



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 455 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st February, 2019)

DAVID MAINA GACHANJA.....CLAIMANT

VERSUS

HON. ESTHER NYAMBURA GATHOGO.....1ST RESPONDENT

PARLIAMENTARY SERVICE COMMISSION.....2ND RESPONDENT

RULING

1. The Application before this Honourable Court for determination is the Chamber Summons dated 29th May 2018 and filed under the provisions of Order 1 Rules 2, 3, 10 (2) and 14, Order 2 Rules 15 (1) (a), (b), (c) and (d) and 15 (3) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. The Applicant seeks the following orders:-

- a. THAT the Parliamentary Service Commission has been improperly joined as the 2nd Respondent in this Statement of Claim.***
- b. THAT the name of the Parliamentary Service Commission the 2nd Respondent, be struck out from the claim.***
- c. THAT the Claimant pay the 2nd Respondent's costs of the Claim.***

3. The Application is based on the grounds that the cause of action of this claim arose out of a contract between the Claimant and the 1st Respondent, which the 2nd Respondent is not privy to. The 2nd Respondent avers that one of its duties is to provide services and facilities to ensure effective functioning of parliament. Further, it only holds and disburses money for the members of parliament to procure their staff at the constituency level.

4. The 2nd Respondent avers that the Claimant has not given any justifiable reason why it should be joined to this cause. It is the 2nd Respondent's position that one is joined as a Respondent where a right to relief arising out of the same transaction or series of transactions exists.

5. The 2nd Respondent further avers that its presence in this claim will not assist this Honourable Court to adjudicate and settle all the questions involved as no question of law or fact would arise between it and the Claimant.

6. It is the 2nd Respondent's case that its joinder to this case will lead its embarrassment and substantial loss.

7. The Application is supported by the Affidavit of Agnes Kamoni sworn on 26th June 2018, and based on the grounds on the face of the Summons.

8. The Claimant opposed the Application vide his Replying Affidavit sworn on 5th October 2018. He avers that the Application is premature as the 2nd Respondent is yet to amend its defence and that its claim that there is no cause of action, can only be made once the Court has seen all the amended pleadings.

9. It is the Claimant's case that the reason the 2nd Respondent was exonerated in ***Civil Appeal No. 59 of 2014: Parliamentary Service Commission vs. George Okoth Owuor & Another***, was because it had already remitted funds for the payment of the Claimant which is not

the case in this claim.

10. The Claimant avers that since the 1st Respondent denies that he was an employee, a fact known to the 2nd Respondent, then it is a necessary party to these proceedings.

Submissions by the parties

11. The 2nd Respondent filed its written submissions dated 13th September 2018, before the Claimant filed a response to its Application. The 2nd Respondent's submissions are based on the issue of whether there was a contractual relationship between it and the Claimant that would give rise to a claim for unfair dismissal based on an alleged contract executed between the Claimant and the 1st Respondent.

12. The 2nd Respondent submits that it has no role on the recruitment and dismissal of the staff recruited by Member of Parliament because the constituency offices have their own funds and vote heads. It relies on Regulations 22 and 23 of the Parliamentary Service (Constituency Offices) Regulations 2005 to explain the rationale for the necessity of facilitating the payment of salaries and allowance by members of parliament and the reason why the employment is for a period of 5 years.

13. The 2nd Respondent further submitted that Regulation 13 of the Parliamentary Service (Constituency Offices) Regulations 2005 and Article 127 of the Constitution mandates it to allocate funds to members of parliament for payment of staff.

14. It is the 2nd Respondent's submissions that it does not involve itself in the choice of staff and terms of engagement of these staff and that it had its own bonafide staff who are recruited through a competitive process and are answerable to it.

15. It is the 2nd Respondent's submissions that there is no privity of contract between it and the Claimant. It relies on the cases of **Price vs. Easton [1833] 4 B & Ad 433, [1833] Eng R 334, [1833] 4 B & Ad 433 [1833] 110 ER 518, Kenya Kazi Limited vs. Nahid Moosa Umar & Another [2006] eKLR, Mombasa Civil Appeal 59 of 2014, Parliamentary Service Commission vs. George Okoth Owuor & 2 Others and Kisumu ELRC No. 320 of 2014 Andrew Tubei Mulati vs. Hon. Enock Kibunguncho and the Parliamentary Service Commission** which hold that a party must be privy to a contract for it to be binding upon them.

16. The 2nd Respondent submits that there was no intention on its part, to be the employer of the Claimant. It relies on Section 2 of the Constituency Offices Regulations [Supra], to define who a "staff" is.

17. The 2nd Respondent further submits that it is a general rule that the intention of parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. To buttress this assertion, the 2nd Respondent relies on the cases of **Ford vs. Beech [1848] 11 QB 852 at 866 as quoted in Savings and Loans Kenya Limited vs. Mayfair Holdings Limited (CA No. 152 of 2006)** and **National Bank of Kenya Limited vs. Pipeplastic Samkolit (Kenya) Limited & Another [2001] KLR 112.**

18. The Respondent submits that it has laid out sufficient grounds for the striking out of its name from the proceedings and it would be judicious for the same to be struck out.

19. In his submissions dated 9th January 2019 and filed on 10th January 2019, the Claimant submits that since the 2nd Respondent has denied the Claimant's employment by the 1st Respondent, it is rightfully enjoined to these proceedings to enable the Court determine whether the 2nd Respondent should pay him his rightful dues, should the 1st Respondent be found to be at fault. He relies on Order 1 rules 3 and 7 of the Civil Procedure Rules which outline who may be joined as a Defendant and especially where the Plaintiff is in doubt as to who to seek redress from.

20. The Claimant submits that in the case of **Parliamentary Service Commission vs. George Okoth Owuor & 2 Others [SUPRA]** the Claimant had been paid by the 2nd Respondent which is not the case in the cause herein.

21. The Claimant further submits that the case herein does not concern privity of contracts and is based on payment of his dues and establishment of whether he was employed by the 1st Respondent.

22. He further submits that even if the case were to be about privity of contracts, there are instances where the Court holds a party liable in contracts they did not execute. He relies on the case of **City Council of Nairobi vs. Wilfred Kamau Githua T/A Githua & Associates & Another [2016] eKLR** which enumerates those instances as follows:-

- a. A collateral contract to the one in question to which the 2nd Respondent was party.*
- b. An agency relationship in which the 2nd Respondent transacted on behalf of the appellant.*
- c. A trust by which the 2nd Respondent transacted on behalf of the appellant and*
- d. An express provision or implied term in the contract made for the benefit of the 2nd Respondent.*

23. He further relied on the case of **Savings and Loans (Kenya) Limited vs. Kinyenje Karangata Gakombe & Another [2015] eKLR** where

the Court held that the determination of whether a claim of that nature disclosed no cause of action against a party must await full trial. It further held that the power to strike out a claim as disclosing no reasonable cause of action must be exercised very sparingly and only in plain and obvious cases. The Court also held that summary procedure must not be allowed to become a means of avoiding trial and obtaining immediate judgment except in the clearest of cases.

24. I have considered all the averments of both parties. The claim by the Claimant is that he was employed as the Assistant Personal Assistant to the 1st Respondent as well as Office Manager Ruiru Constituency. The Claimant exhibited his appointment letter signed by the 1st Respondent and which refer to conditions under Legal Notice No. 77 of 2000 and Parliamentary Service Regulations 2005 as Amended.

25. In view of this letter, the Claimant contends that his employment was governed by the Respondents herein and Parliamentary Service Regulations. As to who really employed the Claimant between 1st and 2nd Respondent, this is a matter to be canvassed by evidence during the main hearing.

26. It is premature at the moment to deduce whether or not the 2nd Respondent was an employee of the Claimant. I will therefore dismiss the application before me and retain the 2nd Respondents as part of this cause.

27. Costs in the cause.

Dated and delivered in open Court this **21st day of February, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wambulwa for 2nd Respondent – Present

Njuguna for Claimant/Respondent – Present