



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

ELRC CAUSE NO. 446 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 4th April, 2019)

REV. PETER MATANO MNENECLAIMANT

VERSUS

BISHOP ZACHARIAH KAHUTHU

REV. LUKE NZIOKI MWOLOLO

REV. CATHERINE NGINA MUSAU

LYDIA WAMBOI MAINA

(SUED) IN THEIR CAPACITIES AS TRUSTEES OF

KENYA EVANGELICAL LUTHERAN CHURCHRESPONDENT

RULING

1. The Application before the Court is dated 6th November, 2018, brought under Section 1A (1) and (2) and Section 3A of the Civil Procedure Act (Cap 21), Order 2 Rule 15(1) of the Civil Procedure Rules, 2010, Section 3 of the Trustees (Perpetual Succession) Act and all other enabling provisions of the law wherein the Applicant seeks for Orders:-

1. That this Honourable Court be pleased to dismiss this claim as against the Respondent as the Respondent is non-suited.

2. That the costs of this application be provided for.

2. The Application is premised on the grounds:-

1. That the suit is defective as the Respondent, being a society, has no legal capacity to be sued in its own name.

2. That this cause is bad in law as it has been filed against the Respondent outside the limitation period as provided by law under section 90 of the Employment Act No. 11 of 2007.

3. That the suit against the Respondent is therefore improper, it is scandalous, frivolous and vexatious and ought to be dismissed with costs forthwith.

4. That the Respondent gave notice of the intention to apply for dismissal of the suit against it at paragraph 3 of its Response to the Amended Memorandum of Claim.

5. That in the above circumstances it is necessary in the interest of justice that this Honourable Court dismisses the suit against the Respondent as prayed with costs to the Respondent.

3. The Application is supported by the Affidavit of Karanu Waweru, the legal officer of the Respondent wherein he avers that the Respondent is a society and it has no legal capacity to be sued in its own name. Further, that the cause of action arose in August, 2012 or thereabouts and it is as such time barred having been filed outside the limitation period as provided under Section 90 of the Employment Act, No. 11 of 2007. He urges the Court to dismiss the Application.

4. The Application is opposed by the Claimant who has filed a Replying Affidavit wherein he states that the Application is mischievous and deliberately misleading for the reason that the Respondent had previously filed an application on 30th October, 2017, seeking to have the claim dismissed on the basis that the Claimant ought to have sued the then Respondents in their corporate names. That the Court dismissed the application and ordered the Claimant to amend his pleadings accordingly.

5. That all the grounds referred to in the application on 30th October, 2017, were dealt with in the amendment of the Memorandum of Claim and as such the Applicant cannot use the same grounds in the instant application.

6. The Claimant avers that the Claim of limitation of time has no basis as the Respondent in the Response to the Claim at paragraph 17 thereof admit that the Claimant has not been terminated to date. He urges the Court to dismiss the Application with cost as it is only meant to delay the cause.

Respondent/Applicant's submissions

7. The Respondent submits that removal of previous Respondents from the suit and introducing a new party amounts to filing of a fresh claim against the said new party. They cite the case of **Enock Kirao Muhanji v Hamid Abdalla Mbarak (2013)eKLR** where it was held:-

“...it is true, as argued by the Applicant that when a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out.

The words “dismissed” and “struck out” are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used interchangeably by the litigants and the Courts.

It is therefore incumbent that when the Court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck out, the court should look at the circumstances of each case to arrive at a decision. The mere fact that the trial Court uses the words “dismissed” does not expressly mean that a fresh suit cannot be filed if indeed the Court meant that the suit should have been “struck out” so as to allow a party to file a fresh suit...”

8. It is further submitted that the suit is time barred having been filed outside the limitation period provided for in the Employment Act, 2007. That the Claimant's pleadings arose sometime in August, 2012, but the claim against the Respondent was filed in 2017 making it time barred. They cite the case of **Fred Mudave Gogo vs G4s Security Services (K) Ltd (2014)eKLR** where it was held that:-

“...it cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 8th August, 2008, a period over 3 years from the date of filing this Claim in the Industrial Court on the 5th June, 2013, and therefore by operation of the law, the claim in the Industrial Court on the 5th June, 2013, and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in causing the Claimant/Applicant from filing the claim in good time.

