



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC NO. 168 OF 2017

(CONSOLIDATED WITH 169 OF 2017-184 OF 2017)

ROBERT NJUGUNA KARANU..... CLAIMANT

VERSUS

ECONOMIC HOUSING GROUP LTD.....1ST RESPONDENT

RONALD KINGANGI.....2ND RESPONDENT

KANJA WARURU..... 3RD RESPONDENT

ANTHONY WAINANINA KAMAU..... 4TH RESPONDENT

MALI RASILI LIMITED..... 5TH RESPONDENT

RULING

1. The claimant herein filed his memorandum of claim seeking for compensation for unfair termination and payment of terminal dues on 20th April, 2017 against the 1st Defendant. However on 27th March, 2018 he filed an Amended Memorandum of Claim that brought on board the 2nd to 5th Respondents. The 2nd and 3rd Respondents are described as the directors of the 1st Respondent, the 3rd Respondent is described as the director and the shareholder of the 1st Respondent while the 5th Respondent is the Holding Company of the 1st Respondent Company.

2. The 2nd, 4th and 5th Respondent filed a preliminary Objection dated 28th February, 2020 on even date which was based on the following grounds;

1. THAT the 2nd, 4th and 5th Respondents were not employers to the claimant herein and they have been wrongly sued in their capacities as directors, shareholders and holding company.

2. That the claim as against the 2nd, 4th and 5th Respondents is an abuse of Court process and it ought to be struck out with costs.

3. The 3rd Respondent on the other hand filed a preliminary objection dated 20th April, 2021 on the ground that he is not the claimant's employer and he as well has been wrongly sued.

4. The Ruling herein is therefore in respect of the said Preliminary Objection by the 2nd, 3rd, 4th and 5th Respondents dated on 28th February, 2020 and 20th April 2021 respectively.

5. The preliminary objections were disposed of by way of written submissions with the 2nd, 4th and 5th Respondents filing theirs on 5th June, 2020, while the 3rd Respondent filed his on 5th May, 2021. The Claimant on the other hand filed his submissions dated 5th August 2020.

2nd, 4th and 5th Respondents' submissions

6. The respondents herein submitted that the claimant has wrongly sued them in their personal capacity as directors, shareholders and holding company of the 1st Respondent when it is clear in the pleadings filed by the claimant that the claimant was employed by the 1st Respondent, a legal entity that can sue and be sued in its name. He reinforced their arguments by citing the case of **Litein Tea Factory Company**

Limited and another –v- Davis Kiplangat Mutai & 5 others [2015] eKLR which upheld the decision in **Solomon – Solomon & company limited [1897] A.C 51.**

7. Accordingly, it was submitted that the Respondents herein have been wrongly sued and besieged this court to struck them out of this suit with costs to them for being wrongly sued.

3rd Respondent's submissions

8. The 3rd Respondent submitted in support of the preliminary objection dated 28th February, 2020 and his Preliminary objection dated 20th April, 2021 submitting that he has been wrongly sued in his individual capacity when the company that employed the claimant is the 1st Respondent who ought to have been sued alone in exclusion of its directors, shareholders and holding company. He cited the case of **Kolaba enterprises ltd -v- Shamsudin Hussein Varvani and another [2014] eKLR.**

9. He equally prayed to be struck off the proceedings herein and be paid cost of the Preliminary objection.

Claimant's Submissions

10. The Claimant submitted that the issue of joinder of parties raised by the Respondents in the Preliminary objection are not on a matter on pure point of law as held in **Mukisa Biscuits case**, rather that this court will need to interrogate facts and evaluate evidence tabled before it before reaching at a determination therefore the preliminary objection does not meet the threshold set out therein.

11. He reinforced his argument by citing the case of **William Kiprono Towet and 1597 others –v Farmlands Aviation Ltd and 2 others [2016] eKLR** where the court held that;

“We are of the considered view that the preliminary objections raised by the respondents did not raise any pure point of law. By and large the respondents dwelt on the character of the suit before the trial court in terms of the number of parties involved. Of concern to the respondents was the fact that each of the appellants had a separate and distinct claim. The respondents were of the view that the said claims were deserving of separate suits and hearings as opposed to a collective hearing. Even if for a moment, and for arguments sake, we were to take the subject of misjoinder as a pure point of law, the veracity of the respondent's pleadings in this regard cannot be vouched for in the absence of a trial.”

12. It is the claimant's submissions that it was necessary to sue the directors and the holding company in their individual capacities as their action contributed to the action by the 1st Respondent. He cited the Court of Appeal case of **Gilgil Telecoms Industries Limited –v- Duncan Nderitu & 57 others [2016] eKLR** where the Learned Judges held that;

“Having perused the record we find that the character and nature of the two appellants was an issue which arose for the court's determination. Dankwerts LJ., in Merchandise Transport Ltd -vs- British Transport Commission [1961] 3 ALL ER 495 at 518 observed;

“.....where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance...”

Conscious of the above mentioned observations we agree with the sentiments of Lord Denning MR. in **Littlewoods Mail Order Store Ltd -vs- McGregor [1969] 3 All ER 855 at 860;**

“I decline to treat the [subsidiary] as a separate and independent entity ... The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit. I think that we should look at the Fork company and see it as it really is - the wholly-owned subsidiary of the taxpayers. It is the creature, the puppet, of the tax-payers in point of fact; and it should be so regarded in point of law.”

13. Accordingly, it was submitted that the directors are the minds of the company therefore they ought to be held liable for the actions of the company as they owe a duty of care to the claimant as envisaged under section 143 of the Companies Act.

14. He concluded by submitting that the respondents' Preliminary objection has been raised for the sole purpose of frustrating the hearing of the substantive issue herein and implored upon this Court to dismiss it and allow parties proceed to hear the case on its merit.

15. I have examined the averments of the parties herein. A preliminary objection per se deals with pure points of law as enunciated in **Mukisa Biscuit Case.**

16. In the current case, the issue of the respondent's character and form in relation to the claimant can only be resolved by production of further evidence and facts and this in my view goes beyond what a real preliminary objection should be.

17. In the circumstances, I will determine the entire issue in main claim.

18. I find the preliminary objection not merited and I dismiss it accordingly.

19. I order the entire claim to proceed.

20. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 8TH DAY OF JULY, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Odhiambo for 3rd respondent – present

Alwala for 1st, 2nd, 4th & 5th respondents – present

No appearance for claimant

Court Assistant – Fred and Wanyoike