



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABORU RELATONS COURT OF KENYA AT NAKURU

CAUSE NO.217 OF 2018

KENYA UNION OF COMMERCIAL, FOOD

AND ALLIED WORKERS.....CLAIMANT

VERSUS

ELDAMA RAVINE WATER & SEWERAGE CO. LTD.....1ST RESPONDENT

RIFT VALLEY WATER SERVICES BOARD.....2ND RESPONDENT

BARINGO COUNTY GOVERNMENT.....3RD RESPONDENT

RULING

The 2nd respondent, Rift Valley Water Services filed Notice of Preliminary Objections on the grounds that;

- 1. The Memorandum of Claim does not disclose any employer-employee relationship between the members of the claimant and the 2nd respondent, who has been wrongly joined in this cause;*
- 2. The 1st respondent is a limited liability company that is independent from the 2nd respondent, thus the 2nd respondent cannot be held liable for a suit arising out of contractual relations involving the employees of the 1st respondent.*
- 3. The Memorandum of Claim admits the lack of a valid recognition agreement between the claimant and the 2nd respondent, thus the claimant cannot bring and sustain this suit against the 2nd respondent.*

On the objections by the parties, oral submissions were made in court.

The 2nd respondent submits that there is no employer employee relationship between the claimant, its members and the 2nd respondent to justify the joinder in these proceedings the 1st respondent is a company, an independent entity and can be sued on its own name. Article 162(2) of the constitution and section 12 of the Employment and Labour Relations Court Act does not define the relations between the claimant and the 2nd respondent as one subject to litigation with the court.

The 2nd respondent is a likening authority, a statutory role in nature and limited to licencing water service providers and does not make it an employer. The relationship between the 1st and 2nd respondent is statutory while the relationship between the 1st respondent and claimant and its members is contractual.

The claimant on its part submits that when the dispute herein started there was no Board and 1st respondent as the 2nd respondent was the responsible entity. All the respondents are necessary parties. The Water act, 2002 gave the 2nd respondent power to appoint the Board and therefore responsible for the 1st respondent operations. The witnesses to be called will feature the 2nd respondent and therefore a necessary party.

Determination

A 'respondent' in proceedings before the court is defined by the Rules, the Employment and Labour Relations Court (Procedure) Rules, 2016 to mean;

“Respondent” means a person against whom a suit has been instituted in the Court or who replies to any proceedings in Court;

In the Memorandum of Claim filed on 3rd July, 2018 the claimant, a trade union under the provisions of the Labour Relations Act, 2007 and has a Recognition Agreement with the 1st respondent. The claim against the 1st respondent is on the basis that it failed to pay employees' salaries for 25 months. The orders sought relate to the payment of the unpaid salaries with interest, trade union dues, the acts of the respondent be declared unfair, an order be issued for the payment of trade union dues and costs.

The 2nd respondent is enjoined and defined as a water services licensee of the 1st respondent. There are no orders sought against the 2nd respondent. There is indeed no further mention of the 2nd respondent save at the description paragraph 3.

As held by the court in the case of **Kenya National Union of Nurses versus County Public Service Board Uasin Gishu County Government Cause No.189 of 2017** where a respondent has been sued and is required to reply to the claims made and notes that liability lies elsewhere, it becomes imperative on such a respondent to seek the enjoinder of the correct and or proper respondent.

In **Amon versus Raphael Tuck and Sons Ltd [1956] 1 ALL E.R. AT Page 273** it was held *inter alia* that;

... A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the Court effectually and competently adjudicate upon and settle all the questions involved in the cause or matter. where it is apparent that the relationship subsisting is that of the claimant and the 1st respondent herein as they enjoy recognition, and the 1st respondent being the party who has employed the claimant members and is now alleged to have failed to pay salaries for 25 months and also failed to remit union dues to the claimant, then on the face of it, liability lies with the 1st respondent. Where the 1st respondent finds that the non-payment of such salaries and trade union dues lie with the 2nd respondent or the 3rd respondent, the duty then falls on the 1st respondent to seek for the enjoinder of the other respondents as necessary parties.

On the face of the Memorandum of Claim, other than the mention of the 2nd respondent, there is no remedy outlined. On the submissions that the claimant and it witnesses will make reference to the 2nd respondent, that still does not create liability in the nature that the 2nd respondent is a necessary party as the respondent herein.

The claims made are on the basis of the Recognition agreement between the claimant and the 1st respondent. Within that relationship, various allegations and remedies are set out for the court to address and have a direct bearing on the 1st respondent.

At this juncture, no cause of action is set out as against the 2nd respondent. The necessity of the 2nd respondent as a necessary of the 2nd respondent for the full adjudication of the cause of action is not established.

The objections made by the 2nd respondent are therefore with merit and are hereby allowed. The 2nd respondent is wrongly enjoined herein. Costs in the cause.

Dated and delivered in open court at Nakuru this 18th day of October, 2018.

M. MBARU

JUDGE

In the presence of: