



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 300 OF 2018

JAPHETH OMOA.....CLAIMANT

VS

OMAR SHARIFF ALI

YAYE SAID ATHMAN

ALI OMAR SHARIF

HABIB OMAR SHARIFF

T/A ISTIQAMA ACADEMY

AND TUITION CENTRE.....RESPONDENTS

RULING

1. On 7th May 2018, the Claimant filed a claim against Omar Shariff Ali, Yaye Said Athman, Ali Omar Shariff and Habib Omar Shariff, all trading as Istiqama Academy and Tuition Centre.
2. The Respondents filed a Reply, together with supporting documents and a witness statement signed by Omar Shariff, on 8th August 2018.
3. The case opened for trial on 29th July 2019, when the Claimant testified.
4. On 6th February 2020, Omar Shariff took the witness stand on behalf of the Respondents.
5. The Respondents' case was closed and directions on filing of final submissions were taken.
6. The matter was fixed for mention on 10th March 2020, to confirm filing of submissions, by which date the Respondents had filed an application for leave to serve a third party notice.
7. By consent of the parties, the Respondents were granted leave to file their application, which they did on 6th March 2020.
8. By their application which is dated 28th February 2020, the Respondents seek leave to issue a third party notice to the following proposed third parties:
 - a) Juma Boma
 - b) Sheikh Ali Idris
 - c) Salma Anwar
 - d) Ali Hussein

9. The Respondents further seek an order to reopen the case.

10. The application is supported by an affidavit sworn by the 1st Respondent, Omar Shariff Ali and is based on the following grounds:

- a) That the Claimant's claim is for compensation for alleged dismissal at Istiqama Academy;
- b) That the Respondents herein had handed over the management of Istiqama Academy to new directors, who had the power to sack or retain the employees;
- c) That the proposed third parties sacked the Claimant, hence this suit;
- d) That in any case, if the Respondents are held liable, the proposed third parties are also liable and they therefore ought to be enjoined in this suit as third parties;
- e) That the Claimant shall suffer no prejudice if the application is allowed.

11. The Claimant's response to the application is contained in his replying affidavit sworn on 16th March 2020.

12. The Claimant states that the present application is an afterthought and a complete abuse of the court process, and should be dismissed in the first instance, for reasons that:

- a) The claim was filed on 7th May 2018 and the Respondents served on 18th May 2018;
- b) The Respondents filed a response to the claim, together with a witness statement on 8th August 2018, after the lapse of the prescribed period of 21 days and without leave of the Court;
- c) The matter was scheduled for pre-trial on 16th October 2018 and on 22nd January 2019, on which dates the Respondents did not attend court;
- d) The matter was listed for hearing on 29th July 2019 and the Respondents were duly served; on the said date the matter proceeded for hearing where the Claimant's evidence was taken;
- e) The Respondent's case was scheduled for 11th November 2019 but the Court was not sitting and the matter was adjourned to 6th February 2020, when the Respondents' case was heard and closed;
- f) The Court directed that submissions be filed and gave a mention date on 10th March 2020 for confirmation; the Claimant filed and served submissions on 21st February 2020;
- g) Instead of filing submissions, the Respondents filed the present application seeking leave to issue a third party notice to Juma Boma, Sheikh Ali Idirs, Salma Anwar and Ali Hassan.

13. The Claimant deposes that the Respondents' application lacks merit due to the fact that:

- a) The Claimant and the Respondents have already closed their cases and the Claimant has filed submissions and hence the case cannot be reopened at this stage;
- b) Pre-trial conference was held and the Respondents never indicated that they wished to enjoin third parties in the suit but sought to proceed and close their case;
- c) The application has been brought to court after the Respondents have heard the Claimant's case and are out on an expedition to use available evidence on record to deny the Claimant justice, which amounts to sharp practice;
- d) The intended third parties are not necessary and proper parties to the suit since they were not and are not owners of Istiqama Academy where the Claimant provided his services as a head teacher.

14. The Claimant maintains that liability in this case falls squarely on the Respondents, as owners of the School as there was no evidence of transfer of ownership to third parties.

15. The Claimant points out that the termination of his employment was effected by letter dated 1st February 2017, which was signed by one of the owners of the School, Omar Shariff.

16. Further, Omar Shariff had signed letter dated 1st January 2018, confirming payment of the Claimant's salary for December 2017.

17. The Claimant's case is that any agreement entered into between the owners of the School and the Board of Governors, had no effect on him as he was not privy to any such agreement.

18. The Claimant states that when he was employed in 2014, the School had different directors but the same owners who are the Respondents.

19. The single issue for determination in this application is whether the Respondents have made out a case for reopening of the case to allow for issuance of a third party notice to the proposed third parties.

20. In their written submissions filed on 1st July 2020, the Respondents made reference to Order 1 Rule 15 of the Civil Procedure Rules, 2010 which provides as follows:

15(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the 3rd party)-

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same relief as claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject- matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them,

he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

21. From the record, pleadings in this case were closed on 8th August 2018 when the matter was certified ready for hearing.

22. The Respondents' application was filed more than a year post close of pleadings and after the parties had presented their respective cases to the Court. The Claimant had even filed final submissions on the main claim.

23. The Respondents did not bother to provide any explanation as to why they were seeking leave to issue a third party notice at this late stage in the proceedings.

24. Moreover, the Respondents did not provide any evidence linking the proposed third parties to the Claimant's employment or termination thereof. I say so first, because the termination letter issued to the Claimant on 1st December 2017 was signed by the 1st Respondent, Omar Shariff in his capacity as Director.

25. Secondly, the hand over agreement between the Directors of Istaqama Academy and the Board of Governors made up of the proposed third parties was executed in January 2018, after the termination of the Claimant's employment.

26. In light of the foregoing, I find the Respondents' application unmeritorious and proceed to dismiss it with costs to the Claimant.

27. The Respondents are directed to file final submissions on the main claim within the next fourteen (14) days from the date of this ruling.

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF SEPTEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyongesa for the Claimant

