



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2612 OF 2016

(Before Hon. Justice Hellen S. Wasilwa 22nd January, 2020)

GLORIA JEPKURUI KOIMA.....1ST CLAIMANT

JAMES NGOCHI NGUGI

T/A NGUGI & COMPANY ADVOCATES.....2ND CLAIMANT

VERSUS

KPMG ADVISORY SERVICES LIMITED.....1ST RESPONDENT

JOSPHAT MWAURA.....2ND RESPONDENT

JANE MUGO.....3RD RESPONDENT

BRIAN D'SOUZA.....4TH RESPONDENT

MICHAEL KIMANI.....5TH RESPONDENT

RULING

1. Pending for determination before this Honourable Court are two Applications both of which are filed by the Respondents/Applicants on 17th July, 2019.

2. The first Application is a Notice of Preliminary Objection dated 16th July, 2019 brought on grounds that:-

1. The Amended Memorandum of Claim dated 2nd November, 2018 and filed on 3rd November 2018 together with the Verifying Affidavit of James Ngochi Ngugi sworn on 2nd November 2018 as drawn and instituted herein is in substance incompetent and fatally defective because:-

a) The 2nd Claimant does not have an employer-employee relationship with the 1st Respondent herein and is therefore not a necessary party to the present proceedings.

b) At all material times pertaining to the Claim, the 2nd to 5th Respondents were acting as agents of a disclosed principal, under actual authority and thus they are wrongly enjoined to the suit.

2. In the premises, the Amended Memorandum of Claim dated 2nd November, 2018 and filed on 3rd November, 2018 together with the Verifying Affidavit of James Ngochi Ngugi sworn on 2nd November, 2018, are in effect an abuse of the Court process of this Honourable Court and as such should be dismissed with costs to the Plaintiff.

3. Secondly, the Respondents/Applicants further filed an Notice of Motion Application dated on even date under Article 159 and 162 (2) of the Constitution of Kenya, 2010, Sections 12 (2) and (3) of the Employment and Labour Relations Court Act, 2011, Rule 17 (1) and (8) of the Employment and Labour Relations Court Rules, 2016 and all enabling provisions of the law. The Application seeks the following Orders that:-

i. The 2nd Claimant's Claim against the 1st to 5th Respondents/Applicants be struck out with costs.

ii. The 2nd to 5th Respondents/Applicants be removed as parties to this suit.

iii. The Amended Memorandum of Claim amended and filed by the 1st and 2nd Claimants on 2nd November 2017 be struck out with costs.

iv. The costs of this Application be provided for.

4. The Application is premised on the grounds **THAT**:-

a) This Honourable Court's jurisdiction under Article 162 (2) of the Constitution of Kenya, 2010 and Section 12 of the Employment and Labour Relations Court Act, 2011 is limited to employment matters and other matters emanating from employment contracts and/or relationships between an employer and employee not their Advocates.

b) There is no employment contract between the 2nd Claimant and the 1st Respondent therefore depriving this Court's jurisdiction to entertain the 2nd Claimant's Claim.

c) The 2nd Claimant's basis of his Claim is that he was acting as an Advocate of the 1st Claimant and not an employee. He therefore not only lacks locus standi to participate in these proceedings but his claim is in the wrong forum.

d) That an advocate such as the 2nd Claimant is estopped from acquiring an interest of his client in any suit or contentious proceedings.

e) A mere scrutiny of the Amended Memorandum of Claim will show that at all material times the 2nd to 5th Respondents/Applicants were acting as agents of a disclosed principal, the 1st Respondent/Applicant, and under actual authority.

f) The joinder of the 2nd to 5th respondents/Applicants in their capacity contravenes the common law principle prohibiting suing agents of a disclosed principal.

g) The suit with respect to the 2nd Claimant does not disclose any triable issues against the 2nd to 5th Respondents/Applicants.

h) The Claim with respect to breach of Client-Advocate privilege was litigated to finality and cured by a court order dated 30th March, 2016 issued by Justice Monica Mbaru prohibiting any access of such privileged information and further requiring that any such information if accessed be expunged from the records of the 1st Respondent/Applicant.

