



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2051 OF 2017

GACHOKA KINGORI.....CLAIMANT

VERSUS

INTER MANAGEMENT GROUP (K) LIMITED....1ST RESPONDENT

BRAND KENYA BOARD.....2ND RESPONDENT

RULING

Introduction

1. The Claimant brought this suit on 13.10.2017 alleging that the respondents have unfairly terminated his employment contract and thereby violated his fundamental rights and freedoms. He therefore prayed for reinstatement to his employment among other reliefs. The second Respondent objected to the suit citing lack of employment relationship between her and the claimant. Subsequent to her defence she filed the Chamber summons dated 23.10.2017 seeking to have her name struck out of the suit because she never employed the claimant at all.

2. The Claimant opposed the said application through the Replying Affidavit sworn on 16.1.2018. The application was heard on 21.2.2018 between the applicant and the claimant since the first respondent did not oppose the same.

Applicants Case

3. Mr. Omoke learned counsel for the Applicant relied on order 1 rule 10(2) and 14 of the Civil Procedure rules to urge the Court to allow the application. He submitted that there was never any employment relationship between the Claimant and the Applicant. He further submitted that the Claimant was employed by the first respondent who was an independent contractor engaged by the applicant to provide certain services.

4. He referred the Court to the procurement documents annexed to the claim to fortify his submission that the claimant was not employed by the applicant. He further referred the Court to several judicial precedents and urged that the application be allowed with costs.

Claimant's Case

5. Mr. Mwambi learned counsel for the claimant opposed the application. He submitted that the applicant has failed to disclose the relationship between herself and the first respondent and their respective obligations under the contract. He relied on the documents annexed to the replying affidavit, which allegedly emanated from the applicant and which terminated the claimant's employment. He specifically referred to the letter dated 2.10.2017 which terminated the claimant's employment and contended that there is no way the applicant could have dismissed the claimant if she was not his employer. He submitted that the applicant was only running away from his obligations as an employer and maintained that the applicant was the employer of the claimant within the meaning of section 2 of the Employment Act.

6. Finally he submitted that the termination of the claimant's services was in violation of Article 47 of the Constitution and section 4 of the Fair Administrative Actions Act which require that a person is entitled to a hearing before any decision is made against him.

Applicants Rejoinder

7. Mr. Omoke urged the Court to find that the Claimant has not proved that he was dismissed by the applicant. He further urged Court to expunge the annexures to the Replying Affidavit contending that they were not properly marked as exhibits.

Analysis and determination

8. The issue for determination herein are:-

(a) Whether there was any employment relationship between the claimant and the applicant.

(b) Whether the applicant is a necessary party in this suit.

Employment Relationship

9. The answer to this first question is in the Claimant's own pleadings which state as follows:

"5. The 1st Respondent did approach and offer positions to the claimant as well as other individuals to enter into its employ as an autonomous organization working for the betterment of the Nation, under contract with the first and by extension the second Respondent.

6. The Claimant joined the employ of the 1st Respondent in the year 2017 as a Head of Media and Publicity Assistant in a Department created by the 1st Respondent, known as the Situation Room.

13. The Claimant, within mere Months of his appointment, was served with a Memo on the 2nd day of October 2017 by the Director of IMG Events and PR Company, one Charles Gacheru, purporting to terminate the services of the claimant as well as entire staff that was employed into the position....."

10. The foregoing excerpt from the Claimants statement of claim, in my view leaves no doubt that he was poached, employed and discharged by the first respondent. The said pleadings corroborates the applicants' case that there was never any employment relationship between the claimant and herself. Consequently, I find and hold that the answer to the first issue for determination is in the negative.

Necessary Party

11. The test of who is a necessary party to a suit was established **by Werrot and Company Ltd & Others –Vs- Andreas Douglas Gregory & Others HCCC No. 2363 of 1998, KLR 2828** where it was held:

"For determination of the question who is a necessary party there are two tests;

(i) there must be a right to some relief against such a party in respect of the matter involved in the proceedings in question and

(ii) it should not be possible to pass an effective decree in the absence of such a party."

12. In this case, it has not been demonstrated by either the first Respondent or the Claimant that without the joinder of the applicant the Court will not be able to effectively and completely adjudicate upon the dispute between the Claimant and the first respondent. Consequently, I find and hold that the applicant does not fit within the said test of a necessary party.

Disposition

13. For the reasons that the Claimant was never employed by the applicant and that the applicant is not a necessary party to the dispute herein, I allow the Chamber Summons dated 23.10.2017 but with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 13th day of April, 2018

ONESMUS MAKAU

JUDGE