



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 490 OF 2016

(Before Hon. Justice Hellen S. Wasilwa 23rd January, 2020)

MESHACK OMBUI & 13 OTHERS.....APPLICANTS

VERSUS

HAMISI NJENGA T/A PREMIER TECHNICAL CONSULTANTS.....RESPONDENT

ROYAL EMBASSY OF SAUDI ARABIA.....INTERESTED PARTY

RULING

1. The instant Ruling is with respect to the Applicant's Notice of Preliminary Objection filed on 1st March, 2019 which raises the following grounds:

1. THAT the suit is grossly misconceived, bad in law, frivolous, vexatious and an extreme abuse of the court process.

2. THAT the Defendant herein is an individual and does not have the capacity to be sued in this suit as he has no locus standi being that Premier Technical Consultants is a company with limited Liability and has the capacity to sue and be sued.

2. The Respondents filed a Replying Affidavit sworn on 26th March 2019 by Meshack Ombui, the 1st Claimant/ Respondent on behalf of all Respondents. He avers that they were employed by Premier Technical Consultants which represented itself as a consulting firm and not a limited company as claimed by the Respondent.

3. He deposes that the Applicant has not produced any substantive documents in support of the Preliminary Objection to prove that it is a limited company.

4. He further deposes that they do not believe that the company changed its name and should it have changed its name it must have mysteriously changed its status. He contends that the Preliminary Objection is a delaying tactic in order to avoid the commencement of the suit since the Applicant filed a Defence and ought to have raised the Preliminary Objection in 2016.

5. The parties herein filed their respective submissions to the Preliminary Objection.

Applicant's submissions

6. The Applicant submits that *locus standi* is a long established principle on who can approach the Court to present a matter. It relied on the Court of Appeal decision in **Alfred Njau & 5 others v City Council of Nairobi [1983] eKLR** where the Court held:-

“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

7. It is its submissions that the Applicant has been sued under his capacity as a sole proprietor yet the alleged business name was registered as a company. It submits that a company has the capacity to sue and be sued and a shareholder of the said company cannot be a substitute. In support of this, it relies on the case of **Foss v Harbotle (1843) 67 ER 189.**

8. It submits that the effect of a party's lack of capacity was well highlighted in **Emmanuel Sichangi Chonge & 2 others v Fanuel**

Walekhwa & Another [2014] eKLR. It contends that nobody can be bound by the terms of a contract, which he is not a party to. It urges the Court to allow the Preliminary Objection and dismiss the suit in its entirety.

Respondents' submissions

9. The Respondents submit that under section 54 of the Companies Act, a company may be registered only with a name that ends with the word Limited or Ltd. They aver that the Applicant herein trades as Premier Technical Consultants and that there is no indication that the Company is limited and that both Hamisi Njenga and Premier Technical Consultants are two separate legal persons.

10. They aver that the copies of the Bank Statement annexed to his Replying Affidavit indicate that Hamisi Njenga and Premier Technical Consultants are the same person. They submit that they are not aware that the Company changed its name.

11. It is their submissions that if the allegations stated are true, the Applicant would have raised the issue in 2016 after being served with the Summons and pleadings. They rely on section 160 of the Evidence Act and submit that the Applicant should be estopped from claiming that it's a limited company.

12. They urge the Court to strike out the Applicant's Preliminary Objection with costs as it lacks merit. They however submit that should the Court find that the Preliminary Objection has merit, the Court do grant them leave to amend the Statement of Claim under section 100 of the Civil Procedure Act.

13. I have examined the averments of both Parties. The Preliminary Objection as it stands can only be proved by evidence of the Applicant by proving that indeed they are a Limited Liability Company.

14. However, the Applicant failed to attach a certificate of its registration to prove their contention meaning that this aspect can only be proved through further evidence, which goes beyond the principle enunciated in **Mukisa Biscuits Case**. I find the Preliminary Objection without merit in the circumstances and I dismiss it accordingly.

15. Costs in the cause.

Dated and delivered in open Court this **23rd day of January, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Gichuhi for Claimant – Present

Respondent – Absent