



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 59 OF 2019

FREDRICK ODHIAMBO OGOLA.....CLAIMANT

VERSUS

MASSAI MARA UNIVERISTY COUNCIL.....RESPONDENT

RULING

1. The Claimant sued the Respondent for unfair termination of his service on the 5th September, 2019 and in response the Respondent entered Appearance on the 2nd October, 2019 and raise a preliminary objection on 22nd October, 2019 based on the following grounds; -

1) That the memorandum of claim filed herein is incurably defective and should be struck out in limine with costs.

2) That the suit filed herein is a non-starter, incompetent and bad in law noting that the Respondent herein is not an organ or body capable of being sued as per sections 15, 19,20 and 36 of the Universities Act No. 42 of 2012 as read together with Order 1 Rule 3 of the Civil Procedure Rules 2010. The Respondent therefore can never be a party for purposes of sustaining a suit. It has no legal capacity and lacks the requisite locus standi to sue and be sued.

3) That the claimant has sued the respondent while no employment relationship exists between the parties herein pursuant to Section 10 of the Employment Act which provides that a written contract of service shall state the name of the Employer.

2. On 10th March, 2021 the claimant filed an Amended Memorandum of Claim which struck out the name of the Respondent herein and in place replaced with **Masaai Mara University**.

3. While this matter was mention for further direction on the 29th June, 2021 the Respondent sought to prosecute it's Preliminary objection raised on 22nd October, 2019 and the Court directed parties to dispose of the Preliminary objection by way of written submission which the Respondent filed on 29th July, 2021 however there were no submissions for the claimant on record.

Submissions.

4. The Respondent submitted that the claimant amended its claim after it had raised an objection therefore the Amended claim ought to be disregarded.

5. It was argued that the respondent's Preliminary Objection raised pure points of law as the Court can ascertain the same by looking at the pleadings alone. In this they cited the case of **Quick Enterprises Limited –v- Kenya Railways Corporation [1999] eklr** and submitted that Masaai Mara University Council is not a legal entity therefore lacks the capacity to sue and be sued as provided for under section 20(a) of the Universities Act

6. It was submitted that no order can be issued against a party that does not have the capacity to sue or be sued and cited the case of **Peter Ngugi Geoffrey and 3 others –v- Muthini Nsda Church [2019] eklr** and the case of **Kiama Wangai –v- Pamela Tsimbiri & 7 other [2014] ekrl** and urged the Court to uphold the preliminary objection and struck out the claim herein.

7. On whether there is any employment contract between the parties herein to vest Jurisdiction upon this Court, it was submitted that the Claimant was never employed by the Respondent as alleged rather that he was employed by Masaai Mara University who ought to have been sued for any employment dispute and not the Respondent.

8. With regard to the Amended claim, the Respondent submitted that the Claimant filed its amended claim dated 31st October, 2019 on the 10th March, 2021 as is reflected by the Court stamp and receipt, way after the Preliminary Objection was raised thus cannot cure the

pleadings herein.

9. The Respondent submitted also that the claimant's amended his claim without leave of Court on 10th March, 2021 to bring on board the right party that is Masai Mara University, which amendments even if allowed by this Court would still be incompetent as the claimant will be caught up by the doctrine of laches under section 90 of the Employment Act. It was argued that the cause of action (termination) took place on 10th August, 2017 therefore this Court cannot enlarge time to file time barred claims. In this they cited the case of **Kenneth Kibimiru Kigalo –v- Mastermind Tobacco (K) Limited and another [2020] eklr**.

10. He concluded by the citing the Court of Appeal case of **David Nderitu Mwangi –v- Tusker mattresses Limited [2017] eklr** where the Court held that;

“In reference to section 90 of the Employment Act, the law is that the Court has no jurisdiction to extends time for filling of claimants falling under the Act”

11. The Respondent therefore beseeched this Court to allow the Preliminary Objection and strike out the Claimant's Claim.

12. I have examined the averments of the parties herein. From the pleadings herein, it is apparent that indeed the claimant herein sued the wrong party who has no capacity to sue and be sued and therefore as submitted by the respondents, the claim as filed cannot be sustained.

13. The claimant attempted to cure the defect by filing an Amended claim on 12/3/2021 to bring in the right party.

14. Order 8 Rule 1 of the CPA states that;

“(1) A party may, without leave of the court, amend any of his pleadings once at any one time before the pleadings are closed.”

15. The claimant filed their amended claim on 10/3/2021. The Respondent had already entered appearance and filed a preliminary objection. To date no defence has been filed by the respondent and therefore pleadings are not yet closed.

16. Since the claimant has corrected their error in the plaint by substituting the right party the omission is cured and therefore the correct respondent is currently included.

17. The preliminary objection was overtaken by events in my view when the claimant amended their claim as per law before pleadings closed.

18. I find therefore that the preliminary objection has no merit and I accordingly dismiss it accordingly.

19. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Awuor for claimant - present

Mr. Mburu holding brief for Maina Ngaruiya for respondent – present

Court Assistant - Fred