



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1672 OF 2014

BRIAN OMBASO.....CLAIMANT

-VERSUS-

MALL TO MALL DESIGNS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th June, 2020)

RULING

The claimant filed an application on 14.02.2020 through Lesinko Njoroge & Gathogo Advocates. The application was by the notice of motion under Article 50(1) of the Constitution of Kenya, 2010, Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules 2016 and all enabling provisions. The claimant prayed for orders:

- a) That the Honourable Court reviews its directions issued on 27.11.2019 closing the parties' respective case and any consequential orders thereof.
- b) That the applicant be granted leave by the Honourable Court to amend the name of the respondent to Mall To Mall Construction Limited.
- c) That an order is issued that the matter be heard de novo upon the filing of the draft amended memorandum of claim annexed herein.
- d) The costs of the application on the cause.

The application was based on the attached supporting affidavit by the claimant and upon the following grounds:

- a) The suit has been fully heard and parties closed their respective cases on 27.11.2019 and parties were directed to file and serve their respective submissions for mention on directions on judgment on 25.02.2020.
- b) The claimant had been under mistaken believe that he had been employed by the respondent when in fact his employer was Mall To Mall Construction Limited. He had all along believed that Mall To Mall Construction Limited was the respondent's department and he sued the wrong party due to the close similarity in the names. The respondent and Mall To Mall Construction Limited share directors and the respondent in the response filed herein on 04.03.2015 had acknowledged to be the claimant's employer. The claimant obtained proper details about the two companies on e-citizen website on 22nd and 24th January 2020.
- c) The amendment will ensure proper and real respondent defend the suit and is not applied for in bad faith.
- d) The application should be allowed in the interest of justice and fairness.

The respondent opposed the application by filing a notice of preliminary objection on 28.02.2020 and through MJD Associates Advocates. The grounds of objection are as follows:

- a) The proposed amendment seeks to defeat section 90 of the Employment Act, 2007 which provides that the time of limitation in employment contracts is 3 years from the date of the cause of action in this case being 04.10.2013, the dismissal date.
- b) The cause of action being time barred, the amendment should be defeated.

The respondent prayed that the application and the entire suit be dismissed.

The Court has considered the material on record and the parties' respective submissions. It is not in dispute that the claimant sued the named respondent and which pleaded at paragraph 4(a) of the memorandum of response filed on 12.09.2018 that the claimant was never in the respondent's employment. By the present application the claimant has admitted that the respondent was not his employer. The respondent and the proposed respondent are companies and therefore separate legal entities and despite their shared directors, the Court finds that the proper company being the claimant's employer ought to have been named as the respondent. To the extent that the respondent is not the claimant's employer, the Court returns that the preliminary objection that the entire suit be dismissed as against the respondent is upheld.

It is not in dispute that section 90 of the Employment Act, 2007 applies and indeed the three years of limitation to initiate a suit against the proposed respondent has since lapsed. The Court would not act in vain to permit a new respondent whose complete response to the suit is undisputedly that the suit is time barred.

Thus the preliminary objection is upheld.

In conclusion the application by the notice of motion filed for the claimant on 14.02.2020 is hereby dismissed and the preliminary objection filed for the respondent on 28.02.2020 is hereby upheld with orders that the entire suit is hereby dismissed with costs.

Signed, dated and delivered in court at Nairobi this Friday, 5th June, 2020.

BYRAM ONGAYA

JUDGE