



# REPUBLIC OF KENYA

## IN THE EMPLOYMENT & LABOUR RELATIONS

### COURT OF KENYA AT NYERI

CASE NO. 436 OF 2017

ELIZABETH MUTHONI MURIITHI.....CLAIMANT

VERSUS

1. JOSEPH MUCHINA MURIUKI

2. MARY WAIRIMU MUCHINA.....RESPONDENTS

### RULING

1. The Respondent took objection to the Claimant's suit. In the preliminary objection against the entire suit filed on 6<sup>th</sup> December 2017, the Respondent asserts that there has never existed an employer-employee relationship between the Claimant and the Respondents herein hence the Respondents have been wrongly sued in place of Zocom Limited which was the Claimant's employer and the correct party to be sued. The second limb of the objection was that the suit had been instituted in the wrong geographical jurisdiction of the honourable court as the Respondents reside in Nairobi.

2. Parties in the suit consented to having the court determine the preliminary objection on the basis of submissions. The Respondents submitted on 20<sup>th</sup> February 2018 and the Claimant submitted on 6<sup>th</sup> February 2018. In the submissions, the Respondents submitted that the Claimant was employed by Zocom Limited a fact the Claimant was aware of and that her salary was paid by Zocom Limited a fact that the Claimant cannot dispute. The Respondent submitted that it was trite law enunciated in the case of **Salomon v Salomon & Co. Limited [1897] AC 22** that a company is a separate and distinct legal entity independent from its directors and shareholders and that the cause of action herein had been instituted against the wrong party. The Respondent submitted that in the alternative and without prejudice to the foregoing, should the Court find that the suit is properly instituted against the Respondents then it should be transferred to Nairobi where the Respondents are situated. The Respondent submitted that since there was no response to the preliminary objection the same should be allowed as prayed.

3. The Claimant submitted that a preliminary objection is one which in the words of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696** that a preliminary objection must be self supporting and apparent on the face of the pleading. It was her position that the preliminary objection is based on the presumption that all the facts pleaded are not in contest and thus do not require adducing of evidence. She argued that a preliminary objection raises a pure point of law, not of facts or a mixture of law and facts. She submitted that to determine whether she was an employee of the Respondents as averred in her statement of claim or whether she was an employee as contended in the Respondent's response is a point of fact which will only emerge from the respective versions of evidence for the court to determine whether the relevant ingredients of an employment relationship existed between the parties. The Claimant thus sought the dismissal of the preliminary objection with costs.

4. The Respondent and Claimant are both right in the contention that a suit against a company can only be instituted against the company and not the directors or shareholders as held in the case of **Salomon v Salomon** and the parameters of a preliminary objection are as set out in the **Mukisa Biscuits** case. In **Salomon v Salomon**, it was well established that a corporate entity is a legal persona. It was stated by Lord Herschell of the House of Lords that:-

....Courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. ....the company is *ex hypothesi* a distinct legal persona.

5. The Respondents argue that the Claimant is aware that the employer was not the Respondents, a **fact which the Claimant is aware of. The Claimant's salary used to be paid by Zocom Limited, again a fact which the Claimant cannot dispute** the case of **Mukisa Biscuits** Law J.A. stated a preliminary objection to be thus:-

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

Sir Charles Newbold, President stated in the same judgment as follows:-

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." (Underline mine)*

6. In the matter before me, I have to ascertain whether there is employment by the Respondents or Zoocom Limited as asserted by the Respondents in their defence. It is submitted by the Respondents that the suit should be tried in Nairobi as the Court lacks territorial jurisdiction. I was appointed a judge of the court in July 2012. The jurisdiction of the Employment and Labour Relations Court then known as the Industrial Court was and still is country wide. It was only in 2013 and 2014 that other stations of the court were established and judges posted to man the court stations. Nyeri was one of the stations set up. In the case before me, no averment was made that the cause of action accrued in Nairobi and neither was there any plea that the suit is filed in the wrong jurisdiction. In my view, the raising of the objection to jurisdiction does not flow from pleadings but is calculated to muddy the waters the main thrust being the averment that the Claimant sued the wrong persons. In my view, the preliminary objection is not well founded as facts will have to be ascertained and a determination made. The Respondents preliminary objection dated and filed on 6<sup>th</sup> December 2017 is dismissed with costs to the Claimant.

It is so ordered.

**Dated and delivered at Nyeri this 13<sup>th</sup> day of March 2018**

**Nzioki wa Makau**

**JUDGE**