. Subsequently, the employer merged “Facilities Management” under an entity called “CBRE Excellerate Cres (Pty)”, the defendant in the suit.

(b) That the defendant exercised control over the claimant including hearing and determining her disciplinary case. Therefore, the defendant was the employer of the claimant since a third party cannot terminate a contract of employment.

(c) That a suit cannot be defeated on the basis of a non-joinder or misjoinder of parties under Order 1 Rule 9 and 10 of the Civil Procedure Rules, 2010.

(d) That the application lacks merit and it be dismissed

Determination

11. The parties filed respective submissions in support of their positions and the issues for determination are:-

(a) Whether the claimant has a cause of action against the Respondent.

(b) What remedy if at all, is available to the applicant.

12. In **Savings and Loan (K) Limited –vs- Kanyenje Karangaita Gakombe & Another [2015] eKLR**, the Court stated thus:-

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party, from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.....”

13. From the contract of employment produced by the claimant in this suit and marked annexure 1 to the Statement of Claim, which contract of employment has not been placed in dispute by either party in this suit the claimant entered into a contract of employment on 29/8/2016 with “***CBRE Corporate Outsourcing (Pty) limited based at BAT in Kenya.***” The employment commenced on 12/9/2016.

14. The entire pleadings in the Statement of Claim relate to the employment relationship between the claimant and “***CBRE Corporate Outsourcing (Pty) Limited***” which the claimant CRES (PTY), which the Claimant served whilst, based at British Tobacco Company (K) Limited in Kenya.

15. The respondent (CBRE Excellerate CRES (PTY) Limited) is clearly a separate and distinct legal entity based in the Republic of South Africa

16. The claimant has not made out in the statement of claim any cause of action against the respondent.

17. The submissions by the claimant in which is admitted that the respondent is a separate and distinct Legal entity from CBRE Excellerate CRES (PTY) Limited does not take this matter any further.

15. In **Werrot & Company Limited and 3 Others –vs- Andrew Douglas Gregory eKLR**, Ringera J. stated:-

“**For determining the question who is a necessary party there are two tests:-**

(i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question

and

(ii) It should not be possible to pass an effective decree in the absence of the party.”

16. The claimant on the face of the pleadings has not established a right to some relief against the respondent, and it should be perfectly possible to obtain an effective decree against CBRE Corporate Outsourcing (PTY) Limited to the exclusion of CBRE Excellerate CRES (PTY) Limited now sued by the Claimant.

20. Accordingly, the Preliminary Objection is upheld and the Court makes the following Order:-

(a) The respondent/Applicant CBRE EXCELLERATE CRES (PTY) LIMITED is struck off the suit with costs.

Dated and delivered at Nairobi this 22nd day of February, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Busaidy Mwaura Ng'arua and Company Advocates for the

Respondent/Applicant

Chimei & Co. Advocates for Claimant/Respondent

Ekale – Court clerk.