



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2362 OF 2016**

**EMANUEL OBINGO OKUMU.....CLAIMANT**

**- VERSUS -**

**THE PASTOR ELIEZER KIRATU, SUPERVISOR FLORENCE OCHIENG, THE**

**MANAGER KENYA ASSEMBLES OF GOD OLYMPIC AND CHIDLIFE**

**VOCATIONAL TRAINING CENTRE OLYMPIC.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> October, 2020)

**RULING**

The claimant filed the memorandum of claim on 22.11.2016 in person. The claimant pleaded that he was employed by the respondent in September 2010 as a security guard until August 2014 having worked for a period amounting to 48 months when the respondent terminated the employment without due regard to the process of law. It was his case that the procedure leading to his termination was unfair and unlawful. He prayed for judgment against the respondent for:

1. One month pay in lieu of notice Kshs.10, 911.70.
2. Underpayment from September 2010 to August 2014 Kshs.216, 561.50.
3. Hose allowance for the term served Kshs.78, 564.20.
4. Annual leave not granted since employment Kshs.30, 552.70.
5. Unpaid overtime of 4 hours each day worked Kshs. 491, 212.80.
6. Compensation for unfair dismissal Kshs. 130, 940.00.
7. Certificate of service.
8. Total amount claimed Kshs.1, 058, 743.20.

The respondent filed the response to the claim (under protest) on 21.12.2016 through Wanyonyi & Muhia Advocates.

The respondent filed on 19.06.2017 the notice of preliminary objection on the grounds that the claimant is non-suited as against the respondents herein and that the memorandum of claim as drawn and filed offends mandatory provisions of the law.

The claimant appointed Okenyo Omwansa & Company Advocates to act in the suit as per the notice of appointment of advocates dated 13.07.2019 and filed on 19.09.2019. By consent, parties agreed to file submissions on the preliminary objection. The respondent filed submissions on dated 05.08.2020 but the respondent failed to do so despite the extended time to comply.

It is submitted that the memorandum of claim is defective because it is not accompanied with a verifying affidavit as provided for in rule 4(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 requiring that a statement of claim be accompanied by an affidavit

verifying the facts relied on. It is submitted that the verifying affidavit in this case was not dated. The Court has examined the affidavit and it is indeed not dated but signed by Enonda A.M Dickson Advocate and Commissioner for Oaths. The Court considers that at the material time the claimant was acting in person and the failure to date the verifying affidavit was not his but that of the Commissioner for Oaths who signed the same. The claimant dated his memorandum of claim on 22.06.22 and the verifying affidavit is filed in Court on 22.11.2020. The Court considers the procedural omission by the Commissioner for Oaths to date the affidavit as per section 5 of the Oaths and Statutory Declarations Act shall not be visited upon the claimant and the claimant should retake oath and refile the duly dated verifying affidavit in 30 days. For avoidance of doubt, the Court returns that the error should be corrected in terms of Article 159 (2) (b), (d), and (e) that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted. The law being that the duty to date an affidavit is vested upon the Commissioner for Oaths, the error should not be visited upon the claimant in his pursuit to access justice as is enshrined and guaranteed in the Constitution.

Second, it is submitted that the respondent is not the proper party because under order 1(3) of the Civil Procedure Rules, persons can be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist. In the present case, it is submitted that the claimant has failed to link the named defendants and the capacity in which they are sued and as relates to the Kenya Assemblies of God, a registered institution. The Kenya Assemblies of God not being a corporate body, it cannot be sued in its name and as per **Julian Akinyi Owino –Versus- Kiarie Shoe Stores [2014]eKLR**, where it was held that it was incumbent upon the appellant (in the present case the claimant) to sue the right person. The Court has considered the submissions. The named respondent includes Pastor Eliezer Kiratu, Supervisor Florence Ochieng, the Manager Kenya Assemblies of God Vocational Training Centre, Olympic. The claimant at paragraph B of the memorandum of claim describes the respondent as an adult male and female of sound mind residing at Nairobi. The Court finds that they are clearly natural persons and further finds that the submission that the Kenya Assemblies of God is not a corporate person is an issue to be determined based on evidence at the hearing and in any event, the claimant has not pleaded that he is suing the Kenya Assemblies of God. That ground of the preliminary objection will therefore fail as not founded on the actual pleadings in the memorandum of claim and, as one requiring evidence to establish and therefore falling short of a preliminary objection.

In conclusion the notice of preliminary objection dated and filed herein on 19.06.2017 is hereby dismissed with orders:

1. The claimant to file and serve within 30 days from the date of this ruling a duly dated verifying affidavit with respect to the memorandum of claim herein.
2. The costs of the preliminary objection in the cause.

**Signed, dated and delivered** by the court at **Nairobi** by video-link this **Friday 16<sup>th</sup> October, 2020**.

**BYRAM ONGAYA**

**JUDGE**