This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims... The Claim therefore does not conform to the mandatory time limitations. It must fail.”

9. The Applicant submits that the Respondent as sued cannot be sued in its own name, as it is a religious organisation registered under the societies Act, Cap 108 which does not contain any provision for institution of suits by or against societies in their names. That the Respondent has no legal capacity. They cite the case of **Bridge Hotel limited Vs Wilfred Mutiso Lai Jesus Celebration Center (2016)eKLR** where the Court found that a religious organisation is not a body corporate and lacked legal personality to institute proceedings in its own name.

10. That the Defence in the matter was filed under protest by the Respondent citing that it was non-suited and therefore the Claimant has no defence of ignorance and proceed to sue the wrong party twice in a row. The Respondent urge the Court to dismiss the suit in whole.

Claimant/Respondent's Submissions

11. It is submitted that the Application is an abuse of court process as all the grounds referred to in the Application dated 30th October, 2017 were dealt with in the amendment of the Claim and then the Respondent/Applicant proceeds to file another Application relying on the same grounds dated 6th November, 2018.

12. That the application offends Section 7 of the Civil Procedure Act, Cap 21, of the Laws of Kenya and principles set out in the case of **Uhuru Highway Development Limited v CBK & 2 Others (1996) eKLR** and should be dismissed with costs.

13. The Applicant had initially filed this claim against 4 Respondents sued in their capacity as Trustees of Kenya Evangelical Lutheran Church.

14. The Respondents filed a Notice of Motion application dated 30/10/2017 seeking dismissal of the claim on the ground that the said trustees having been sued in their individual capacities instead of the Trustees of Kenya Evangelical Lutheran Church, the suit was defective.

15. The Claimant filed another application dated 6.11.2017 seeking to amend the claim and this application was allowed by consent of the parties on 30.11.2017.

16. Following the order to amend the claim, the Claimant amended their claim and introduced a Respondent Kenya Evangelical Lutheran Church in December 2017.

17. The current Respondent now seeks dismissal of this suit on the ground that the claim is time barred as he contends that having been included in this claim in 2017, this is the time the claim was filed and therefore the same is time barred.

18. In **Sanyu International Limited vs Oriental Commercial Bank Limited (2017 eKLR Civil Appeal No. 11/2013)** – the Court of Appeal (Nambuye, Kiage and Murgor JJ) were faced with a similar issue where the Claimant had sought to amend the claim and brought in a new Respondent, the Court of Appeal opined as follows:-

“Having found as we have that the further amended Plaintiff does not disclose any new parties to the suit, we find that the issue of limitation does not arise....”.

19. This in essence means that where an Amended Claim introduces new parties, limitation is of essence. Other than the above contention, the Respondent/Applicant have contended that the removal of previous Respondents resulted in termination of the original suit.

20. Indeed all original Respondents were removed with the Amended Claim. A new Respondent was introduced at that time. Given that the Respondent was introduced through an Amendment, it cannot be said that a new suit was being filed. However, the new Respondent having been introduced in 2017 as against him, the issue of limitation is important.

21. From the Plaintiff filed herein, the Claimant has submitted he was constructively dismissed. However, the Respondent have denied dismissing the Claimant. In paragraph 20 of the Response, they aver as follows:-

“The Respondent denies the allegation that it has constructively, unfairly and unlawfully dismissed the Claimant. The Claimant has not been dismissed and the church has exercised a lot of restraint by offering the Claimant an opportunity to address instances of gross misconduct on his part when it actually was entitled to dismiss him summarily (emphasis is mine)”.

22. It is therefore in contention as to whether the Claimant has been dismissed or not and therefore also in contention when the cause of action arose.

23. It will therefore be premature for this Court to settle on a position that the cause of action arose at a particular time and determine issues of limitation.

24. In the circumstances, the application by the Respondent fails and I order this claim to proceed to conclusion.

25. Costs in the cause.

Dated and delivered in open Court this 4th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Mutua for Respondent – Present

Kimathi holding brief Maina for Claimant – Present