



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE NO. 808 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 1st April, 2019)

KENYA UNION OF EMPLOYEES OF VOLUNTARY

AND CHARITABLE ORGANIZATIONS (KUEVACO).....1ST CLAIMANT

ODIN BOAZ OTIENO (Janitor).....2nd CLAIMANT

-VERSUS-

KENYA UNION OF POST PRIMARY EDUCATION

TEACHERS (KUPPET) – HEADQUATERS.....1ST RESPONDENT

KENYA UNION OF POST PRIMARY EDUCATION TEACHERS

(KUPPET) – THARAKA NITHI BRANCH.....2ND RESPONDENT

PATRICK GITONGA.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Claimant filed a Statement of Claim on 2nd May 2017 on behalf of Evangeline Muthoni Njeru, the Grievant, against the Respondents alleging constructive dismissal of the Grievant.

2. On 21st February 2018 the 4th Respondent raised a Preliminary Objection on the following grounds:

1. **THAT** the suit offends provisions of the County Government Act, 2012 Section 43.

2. **THAT** the County Government is an autonomous government. The Attorney General can only represent the County Government of Tharaka Nithi upon the request by the County Government to represent it in Court. (Pursuant to Section 43 of the County Government Act, 2012 and Article 156 (4) of the Constitution of Kenya).

3. **THAT** the 3rd Respondent is not a Labour Officer in the Ministry of East African Community, Labour and Social Protection hence not an employee of the Ministry.

4. **THAT** the Claimants does not disclose any cause of action against the 4th Respondent.

5. **THAT** the Attorney General has been improperly joined in the suit.

6. **THAT** the suit is incompetent in so far as the 4th Respondent is concerned and that the 4th Respondent herein ought to be excused from the present proceedings.

3. In response to the Preliminary Objection, the Claimant filed an Affidavit, on 21st June 2018, deponed by Odin Boaz Otieno. He states that

the 4th Respondent is properly joined in the suit pursuant to Section 13 (A) (2) of the Government Proceedings Act.

4. He states that in the letter dated 6th May 2016 addressed to the Principal Secretary Ministry of Labour, Social Security and Services, the Attorney General stated that the law required him to respond to the Claimant within 30 days from service of the Notice to sue and upon expiry of the 30 days the Claimant would institute proceedings against the Attorney General on behalf of the Ministry. Additionally, the 4th Respondent is properly sued as a vicarious Respondent and that the Attorney General has failed to file a response to the claim. Therefore, he has admitted vicarious liability for all the Claimant's prayers.

5. He states that the 4th Respondent chose to give the non- compulsory Notice of Preliminary Objection instead of using the constitutional right under Article 50 (2) (k) of the Constitution.

6. The 1st, 2nd and 3rd Respondents filed a Replying Affidavit sworn by their Counsel Charity Wangui Ndwiga in which she states that they are not at liberty to support or object the Notice of Preliminary Objection raised by the 4th Respondent and the relevance in the suit.

7. The Preliminary Objection was canvassed by way of written submissions with each party filing its respective submissions.

4th Respondent's submissions

8. The 4th Respondent submitted that Order 1 Rule 3 of the Civil Procedure Rules sets down the issue of joinder of defendants and that the 4th Respondent is wrongfully enjoined since the 1st, 2nd and 3rd Respondents can stand alone as the rightful defendants against whom the Claimant can obtain its reliefs.

9. The 4th Respondent submitted that in the letter dated 1st August 2016 from the Ministry of East African Community, Labour and Social Protection confirms that the 3rd Respondent is not a labour officer in the Ministry and hence not an employee of the Ministry. Therefore, in the absence of a nexus between the 3rd Respondent and the Ministry the Attorney General ought not be enjoined in this suit.

10. The 4th Respondent relied on the decisions in **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR** and **Apex International Ltd & Anglo Leasing & Finance International Ltd v Kenya Anti-corruption Commission [2012] eKLR**.

11. It is the 4th Respondent's further submission that the Claimant's claim does not disclose any cause of action against the 4th Respondent. He relied on the case of **V.K. Construction Company Ltd v Mpata Investments Ltd Nairobi HCC 257/2003** where Ringera J, as he then was, held:-

“a reasonable cause of action is such a factual situation as would entitle a person to obtain a remedy against another person and which has some chance of success when only the averments in the plaint are considered. In other words, the test for reasonableness of the cause of action is the possibility of the success thereof when only the plain is considered”.

12. Further, that this suit offends Section 43 of the County Government Act 2012 on the fact that even if the said officer was a County Government employee, that County Government has to request the Attorney General to act on its behalf.

Claimant's submissions

13. The Claimant in its submissions reiterated the contents in the Affidavit sworn by Odin Boaz Otieno. It submitted that the 4th Respondent had knowledge of the Claimant's intention to institute Court proceedings against him on behalf of the Tharaka Nithi County Labour Officer and the Prosecutor. Further, that the 4th Respondent was properly joined in this suit in accordance with the compulsory requirements under Article 50 (2) (k) of the Constitution and Rule 13 (1) of the Employment and Labour Relations Court (Procedure) Rules.

1st, 2nd and 3rd Respondents Submissions

14. The 1st, 2nd and 3rd Respondents submitted that the reliefs sought in the statement of claim are sought against the Tharaka Nithi Labour Officer, Mr. Zaverio M. Mirigo, and as such the 4th Respondent has been properly enjoined in this claim to necessitate the participation of the County Government of Tharaka Nithi.

15. They therefore prayed that the Notice of Preliminary Objection be dismissed in the interest of justice without costs to the 1st, 2nd and 3rd Respondents.

16. I have examined the averments of both Parties. From paragraph 7 of the Memorandum of Claim, the Claimant was employed by the 1st Respondent. The 1st Respondent is a Trade Union which has the capacity to sue and to be sued. The 1st and 2nd Respondent are not answerable to the 4th Respondent.

17. However, the grievant has cited various incidences in the claim, which tend to point to some actions or inactions by the Labour Officer of Tharaka Nithi. This implies that there is some claim levelled against the Attorney General as seen from paragraphs 4 to 6 and 7 of the Claim.

18. It is therefore apt that the Attorney General is properly enjoined in this case to defend the actions or inactions of the Labour Officer.

19. The Preliminary Objection in my view then has no merit and I therefore dismiss it and allow the 4th Respondents herein to stay as Parties to this suit.

20. Costs in the cause.

Dated and delivered in open Court this 1st day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties