



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 198 2020

HARRIET ARANGI WERE.....CLAIMANT

VERSUS

THE NAIROBI CHAPEL.....1ST RESPONDENT

NCBA BANK KENYA PLC..... 2ND RESPONDENT

OSCAR MURIU..... 3RD RESPONDENT

RULING

1. The applicant in the application dated 20th January, 2021 seeks an order that the claimants suit be struck out for want of jurisdiction and for disclosing no reasonable cause of action against the 2nd respondent.
2. The application is premised on grounds 1 to 20 in the Notice of Motion and buttressed in the supporting affidavit of **Huldah Mengele** a legal officer of the 2nd Respondent.
3. The nub of the opposition is a Preliminary Objection raised in the Memorandum of Response to the statement of Claim dated 14th July, 2020 by the 2nd respondent that the relationship between the claimant and the 1st respondent and the 2nd respondent is purely commercial by dint of the fact that they are both account holders at the 2nd respondent bank. That this is not an employee employer relationship within the meaning of Article 162(2) of the Constitution as read with Section 12 of the Employment and Labour Relations Court Act, 2014. That if there are any remedies to the claimant against the 2nd respondent which is denied, they lie in the Banking Act and not the Employment Act, 2007, it being a banker-customer relationship.
4. The claimant opposes the Preliminary Objection and the application vide a replying affidavit sworn to on 9th February, 2021. She deposes that the suit arises out of the termination of her employment by the 1st respondent and the collusion of the 1st respondent with the 2nd respondent to deny the claimant her terminal dues vide unauthorized bank deposit reversal in the claimant’s account held with the 2nd respondent.
5. That the 2nd respondent is therefore responsible for the wrongful seizure of the claimant’s pension and ex-gratia gift by the employer.
6. That the 2nd respondent reversed the payment without the claimant’s consent.
7. The Court has carefully considered the Preliminary Objection vis a vis the statement of claim dated the 15th May, 2020. The Court has also carefully considered the extensive memoranda of Response by the 1st and 3rd respondents dated 11th November, 2020 and that by the 2nd respondent dated 4th June, 2020.
8. Having also considered the decision of the Court of Appeal in **Mukisa**

Biscuits Manufacturing Co. Ltd. -vs- West End Distributors Limited (1969) E.A. 696 as follows:-

“So far as I am aware, 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.”

Sir Charles Newbold emphasized thus:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in a nature of what used to be a demurer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasions, confuse the issue. The improper practice should stop.” ,

9. The Court is of the considered finding that in the present matter the point raised is not a pure point of law. It is an issue of mixed facts and law and the facts themselves are in contention.

10. The suit clearly arises from an employee/employer relationship between the claimant and 1st respondent. The cause of action arises from an alleged wrongful and unfair constructive dismissal of the claimant by the 1st respondent.

11. The 2nd respondent is accused of wrongfully withdrawing terminal benefits due and owing to the claimant pursuant to an unlawful collusion between the 1st and 2nd respondent on the matter of terminal benefits payable to the claimant.

12. These facts are not common cause but have been placed in dispute by the respondents. The 2nd and 3rd respondents are necessary parties to the suit and have the responsibility to exculpate themselves from liability upon a full hearing on the merit of the suit.

13. The Court has jurisdiction to hear and determine all disputes relating to an employment and Labour relationship. This is one such case.

14. The preliminary objection raised in the statement of defence and augmented in the application lacks merit for the obvious reason that it involves determination of facts in dispute and same is dismissed with costs in the cause.

Dated and delivered at Nairobi (virtually) this 16th day of September, 2021.

MATHEWS N. NDUMA

JUDGE

Appearances:-

Wamae & Allen Advocates for the 2nd respondent

Michuki and Michuki Advocates for the 1st and 3rd respondents

Akides Co. Advocates for the claimant