



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 3 OF 2019

NICHOLAS KIPROTICH RONOH.....CLAIMANT

VS

TAITA TAVETA UNIVERSITY.....1ST RESPONDENT

PROFESSOR JONAH ARAP TOO.....2ND RESPONDENT

RULING

1. By his application brought by Notice of Motion dated 25th October 2019 and filed in court on 28th October 2019, the 2nd Respondent, Professor Jonah Arap Too who is the 1st Respondent's Deputy Vice Chancellor-Administration, Finance and Planning seeks orders to strike out the suit as against him.

2. The application is based on the following grounds:

- a) The Claimant has a contract of employment with the 1st Respondent where his terms of employment, including salaries and allowances are provided;
- b) The appointment, remuneration, disciplinary proceedings and the subsequent dismissal of the Claimant were done by or with the authority of the 1st Respondent and not the 2nd Respondent;
- c) Accordingly, there was no contractual relationship between the 2nd Respondent and the Claimant;
- d) There is no specific prayer in the claim sought against the 2nd Respondent and there is no common question of law or fact that necessitates joinder of the 2nd Respondent;
- e) The 2nd Respondent has therefore been wrongfully joined in this suit;
- f) It is in the interest of justice that the prayer sought in the application is granted.

3. The Claimant's response to the 2nd Respondent's application is contained in the replying affidavit filed on 6th November 2019.

4. The Claimant concedes that his employment contract was terminated by the 1st Respondent but states that the termination arose out of a series of transactions in which the 2nd Respondent was actively and directly and/or indirectly involved in his capacity as Vice Chancellor and also in his personal capacity.

5. The Claimant depones that there exist against the 2nd Respondent specific questions of fact as indicated in paragraphs 28, 29, 30, 33, 34, 35, 37, 38, 39 and 45.c.ii.cc of the amended claim and legal reasons and backing under Articles 10, 41 and 50 of the Constitution of Kenya.

6. The single issue for determination in this application is whether the 2nd Respondent is a necessary party in these proceedings.

7. The 2nd Respondent submits that he has been improperly sued because there was no employment relationship between him and the Claimant. The 2nd Respondent further submits that the Claimant has not made any specific prayer against him.

8. On his part, the Claimant submits that the 2nd Respondent is a necessary party in these proceedings because the 2nd Respondent subjected

the Claimant to an irregular disciplinary process, which culminated in the termination of the Claimant's employment.

9. In the submissions filed on behalf of the Claimant on 3rd February 2020, reference was made to the decision in *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matagaro & Ezekiel Misango Mutisya [2014] eKLR* where **Gikonyo J** stated the following:

“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 effectively 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 effectively and completely adjudicate and settle all questions involved in the suit.”

10. With regard to the submission by the 2nd Respondent that there is no specific claim made against him, the Claimant sought refuge in an earlier rendition by **Musinga J** (as he then was) in *Andy Forwarders Service Limited & another v Price Waterhouse Coopers Limited & another [2012] eKLR* that:

“A person may be enjoined in a suit not because there is a cause of action against him, but because that person's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter.”

11. It is not in dispute that in the events leading to the Claimant's claim, the 2nd Respondent acted in his capacity as the 1st Respondent's Deputy Vice Chancellor in charge of Administration, Finance and Planning.

12. As stated by this Court in its decision in *Engineer Mwalimu Kithome Musau v Kenya Water Institute & another [2018] eKLR* suing of public officers acting in their official capacity is to be discouraged. However, this general interdict is premised on the assumption that in the discharge of their duties, public officers act within the law and in good faith. Where this assumption cannot be guaranteed, then a public officer may personally be called to account.

13. In his amended Memorandum of Claim, the Claimant makes serious allegations, bordering on unfair labour practices, against the 2nd Respondent. In my view, judicial examination of these allegations is critical to the overall determination of the Claimant's case.

14. For this reason, the Court finds and holds that the 2nd Respondent Professor Jonah Arap Too is a necessary party in these proceedings. His application dated 25th October 2019 is therefore dismissed with costs to the Claimant.

15. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY MARCH 2020

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyasimi for the Claimant

Mr. Bwire for the Respondents