



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1049 OF 2018

BONIFACE OMONDI.....CLAIMANT

VERSUS

MATHARE YOUTH SPORTS ASSOCIATION....1ST RESPONDENT

BOB MUNRO.....2ND RESPONDENT

RULING

1. The application before me is the 2nd Respondent's Notice of Motion Application dated 30th November 2018. It is expressed to be brought under Rules 15 and 17 of the Employment and Labour Relations Court Rules, 2016, Order 1 Rule (10), (22) of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act. The application seeks the following orders:

- i. THAT the name of the 2nd Respondent/Applicant here namely Bob Munro be struck off from this claim for misjoinder or
- ii. THAT the claim against the 2nd Respondent/Applicant be struck off for being frivolous, vexatious and abuse of the court process.
- iii. Costs of the application be provided for.

The grounds upon which the application is premised are set out on the face of the application as well as in the supporting Affidavit of Bob Munro, the 2nd Respondent/Applicant attached to the application. By way of summation, the grounds and affidavit assert that the Claimant was employed by the 1st Respondent, a legal entity capable of entering into contractual arrangements and which entity can sue or be sued in its name. The 2nd Respondent asserts the contract exhibited by the Claimant was entered into between him and the 1st Respondent. The 2nd Respondent/Applicant is the Chairman, Board of trustees of the 1st Respondent but has no role in the day-to-day management of the 1st Respondent. The 2nd Respondent/Applicant thus seeks that his name be struck out from this claim for reasons of misjoinder; and further that the claim against him be struck out for being frivolous, vexatious, and an abuse of the process of the Court. The 2nd Respondent asserts that there is no case against him as he does not hold a management role with the 1st Respondent and that he was not involved in recruitment, management or termination of employee contracts. He asserts that the Claimant has not made any specific claim against him. For these reasons, he avers that he is not a necessary party to the suit.

2. The Claimant filed grounds of opposition dated 29th January 2019 indicting 9 grounds why the application should be declined. In sum, the Claimant/Respondent's opposition to the motion is grounded on the averment that the 2nd Respondent instigated the termination and midwived the investigations against the Claimant with a pre-determined conclusion. Further, the Claimant is opposed to the application as the 2nd Respondent is personally liable on the claim of defamation pleaded against him.

3. The matter was disposed of by way of written submissions. The 2nd Respondent submits that a clear reading of the claim shows that he is only mentioned in paragraph 2 which is an introductory paragraph and there's no claim or specific prayer or remedy sought against him to warrant the joinder. The 2nd Respondent submits that the only issue for determination is whether the 2nd Respondent is properly joined in these proceedings and if the answer is in the negative, the consequential question as to whether the case against him can be struck off for misjoinder. The 2nd Respondent cites Rules 15 and 17 of the Employment and Labour Relations Court Rules which provide as follows: "15. (1) *The parties to a suit shall, within fourteen days after the close of pleadings or such other period as the Court on application may direct, move the Court to hold a scheduling conference to ascertain: any other matters the Court may deem necessary. Rule 17 provides that interlocutory application shall be by way of a Notice of Motion.* (b) Order 1 Rule 10 (2) of the Civil Procedure Rules provides: - "the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who

ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

The 2nd Respondent submits the twin test for determining the question of who is a necessary party in a suit was established in the case of **Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others [1998] eKLR**

"For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party."

It is submitted that this test was reiterated by this court in the case of **Kizito M. Lubano v KEMRI Board of Management & 8 Others [2015] eKLR** as follows;

"The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus *necessary parties herein...*"

4. The 2nd Respondent submits on the question as to whether he is properly joined in these proceedings, the sole issue for determination is whether the 2nd Respondent is properly joined in these proceedings. In order to guide this Honourable court in determining this single issue, the 2nd Respondent will rely on the twin tests set out in the case law above for determining the question of who is a necessary party. (ii) As noted in the case law, there must be a right to some relief against the party in respect of the matter in question. It is admitted that the Claimant was employed by the 1st Respondent by a contract of employment executed by both the Claimant and the 1st Respondent's Executive Director on behalf of the 1st Respondent. The 2nd Respondent/Applicant submits he did not participate in the recruitment or dismissal of the Claimant which role is the preserve of the 1st Respondent. The 2nd Respondent submits that his limited role of receiving a complaint against the Claimant and forwarding it to the 1st Respondent's Executive Director and the Human Resource Manager cannot and does not warrant this joinder in these proceedings. He would be, at best, a witness of fact. Lastly, it is submitted, there is no allegation of wrong doing on the part of the 2nd Respondent in the memorandum of claim or the witness statements and no specific remedy is sought against him to warrant his joinder in the matter. The 2nd Respondent submits that there was no privity of contract between the Claimant and the 2nd Respondent as the parties to the employment relationship are in an agreement executed between the Claimant and the 1st Respondent. The 2nd Respondent was a third party who did not benefit from the employment contract unless such a contract was for his benefit or made on his behalf as held in the case of **Provincial Construction Company & Another v Attorney General [1991] eKLR**. The 2nd Respondent submits that the Claimant cannot seek to claim from the 2nd Respondent where no contractual relationship existed. The 2nd Respondent cited the case of **Ainear Liluyani Njirah v Agha Khan Health Services [2013] eKLR** where the Court of Appeal made a distinction between express and implied benefits which are enforceable under a contract by a third party that only persons who negotiate and sign a contract and privy to it are entitled to enforce its terms. The 2nd Respondent, therefore, submits that under the first test for determining the question of who is a necessary party, he is not a necessary party and his being sued in his personal capacity only exposes him to unnecessary costs related to this litigation and other incidental risks. He submits the second test is that it should not be possible to pass an effective decree in the absence of such a party and under this second test, he is of the view that this Honourable court can hear and determine the Claimant's claim without the dragging the 2nd Respondent into these proceedings and render judgment. On the face of the Memorandum of Claim, other than the mention of the 2nd Respondent on the introductory part of the claim, the 2nd Respondent is not mentioned anywhere else except for the remedies sought generally against both Respondents. The 2nd Respondent submits that in his grounds of opposition, not in the pleadings, the Claimant alleges that he believes that his claim will not be effectively determined if the 2nd Respondent is absent from the proceedings. The Claimant does not state facts to support his belief. If the 2nd Respondent committed any wrongs against the Claimant, he did so in his capacity as the Chairperson and Trustee of the 1st Respondent, with whom the Claimant had an employment relationship. The 2nd Respondent submits that the 1st Respondent only acts through its Chief Executive Officer but is a separate legal entity from the 2nd Respondent capable of contracting in its own capacity as a legal person and is indeed *sui juris*. The 2nd Respondent further submits that the reliefs sought by the Claimant are not directed at the 2nd Respondent, but to his employer who is the 1st Respondent. The 2nd Respondent invites this Honourable court to peruse through the Claimant's memorandum of claim to confirm, indeed, the grounds raised in opposition to this application do not exist in the pleadings before the court. The 2nd Respondent submits that the Claimant therefore does not establish any cause of action against the 2nd Respondent. It is the 2nd Respondent's submission that this is a clear case of misjoinder and his application should be allowed and the suit against him be dismissed and or struck out on the grounds set out on the application and these submissions so that the court can effectively determine the dispute between the Claimant and his employer, the 1st Respondent as the inclusion of the 2nd Respondent/Applicant in this suit is unnecessary, hopeless and is merely calculated to cause the 2nd Respondent/Applicant unnecessary anxiety, trouble and expenses. The 2nd Respondent/Applicant thus urges that the application dated 30th November 2018 be allowed as prayed.

5. The Claimant being opposed to grant of the motion cited the case of **Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro & Ezekiel Misango Mutisya [2014] eKLR**, where F. Gikonyo J. held that: -

"A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties." (emphasis added)

6. The Claimant submits that the 2nd Respondent qualifies the threshold under Order 1 rule 3 to be joined as a defendant to the main suit, and further that his presence is necessary and relevant for the effectual and complete determination of all questions in the suit. On the first limb, the Claimant submits that the 2nd Respondent satisfies the threshold set under the Civil Procedure Rules' Order 1 rule 3 which provides: -

"3. Who may be joined as defendants [Order 1, rule 3.] All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."

It is submitted that in the instant suit, the claim of wrongful termination while raised primarily against the 1st Respondent, it arose by virtue of actions of the 2nd Respondent. The Claimant submits that the 2nd Respondent is responsible for instigation of the impugned disciplinary process against the Claimant. The Claimant submits that in the main suit, he intends to move evidence that whereas the 1st Respondent claims the investigations were initiated by allegations contained in an anonymous email, in fact, the 2nd Respondent was the party responsible. This is supported by the fact that the alleged anonymous email contains scanty details and appears to be a sham, hurriedly drawn up to support the instigation of the persecution against the Claimant. The Claimant submits that moreover, the 2nd Respondent has deposed in his affidavit sworn on 29th November 2018 in support of this Notice of Motion application that he sat in the *ad hoc* committee of relevant senior staff of the 1st Respondent established to review the investigations report. Given he was the known source of the material resulting in the disciplinary proceedings to have sat in the investigations, it defeats the rules of natural justice for him to be involved in disciplinary investigations. The Claimant submits the Report of *Ad-Hoc* Committee on Staff Misconduct indicates that the 2nd Respondent is a member and in the said report, under item "f" in the report on Key Events/Reports, he is reported to have authorized the suspension of the Claimant following his consultation by the Executive Director. Further, he signed off in the report clearly indicating his role went beyond an *ex officio* capacity. The Claimant submits that in light of the foregoing, this Court should find that there is reasonable cause for joinder of the 2nd Respondent and that the 2nd Respondent is a necessary party to this suit. He cited the case of **Pravin Bowry v John Ward & Another [2015] eKLR** where the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The Court referred to the Ugandan case of **Deported Asians Custodian Board v Jaffer Brothers Ltd [1999] 1 E.A. 55 (SCU)** where the court stated as follows:

"A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter..."

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."

7. The Claimant submits that the presence of the 2nd Respondent is necessary for the Claimant to set up his claim against the 1st Respondent. The Claimant has based his claim on the fact that, among other things, the reasons advanced for his dismissal were false, he was never afforded a chance to face his accusers, and that even if the allegations were true, there has been no criminal prosecution against him despite the seriousness of the allegations. The Claimant submits these reasons are particularized in the Memorandum of claim and the unique factor about all of them is that they all revolve around the question of proof of the alleged misconduct that was the basis of the Claimant's termination. Simply, they claim that the basis for the investigation was unproven allegations, which allegations arose from the letter by the 2nd Respondent dated 28th September 2018 and it is by virtue of this un-substantiation of allegations against the Claimant that he was eventually dismissed from his post. The Claimant has claimed that this amounts to malicious termination, the malice herein having been occasioned by the 2nd Respondent instigating and midwifing the termination of the employment of the 1st Respondent. The Claimant submits that it will not be able to effectively set out his claim against the 1st Respondent absent of the claim raised against the 2nd Respondent and that it will be necessary for the 2nd Respondent to set out in lengthy detail the manner in which he received and handled the alleged 'whistleblower' information given that the letter he wrote forwarding the whistleblower's email does not have a recipient. The Claimant submits there are issues that are pertinent to the determination of whether the dismissal of the Claimant was malicious and they can only be addressed by the 2nd Respondent. In light of the foregoing, the Claimant urges this Court to find that the 2nd Respondent is a party necessary for this Court to effectually and completely adjudicate over this matter and urges the Court to dismiss this application with costs.

8. This application is on joinder or rather the alleged misjoinder of a party. In the case of **Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others (supra)** it was held that

"For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party."

9. Other than the mention in the descriptive part of the claim, there is no mention of the 2nd Respondent. In a suit, the parties who are necessary for the adjudication of the dispute are what is deemed a necessary party. The pleadings do not reveal a right to some relief against the 2nd Respondent and it is possible to pass an effective decree in the absence of the 2nd Respondent. As no specific allegation is made in the memorandum of claim against the 2nd Respondent his name ought to be struck out as he is not a necessary party to the suit and from material before the court may at best be a witness for the Respondent – Mathare Youth Sports Association. Application is granted and the 2nd Respondent's name is struck off the suit. Costs of the application to be borne by the Claimant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2021

NZIOKI WA MAKAU

JUDGE