



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 641 OF 2016

JAMES RAYANI.....CLAIMANT

VERSUS

THE MANAGEMENT COMMITTEE NYALI PALM

GARDEN ESTATE.....1ST RESPONDENT

HANS PETER WERLE.....2ND RESPONDENT

R U L I N G

1. The Application before me is the Chamber Summons dated 17/11/2016. It is brought by the respondent in the suit. It seeks the following orders:

- (i) That the Memorandum of Claim dated 31st August 2016 and filed herein on 6th September 2016 be struck out and dismissed against both respondents.
- (ii) That alternatively, the 1st respondent be struck out as a respondent to the Memorandum of Claim dated 31st August 2016 filed herein.
- (iii) That alternatively, that the respondents be given 21 days from the date of determination of this application to file their respective responses to the claim
- (iv) That the costs of this application and the memorandum of claim be awarded to the respondents.

2. The grounds upon which the application stands are:

- (a) The Memorandum of Claim herein discloses no or no reasonable cause of action as against the 2nd respondent;
- (b) The 1st respondent herein is non-suited and not registered and is not a person or entity recognized in law as having the capacity to sue or being sued in such capacity and therefore proceedings against it are nullity.
- (c) This suit is unsustainable in law as the 1st respondent does not exist and the claimant could not have been employed by the respondent in his personal capacity;

(d) In the premises, this action and the Memorandum of Claim filed herein are scandalous, frivolous or vexatious and an abuse of the process of this honourable court;

(e) It is only just and fair in the circumstances of this matter that the memorandum of Claim be struck out whether in its entirety against both Respondents or as against the 1st respondent.

3. The Chamber Summons is supported by the affidavit of Mr. Hans Peter Werle on 17/11/2016 whose gist is that the first respondent lacks legal capacity and that the fact that the 2nd respondent has been nominated to manage the affairs of the 1st respondent did not render him the employer of the claimant herein.

4. The claimant has opposed the Motion vide his grounds of opposition and the affidavit sworn on 28/3/2017. The gist of the claimant's objection is that the court lacks jurisdiction to entertain the application, application is bad in law and it lacks merits.

5. The application was disposed of by written submissions which were to be filed within timelines fixed by the court. The applicants filed theirs on 13/4/2017 and the claimant filed his on 4/5/2017. The issues for determination are:

(a) Whether the court lacks jurisdiction

(b) Whether the applicant filed and served her submissions outside the time fixed by the court.

(c) Whether the application is bad in law and it is incompetent.

(d) Whether the application lacks merits

Jurisdiction and incompetence

6. The claimant has submitted that the application is brought under the Civil Procedure Rules (CPRs) as opposed to the Employment and Labour Relations Court (Procedure) Rules 2016 (ELRCRs) and for that reason it is incompetent and the court lacks jurisdiction to entertain it. The applicant has however cited Article 159(2) of the Constitution and the ***Raila Odinga vs I.E.B.C and Others (2013) eKLR*** to urge that the court should dispense justice without undue regard to procedural legal technicalities.

7. I agree with the applicant she should not be denied her day in court on mere procedural legal technicalities. In many event it is my considered belief that where the ELRCRs are have a lacunae, the litigants before this court should invoke the provisions of the Civil Procedure Rules. The reason for my foregoing view, and it is not overstretched, is that the Civil Procedure Rules is prima facie, the adjectival law that guides civil litigation in Kenya. Consequently, I find and hold that the mere fact that a party has invoked the "wrong" provision of law does not perse strip the court of its jurisdiction over the dispute therein nor does it render the application incompetent. The claimant's objection on ground of jurisdiction and procedure must therefore fail.

Submissions served out of time

8. The claimant objected to the submissions by the applicant on grounds that although they were filed on time, they were served on 18/4/2017 outside the time fixed by the court. The reason for the said objection is that the court had directed that if the applicant failed to file and serve within 14 days, the application will stand dismissed. The applicant has however submitted that the delay in serving the submissions was caused by the Easter holiday that started on 14/4/2017 and ended on 17/4/2017.

9. I find the explanation by the applicant reasonable and dismiss the objection by the claimant. I therefore hold that the application's life was spared by an operation of the law. The last day to serve having become a public holiday, the applicant was entitled to do so on the first day immediately after the end of the public holiday. Consequently, service of the submissions on 18/4/2017 was perfectly in order.

Merits

10. The applicant has contended that the claim against the first respondent is incompetent because it is against nonsuited party. Specifically it has been submitted that the first respondent is not a corporate body and therefore lacks legal capacity of being sued. The applicant has relied on ***Football Kenya Federation vs Kenya Premier League Ltd and 4 Others (2015) eKLR*** where the court struck out a Notice of Motion brought by the Federation, an unincorporated entity, because it lacked legal capacity to sue.

11. As regards the second respondent, it has been submitted he is only a member of the interim management committee of the first respondent and as such he is not the claimant's employer. Essentially, the applicant submits that the entire suit is misconceived because there is no employer-employee relationship between the claimant and the respondent.

12. The claimant has in response dismissed the submission by the defence as misguided and submitted that joinder or misjoinder of parties does not render a suit incompetent. In his view the relationship between the parties herein is a matter of evidence which can only be determined by trial.

13. I have carefully considered the submissions by the two sides. In my view the questions to answer herein are the legal capacity of the first respondent and whether the two respondents fit within the meaning of an employer. The answer to the foregoing questions is in Section 2 of the Employment Act. The said section defines employer as:

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”.

14. The foregoing definition is very clear and deliberate. It was therefore the intention of the parliament to bind unincorporated bodies and their agents or managers to the employment contracts entered with their employees, whether the contracts are expressly entered into or otherwise. Under Section 8 of the Act, a contract of service may be written or oral and I should hasten to add that, it can be impliedly entered into through the conduct of the parties.

15. In view of the definition of employer given above by Section 2 of the Act, I find that the Chamber Summons by the applicants lacks merits and it must fail save for prayer 3 which is basically, leave being given to the applicants to file defence to the claim within 21 days of this order.

DISPOSITION

16. The Chamber Summons dated 17/11/2016 is dismissed save for direction that the respondents are to file their respective responses to the suit within 21 days hereof. Costs to the claimant.

Dated, signed and delivered this 28th July 2017

O. N. Makau

Judge