



**R REPUBLIC OF KENYA**

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

**CAUSE NO.142 OF 2015**

**LUCAS OTIENO ONDONG ..... CLAIMANT**

**VERSUS**

**EQUITORIAL COMMERCIAL BANK LIMITED .....1<sup>ST</sup> RESPONDENT**

**CENTRAL BANK OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 2<sup>nd</sup> Respondent through their application and Notice of Motion dated 26<sup>th</sup> June 2015 are seeking that the suit filed against the 2<sup>nd</sup> Respondent [CENTRAL BANK OF KENYA] be struck out and be dismissed with costs. The application is supported by the affidavit of Daniel Muguima and on the grounds that the suit falls within the precincts of an employer-employee relationship as it arises out of a contract between the Claimant and the 2<sup>nd</sup> Respondent to which the 2<sup>nd</sup> Respondent was not a party. The 2<sup>nd</sup> Respondent is therefore wrongly joined herein and injustice will be occasioned if condemned to live with the anxiety and incur unwarranted costs in the litigation process that it ought not to be a party, in the interests of justice and to avoid the 2<sup>nd</sup> Respondent suffering irreparable loss and damage, the suit should be dismissed with costs.

2. Mr Muguima in his affidavit in support of the application deposes that he is the manager in charge of bank supervisor of the 2<sup>nd</sup> Respondent and upon service with summons herein a defence has since been filed. The dispute herein relate to an employer-employee relationship between the Claimant and 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent ought not to be dragged into court. Privity of contract does not confer rights or impose obligations on strangers to it and in this case, the Claimant ought to sue his former employer the 1<sup>st</sup> Respondent only. The termination was effected by the 1<sup>st</sup> respondent.

3. Mr Muguima also avers that some time in January 2014 it carried an on-site inspection of the 1<sup>st</sup> Respondent and prepared an inspection report giving recommendations on the way forward. The report is not individualistic and was aimed at correcting anomalies or any lacuna in the 1<sup>st</sup> Respondent business. The 2<sup>nd</sup> Respondent then held discussions with the claimant, then the Risk Manager at 1<sup>st</sup> Respondent business that revealed a lot of discrepancies in the risk and internal audit functions which in turn compromised the operations of the 1<sup>st</sup> respondent. The 1<sup>st</sup> Respondent was to correct these discrepancies in the interests of the general public but did not make recommendations of a sanction against the claimant. To hold the 2<sup>nd</sup> Respondent culpable would be to encourage a proliferation of suits by individual against the 2<sup>nd</sup> Respondent while holding their statutory duty.

4. The claimants filed Grounds of Opposition to the application by the 2<sup>nd</sup> Respondent noting that

the same is misconceived and should be dismissed to allow the hearing of the main suit.

5. Parties filed their written submissions save for the 1<sup>st</sup> Respondent who did not reply to the application or file any written submissions.

6. The 2<sup>nd</sup> Respondent submit that section 12 of the Industrial Court Act [the Employment and Labour Relations Court Act] give the Court jurisdiction over employment and labour relations and the employment contract between the Claimant and 1<sup>st</sup> Respondent does not include the 2<sup>nd</sup> Respondent and hence not a proper party to the proceedings herein which relate to an employment relationship. The issue in dispute relate to the alleged unfair termination of employment of the Claimant by the Respondent and as such to enjoin the 2<sup>nd</sup> Respondent herein will only serve to drag them in Court for no apparent cause. The suit should be struck out as held in the case of **Trusted Society of Human Rights Alliance versus Mumo Matemu & 5 Others [2014] eKLR**. That for the wrong enjoinder, costs should be paid.

7. The Claimant submit that the claim has set out a clear nexus between the 2<sup>nd</sup> Respondent and the Claimant who are the makers of the inspection report that led to termination of employment. The Court is required to address substantive justice in accordance with article 41 and 159(d) of the constitution and section 20(1) of the Employment and Labour Relations Court Act. The law allow the Claimant to enjoin any party necessary in the same transaction and herein exists such nexus. The choice of who to sue is on the claimant. The claim raises a cause of action against the 2<sup>nd</sup> Respondent as the author of a report leading to termination of employment. as held In **Case No.273 of 2013, Joseph Leboo & others versus Director Kenya Forest Services & Others (ELC – Eldoret)**.

8. The Court constitutive Act, Employment and Labour Relations Court Act and the rules thereto do not directly address the joinder, non-joinder or mis-joinder of parties. Rule 18 relate to case management but not directly with regard to where a party such as the 2<sup>nd</sup> Respondent seek to have the suit dismissed for wrongly being joined herein. The Court practice is to rely on written law applicable for the High Court, the Civil Procedure Act and the rules thereto. Therefore this Court in the case of **Jacob N Muvengi versus Speaker Nairobi City County Assembly and Chege Mwangi & Others [Proposed interested parties], cause no.2108 of 2014** held that Order 1 rule 10(2) of the Civil Procedure Rules provide clear wording for a person to be enjoined as plaintiff or defendant. Such joinder must be with the purpose to ensure that the *presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon*.

9. In **Dr. Kizito Lubano versus KEMRI & Others, Petition No.47 of 2015**, the Court held that the joinder of the Commission for Administration of Justice was not necessary as they had only performed their statutory duty/mandate.

The issue in dispute herein is that of *unlawful termination of Lucas Otieno Ondeng by the Equatorial Commercial bank Limited on the 14<sup>th</sup> July 2014*.

Paragraph 3 of the memorandum of claim is that the 2<sup>nd</sup> Respondent is sued in its capacity as the maker of a report dated 31<sup>st</sup> January 2014. The 14<sup>th</sup> July 2014 the Claimant was terminated without any due cause and contrary to his employment contract. The claimant's tribulations commenced when he candidly as was required of him by statute, under the Central bank of Kenya Act, divulged important information requested by the 2<sup>nd</sup> respondent, and as dictated by law, he submitted such information. The 2<sup>nd</sup> Respondent made a report and highlighted recommendations noting anomalies with the 1<sup>st</sup> Respondent and found that such ought to be corrected. The remedies sought are against the 1<sup>st</sup> Respondent for unlawful termination; compensation and costs.

10. Save for the report made by the 2<sup>nd</sup> Respondent with recommendations to the 1<sup>st</sup> respondent, I find no specific claim(s) against the 2<sup>nd</sup> respondent. The act of termination and the reasons for the same is made by the 1<sup>st</sup> respondent. Had the 1<sup>st</sup> Respondent not issued the letter of termination dated 14<sup>th</sup> July 2014, the report of the 2<sup>nd</sup> Respondent would not have arisen herein. The act of termination was at the

instance of the 1<sup>st</sup> respondent. The issues herein therefore can be addressed without the presence of the 2<sup>nd</sup> respondent. The presence of the 2<sup>nd</sup> Respondent before the Court is not a necessary party that will prevent the Court from effectively addressing the issue(s) in dispute completely for the adjudication of the same.

11. This analysis when distinguished from what the Court held in **Dr. Gabriel G Mbugua versus KEMRI, Cause No.1275 of 2014** is clear in that each case must be looked at in its facts and remedies sought and despite the position in the case of **Supreme Court in Trusted Society of Human Rights Alliance**, the facts relevant herein are totally different from that case. Herein exists an employment relationship between the Claimant and the 1<sup>st</sup> Respondent that was regulated under a different legislative framework unlike the constitutional issues raised in the case before the Supreme Court by the Trusted Society.

12. As such, the joinder of the 2<sup>nd</sup> Respondent is not necessary. However the 2<sup>nd</sup> Respondent was acting in the public interest, such is their statutory duty and should not claim costs.

**Application dated 26<sup>th</sup> June 2015 allowed. The 2<sup>nd</sup> Respondent is expunged from the records herein. Costs shall be in the cause.**

Orders accordingly.

**DELIVERED IN OPEN COURT AND SIGNED THIS 31<sup>ST</sup> DAY OF MARCH 2016.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Lilian Njenga

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