i) Though the 1st Respondent/Applicant had not accessed any privileged information as claimed, it complied dutifully, faithfully and fully with the said Court Orders prohibiting such access after the said Orders.

j) On the strength of the said ruling, the issue of breach of advocate-client privileged information is closed and not open for re-litigation.

k) There is a misjoinder of parties and misjoinder of causes of actions and the suit is therefore scandalous, frivolous or vexatious as against the 2nd to 5th Respondents/Applicants.

l) The suit is only aimed at prejudicing, embarrassing and harassing the 2nd to 5th Respondents/Applicants unjustifiably for the same is without substance.

5. The Application is further supported by the Affidavit of **JOSPHAT LEONARD MWAURA**, the CEO of the 2nd Respondent/Applicant herein sworn on 16th July, 2019 in which he reiterates the grounds on the face of the Notice of Motion Application.

6. In response to both Applications, the Claimants filed a Replying Affidavit deposed by **JAMES N. NGUGI**, the 2nd Claimant herein on 24th October, 2019 in which he admits having not been employed by the Respondents herein but averred that the Respondent is guilty of breach of his rights to privacy in the course of the 1st Claimant's employment.

7. He further averred that from the said breach he did file a claim under Civil Suit No. 8 of 2017 that culminated in the Court. He further contends that the said suit and the instant matter before this Honourable Court are akin to each other can therefore not be determined separately.

8. The 2nd Claimant further contended that the 2nd to 4th Respondents are necessary parties to this instant Claim as they have been enjoined in this matter in their capacity as partners of the 1st Respondent and are therefore personally liable for violation of the Claimants rights to privacy.

9. He further avers that his claim against the Respondents is purely on whether his rights as an advocate and as a citizen were breached in any

way and that the striking out of the suit against the 2nd to 5th Respondent will deny them (the Claimants) and the Court a crucial opportunity to determine this matter with truth to finality.

10. The 2nd Claimant terms the assertion that his Claim doesn't raise any triable issues against the 2nd to 5th Respondent as premature and ill-advised as it is an attempt to determine the matter that is yet to be heard and determined on merit.

11. He further contends that both the Notice of Motion Application and the Notice of Preliminary Objection are filed in bad faith and are an attempt to delay this suit further. It is on this basis that he urged this Honourable Court to dismiss both Applications with costs to the Claimant.

12. In disposing off the Applications the parties hereto agreed to proceed by way of written submissions.

Submissions by the Parties

Respondents/Applicants Submissions

13. It is submitted on behalf of the Respondents/Applicants that this Honourable Court lacks jurisdiction to determine the 2nd Claimant's Claim as it draws its jurisdiction from Article 162 (2) of the Constitution of Kenya, 2010 and Section 11 of the Employment and Labour Relations Court Act.

14. It is further submitted that the 2nd Claimant lacks locus standi to participate in the instant Claim as his Claim is based on the sole basis that he was acting as an advocate of the 1st Claimant. To fortify this argument the Respondents/Applicants rely on the Court decision in the Court of Appeal case of **Daniel N. Mugendi Vs Kenyatta University & 3 Others (2013) eKLR.**

15. The Applicants further contend that the 2nd Claimant only seeks to sneak himself into the enforcement of a contract that he is not privy to. To buttress this argument the Applicants relied on the case of **Agricultural Finance Corporation Vs Lengetia, 1982-88 1 KAR 772,** which cited with approval the case of **City Council of Nairobi Vs Wilfred Kamau Githua T/A Githua Associated & Another (2016) eKLR.**

16. It is on this basis that the Applicants contended that the 2nd Claimant's claim fails to disclose any cause of action and cannot sustain any cause of action against the 2nd to 5th Respondents. It is therefore the Applicant's submission that the same ought to be struck out with costs.

