



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO 868 OF 2019

FELIX ERICK GWARO OMARIBA.....CLAIMANT

VERSUS

ISUZU EAST AFRICA LIMITED.....1ST RESPONDENT

HONDA MOTORCYCLE KENYA LIMITED.....2ND RESPONDENT

RULING

1. This ruling relates to the 2nd respondent's Notice of Motion dated 8.7.2020 seeking the following orders:

- a. That the claim against the 2nd respondent be struck out.
- b. That the costs of this application and the suit be awarded to the 2nd respondent.

2. The application is supported by the Affidavit sworn by 2nd respondent's General Affairs Manager Mr Erick Ngugi on 8.7.2020 and it is opposed by the claimant vide the replying affidavit sworn on 25.8.2020. The application was disposed of by written submissions.

3. The applicant's case is that this court lacks jurisdiction over the claimant's claim against it and as such, it ought to be struck out with costs. It contended that as at the time when the cause of action arose it did not have any employer – employee relationship with the claimant. It further contended that the dispute between it and the claimant is not an employment and labour relations dispute and as such this court has no jurisdiction over it by dint of the constitution and the ELRC Act.

4. It is further the respondent's case is that it is not a necessary party to the proceedings in the suit and there is no privity of contract between the claimant and itself. Therefore, it prayed for suit against it to be dismissed and or struck out under Order 1 Rule 10 (2) of the Civil Procedure Rules.

5. In its submission, it maintained that the claim for defamation is before the wrong forum because it did not arise from the contract of employment between it and the claimant. Further, it contended that the said claim ought to be filed at the High Court which has unlimited jurisdiction in civil disputes and violation of rights and freedoms including freedom of expression. For emphasis it relied on several authorities which I have carefully considered.

6. The claimant, however, contended that the court has jurisdiction over the suit under Article 162 (2) of the Constitution and section 12 of ELRC Act as it relates to employment dispute. The claimant contended that she resigned from the 2nd respondent to join the 1st respondent and the 2nd respondent accepted. Thereafter the 1st respondent wrote to the 2nd respondent for a reference and it gave a negative report that the claimant was negligent at work and was involved in fraudulent dealings with its customers. On the basis of the said negative report, the 1st respondent terminated his employment contract.

7. The claimant contended that the report by the 2nd respondent was false and maliciously made, and it amounted to defamation. He further contended that his summary dismissal by the 1st respondent was based on the information given by the 2nd respondent and consequently, it is a necessary party to this suit.

8. He further contended that this court has jurisdiction to determine dispute between employer and employee on subsisting contracts and even after separation and related matters. He cited several authorities to fortify his view that this court has jurisdiction to determine defamation and malicious prosecution claims that are coincidental to the employment dispute at hand. He averred that his defamation claim herein is coincidental and is related to issue at hand. Therefore, he prayed for the application to be dismissed with costs.

Issues for defamation

9. Having carefully considered the pleadings, the application, affidavit and written submissions the issue for determination is whether this court has jurisdiction to determine the defamation dispute between the claimant and the 2nd respondent.

10. The jurisdiction of this court is well anchored in the constitution of Kenya and the Employment and Labour Relations Court (ELRC) Act. Article 162 (2) (a) of the Constitution delegated the power to the Parliament to establish the court with jurisdiction to hear and determine employment and labour relations disputes. The Parliament exercised that power in 2011 by enacting the ELRC Act.

11. The preamble to the Act states:

“An Act of parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes”.

12. Section 12 of the Act then sets out some of the powers that the court has and the remedies it can award in exercising that jurisdiction as follows:

“(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provision of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including -

(3) In exercise of its jurisdiction the court shall have power to make any of the following orders –

...

(v) award of damages in any circumstances contemplated under this Act or any written law

(vi) an award in any circumstances contemplated under this Act or any written law;...”

13. The jurisprudence emerging from this court and the Court of Appeal is that a tortious claim between an employer and employee or former employer/and former employee can be heard and determined alongside a claim for unfair termination if the tortious claim originates or springs up from employer/employee relationship. In **paramount Bank Ltd V Vagvi Syed Qumara & another [2017] eKLR** the Court of Appeal expressed itself as follows:

“There cannot therefore be any doubt that in addition to the claim for unfair termination the claim relating to general damages for malicious prosecution and defamation which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers Under section 12 of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately”.

14. Again in **Barclays Bank of Kenya Ltd Vs Julius Kiema Kenga & another [2019] eKLR** the court of Appeal differently constituted upheld the above decision and held that;

“ We are equally satisfied that in the present case, given the circumstances we have alluded to, it is within the mandate of the ELRC to deal with malicious prosecution claim alongside the claim for wrongful termination.”

15. In the instant case, the claimant was employed by the 2nd respondent until 1.4.2019 when he tendered his resignation and secured another employment with the 1st respondent, who sought background information from the 2nd respondent as the former employer of the claimant. The 2nd respondent gave the negative report to the 1st respondent and which formed the basis of the defamation claim herein. The 2nd respondent gave the information in its capacity as former employer of the claimant.

16. Consequently, I find and hold that the defamation dispute herein has its origin from the employer/employee relationship between the claimant and the 2nd respondent and this court has jurisdiction to determine the claim for defamation between the claimant and his former employer alongside the claim for unfair dismissal against the 1st respondent which resulted from the alleged libelous letter by the former employer.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL, 2021

ONESMUS N. MAKAU

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 April 2020, this Ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE