



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE 929 OF 2015**

**DAVID KIMANTHI.....CLAIMANT**

**VS**

**NIGHTINGALE APARTMENTS.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 15.12.2015 claiming kshs.485,000 as his unpaid salary and allowances for five months. It is the claimant's case that he was employed by the respondent as her General Manager from 12.5.2014 till early November 2014 when the contract of service was terminated by a mutual agreement between him and the respondent.

2. The respondent has denied that she ever employed the claimant as alleged in the suit and averred that she only hired the claimant as an Independent Contractor on 12.3.2014 to train her staff with a view to developing and bettering their skills. She therefore denied any employer-employee relationship between the claimant and herself and further denied liability to pay the dues sought by the claimant. On 31.8.2016, the respondent amended her defence to state that she is not a body Corporate as opposed to what the claimant had pleaded in paragraph 3 of the claim.

3. The issues for determination herein are:

**(a) Whether the suit is incompetent for being brought against an unincorporated business name.**

**(b) Whether the parties were in employment relationship between 12.5.2014 and November 2014.**

**(c) Whether the claimant is entitled to the kshs.485,000 sought or any part thereof.**

4. To answer the said questions the parties adopted their witness statements and exhibits filed except three payment vouchers filed by the defence which were objected to by the claimant. The claimant also testified as Cw1 to lay the basis for his objection to the said vouchers. Thereafter both parties filed written submissions through their counsel.

## **Analysis and Determination**

### **Unincorporated entity**

5. The respondent pleaded that she was not a body corporate in her defence which was amended one day to the hearing. The claimant who was represented by counsel never wished to file any amended claim or even ask for time to verify whether indeed the respondent was a body corporate as alleged in the claim. The respondent has therefore submitted that the suit is incompetent because the respondent is not a legal person capable of being sued. She cited **Football Kenya Federation vs Kenya Premier League Ltd and 4 others [2016]eKLR** where Aburili J struck out a suit by the Football Federation Kenya for want of legal capacity to sue and prosecute the same.

6. In this case the burden of proving that the respondent is a legal person incorporated as a Limited Liability Company lay with the claimant. He did nothing to discharge that burden even after the respondent indicated that deficiency by amending her defence one day to the hearing date. It is trite law that no suit can be brought against a person who lacks legal capacity. Such window is only availed under Article 22 of the Constitution of Kenya on matters involving violation of Constitutional rights under the Bill of Rights. This suit is not falling within the province of the Bill of Rights violations and consequently it is incompetent and must be struck out for being brought against an incompetent person.

### **Disposition**

7. In view of the foregoing finding, I will not go to the merits of the dispute instead I strike out the suit, just may be the claimant may bring fresh suit against the correct defendant. No orders as to costs because there is no defendant capable of being paid costs.

**Signed dated and delivered at Mombasa this 27<sup>th</sup> day of January 2017.**

**O.N. MAKAU**

**JUDGE**