17. The Applicants further submit that an agent of a disclosed principal cannot be sued and therefore the 2nd to 5th Respondents herein have been wrongly enjoined in this matter. To fortify this argument the Applicant cited and relied on the findings in the cases of **City Council of Nairobi vs Wilfred Kamau Githua T/A Githua Associates & Another (2016) eKLR, Victor Mabachi & Another Vs Nurtun Bates Limited (2013) eKLR** and **Manuel Anidos Vs Kinangop Windpark Limited (in receivership) & 2 Others (2019) eKLR.**

18. In conclusion, the Applicants submitted that this Court should proceed to strike out the Amended Memorandum of Claim as filed herein. They further submitted that this Honourable Court lacks the requisite jurisdiction to entertain the 2nd Claimant's Claim as it fails out of this Court's jurisdiction by dint of Article 162 (2) of the Constitution of Kenya, 2010. For emphasis the Applicants relied on the Authority of **Apex International & Anglo Leasing Finance Limited Vs Kenya Anti-Corruption Commission (2012) eKLR** and **Goodwill and Trust Investments Limited & Another Vs Witt & Bush Limited (Nigerian SC 266/2005).**

Claimants'/Respondents' Submissions

19. The Claimants on the other submitted that this Court is clothed with the necessary jurisdiction to hear and determine the Claim for the 2nd Claimant as filed herein as what he seeks is a declaration that his rights to privacy have been violated or breached by the Respondents herein.

20. It is further submitted that the said cause of action arose in the course of the 1st Claimant's employment and therefore ought to be determined together. For emphasis on jurisdiction, the Claimants cited and relied on the decisions in the cases of **George Joshua Okungu Vs Kenya Pipeline Company Limited & 3 Others (2016) eKLR** and **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others (2012) eKLR.** The Claimant further relied on the provisions of Section 12 (3) (iv) of the Employment and Labour Relations Court Act.

21. On the issue of whether the 2nd to 5th Respondents can be sued as they were agents of the 1st Respondent the Claimants submitted that the said 2nd to 5th Respondents are partners of the 1st Respondent and not the agents as contended by the Applicants herein.

22. It is further the Claimants submissions that the 2nd to 5th Respondents have been rightfully sued for tortious acts committed by them in their own personal capacities. To buttress this argument the Claimants cited the case of **National Social Security Fund Board of Trustees Vs Ankah Holdings & Others (2016) eKLR.**

23. It is further contended that the 2nd to 5th Respondents are properly enjoined in the suit and are therefore necessary parties to the Claim.

24. In conclusion the Claimants submitted that the Respondents Preliminary Objection and Notice of Motion both dated 16th July, 2019 ought to be dismissed for want of merit and that the same are vexatious and a waste of this Court's time.

25. I have considered the averments of both Parties and submissions filed herein.

26. From these pleadings, the 2nd Claimant is enjoined in this suit as an Advocate of the 1st Claimant in a non-related divorce matter. There is no indication that he has an employer-employee relationship with the Respondents herein. This Court draws its jurisdiction from Section 12(1) of Employment Labour Relations Court 2014, which states as follows:-

1. “The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-

a) disputes relating to or arising out of employment between an employer and an employee;

b) disputes between an employer and a trade union;

c) disputes between an employers’ organisation and a trade unions organisation;

d) disputes between trade unions;

e) disputes between employer organisations;

f) disputes between an employers’ organisation and a trade union;

g) disputes between a trade union and a member thereof;

h) disputes between an employer’s organisation or a federation and a member thereof;

i) disputes concerning the registration and election of trade union officials; and

j) disputes relating to the registration and enforcement of collective agreements.

27. And Article 162(2)(a) of the constitution which states as follows:-

2) “Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:-

a) employment and labour relations”

28. In absence of establishing any employee relationship with the Respondents, the 2nd Claimant’s claim is not tenable and I strike the 2nd Claimant from these claims accordingly.

29. As to the striking out of the 2nd to 5th Respondents from these proceedings, I need to establish the relationship between the said Respondents and 1st Respondent vis a vis the Claimant. This has not been established in this application. I therefore would decline to strike out 2nd to 5th Respondents in the claim. The claim to proceed accordingly between the 1st Claimant and the Respondents.

30. Costs in the cause.

Dated and delivered in open Court this 22nd day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties