



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 195 OF 2019

LAWRENCE AKOLO OMUNGALA.....CLAIMANT

VERSUS

NESTLE KENYA LIMITED.....RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 5.7.2019 which is brought under section 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15 (1) of the Civil Procedure Rules Section 12(3) (viii) of the Employment and Labour Relations Court Rules. The application seeks the following orders:

- a. That the statement of claim dated 28.3.2019 and filed on 29.3.2019 be struck out as against the respondent for misjoinder of parties.
- b. Costs of the suit and the application be awarded to the applicant.

2. The application is supported by the Affidavit sworn on 28.6.2019 by Anne Stella Macharia and it is based on the grounds set out in the body of the Motion. In brief the applicant's case is that the claimant was not employed by her as at the time when the impugned separation occurred.

3. The claimant has opposed the application vide the grounds of opposition filed on 1.11.2019. In brief, the claimant admits that he was employed by the Nestle Equatorial Africa Region Limited in August 2011 but contends that in 2015 he requested for some leadership experience and as such he was transferred to the respondent company as QA Manager in December 2015. He further admits that he continued reporting to the Corporate QA Manager, Nestle Equatorial Africa Region Limited. He contended further that the alleged misjoinder of parties can be rectified by an amendment of the pleadings.

4. The claimant relied on the said grounds of opposition to canvass the application but the applicant filed written submission. In brief the applicant maintained that the claimant was not her employee and as such there was no privity of contract between the parties herein. She relied on **Agricultural Finance Corporation v Lengata Limited [1985] eKLR at 765** where the Court of Appeal held that the general rule is that a contract cannot be enforced against a person who is not a party to the contract.

5. I have carefully considered the applicant's supporting affidavits, grounds of opposition and the pleadings on record. The main issue for determination is whether the suit should be struck out against the applicant for misjoinder of parties.

6. The claimant has admitted that he was employed by Nestle Equatorial Africa Region Limited in August 2011. The court has been shown copies of the Appointment Letter, Confirmation Letter and Letter of Redundancy. They all show that the claimant was employed by the said company and not the applicant. He was paid terminal dues by the said company and even signed a settlement agreement to signify a mutual separation,

7. The claimant never swore any affidavit to oppose the application. It follows that the factual averments by the applicant in the supporting affidavit have not been controverted. Likewise, the alleged grounds of opposition filed on 1.11.2019 are not points of law but facts which cannot stand because they were not deposed by way of affidavit as required. The application is therefore not opposed on the basis of any grounds of law or facts.

8. The foregoing default notwithstanding, I wish to observe that the claimant ought to have sued his rightful employer and not a stranger. It is trite law that as a general rule of law of contracts, only a party to a contract can be sued under the contract. I gather support from **Agricultural Finance Corporation v Lengata Limited [1985] eKLR at 765** where the Court of Appeal held that:-

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.”

9. In this case, the applicant has annexed to the supporting affidavit Certificate of Incorporation of herself and that of the Nestle Equatorial Africa Region Limited to prove that they exist as separate legal persons. The said evidence has not been controverted by the claimant and as such I find and hold that the application has merits. Consequently, I allow the application as prayed by striking out the suit as against the applicant for misjoinder of parties. The claimant will pay the applicant’s costs of the application and the suit.

Dated, signed and delivered at Nairobi this 22nd day of October, 2020.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE