



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 473 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 1st February, 2017)

RUTH NYABIO..... CLAIMANT

VERSUS

BOARD OF DIRECTORS BEVERLY SCHOOL OF KENYA ... RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary objection dated 18.4.2016, wherein they have raised the following issues:

- 1. That the Claim in its entirety is fatally defective and instituted against wrong party (Respondent).***
- 2. That the Claim is bad in law, misconceived and an utter abuse of the due Court process.***
- 3. That the Claimant's pleadings herein are based on an incurable illegality and ought to be struck out forthwith with costs to the Respondent.***

2. The Preliminary objection was canvassed orally in open Court and the Respondent urged the Court to consider that the Respondent is a body corporate registered under the Companies Act Cap 486 Laws of Kenya.

3. The Respondent as sued is the wrong party as it lacks capacity of so doing. They rely on the case of **Grace Mwenda Munjuri Vs. Trustees of the Agricultural Society of Kenya (2014)eKLR** wherein the Court held that suing the wrong party is a defect that cannot be cured by any constitutional provision looking at the Constitutional preamble to the last Article.

4. They also rely on the case of **Maurice Ooko Otieno vs. Mater Misericordiade Hospital Civil Case No.607 of 199** where the Court held that the capacity of the Board of Directors is not the same as that of a limited liability Company.

5. It is the Respondent's contention that the Clause 17(3) of the Contract of Employment is couched in mandatory terms and the parties are as such bound to abide.

6. They pray for the Preliminary Objection to be allowed as prayed.

7. They have in the same breath filed a Notice of Motion Application dated 18.4.2016, brought under Section 15(4) of the Employment and Labour Relations Court Act Cap 234B, Section 6(1) & (2) of the Arbitration Act No. 4 of 1995, Rule 16(1) of the Employment and Labour Relations Court (Procedure Rules) 2010 (formerly Industrial Court Rules and all other enabling provisions of the Law, wherein the Applicant seeks for orders:

1. That the cause filed herein be stayed and the dispute be referred to Arbitration in accordance with the Agreement of the parties as set out in the Employment Contract dated 1st January, 2016.

2. That the costs of this action and the Application be borne by the Claimant.

8. The Application is based on the grounds:

a. That the Applicant and the Respondent entered into an Employment Agreement on or about 1st January, 2016, as a senior school teacher.

b. That the dispute as articulated by the Claimant in the memorandum of Claim herein stems from inter alia a purported breach of the terms and conditions of the Employment Agreement.

c. That among the various clauses contained in the aforementioned Employment Agreement under Clause 17(3) thereof states:

“All disputes arising under this agreement or in any matter touching or relating to the employment of the employee shall be referred to arbitration under and in accordance with the provisions of the Arbitration Act 1995 or any other Act amending or replacing the same and the Rules and Regulations made thereunder.”

d. That even though this Honourable Court has unlimited jurisdiction; this does not defeat an arbitration process grounded on the contractual will.

e. That the Defendant shall not suffer any prejudice if the Orders sought are granted.

9. The Application is supported by the affidavit of one Alice Agam Muliri wherein she restates the grounds on the face of the application and prays for the application to be allowed as drawn.

10. In response to the Notice of motion Application dated 18.4.2016 the Claimant states that the contract of employment was signed after termination had been effected and as such it is of no consequence to the proceedings herein.

11. They state that the Claimant was engaged on 1.1.2016 but the letter of employment is dated 22.2.2016 and received by the Claimant on 23.2.2016 and as such for the period between 1.1.2016 and 22.2.2016 there was no contract of employment. They pray for the Application to be dismissed.

12. On the Preliminary objection the Claimant states that it can be cured by way of amendment and they have already taken steps to cure the defect by filing an application to amend the Memorandum of Claim which is yet to be heard and determined.

13. They urge the Court to dismiss the preliminary objection.

14. I have considered the averments of both parties and I note that indeed the appointment letter of the Claimant dated 1st January 2016 was written by Beverly School of Kenya (Exhibit 2) which the Respondent concede is a Limited Liability Company. Suing the Directors of the Company is therefore an error which the Respondent Claimant have also acceded to.

15. The Respondent have filed an application to seek to amend the claim which is pending before this

Court and have submitted that the error is one which can be corrected through an amendment by virtue of Article 159(5) of the Constitution.

16. I do agree with this position and add that the Courts primary duty is to do justice to the parties and would not unduly dwell into procedural technicalities. That being the position of this Court, IO find that the error is one that can be corrected through an amendment so that substantive issues can be canvassed.

17. On the 2nd issue, it is also true that the employment contract of the Claimant Clause 17(3) stated:

“All disputes arising under this agreement or any matter touching or relating to the employment of the employee hereunder shall be referred to arbitration under and in accordance with the provisions of the Arbitration Act 1995 or any other Act amending or replacing the same and the rules and regulations made there under”.

18. This Clause is couched in mandatory terms. The Respondents argue that this contract was signed after the Claimant was dismissed and so would not apply to the Claimant.

19. I note that indeed this contract was dated 1.1.2016 but signed on 23.2.2016. On 22.2.2016, the Claimant was issued with a termination letter which is also signed the same date. She was cleared same day from Respondent’s School. The Respondents purported to reinstate her again on 29th February 2016 but never issued her with any other contract.

20. Given that the contract of employment is signed on 23.1.2016 the same date of termination, it is apparent that the contents thereof cannot hold the Claimant because the termination came before the signing of the contract.

21. Given this position, I agree with the Respondents submission that between 1st January 2016 to 22nd February 2016 when the Claimant was dismissed, she had not been issued with the contract of service and so the contents in the contract coming on 23.2.2016 after the termination cannot hold the Claimant back.

22. It is my finding that the Preliminary Objection has no merit and is therefore dismissed accordingly. To correct the error in the claim, the Respondent is given leave to amend the claim within 30 days from today.

23. Costs in the cause.

Read in open Court this 1st day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Respondent

No appearance for the Claimant