REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 6500 OF 2020

STEPHEN WANGA MUGONI.....CLAIMANT

VERSUS

RAMA HOMES LIMITED T/A RAMA GROUP OF COMPANIES.....1ST RESPONDENT

RAMA MACHINES LIMITED.....2ND RESPONDENT

RULING

1. The 1st Respondent/Applicant filed Chamber Summons Application dated 25th June 2021 seeking to be heard for Orders that the Honourable Court be pleased to strike out the 1st Respondent as a party to the suit herein and that the costs of this Application be borne by the Claimant. The Application is based on the grounds that the Claimant has no reasonable cause of action against the 1st Respondent. That as per law, employment claims are disputes between the employer and employee and that in this case the dispute is between the Claimant and the 2nd Respondent. That the Claimant even acknowledges at paragraph 6 of the Memorandum of Claim dated 27th November 2020 that the 2nd Respondent is his employer and the Contract of Service dated 19th August 2019 is also indicated to be between the Claimant and the 2nd Respondent. The Applicant asserts that the 1st Respondent has been wrongly joined as a party in the instant claim and that joinder of the 1st Respondent will prejudice the expeditious settlement of this matter. The Application is supported by the affidavit of the 1st Respondent's Legal Officer, Eric Muia who depones that the Claimant is stranger to the 1st Respondent/Applicant as they have never been in an employee-employer relationship nor had a contract of service between them. He asserts that the Memorandum of claim dated 27th November 2020 raises and/or discloses no reasonable cause of action against the 1st Respondent.

2. In opposing the application, the Claimant/Respondent filed a Reply dated 4th August 2021 averring that the 2nd Respondent and the 1st Respondent are sister companies and share the same office. That after signing the contract dated 19th August 2019 he was issued with an induction letter prepared by the 1st Respondent and not the 2nd Respondent and that during the pendency of his employment his salary was paid vide cheques issued by the 1st Respondent. Further, upon termination of his employment, the 1st Respondent issued him with the acknowledgement of payment dated 7th November 2020 confirming payment of his dues. It is the Claimant/Respondent's averment that the 1st Respondent is therefore a necessary party in this suit. It is the 1st Respondent/Applicant's submission that a "contract of service" is clearly defined under Section 2 of the Employment Act as "an agreement, whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time" whereas an "employee" is defined as "a person employed for wages or a salary". It submits that the Claimant's employment contract unambiguously refers to the 2nd Respondent as the employer with Clause 3.i of the Employment Contract further providing that the 2nd Respondent shall pay the Claimant's salary of Kshs. 200,000/-. That in the execution part of the said contract the Claimant also acknowledges the contract as between himself and the 2nd Respondent. That the basis of an employment relationship is a contract of service and the Claimant having a contract of service with the 2nd Respondent indicates an exclusive employer-employee relationship between the contracting parties.

3. The 1st Respondent/Applicant further submits that it on numerous occasions loaned the 2nd Respondent sums of money which went to paying salaries to some of the 2nd Respondent's employees including the Claimant. That nevertheless, the obligation of the 2nd Respondent to pay salaries to its employees always remained with it as depicted under Clause 3.i of the employment contract. It denies that the two companies are sister companies and that in any case an employee of a company is not an employee of another sister or related company by virtue of that corporate relationship. The Applicant relies on the case of **Christine Adot Lopeiyo *v* Wycliffe Mwathi Pere [2013] eKLR** where the Court analysed guiding parameters that distinguish employment and contract for service as follows:

> *The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.*

The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.

The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.

Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance…

4. It submits that from the foregoing parameters, the 2nd Respondent in the instant case hired the Claimant and provided him with his key responsibilities, indicators of good performance and code of conduct as seen in Appendices I and II to the Contract, which it expected the Claimant to adhere to. That in the contract the 2nd Respondent also undertook to remunerate the Claimant as submitted herein above and therefore takes the ultimate risk of loss or profit in its employment relationship with the Claimant. That the contract between the Claimant and the 2nd Respondent also expressed mutuality of obligation as it made commitment to maintain the employment relationship over a period of time. It is the Applicant's submission that with this demonstration, claims against the 1st Respondent are misplaced and misconceived. The 1st Respondent/Applicant submits that the proper relationship with which the Court can exercise its jurisdiction on pursuant to Section 12 (1) (a) of the Employment and Labour Relations Court Act is the one between the Claimant and the 2nd Respondent as hereinabove submitted.

5. On the other hand, the Claimant/Respondent submits that whilst the 1st Respondent has alleged making payment of loans, it has not attached any proof of the loan agreements referred to. He relies on Section 107 of the Evidence Act which provides that '*whoever desires any court: to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist; and when a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person'*. He further cites Section 109 of the Evidence Act which states that '*the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lie on any particular person'*. It is submitted by the Claimant that the fact the 1st Respondent paid his salary including his terminal dues demonstrates that it had an employer-employee relationship with him. To this end he relies on the decision in **Patrick Mutua Mwanzia & 19 Others *v* Habo Group of Companies [2018] eKLR** where the court confirmed the company that had been paying the claimants and issued their termination letters, as having been their employer. The Claimant submits the case of ***Industrial Court at Nairobi, Cause No. 1011 of 2010 - Symon Wairobi Gatuma versus East African Breweries Limited & 3 others***, cited with approval in **Phillip Ateng Qguk & 27 Others *v* Westmont Power [Kenya] Limited & Another [2015] eKLR**, the Court found that subsidiary or sister companies are often merely places of work for many employees, and that Courts should look at the business structure, not the legal structure adopted by the enterprise, in enforcing employees' rights. The Claimant submits that in the instant case there is adequate material to find the alleged separate entity was merely a façade aimed at placing barriers in the way of him realizing his employment rights, as asserted in the ***Phillip Ateng case*** above.

6. The Claimant/Respondent submits that the 1st Respondent has met the threshold to be enjoined in this suit as a necessary party and that Nambuye J. (as she then was) stated in **Kingori *v* Chege & 3 Others [2002] 2 KLR 243** that the guiding principles when an intending party is to be joined include: must be a necessary party; must be a proper party; in the case of the defendant, there must be a relief flowing from that defendant to the plaintiff; the ultimate order or decree cannot be enforced without their presence in the matter; and their presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit. It is the Claimant's submission that the Application herein should therefore be dismissed with costs.

7. The 1st Respondent asserts that it is not a necessary party in this dispute. It asserts that it had no employer-employee relationship with the Claimant. The Claimant on his part asserts that the 1st Respondent is a necessary party as it paid his terminal dues as well as salaries as admitted in the pleadings. The definition of a necessary party is **a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court**. If a necessary party is not impleaded, the suit itself is incompetent. The 1st Respondent made various payments to the Claimant including terminal dues and as such there is a live thread between the 1st Respondent and the Claimant and the suit cannot be mounted against one of the 2 Respondents to the exclusion of the other. The 1st Respondent is a party who is so necessary for the adjudication of the dispute in this case and in their absence there would a pyrrhic determination in the cause. As such the 1st Respondent's notice of motion is dismissed with costs to the Claimant.

It is so ordered.

Dated and delivered at Nairobi this 4th day of November 2021

Nzioki wa Makau

JUDGE