



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.E0010 OF 2021

(as consolidated with ELRC Cause No.E008 of 2021.)

(Before D.K.N.Marete)

CHABARI TITUS KITHATHARI.....CLAIMANT

VERSUS

MERU COUNTY GOVERNMENT....RESPONDENT

RULING

This is an application by way of Preliminary Objection dated 5th March 2021. It comes out thus;

1. That this honourable Court lacks jurisdiction to hear and determine this suit.
2. That the claim is not an employment claim.
3. That the suit is an abuse of the court's process.
4. That the Claimant's suit be dismissed with cost.

The matter and application came to court variously without the presence of the parties. On 2nd June 2021, the parties came to court, all set to do duel on the preliminary objection whose written submissions they had forwarded on their volition. We reverse this pro-activity.

The Respondent, in her written submission dated 25th April, 2021 avers that the subject matter of the suit is a tender to the Claimant for the construction of an ECDE classroom at Muungu Primary School, *et al.*

It is the Respondents contention and submission that this is not an employment claim, or at all.

The Respondent's further objection is that the alleged tender was between, Rianduga Investments Limited, a limited liability company with the right to sue and be sued on its own. The claimant therefore lacks *locus standi* to institute this suit as it is.

The Respondent in further support of her application seeks to rely on the provisions of S.12 of the Employment Act, 2007 that dictates the jurisdiction of this court as set out therein. She *in toto* disputes that the claim as set out falls within the categorization of the provisions of the said S.12 thereof.

The Respondent further buttresses the absence of *locus standi* on the part of the Claimant in bringing out this suit and seeks to rely on the authority of **Foss vs Harbottle (1843) 67 ER 189** where the court observed as follow;

“...is that there is no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to a company is the company itself. This is based on the principle that a company is a legal personality distinct from its directors and shareholders.”

This applies in the present case therefore rendering the claim untenable in the circumstances.

The Claimant/Respondent, in eloquence of the preliminary objection extensively cites Article 162 2 (a) of the Constitution of Kenya, 2010 and also S.12 of the Employment Act, 2007. He further cites Black Law Dictionary, 8th Edition as follows in support of his case.

Black Law Dictionary, 8th Edition defines employment contract, Employment and Employees respectively in the foregoing terms;

“A contract between an employer and employee in which the terms and conditions of the employment are stated.”

“1.The act of employing , the state of being employed. 2. Work for which one has been hired and is being paid by an employer”.

“A person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance”

An employer has been further defined under the Employment and Labour Relations Act as “Any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor or such person, public body, firm , corporation or company”

He further submits that the issues raised do not agree with the *locus classicus* authority of **Mukhisa Biscuits Manufacturing Company Ltd Vs West End Distributors Limited (1969) EA 696** case which has since been the *locus classicus* in the region, the court observed that;

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Again,

“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 the judicial discretion.”

She further submits as follows;

A close look at the authority of **Mukhisa Biscuits** establishes the essence of a preliminary objection. It is a point of law apparent out of the pleadings and must meet certain criteria to pass as such. It would, if appropriate and well-presented come in to dispose of the suit at a preliminary stage of the proceedings. This is the more reason why its application must be rigorously thrashed to obviate situations whereby litigants would be estopped from pursuing their matters in unclear and uncertain circumstances.

I fall for the preliminary objection clearly and without obliteration. The cause of action arises out of a contract *inter partes*. No discernible (amount of) imagination or speculation would convert this to be employment or an employment contract as is known in law.

I remember this issue was raised very initially in the cause of hearing but the claimant insisted on having his day in court. This is a sad way of looking at things.

I hold for the preliminary objection. The reverse is not in any way sustainable.

I am therefore inclined to allow the preliminary objection and further order that the Claimant meets the costs of the same.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Miss Baithialu instructed by State Law Office for the Respondent/Objector

2. Miss Aketch instructed by Vivian Loise Aketch & Company Advocates for the Claimant/Respondent