



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.2007 OF 2016**

**WAITHIRA MBAGE .....CLAIMANT**

**VERSUS**

**HILLCREST INVESTMENT LIMITED ..... RESPONDENT**

**RULING**

1. The claimant, by Notice of Motion dated 21<sup>st</sup> February, 2017 is seeking for orders that;

*a) The claimant be granted leave to enjoin Edwin Kuraru and Andrew Hollas as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively to the claim herein and the statement of claim dated 27<sup>th</sup> September, 2016 be amended accordingly in terms of the annexed Amended Statement of Claim.*

*b) Costs of this application be provided for.*

2. The application is supported by the affidavit of Mbage Njuguna Ng'ang'a and on the grounds that issues have arisen which necessitate the joinder of Edwin Kuraru and Andrew Hollas as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in this claim in order for the claim to be determined conclusively. The two proposed respondents are materially involved and connected with the matters in issue for determination by the court. It is paramount for the two to be enjoined in the interests of justice.

3. In the affidavit, Mr Mbage avers that as the father to the claimant he has authority from the claimant to make the affidavit in support of the application. In May, 2016 the claimant started complaining to him of harassment she was being subjected to at her place of work, Hillcrest International Schools by Edwin Kuraru who had joined the school as the Commercial Director and the claimant was about to graduate with a Masters in Global Marketing which she was studying online through the University of Liverpool in the UK. He advised the claimant to be careful on her dealings with her superiors at work and not to give them any grounds for termination of her employment as it was difficult to get alternative employment before she completed her Master's degree.

4. on or about June, 2016 the claimant received communication from the University of Liverpool to the effect that she had passed her final examinations and successfully completed her dissertation and was eligible for an award of the Master's degree in Global Marketing and was invited to attend graduation at the university in mid-July, 2016. The claimant attended her graduation was returned to work.

5. Upon return to work, the claimant was informed via email by Mr Kuraru that her duties had been assigned to Christina Lacey, an expatriate who had initially been recruited to the respondent Kindergarten as a teacher. The claimant also was issued with a show cause for alleged taking of unauthorised leave.

6. Mr Mbage also avers that he was surprised at this turn of events for the claimant who has shared with him the vents and he took up the matter with the school director and principal shareholder of the school, Mr Anthony Wahome so as to find out what was going on. Mr Wahome is known to him and had invited him to serve as director to one of his Group of companies, AG Group International Limited, which was/is shareholder of the Hillcrest schools and noted that he, would take up the matter with Mr Kuraru to know what the problem was.

7. Later Mr Wahome came back to the deponent with information that he had discussed with Mr Kuraru and there was no need for the claimant to be served with a show cause and this issue would be resolved amicably. Mr Wahome, by emails confirmed to the deponent that he was dissatisfied with how the matter of the claimant had been handled.

8. Mr Mbage also avers that when the claimant replied to the show cause letter noting she had applied for annual leave so as to be able to attend at her graduation she was summoned by Mr Hollas, chairman of the board who informed her that her position had been declared redundant. That both Mr Hollas and Kuraru are not shareholder of the schools and serve by invitation by my Wahome and who upon being appraised of the matters wondered how his colleagues would issue show cause notice when the claimant gave a reasonable reply and also declared her position redundant. That Mr Hollas and Kuraru remained adamant in their position and opted to have the claimant file suit.

9. That for the material roles and involvement of Mr Kuraru and Hollas in the matters in issue, they should be enjoined as respondents herein. Such will serve justice and no prejudice shall be suffered.

10. In reply, the respondent filed Grounds of Opposition to the application.

11. The respondents thus oppose the application on the grounds that the intended respondents are not necessary parties herein and their presence and participation is not necessary for the court to effectually and completely adjudicate the matter before court. The jurisdiction of the court has not been properly invoked and there is no employer and employee relations dispute between the claimant and the intended respondents to warrant their joinder.

12. Both parties filed written submissions.

13. The claimant submit that the orders sought should issue as by joining the intended respondents is material herein as they are involved and connected with the matters in issue. The intended respondents are directors of the respondent and thus exercise control and direct affairs of the respondent and thus fall within the definition of an employer set out under section 2 of the Employment Act, 2007. There is liability under tort where a party is in breach of a contract with the third person and where the intended respondents have caused the respondent to breach its contract of employment with the claimant and thus are liable.

14. Under Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 a party may amend pleadings before service of before close of pleadings provided that after close of pleadings a party may with leave of the court make necessary amendments. Such amendments should freely be allowed as held in **Kenya Cold Storage (1964) Ltd versus Overseas Food Services (Africa) Ltd [1982] eKLR**.

15. The court has jurisdiction to allow the application in the interests of justice and for the expeditious disposal of the suit herein.

16. The respondent in reply submit that there is no employer and employee relationship between the intended respondents and the claimant as required under section 12(3)(iii) of the Employment and Labour Relations Court Act which sets out the jurisdiction of the court. even where the court may in the right circumstances make an order for joinder of a party to on-going proceedings, this is not one such case as article 162(2) of the constitution read with section 12 of the constitutive Act for the court, the court is only seized of matters of an employer and employee relationship.

17. In **MWM versus MFS [2014] eKLR** the court held that the question for joinder must be addressed in the context of what relief a claimant is seeking against the new defendant and whether the non-joinder would hinder the court from making an effective decree. In this case the claimant has not made any claim against the intended respondents to warrant their joinder as held in **Lucas otieno Ondong versus Equatorial Commercial bank Limited & another [2016] eKLR**.

### **Determination**

18. Rule 14 of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow parties to amend their pleadings and where filing of pleadings have closed, the court must grant leave for amendments. THz claimant correctly make reference to these Rules with regard to amendments.

19. It is trite that amendment to pleadings should be readily allowed. However where a party object to joinder, the reasons must be assessed on their merits. Where joinder ill lead to practical problems in addressing the issue(s) in dispute or will occasion unnecessary costs on the parties in the suit, joinder will be declined. Joinder will also be declined where there is no specific relief sought against the intended respondent and The determining factor in joinder of parties is that there is no common question of fact or law that arise between the existing and the intended parties as held in **Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR**.

20. In this case the claim is premised on the facts that the claimant was by letter dated 4<sup>th</sup> May, 2015 employed by the respondent in the position of manager, Public Relations and Communications at Hillcrest International Schools on a two-year contract effective 1<sup>st</sup> September, 2015 and ending on 31<sup>st</sup> August, 2017. The letter of employment or appointment is annexed to the claim under the title Hillcrest International Schools as a contract of employment between the claimant and Hillcrest Investment Limited, the respondent.

21. There is therefore a binding employment contract between the claimant and the respondent. Such is a relationship and matter subject to the jurisdiction of this court.

22. In addressing the question as to whether the intended respondents should be joined herein as parties Mr Mbage in his supporting affidavit for the claimant at his paragraph 14 avers that;

*It is instructive to note that both Andrew Hollas and Edwin Kuraru, unlike Mr Wahome, are not shareholders of Hillcrest International School and are only members of the board by invitation by Mr Wahome and his other equity shareholder.*

23. These averments taken into account give a synopsis of the standing and position of the intended respondents. The all-important stakeholder(s) is or are the shareholder(s) of the respondent company and who bear the greatest responsibility over the respondent on matters employment and labour relations and thus the claims made by the claimant. Any orders made herein shall relate to the respondent company as the employer and not the individual board members or fellow employees.

24. The above addressed, the duty in law rests with the respondent as the employer to set out their case in terms of section 10(6) and (7) of the Employment Act, 2007 as made by the claimant. Where the claimant has sued the respondent as the employer, responsibility is therefore on the respondent and not third parties invited by the respondent to serve the business.

**As no claim is made against the intended respondents in the claim filed on 27<sup>th</sup> September, 2016 or in the draft amended claim, the orders sought shall not issue. The application is hereby declined. Costs in the cause.**

Dated and delivered in open court at Nairobi this 27<sup>th</sup> day of July, 2017.

**M. MBARU JUDGE**

In the presence of:

Lilian Njenga and David Muturi – Court Assistants

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