



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 1992 OF 2014**

**NICHOLAS WAMBUA NDUNDA..... CLAIMANT**

**VERSUS**

**SIMON MUSYOKA KAINGO t/a**

**KITUI COTTAGES GUEST HOUSE .....RESPONDENT/APPLICANT**

**RULING**

1. By a Notice of Motion dated 12<sup>th</sup> February 2015, the respondent sought an order that the claimant's claim herein be struck out for the reason that the respondent does not trade as Kitui Cottages Guest House and that the same is separate legal entity and limited liability Company with capacity to sue and be sued. The respondent attached as "SMK 1" a copy of certificate of incorporation to vouch for this.
2. On 21<sup>st</sup> April, 2015 the claimant filed an application dated 10<sup>th</sup> April, 2015 seeking leave of Court to amend the memorandum of claim dated 7<sup>th</sup> November, 2014. The purpose of the amendment was stated to bring before the Court Kitui Cottages Limited as the 2<sup>nd</sup> respondent to enable just determination of the real questions in controversy. This application was allowed by consent of the parties on 4<sup>th</sup> June, 2015.
3. The present application in respect of which this ruling relates was filed earlier in time to the one of April 10<sup>th</sup> in respect which a consent has been reached.
4. Paragraph 2 of the statement of claim stated that the respondent is an adult of sound mind carrying on business of bar and restaurant and whose address is care of "The Manager, Kitui Cottages a Guest House". The 3<sup>rd</sup> paragraph further stated that the respondent offered the claimant employment as guest attendant.
5. When the application of 10<sup>th</sup> April, 2015 was allowed, the reasonable thing the claimant would have done was to withdraw the suit against Simon Musyoka Kaingo.
6. It is clear from the memorandum of claim that the claimant was under the mistaken belief that Mr. Simon Musyoka Kaingo was trading as Kitui Cottages & Guest House. This has since proved wrong when his attention was brought to the fact that Kitui Cottages and Guest House was a Limited liability Company capable of being sued in its own name.

7. Striking out pleadings is very serious order to make since it denies the party affected the opportunity to prosecute to conclusion, their claim. It must only be made in exceptional cases especially where it is clear that it is the only order to make. Misjoinder of a party can be cured by striking out of the suit, the unnecessary party and awarding such party costs. Further, a Court of law can allow an amendment to pleadings even where such amendment would mean including or substituting a party. The Court must lean more towards conserving or sustaining claims presented to it to determine than dismissing the same on technicality unless that is the inevitable order to make.

8. In the circumstances, the Court will not strike out the claim herein but will order that Mr. Simon Musyoka Kaingo be struck off this suit and costs be awarded to him.

9. It is so ordered.

Dated at Nairobi this 1<sup>st</sup> day of April 2016

**Abuodha J. N.**

**Judge**

Delivered this 1<sup>st</sup> day of April 2016

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**