



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 189 OF 2020

(Before Hon. Justice Dr. Jacob Gakeri)

MAUREEN ONSONGO.....CLAIMANT

VERSUS

EOH LIMITED AN EOH/COPY CAT LIMITED COMPANY....RESPONDENT/APPLICANT

RULING

1. The Applicant/Respondent filed a notice of preliminary objection dated 3<sup>rd</sup> August 2021. The notice does not cite the law under which it is filed but states that the Applicant/Respondent would raise a preliminary objection on points of law before the hearing of the suit herein on the finding that the suit is incurably defective, incompetent and bad in law and ought to be struck out on the grounds that the Respondent is not a proper party.

2. The Applicant/Respondent filed its submissions dated 3<sup>rd</sup> August 2021 in support of the preliminary objection. The Applicant/Respondent submits that the Claimant's suit is incurably defective, incompetent and bad in law and ought to be struck out on the premise that the Respondent is not a proper party. Reliance was made on the decision in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696** on the nature of a preliminary objection.

*“ ... is in the nature of what used to be a demurrer. 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”*

3. Further reliance was made on the decisions in **Quick Enterprises Ltd v Kenya Railways Corporation Kisumu HCCC No. 22 of 1999 and Autar Singh Bhamra & Another v Oriental Commercial Bank Kisumu HCCC No. 53 of 2004** on the nature and effect of a preliminary objection.

4. The Applicant/Respondent submits that since the Claimant was employed by EOH Seal Ltd effective 1<sup>st</sup> August 2015, the Company should be the proper Respondent in the suit. It is further submitted that Copy Cat Limited is not a party to the suit because it is a different legal entity and that the only relationship between the two companies is that Copy Cat Limited is one of the shareholders of EOH Seal Limited. That because the two companies are distinct and separate legal entities with capacity to sue or be sued in their own right, Copy Cat Ltd is not a necessary party in the adjudication of the claim before the Court. Reference was made on the *locus classicus* decision of the House of Lords in **Salomon v Salomon & Co. Ltd (1897) AC** where at page 52 Lord Mac Naghten was unequivocal that –

*“The Company is at law a different person altogether from the subscribers to the memorandum and through it may be that after incorporation the business is precisely the same as it was before, and the same person are managers ... the Company is not in law the agent of the subscribers or trustee for them nor are the subscribers as members liable in any shape or form except to the extent and in the manner provided by Act.”*

5. Further reliance was made on Order 1, Rule 3 of the Civil Procedure Rules on who may be joined as Defendant's/Respondent's for purposes of relief.

6. Counsel submitted that the relief being sought by the Claimant is not available against Copy Cat Ltd which is distinct legal entity in its own right. Finally, the Applicant submits that the Claimant's suit is misplaced since it seeks to enjoin a party who was not privy to the contract of employment and that the same should be dismissed with costs.

7. The Respondent/Claimant filed a replying affidavit with no grounds of opposition or submissions to counter the preliminary objection. The Claimant deponed that the import and thrust of Order 1 Rule 9 of the Civil Procedure Rules is that even if the Respondent is a wrong party in the suit, the Court will not dismiss the suit on that account but will proceed and make a determination on whether indeed the

Respondent was a wrong party.

8. Order 1 Rule 9 of the Civil Procedure Rules which states: ***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”***

9. THAT without prejudice to the foregoing, the Respondent had filed a Response to the Memorandum of Claim dated 12<sup>th</sup> January 2021 wherein it admits the following:

i. At paragraph 2 of the Response to the Memorandum of Claim, the Respondent admits to the description of the parties.

ii. At paragraph 3 of the Response to the Memorandum of Claim, the Respondent admits to my remuneration and position.

iii. At paragraph 4 of the Response to the Memorandum of Claim, the Respondent admits to the terms of my contract.

iv. At paragraph 4 of the Response to the Memorandum of Claim, the Respondent confirms terminating my services.

10. That the Preliminary Objection was an afterthought designed to obfuscate and delay justice having been filed on a date that the suit was set for main hearing.

11. That there was no evidentiary basis for the Preliminary Objection as contrasted with the express admissions made in the Response to the Memorandum of Claim dated 12<sup>th</sup> January 2021.

12. That based on the provisions of law cited above and the admissions in the Response to the Memorandum of Claim dated 12<sup>th</sup> January 2021, the Preliminary Objection ought to be dismissed with costs in the Claimant's favour and this suit set down for expeditious determination.

#### **Analysis and Determination**

13. The substratum of the Applicant's/Respondent's notice of preliminary objection is misjoinder of parties that the Respondent is an amorphous entity because two companies are identified as one. That Copy Cat Limited should not have been included as a Respondent in the suit. That inclusion of Copy Cat Limited as a Respondent renders the Claimant's suit incurably defective, incompetent and bad in law and a candidate for striking out.

14. The effect of misjoinder of non-joinder of parties, is provided for by Order 1 Rule 9 of the Civil Procedure Rules, 2020, which make it patently clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. It provides that:

***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”***

15. As the Applicant/Respondent submits the importance of parties in proceedings before a court of law cannot be gainsaid.

16. In **Apex International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission (2012) eKLR**, the Court quoted the words of Mukhtar J. of the Supreme Court of Nigeria in **Goodwill and Trust Investment Ltd V Will and Bush Ltd (2011) LCN/B820 (SC)** as follows:-

*“It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the Court, the Court lacks jurisdiction to hear the suit and where the Court purports to excise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”*

17. The issue was emphasized by Gikonyo J. in **Zephir Holdings Ltd v Mimosa Plantations Ltd and 12 Others (2014) eKLR**.

18. The foregoing aptly captures the essence of parties in judicial proceedings which the Court is in agreement with entirely. However, the crux of the matter in this application is the effect of suing two companies as one.

19. In **William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others [2016] eKLR** the Court of Appeal held that –

*“Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.”*

20. Needless to emphasize Articles 159(2)(d) of the Constitution of Kenya, 2010 provides that *“Justice shall be administered without undue regard to procedural technicalities.”* The words of Ochieng J. in **Republic v District Land Registrar, Uasin Gichu and Another (2014) eKLR** on Article 159(2)(d) are also instructive.

21. There is sufficient judicial authority for the proposition that courts of law are enjoined to sustain suits rather than terminate them on technicalities unless the case appeared hopeless and beyond redemption (see **DT Dobie Company (Kenya) Ltd v Joseph Muchina & Another [1980] eKLR**. This position is underpinned on the need to administer substantive justice which cannot be achieved unless suits are sustained.

22. The Applicant/Respondent contends that the misjoinder herein renders the suit *inter alia* “incurably defective and bad in law.”

23. It is common ground that there is a misjoinder in this suit and on that basis, the Applicant/Respondent seeks the striking out of the entire suit.

24. Although Order 1 Rule 9 of the Civil Procedure Rules 2020 and the authorities relied upon by the Applicant are emphatic on the effect of misjoinder or non-joinder of parties and that the Company is at law a different person altogether from the subscribers to the memorandum as enunciated by the House of Lords in **Salomon v Salomon & Co. Ltd (1897)**, the respondent in the main suit is an amorphous person and does not exist in law. The Company sued is neither an EOH Seal Limited nor COPY CAT Limited but EOH Limited Company. The Applicant/Respondent submits that the two are different legal entities but one is a shareholder of the other.

25. Needless to emphasise, a copy of the Claimant’s letter of offer dated 29<sup>th</sup> June 2015 clearly states that she was an employee of EOH Seal Limited and the same is evident from the letter of confirmation dated 7<sup>th</sup> September 2016 signed by one Robert Gitau as Managing Director of the company.

26. The Claimant opposed the preliminary objection by way of affidavit with no grounds of opposition and relied on Order 1 Rule 9 of the Civil Procedure Rules exclusively.

### **Conclusion**

27. As already observed, Order 1 Rule 9 of the Civil Procedure Rules is couched in mandatory terms on the issue of misjoinder and there is sufficient judicial authority on this point of law.

28. The Court is of the view that the appropriate remedy by the Respondent would have been to move the Court to have the name of the improperly joined party struck out of the proceedings.

29. Lastly, the misjoinder cannot be said to have rendered the suit so hopeless that it cannot be salvaged by an amendment of the statement of claim which can be done at any time before judgment as per Order 1 Rule 10(2).

30. In the final analysis, the preliminary objection dated 3<sup>rd</sup> August 2021 is dismissed with no order as to costs. Suit to be heard on merits.

31. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF OCTOBER 2021**

**DR. JACOB GAKERI**

**JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**