



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 454 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

BENARD OCHIENG ODUOR.....CLAIMANT

VERSUS

TRADE WINDS AVIATION SERVICES LIMITED.....1ST RESPONDENT

KENYA AIRWAYS.....2ND RESPONDENT

RULING

The 2nd Respondent filed a Preliminary Objection dated 6th July, 2020 raising the following grounds:

- a. That the Claimant has not demonstrated a cause of action against the 2nd Respondent.
- b. The Claimant has not shown that there exists or existed any employment relationship between him and the 2nd Respondent.
- c. The 2nd Respondent ought to be struck out from this suit with costs as it is not a necessary party.

In response to the preliminary objection, the Claimant filed a Replying Affidavit sworn on 29th September, 2020. He deposes that all the issues raised in the preliminary objection can be conclusively determined by calling evidence during the hearing. He deposes that the 2nd Respondent is a necessary party to this suit having contributed to being joined in the matter as he received a letter from the 1st Respondent stating that he was aware that his services were outsourced to the 2nd Respondent which had declined to take him back.

He avers that his advocate sought a response from the 2nd Respondent on the adverse allegations and that the 2nd Respondent’s response was purely evasive and confirmed the 1st respondent’s assertion that it had declined to take him back because the 2nd Respondent did not want him back. He avers that he had no option but to join the 2nd Respondent in this suit.

He further avers that the 1st Respondent stated in the termination letter that the reason for his termination is that the 2nd Respondent blacklisted him from the ramp which was his designated working area. He refers to the averments in the Witness Statement of Mr. Samuel O. Obondo on the 2nd Respondents refusal to take him back despite his acquittal and avers that the 1st Respondent could do very little as long as the 2nd Respondent had refused to take him back in employment.

He therefore avers that the preliminary objection by the 2nd Respondent is frivolous and should be dismissed.

The preliminary objection was disposed of by way of written submissions. The 1st Respondent stated that it was not opposed to the preliminary objection thus it did not file any document.

2nd Respondent’s submissions

It submitted that the Court derives jurisdiction to determine claims from section 12 of the Employment and Labour Relations Court Act which is categorical that it deals with disputes arising out of employment between an employer and an employee. It submitted that it is the 1st Respondent that owed the Claimant a duty under the Employment Act.

It argued that the issues raised are on breaches of the provisions of the Employment Act which are duties imposed on an employer and not on any other third party. That there is no benefit in including a third party in an employment matter. It submitted that the reasons for termination can only be addressed by the 1st Respondent and as such it has no *locus standi*.

It further submitted that even if the Claimant's allegations are true, it would still be the duty of the 1st Respondent to justify the decision it made and the reasons thereof. That it would serve no purpose to call it. It submitted that Section 43 of the Employment Act is clear that the employer is to prove justification to the court. It submitted that it is prejudicial to the 2nd Respondent to be taken through a costly process in the Court yet the Employment Act does not impose duties on third parties. That the claims sought against the 2nd Respondent cannot possibly be granted as it was not the Claimant's employer. It prayed that the Court does allow the preliminary objection as prayed.

Claimant's submission

The Claimant in his submissions, reiterated the averments in his Replying Affidavit. He further submitted that the Respondent's witness statement confirms that the 1st Respondent played no role in the criminal case against him and that the incident took place in the 2nd Respondent's premise for which the 2nd Respondent was the complainant.

He submitted that the preliminary objection does not meet the test of a preliminary objection which should be purely on a point of law without the need to ascertain the facts by way of evidence.

Analysis and Determination

The contention of the Preliminary Objection is that there exists no employment relationship between the Claimant and the 2nd Respondent.

In **Mukisa Biscuits Manufacturing v West End Distributors (1969) E.A. Law**, JA stated as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

The claimant's contention is that the 2nd Respondent should be part of the proceedings for reason that the 1st Respondent in its letter dated 13th December, 2017 stated that the Claimant had been outsourced to the 2nd Respondent who declined to take him back. That these facts are not disputed.

The Claimant in paragraph 7 of this Memorandum of Claim stated:

“The 1st Respondent has adamantly insisted that it terminated the Claimant's services because the 2nd Respondent who is its agent and who is therefore its principal declined to accept the Claimant's services in its flights and all its areas of operation which are always serviced by the 1st Respondent, its lawful agent.”

The contract of employment in this instant was between the Claimant and the 1st Respondent who paid his salary and terminated his services. This is irrespective of the fact that the Claimant worked at the 2nd Respondent's premises on the basis of outsourced services. Section 2 of the Employment Act defines an employee as:

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

The upshot it is that the Claimant's claim can only be against the 1st Respondent with whom there existed an employment relationship. The fact that the 2nd Respondent rejected the claimant did not mean that the claimant had to be terminated, and does not transfer any responsibility to the 2nd Respondent so long as it was with the terms of the contract between the 2nd Respondent and the 1st Respondent.

I therefore agree with the 2nd Respondent that it is not a necessary party to these proceedings as there is no employment relationship between the Claimant and the 2nd Respondent. The Court of Appeal in **Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016] eKLR**, though determining on recognition, held:

“In the instant case, the outsourced employees entered into express contractual relationships with Jokali, which in turn contracted with Abyssinia to provide employees to perform various duties. The employees, though working in Abyssinia's premises, remained under Jokali's management and control. Faced with these facts, we find that, bar the fulfilment of the mandatory legal requirements, it was Jokali, and not Abyssinia, that was obliged to recognise the Union in respect of Jokali's employees. We therefore disagree with the learned judge that the employees outsourced to Jokali remained employees of Abyssinia”

[Emphasis Added]

No legal claim in respect of the termination of the claimant's employment can stand against the 2nd Respondent in the absence of an employment relationship. Consequently, I find that the preliminary objection has merit and the same is accordingly allowed. The 2nd Respondent is hereby removed from these proceedings and the case will proceed with the 1st Respondent as the only Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF DECEMBER 2020

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE