

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.125 OF 2016

KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS.....CLAIMANT

VERSUS

STEPHEN MWANGI IRERI.....1ST RESPONDENT

BOARD OF MANAGEMENT OF MURUAI PRIMARY SCHOOL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 23rd September, 2016)

RULING

The claimant filed the statement of claim and a notice of motion on 03.06.2016 alleging the unfair termination of Madam Ann Wanjuhi Kuria, an early childhood development teacher. The respondents filed on 13.07.2016 a notice of preliminary objection through F.O. Makori, Litigation Counsel, for the Attorney General. The respondents prayed that the claimant's statement of claim and notice of motion both dated on 30.05.2016 be struck out with costs upon the following preliminary grounds:

1. That the claimant's notice of motion and statement of claim as filed contravenes the mandatory provisions of Article 3 and 10 as read together with section 9 of schedule 4 and section 33 of the 6th schedule of the Constitution of Kenya, 2010 hence the cause of action against the 1st respondent is bad in law, incurably defective, fatally incompetent and an abuse of court process.
2. That the claimant's notice of motion and statement of claim as filed contravenes the mandatory provisions of sections 1, 2, 9, and 14 of schedule 4 of the Basic Education Act, 2013 hence the cause of action against the 1st respondent is bad in law, statute barred, incurably defective, fatally incompetent and an abuse of court process.
3. That the 1st respondent will suffer irreparable prejudice if the claimant's notice of motion and statement of claim is heard and determined as filed.

The respondents have submitted that the pre-primary education function is vested in the county government under section 9 of schedule 4 and section 33 of the 6th schedule of the Constitution of Kenya, 2010 so that the 1st respondent could not be properly sued. The claimant has submitted that since the pre-primary education function is constitutionally vested in devolved government, the respondents could not move against her by making the dismissal decision which is in issue in the present case. The court finds that the alleged *ultra vires* actions having been allegedly done by the respondents as stated in the statement of claim and the claimant's affidavits on record, the respondents are proper parties to the suit.

The respondents have further submitted that under sections 1 and 2 of schedule 4 of the Basic Education Act, 2013 the 2nd respondent is a body corporate so that the 1st respondent should not have been sued as he is not a proper party to the suit. The court considers that even if the 1st respondent was not a proper party to the suit, the suit would survive as against the 2nd respondent. Further, the claimant has pleaded at paragraph C5 of the statement of claim that she served under unstructured terms of employment and the

documents on record show that the 1st respondent played a crucial role in the challenged termination including signing the termination letter. In this case that the claimant alleges that the termination was without relevant legal authority on the part of respondents and taking into account the documents and pleadings that implicate the 1st respondent, the court returns that the 1st respondent is a proper party to the suit. While making that finding, the court further finds that the preliminary objection could not validly bring the suit to dismissal with finality as the suit would remain sustainable against the 2nd respondent.

Thus the court returns that the suit was not incurably defective or incompetent as amendment or striking out the improper party was an available but unnecessary cure in the circumstances of the case. The court finds that striking out of the suit was therefore not the proper line of attack and the preliminary objection will fail.

In conclusion, the preliminary objection is hereby dismissed with costs and parties are now invited to take directions on further steps in the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 23rd September, 2016.**

BYRAM ONGAYA

JUDGE