



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.E093 OF 2020

DR. HELLEN ETHANGATTA.....PETITIONER

VERSUS

THE CO-OPERATIVE UNIVERSITY OF KENYA.....RESPONDENT

RULING

Ruling herein relates to the respondent's [The Co-operative University of Kenya] application dated 2nd February, 2021 and seeking for orders that the petition herein be struck out against the respondent with costs on the grounds that the petitioner was never an employee of the respondent and there exists no employment relationship between the parties or any contract of employment. the petition herein relates to an employment dispute between the petitioner and her employer who has been disclosed as Agri and Co-operative Training and Consultancy Services Limited. The respondent is not a party or privy to the contract of employment between the petitioner and the employer.

The application is supported by the affidavit of Anne Jemimma Mmata the principal human resource manager of the respondent and who avers that the petition filed against the respondent by the petitioner is scandalous, abuse of court process and should be struck out with costs. The petitioner has never been an employee of the respondent to justify the petition herein. The employer is known and stated and who had a contract of employment with the petitioner.

In reply, the petitioner opted to file her application dated 17th March, 2021 and seeking for orders that the application be heard first before the respondent's application dated 2nd February, 2021; she be allowed to amend the petition; and an order be issued enjoining Agri and Co-operative Training and Consultancy Services Limited herein as a respondent. the application is also seeking for orders that various officers of the respondent be called to court for examination and to produce books of account and documents relating to the operations of the respondents' company.

The petitioner's application is made on the grounds that the petition is made against the respondents and upon serving the respondent herein, application dated 2nd February, 2021 was filed seeking for the striking out of the petition on the grounds that the petitioner was a stranger. This is done with knowledge that the respondent fully associates itself with Agri and Co-operative Training and Consultancy Services Limited as its consulting arm and in the interests of justice, such entity should be enjoined herein as a respondent.

Both parties attended and made oral submissions.

Determination

Under the Employment and Labour Relations Court (Procedure) Rules, 2016 a respondent in proceeding is defined under as follows;

“respondent” means a person against whom a suit has been instituted in the Court or who replies to any proceedings in Court;

The respondent must reply to the facts existing between the parties.

Even in the case of a petition premised under alleged violation of rights and freedoms under the constitution, Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 apply. a respondent is defined as;

“respondent” means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;

There must exist a cause of action against a respondent upon which the claim or petition is premised upon.

In **DT Dobie & Co (K) Ltd V Muchina, [1982] KLR**, the Court of Appeal when interpreting Order VI Rule 13 (1) of the repealed Civil

Procedure Rules which is the equivalent of the current Order 2 Rule 15 defined the term “reasonable cause of action” to mean;

an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ...

the respondent has denied ever employing the petitioner. That the petitioner had an employment contract with a third party.

In the petition filed on 2nd December, 2020 the petitioner has defined the respondent as follows;

The respondent is a public university which operates a corporate arm by the name and style of Agri and Co-operative Training and Consultancy Services Ltd.

In support of the petition, the petitioner filed Supporting Affidavit and has attached a contract dated 12th February, 2019 with regard to appointment as the Chief Executive Officer, ATC and being a contract of employment between the petitioner and Agri & Co-operative Training and Consultancy (ATC).

The contract is signed between the petitioner and Chairman, ATC Board of Directors on 22nd February, 20119.

Clause 2 of the contract is that;

2. Duty Location

The duty station shall be Agri & Co-operative Training and Consultancy (ATC) located at the Co-operative University of Kenya, Main Campus situated in Karen along Ushirika Road.

Clause 2 is in tandem with section 10(2) (f) of the Employment Act, 2007 which requires the employer to state the place of work for the employee.

The entire contract has no reference to the respondent as an employer in any manner whatsoever. There is no relationship between the petitioner’s employment with the respondent at all.

The application seeking to enjoin a third party and Agri & Co-operative Training and Consultancy herein as a respondent would not cure the obvious lapse and lack of jurisdiction by the court with regard to the petition herein which relates to parties unrelated to matter over which the court should preside over, employment and labour relations and for connected purposes. There is no such relationship between the petitioner and the respondent to justify the amendment of the petitioner.

The petitioner having been served with the application seeking to have the petition struck out went out to file a counter-application seeking joinder of a third party instead of taking cognisance of the fact that the petition is filed against the wrong party. Such is in abuse of court process.

For the reasons set out above, Application dated 2nd February, 2021 is hereby allowed and application dated 17th March, 2021 found to be in abuse of court process. Petition herein is dismissed. costs to the respondent.

DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF MAY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

.....and