



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 312 OF 2019

MAJOR SILAS MWITI (RTD).....1ST CLAIMANT

SUNLAND ROSES LIMITED.....2ND CLAIMANT

- VERSUS -

PETER VILJOEN.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th June, 2019)

RULING

The claimants filed a statement of claim on 15.05.2019 through Gitobu Manyara & Company Advocates. The claimants stated the matters in dispute to include:

- a. Whether the claimants are entitled to suspend or remove the respondent as the managing director of the 2nd respondent.
- b. Whether the claimants are entitled to dismiss the respondent from employment as the managing director of the second respondent on grounds of desertion from duty, stealing by director, conspiracy to defraud, and wilful running down of the 2nd claimant and on account of being a fugitive from justice.
- c. Whether the respondent fraudulently and unlawfully caused the alteration of his immigration status.
- d. Whether the claimants are entitled to a true and accurate rendering of the 2nd claimant's state of accounts during the term the respondent has been the managing director.
- e. Whether the claimants are entitled to compensation and damages for unlawful and fraudulent conversion of the 2nd claimant's assets and proceeds from sale of flowers.
- f. How much compensation or damages are the claimants entitled to?
- g. Who should pay the costs and interest occasioned by the claim?

At paragraph 3 of the statement of claim the claimants stated, “**The respondent is an adult person of sound mind, of South African citizenship and was at all material times employed as the Managing Director of the Second Claimant. As he is out of jurisdiction of this Honourable Court leave will be sought to serve him by substituted service.**” At paragraph 11 of the statement of claim the claimants pleaded that the respondent has engaged in secret insider trading deals not in the company's interests and in total breach of his duties as the Managing Director of the 2nd claimant and the particulars of the alleged breach of duties have been set out accordingly. At paragraph 14 of the claim the claimants plead that without any investment in the company the respondent unlawfully and fraudulently caused a work permit to be changed to an investor's permit and at paragraph 16, that the claimants invited the respondent as a Managing Director by reason of his experience in the flower business but he did not contribute a single penny into the business.

The claimant pray, amongst other prayers, a declaration that the respondent has deserted duty as the Managing Director of the 2nd claimant, and that through the 1st claimant, the 2nd claimant is entitled to employ another managing director.

The respondent filed on 27.05.2019 a notice appointing Muriu, Mungai & Company Advocates to act in the suit. The respondent also filed

on 24.05.2019 a preliminary objection challenging the jurisdiction of the Honourable Court to hear and determine the matter on the grounds that the claim does not disclose a cause of action or dispute within the meaning of section 12(1) of the Employment and Labour Relations Court Act; and the claim relates to management of the 2nd claimant in which the 1st claimant and the respondent are shareholders and therefore a purely commercial dispute which should have been filed in the High Court.

There is no dispute that the 1st claimant and the respondent each have 50% shareholding in the 2nd claimant. The Court has revisited the record. The claimants have not stated that they seek to interfere with the respondent's shareholding in that regard. The claimants' case is that the respondent as an employee of the 2nd claimant holding the position of Managing Director has deserted duty, has breached his duties as such, should render an account, and should be terminated from employment in that regard. The Court has considered that the respondent has not filed a statement of response and has not placed before the Court any material evidence to oppose the claimants' case that the respondent is an employee and that the claimants are entitled to reliefs as claimed and as prayed for.

The Court has considered the material on record. The material shows that the primary relationship between the 1st claimant and the respondent is that they hold equal shares and are co-directors in the 2nd claimant. The claimants' case is that the relationship is equally that of an employer-employee because as pleaded, the respondent is employed as the managing director of the 2nd respondent. To the extent that the claimants have alleged employment relationship but which can only be established by way of evidence, the facts are in dispute and evidence is required to make a finding one way or the other. The Court would have jurisdiction in so far as the employment relationship has been pleaded. One curious relief is that the Court is asked to aid the claimants by way of a Court order to terminate the employment of the respondent as the 2nd claimant's Managing Director. Such absurd conceptions may not be entertained by the Court. The Court returns that in the circumstances the case is one of mixed directorship and employment but more so a dispute between shareholders or directors.

The Court has found that the overriding relationship is that of shareholding and directorship and it will be more effective and efficient that the matters are determined by the commercial division of the High Court. While making that finding the Court returns that it is well settled that the directors like the 1st claimant and the respondent are the mind and expression of the will of the company such as the 2nd claimant and to avert absurd outcomes such as the mixed mind and decision of the 2nd claimant as against the respondent or the 1st claimant, the suit would properly proceed as a dispute between directors or shareholders. The Court finds accordingly.

In conclusion, the preliminary objection is hereby determined with orders as follows:

1. The suit is hereby transferred to the High Court's commercial division for hearing and determination.
2. Order 1 given on 27.05.2019 is hereby extended until further orders by the High Court.
3. The costs of the preliminary objection to abide the outcome of the suit.
4. Parties to fix a date for mention within 14 days from today before the High Court for directions on further steps accordingly.

Signed, dated and delivered in court at **Nairobi** this **Friday 14th June, 2019**.

BYRAM ONGAYA

JUDGE