



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NUMBER 96 OF 2017**

**BETWEEN**

**INGWE WEKULO NEWTON.....CLAIMANT**

**VERSUS**

**EDUCATION FOR LIFE.....RESPONDENT**

**1. GLYN DAVIES**

**2. JANE DAVIES**

**3. BENEDICTOR AMBALWA PETTI**

**[Sued as Officials of Education for Life].....INTENDED RESPONDENTS**

**RULING**

1. In the Statement of Claim filed on 6<sup>th</sup> February 2017, the Claimant names Education for Life, as his former Employer/ Respondent herein. His claim is that his contract was unfairly and unlawfully terminated. He seeks Judgment against the Respondent, for notice pay and compensation, totaled at Kshs. 447,538.

2. He has applied for leave to amend his Statement of Claim, to bring in the Intended Respondents. His Application is dated 15<sup>th</sup> October 2018. He states that the Intended Respondents are Officials of the Respondent. The Respondent is registered under the Societies Act, Cap 108 the Laws of Kenya.

3. The Respondent filed its Statement of Response under protest, on 23<sup>rd</sup> February 2017. Its position is that being a registered Society, it has no capacity to sue or be sued, in its own name.

4. This response seems to have provoked the Claimant into seeking amendment of the Claim.

5. As expected the Respondent opposes the Application. The Respondent relies on Grounds of Opposition filed on 6<sup>th</sup> November 2018. Its position is that the Claim is brought against an entity, with no capacity to sue and be sued, and cannot be cured by amendment. There is no search attached from the Registrar of Societies, showing that the Intended Respondents are Officials of the Respondent. One of the Intended Respondents is a mere Employee of the Respondent. The Application is fatally defective, in that it is supported by an Affidavit of the Claimant's Advocate. On 20<sup>th</sup> February 2019, the Respondent filed a Notice of Preliminary Objection. It is stated that amendment sought is time-barred, because it would have the effect, if allowed, of replacing the Respondent with Intended Respondents. Such replacement would result in denying the Respondents, the defence of time-bar, under Section 90 of the Employment Act 2007, termination having taken place in January 2016.

6. The Application was heard on 21<sup>st</sup> February 2019.

**The Court Finds:-**

7. Rule 14 [6] of the Employment and Labour Relations Court [Procedure] Rules 2016, allows Parties to amend their Pleadings before service or before close of the Pleadings.

8. Pleadings close, under Rule 13 [4] of the Rules, 14 days after the service of the Statement of Response, or where no Response is filed, 14 days after service of the Statement of Claim.

9. Parties do not dispute that Pleadings closed, necessitating that the Claimant seeks leave to amend the Statement of Claim, under the proviso to Rule 14[6].

10. There is wide discretion granted to the Court in considering an Application for amendment of Pleadings. Rule 14[7] allows the Court, *sua sponte*, or with formal prompting from either Party, to call for further details through the filing of Supplementary Pleadings, for clarification of issues in dispute. The only requirement the Court must observe in exercise of its discretion, is that the other Party is not denied corresponding leave to amend its own Pleadings.

11. Other Rules such as Rule 18 allows the Court to order service upon Parties who appear to the Court to have interest in the matter being considered.

12. The Court does not think that a Party, who joins proceedings at a later stage after the Claim is initiated, can rely on a defence of time-bar, as argued in this Application by the Respondent. In what capacity is such a Party brought in, in relation to the Respondent already in the proceedings, regardless of the legal capacity of the existing Respondent to sue or be sued? Did the Intended Respondents, have any relationship with the Claimant, and with the existing Respondent, whether the existing Respondent is a legal or a mere business entity?

13. The cause of action has not changed. The Intended Respondents have a relationship with the Respondent already in Court. Termination took place in January 2016. The Claim was filed a year later, on 6<sup>th</sup> February 2017. The Application for amendment was filed on 18<sup>th</sup> October 2018. The Intended Respondents had notice of the Application well within the limitation given under Section 90 of the Employment Act. The Court does not think there is any new Claim filed, but if by seeking leave to amend his Claim and bring in the Intended Respondents the Claimant can be said to have filed a new Claim, the critical date would be the date the Application for leave to amend was filed.

14. A perusal of the documents filed by the Parties from the outset, show that the Claimant was employed by an entity called Education for Life. His contract is on the letterhead of this entity. He was assigned duties through correspondence made on the letterhead of Education for Life.

15. The letter of termination issued on the letterhead of Education for Life. The copy exhibited by the Claimant is unsigned. There is exhibited also, a Statement of Pay. It is signed by one of the Intended Respondents, Benedictor Ambalwa Petti, described as Centre Manager.

16. The letters assigning the Claimant duties are signed by the other 2 Intended Respondents, Glyn and Jane Davies.

17. The Centre Manager, Glyn and Jane all fit the description of the term 'Employer' under employment law. It is not necessary that they are shown through documents from the Registrar of Societies, to be Officials of the Respondent. It is enough that there are documents issued by them, showing they exercised instructional and decisional control over the Claimant.

18. The Court has observed in past decisions that an Employee cannot always be expected to know, the business or legal capacities through which his Employer, operates the employing business or enterprise. The Court should not bar an Employee from amending his Pleadings, to bring in what the Employee thinks his is Employer, or are his Employers. The term 'Employer' under Section 2 of the Employment Act 2007, and other labour legislations of 2007/ 2008, is broadly worded to ensure Employees are not denied access to industrial justice, through limited characterization of the term, and through complex legal and business forms adopted by their Employers. Benedictor Ambalwa Petti, may well be an Employee of Education for Life, but as Centre Manager, could also be an Employer to the claimant, going by the definition of the term 'Employer', given under Section 2 of the Employment Act 2007. The Claimant certainly cannot be blamed for appearing confused over the legal or business nature, of the entity which employed him, Education for Life.

19. The Court is satisfied that the Intended Respondents are necessary Parties to the proceedings. Their being brought into the proceedings is not affected by Section 90 of the Employment Act. There is no new cause of action. They are Officials or Managers of the entity called Education for Life, and there are documents filed, to suggest they employed the Claimant. The Court has discretion in granting leave to amend Pleadings. The Application by the Claimant is allowed. The position of the Respondent, including what is characterized as preliminary objection, has no merit and is rejected.

IT IS ORDERED:-

- a) The Application filed by the Claimant on 16<sup>th</sup> October 2018, which is dated 15<sup>th</sup> October 2018 is allowed.***
- b) Amended Statement of Claim shall be deemed as duly filed and served upon the Respondent, upon payment of Court fees.***
- c) The Respondent may file and serve an Amended Statement of Response within 14 days of confirming the Amended Statement of Claim as duly filed and served.***
- d) Parties shall thereafter comply with Rule 15 of the Court [Procedure] Rules, and set down the main Claim for hearing.***
- e) Costs in the Cause.***

**Dated and delivered at Mombasa this 21<sup>st</sup> day of March 2019.**

**James Rika**

**Judge**