



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE E362 OF 2021**

**DANIEL MUSYOKI LABAN.....CLAIMANT**

**VERSUS**

**JENNIFER NJOKI KAIRU.....1<sup>ST</sup> RESPONDENT**

**ALEXANDER PRESER VELVER OTTO MARIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Respondents/Applicants Notice of Preliminary Objection to the Plaintiff's suit on the is on the grounds that:

- 1) The SUIT as filed and canvassed by the Plaintiff vide Plaintiff dated 22<sup>nd</sup> April 2021 is fatally and incurably defective and as such cannot stand or be ventilated before this Honourable Court.
- 2) The suit has been brought by way of a Plaintiff and not a Memorandum of Claim and is therefore fatally defective and should be struck out.
- 3) Further, the claim as filed contravenes the mandatory provisions of the law for a company to be sued as an independent juristic legal entity distinct from individuals who are its members.
- 4) There is no cause of action raised against the Respondents and thus the suit is only fit for striking out.
- 5) This suit ought to be struck out pursuant to Rule 4(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and section 19 of the Companies Act, 2015.

2. In response, the Plaintiff filed a Replying Affidavit sworn on 17<sup>th</sup> May 2021 by his Advocate Kenneth Macharia Maina who deposes that a search on the LSK online records of Advocates indicates the status of **Mr. Wambugu Samuel Mathenge** as "inactive". This means that the said Mr. Wambugu Samuel Mathenge was therefore not qualified to sign suit papers or address the Court pursuant to Section 34 as read with section 9 of the Advocates Act which provides that an advocate is unqualified to practice law if they have not taken out a practicing certificate for the given year. That it thus follows that any documents signed by such an advocate is a nullity as was clearly stated by Majanja J. in **Abraham Mwangi v IEBC & Others (HC App. No. 3 of 2013)** and that the Notice of Preliminary Objection herein ought to be struck out on those grounds. He further avers that the error in bringing this suit by way of plaintiff as opposed to the requirements of Rule 4(11) of the Labour Relations Court (Procedure) Rules, 2016 is not fatal and can be corrected. That Article 159(2)(d) of the Constitution of Kenya, 2010 provides that courts and tribunals should administer justice without undue regard to procedural technicalities and that in **Jared Nyamweya v Kenya Seed Company Ltd [2020] eKLR**, Nduma J. directed the plaintiff therein to amend the pleadings to comply with Rule 4(11) of the Labour Relations Court (Procedure) Rules, 2016. It is also his averment that the Court in **Mugenyi & Co. Advocates v The AG (1999) 2 EA 199** gave ten instances in which the veil of corporate personality may be lifted with one of the instances being where a private company is formed between personal relationships of members. That the company herein was borne out of the personal relationship between the Claimant and the 1<sup>st</sup> Respondent and that the 2<sup>nd</sup> Respondent was also involved as the legal husband of the 2<sup>nd</sup> Respondent. That the frustration and subsequent termination of the employment of the Claimant was also on account of the personal relationship between the Claimant and the 1<sup>st</sup> Respondent as evidenced in the pleadings on record and to be further demonstrated in the substantive suit. He avers that there is clear cause of action as the Claimant worked as a Director and /or a Partner for three years and seven months and left the said position without terminal dues and/or an exit package. That the pleadings on record also demonstrate that the Claimant's resignation was not by consent but was as a result of threats, intimidation and coercion.

3. In submissions, the Plaintiff/Respondent further submits that the Law Society of Kenya vide a correspondence dated 2<sup>nd</sup> November, 2021 confirms that the Respondents' advocate applied for a practicing certificate and was issued with a receipt on 21<sup>st</sup> May 2021 and also confirm that he was only qualified to practice law after that date. Pursuant to this, the Plaintiff/Respondent urges the Honourable Court to strike off all documents filed by the Respondents/Applicants before 21<sup>st</sup> May 2021. He submits that the Respondents will suffer no prejudice if he as the Claimant is allowed to amend his pleadings to comply with Rule 4(11) of the Labour Relations Court (Procedure) Rules and have this suit decided on merit. He urges the Court to be guided by the principles in the **Mugenyi & Co. Advocates** case above and allow the Respondents to be sued in their personal capacities because of the nature of the relationships between the parties. It is the Plaintiff/Respondent's submission that he is lawfully entitled to terminal dues and/or benefits which he left behind when he resigned and which constitutes his cause of action against the Respondents.

4. The preliminary objection was filed by an incompetent person and is amenable to being struck out. The allegations that the suit was filed as an incompetent cause is subject for some pause. Under the provisions of Rule 4(11) of the Employment and Labour Relations Court

(Procedure) Rules 2016 the nomenclature provided for the party seeking redress is Claimant and the person defending the claim is called a Respondent. If there is any misnaming then the same is curable under Article 159(2)(d) of the Constitution as the mere reference to Plaintiff and Defendant cannot by themselves defeat a suit. As the advocate who filed the papers had no authority to do so the costs of the objection taken shall be met personally by the said advocate and failing which the matter shall be referred to the Council of the Law Society to deal by way of further sanction. The Court will hold the reporting of this case and shall only forward it to Kenya Law after 7 days which is the period the Advocate must pay the costs which I assess at 15,000/- to the Claimant. Mention shall be on 17<sup>th</sup> November 2021 to confirm compliance and the filing of an amended memorandum of claim.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF NOVEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**