



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
CAUSE NO.52 OF 2019

MWINYI AHMED MWINYI.....CLAIMANT

VERSUS

MARA CONCORD GAME LODGE

T/A LEO INVESTMENT LIMITED.....1ST RESPONDENT

RAHIM CHATUR.....2ND RESPONDENT

RULING

The 2nd Rahim Chatur filed application dated 9th October, 2019 under the provisions of Order 51 Rule 1, Order 2 Rule 15(1) of the Civil Procedure Rules and seeking for orders that the suit filed against him be struck out for failure to disclose any reasonable cause of action against him and the costs be assessed and awarded to him.

The application is based on the grounds that the claimant has pleaded that his employment contract was with the 1st respondent and the cause of action is substantively pegged on alleged breach of the said contract. The 2nd respondent was not a party to the employment contract and there is no privity of contract. The claimant has not pleaded any breach of contract by the 2nd respondent.

The 2nd respondent cannot be in breach of a contract he was not a party to and consequently no plausible defence to the instant suit. The suit against the 2nd respondent should be dismissed with costs to the 2nd respondent.

There was no affidavit to the application and Notice of Motion.

The claimant in reply filed his Replying Affidavit and avers that the claim herein is filed against the respondent's with the 2nd respondent being the proprietor and director of the 1st respondent and at all material times was the immediate boss who directed and assigned the claimant with duties. There shall be no prejudice suffered where the 2nd respondent remains a party herein.

The 1st respondent is organised by the 2nd respondent to mask the legal identity of the employer and have therefore taken caution to bring both respondents to court for a speedy determination of the matter.

The Employment Act does not bar directors and their companies from being enjoined in the same claim as held in **Daniel Mutisya Masesi versus Romy Madan & General Foods (K) Limited, Cause No.691 (N) of 2009**.

The principles of separateness and liability do not apply in labour relations as held in **Phillip Ateng Oguk & 28 others versus East Africa Power Mgt Limited, Cause No.281 of 2014**.

The claimant also avers that the application as filed in bad faith and thus should be dismissed with costs.

Both parties made oral submissions.

The application herein is premised under the provisions of Order 51 Rule 1 and Order 2 Rule 15(1) (a) of the Civil Procedure Rules and which directs on the filing of applications and the striking out of pleadings. Such an application should be accompanied and supported by an Affidavit.

Application filed with the court are regulated under the provisions of Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and which requires that every Notice of Motion should be supported by an affidavit. These provisions are couched in mandatory terms.

In this regard the 2nd respondent's advocate submitted that such an application can be filed without an affidavit.

Rule 17 of the court rules thus requiring a Notice of Motion be supported by an affidavit to proceed without one is to deny the other party and the court crucial and relevant facts supporting the same.

On the substantive issues raised in the application, the claimant's claim is that he was employed by the 1st respondent who issued him with an employment contract whereas the 2nd respondent is the proprietor/director and his immediate boss. The challenge by the 2nd respondent is that there is no privity of contract connecting him to the claimant and there is no need to lift the corporate veil to enjoin him as a party herein.

In the ordinary practice, **Order 1 Rule 10 (2) of the Civil Procedure Rules** allow the enjoinder of a party whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle the questions involved in the suit. This may be done at any time, whether on application or *suo motu*. See **Rubina Ahmed & 3 others versus Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR**.

With regard to employment and labour relations, section 20 of the Employment and Labour Relations Court act, 2011 give the court general powers to direct for the attendance of any party deemed necessary and appropriate to assist the court in the adjudication of disputes before it. This can be done by application by either party or *suo motu*.

The 2nd respondent does not deny that he is a director of the 1st respondent and that he was the one supervising the claimant. He then becomes a necessary party herein to attend to enable the court to effectually and completely adjudicate upon and settle the questions involved in the suit. He stands out as a necessary party herein and thus appropriately enjoined as a respondent.

This is aptly captured in the case of **Zephir Holdings Limited versus Mimosa Plantations Limited & others (2014) eKLR**, that;

A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.

also in **Local Building and Construction Limited versus Institute of the Blessed Virgin Mary Loreto Msongari & 2 others [2019] eKLR** the court 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. We reproduce the same hereunder: 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.

There shall be no prejudice visited upon the 2nd respondent by attending in these proceedings as a director and proprietor of the 1st respondent.

Accordingly, application dated 9th October, 2019 is hereby found without merit and hereby dismissed with costs to the claimant.

Delivered at Nakuru this 13th day of February, 2020.

M. MBARU

JUDGE

In the presence of: