



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.E003 OF 2020

(Before D.K.N.Marete)

JACOB ALEMU ZEWDE.....CLAIMANT

VERSUS

SAUTI MOJA MARSABIT.....1ST RESPONDENT

BERNARD NDAMBO.....2ND RESPONDENT

RULING

This is an application by way of Preliminary Objection dated 18th May, 2021 and comes out as follows;

1. The first Respondent/Defendant being an unincorporated entity/unlawful society with no legal personality is incapable of being sued in its own name and as such cannot be held liable to the Plaintiff/Claimant whatsoever.

2. The name of the first Respondent/Defendant be struck from the record and the claim be dismissed absolutely for being incompetent and bad in law.

3. Costs

The application was in court for oral hearing and presentation on 3rd June 2021 whereby the Respondent submitted that the description of the response, paragraph 2 and 3 of the claim as a Community Based Organization and her Executive Director as respondents.

It is their submission that in such capacity, the respondents lack capacity and competency of suing and being sued. Further, the respondents submit to the essence of a precise identification of a person suing or being sued. In a Collective Bargaining Agreement one can only sue through trustees or office because her party must be clearly identified.

It is the Respondent's further submission that the defect in the claim cannot be cured vide Article 159 (2) (d) of the Constitution of Kenya, 2010 as capacity is key and critical in all court process. The reference comes out thus;

“Justice shall be administered without undue regard to procedural technicalities”

The position of the 2nd Respondent must be established.

The Respondent in the penultimate submits that the claim is an abuse of the process of court and prays that the same be dismissed with costs.

Mr.Muriithi, counsel for the Claimant in opposition to the Preliminary Objection at the inset submits that it does not challenge the presence of the 2nd Respondent to the suit.

It is the Claimant's further submission that the list of Documents by the respondent dated 20th April 2021 exhibits a certificate of Registration of the Respondent. This agrees with S.2 of the Employment Act, 2007 which defines an employee as

“A person employed for wages or salary and includes an apprentice and indentured learner

The 1st Respondent is therefore capable of being an employee.

The claimant in further buoyance of his case seeks to rely on the authority of **Issa Shekue Shali vs Buscar Limited (2018) eKLR** where the court observed as follows;

4. *The Claimant submits that he was indeed an Employee of the Respondent. The Claimant calls the attention of the court to a letter addressed by the Respondent to him, sated 26th May 2005, instructing the Claimant what to do in event any of Respondent's vehicles broke down within the business territory of Kilifi. He relies too, on the salary vouchers annexed to his Statement of Claim. He submits that the Respondent operated variously as Buscar Limited, Busways Limited, and Buscar E.A Limited. The claim is not time-barred. Termination took place on 19th December 2014. The claim was filed on 18th May 2015, within the time given under Section 90 of the Employment Act, 2007.*

5. *The Respondent submits that the claimant has failed to show who employed him. Buscar E.A Limited was registered in Kenya on 18th July 2014 as shown in the Certificate of Incorporation. The Company the Claimant used to work with closed due to bankruptcy. The claim has no foundation.*

7. *It is not material to the Claim, whether the Respondent/Employer was Buscar Limited, Buscar E.A.Limited or Busways Limited. The Claimant has shown he was employed by the Respondent Transport Business, first as a Booking Officer and later as the Manager at Kilifi Office. The business and legal structure adopted by the Employer, which is frequently aimed at avoiding legal and regulatory burdens, should never be the concern of the Employee. It is sufficient that the Employee is able to show he worked for the Employer's business, regardless of whichever form that business adopts. The Claimant was never involved in registration of his Employer's business, and is not expected to know details or registration. Employees do not go about asking Employers, upon employment, what their Employers' business registration details and operational structures are. Section 2 of the Employment Act 2007 is broad enough to include the different reincarnations of the business that is Buscar. It would even have been permissible for the Claimant, to sue the businessman names Salim Sheikhan Salim, who called and told the Claimant not to report to work, on 19th December 2014. The Claimant was an Employee of the business for 12 years. He has exhibited the letter from Buscar Kenya Limited, Luxury Bus Services, dated 26th May 2005. He was an Employee of the Respondent.*

8. *He was called by Respondent's Director Salim Sheikhan Salim on or around 19th December 2014 and told not to report to work. There was no notice of termination, no hearing, and no formalities; just a phone call. Termination was unfair under Section 41, 43 and 45 of the Employment Act 2007.*

He also seeks to rely on the authority of **Ingwe Wekulo Newton vs Education for Life 2019 eKLR**, where the court observed as follows;

14. *A perusal of the documents filed by the parties from the outset, show that the Claimant was employed by an entity called Education for Life. His contract is on the letterhead of this entity. He was assigned duties through correspondence made on the letterhead of Education for Life.*

15. *The letter of termination issued on the letterhead of Education for life. The copy exhibited by the Claimant is unsigned. There is exhibited also, a Statement of pay. It is signed by one of the Intended Respondents, Benedictor Ambalwa Petti, described as Centre Manager.*

16. *The letters assigning the Claimant duties are signed by the other 2 Intended Respondents, Glyn and Jane Davies.*

17. *The Centre Manager, Glyn and Jane all fit the description of the term, 'Employer' under employment law. It is not necessary that they are shown through documents from the Registrar of Societies, to be Officials of the Respondent. It is enough that there are documents issued by them, showing they exercised instructional and decisional control over the Claimant.*

18. *The Court has observed in past decisions that an Employee cannot always be expected to know, the business or legal capacities through which his Employer, operates the employing business or enterprise. The court should not bar an Employee from amending his pleadings, to bring in what the Employee thinks his is Employer, or are his Employers. The term 'Employer' under Section 2 of the Employment Act 2007, and other labour legislations of 2007/2008, is broadly worded to ensure Employees are not denied access to industrial justice, through limited characterization of the term, and through complex legal and business forms adopted by their Employers. Benedictor Ambalwa Petti, may well be an Employee of Education for Life, but as Centre Manager, could also be an Employer to the claimant, going by the definition of the term 'Employer', given under Section 2 of the Employment Act 2007. The Claimant certainly cannot be blamed for appearing confused over the legal or business nature, of the entity which employed him, Education for Life.*

19. *The Court is satisfied that the Intended Respondents are necessary parties to the proceedings. Their being brought into the proceedings is not affected by Section 90 of the Employment Act. There is no new cause of action. They are Officials or Managers of the entity called Education for Life, and there are documents filed, to suggest they employed the Claimant. The Court has discretion in granting leave to amend Pleadings. The Application by the Claimant is allowed. The position of the Respondent, including what is characterized as preliminary objection, has no merit and is rejected.*

An observation and verification of the respective cases of the parties tilts the outcome in favour of the Claimant. This is a derivation of his various authorities which substantiate a case of an employer and the presence of a valid employment contract *inter partes*.

The application therefore fails and is dismissed. In the absence of the preliminary objection, the parties be and are at liberty to expeditiously litigate their cases to fruition.

Dated and delivered at Nyeri this 16th day of June, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Mwirigi instructed by Mukira Mbaya & Company Advocates for the Objector/Respondent
2. Mr.Muriithi instructed by Muriithi & Company Advocates for the Claimant/Respondent.