



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO. 87 OF 2017

EVANS OCHARO.....CLAIMANT

v

THE TRUSTEES BUNGOMA MEMBERS CLUB.....RESPONDENT

RULING

1. Evans Ocharo (Claimant) commenced legal proceedings against the Trustees, Bungoma Members Club (Respondent) on 23 May 2017 and the Issues in dispute were stated as

1. Salary in lieu of notice
2. Salary arrears
3. Leave allowance due
4. Public holidays due
5. Off days allowance dues
6. Overtime allowance dues
7. Compensation for unfair termination.

2. Upon service of Notice of Summons and the Memorandum of Claim, the Respondent filed a Notice of Preliminary Objection in the following terms

TAKE NOTICE that the Respondent shall at the earliest opportunity raise a point of Law that;

i) The suit herein is fatally defective, frivolous, fixatious (sic) and an abuse of the Courts process as the Respondent lacks the locus standi of suing or being sued in its own name.

3. When the Preliminary Objection was placed before Court on 25 September 2017, the Respondent indicated that it had filed submissions and the Claimant sought 7 days to file his submissions. The said submissions were filed on 27 September 2017.

4. The Court has considered the submissions and the authorities and come to the conclusion that the preliminary objection cannot stand for the Cause is not fatally defective, frivolous or an abuse of the court

process, majorly on 2 grounds, statutory and constitutional.

Statutory

5. Employment contracts are principally governed in this jurisdiction by employment laws of general application and in certain instances by specific statutory Acts.

6. One of the laws of general application is the Employment Act, 2007.

7. The Act has appeared to take a departure from the common law and company law approach to the locus of parties who can sue and be sued.

8. In my view there was a mischief which led to the statutory requirement that the *employer* details its name as an employer in the formal contract.

9. Many employees in this country did not know and still do not know the legal identities of their employers and in cases of alleged breach of contract, as herein, the stronger party, the employer would run rings around the correct identity of the employer to avoid liability.

10. Section 9 of the Employment Act, 2007 therefore obligates an employer to cause to be drawn an employment contract in certain prescribed circumstances.

11. Section 10(2)(b) thereof takes the obligations a notch higher by contemplating that the contract will have the *name of the employer*.

12. And in terms of section 2 of the Employment Act, 2007, *employer means 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*

13. Regarding the parties who/which can be sued, section 87 of the Act contemplates that the employee can commence legal action against the *employer*.

14. On 1 June 2015, an entity describing itself as *Bungoma Members Club* issued to the Claimant a formal contract of appointment. The contract set out some of the conditions and terms of service.

15. It is that entity that the Claimant has instituted legal proceedings against, albeit with the inclusion of the term *Trustees*.

16. The provisions of the Employment Act, 2007 were in my view meant to address that power balance.

Constitutional

17. Articles 22, 258 and 260 (definition of *person* as means *a company, association or other body of persons whether incorporated or unincorporated*) lay out the competency or locus of who can institute proceedings alleging violation or threatened violation of the constitution.

18. My reading and understanding of the aforesaid Constitutional provisions suggest that competency/*locus standi* has been fundamentally expanded such that even unincorporated/unregistered bodies are clothed with the right to institute legal proceedings or to be sued.

19. Within that constitutional context, it would not make legal sense to contend that for *statutorily* or *contractually* anchored causes of action, an entity such as the Respondent cannot be sued while in situations of constitutional breaches, such entity can be sued.

20. In other words, a statute should not appear to disallow what the Constitution allows or contemplates.

21. And if I were wrong, I would still find that the alleged failure would not amount to a fatal defect or an abuse of the court process, for a simple amendment would suffice to bring the correct party before Court.

22. The upshot of the above is that I take a contrary position to the positions taken by the Courts in the many authorities cited by both the Claimant and the Respondent, more so considering the provisions of the Employment Act, 2007, already referred to.

23. For the above reasons, the Court declines the invitation by the Respondent to strike out or dismiss the Cause herein.

24. Costs in the Cause.

Delivered, dated and signed in Eldoret on this 3rd day of November 2017.

Radido Stephen

Judge

Appearances

For Claimant Munene Chege & Co. Advocates

For the Respondent Olando Udoto & Okello, Advocates

Court Assistants Nixon/Etyang