



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO.2184 OF 2015

PRAXIDES AKOTH ODUOR.....CLAIMANT

VERSUS

LIBERTY EAGLE LIOMITED.....1ST RESPONDENT

PEOPLE INSIGHTS LIMITED.....2ND RESPONDENT

RULING

1. The 2nd Respondent by application and Notice of Motion dated 15th February 2016 is seeking for orders that the name of the 2nd respondent, People Insights limited be struck out from these proceedings and the suit against them be dismissed and the Claimant be condemned to pay costs. The application is supported by the annexed affidavit of Ann Pondo and on the grounds that there is no employer-employee relationship between the Claimant and the 2nd Respondent and there is no privity of contract between such parties. The suit discloses no reasonable cause of action against the 2nd respondent. The 2nd Respondent wrote to the Claimant seeking termination of the case against them before costs escalated but the Claimant has not obliged. The continued pendency of the suit against the 2nd Respondent is prejudicial for the needless anxiety and costs.
2. In her affidavit, Anne Pondo avers that as the administrator of the 2nd Respondent has authority to support the application. That in the claim there is nothing specific against the 2nd Respondent and there is no contractual relationship between the 2nd Respondent and the claimant. The Claimant has refused to settle the matter amicably to avoid unnecessary costs.
3. The Claimant filed Grounds of Opposition on the grounds that the Court has jurisdiction to hear and determine the case and the Court should proceed without undue regard to technicalities as the application runs counter to the need for expeditious disposal of cases and is only meant to delay justice and should be dismissed.
4. The 1st Respondent did not oppose the application.
5. Parties filed written submissions.
6. The 2nd Respondent submit that the 1st Respondent has admitted to have employed the Claimant through contract of employment dated 15th November 2013. The Claimant completed her probation

period subject to the permanent employment contract and by letter dated 15th march 2014 was confirmed as the Sandwich Artist. By letter dated 5th may 2015 the 1st Respondent summarily dismissed the claimant. That these are facts admitted by the parties and the 1st Respondent is not opposed to the 2nd Respondent application seeking the suit against them be struck out as they know they have employed the claimant.

7. The 2nd Respondent also submit that there is no employer-employee relationship between the 2nd Respondent and the Claimant as defined under section 2 of the Employment Act. There is no cause of action disclosed against the 2nd respondent. In **Kenya Union of Post Primary Education Teachers [KUPPET] versus Techers Service Commission & Another [2015] eKLR**. The Court held that every employer should issue an employment contract to the employee and set out the terms and conditions of the employment and the benefits that go with it as set out under section 13 of the Employment Act. The Claimant had no written contract with the 2nd Respondent so as to include them in this suit.

8. There is no privity of contract as the parties to the employment relationship is in an agreement executed between the Claimant and the 1st respondent. a third party cannot benefit from a contract unless such contract is for his benefit or made on his behalf as held in **a Provisional Construction Company Limited versus AG, Civil Case No.165 of 1991**. The Claimant cannot seek to claim from the 2nd Respondent where no contractual relationship existed. In **Ainear Liluyani Njirah versus Agha Khan Health Services [2013] eKLR**, the Court of Appeal made a distinction between express and implied benefits which are enforceable under a contract by a third party. That only persons who negotiate and sign a contract and privy to it are entitled to enforce its terms.

9. The 2nd Respondent also submit that section 12 of the Industrial Court Act [Employment and Labour Relations Court Act] give the Court jurisdiction to determine employment and labour relations disputes. To determine an employer-employee relationship there must be a wage and control over the employee by the employer as held in **Joseph Karobia Gicheru versus Michael Gachoki Gicheru [2013] eKLR**. Where the Court proceeds without jurisdiction, the entire proceedings are empty of legal lite and are null and void *ab initio*.

10. On this basis, the 2nd Respondent has been engaged on needless litigation by the Claimant and application should be allowed with costs.

11. The Claimant submit that she was employed by the 1st Respondent as a Sandwich Artist on 18th November 2013 and the interview was run by the 2nd Respondent who the Claimant believes was the human resource function of the 1st respondent. The Claimant got an email from the human resource manager summoning her to disciplinary meeting held on 4th May 2015 and these facts are admitted by the 1st respondent. Such email was issued by the 2nd Respondent officer, Ann Pondo. The disciplinary hearing was thus conducted by the 2nd Respondent who recommended dismissal of the Claimant from her employment with the respondent.

12. The Claimant also submit that the 2nd Respondent is properly enjoined in the suit as held in **Kizito M Lubano versus KEMRI Board of Management & 8 Others [2015] eKLR** that a party may be joined into the suit not because there is a cause of action against it but the party's presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the case. The 2nd Respondent has had a hand in the claimant's employment even though the employment contract was with the 1st respondent. The Court should therefore look at the substantive issue(s) raised and not the technicalities of joiner. The 2nd Respondent is seeking to escape responsibility contrary to fair labour relations.

13. Section 20 of the Employment and Labour Relations Court Act guides the Court to proceed without undue regard to technicalities. The application should be dismissed.

Determination

14. An employment relationship is regulated under the Employment Act which sets out the fundamental rights of employees, provides basic conditions of employment of employees, and to provide for matters connected with the foregoing. The Court therefore has jurisdiction over employment and labour relations claims pursuant to the provisions of article 41 and 162 of the constitution as read together with the Employment and Labour Relations Court Act. As submitted by the Claimant in the case of **Kizito M Lubano**, cited above, the employment relationship is not only regulated by the terms and conditions set out under the employment contract as the parties are allowed to use policies and regulations set out under general provisions applicable to all employees under the same employer or entity. As such, where a party cites a policy or regulation or guideline that relates to their employment, the Court have to call for such evidence and analyse the same to an effective settlement of the matter. Indeed majority of employers will have a human resource policy or manual attached to the employment contract or issue regular guidelines, memo, and annexures to the contract of employment that go into the regulation of the employment relationship.

15. Such are matters of evidence and cannot be addressed in an application such as this one.

16. However, I note the claim is based on the issue in dispute being the unfair dismissal of the Claimant and the non-payment of terminal dues. That on 29th April 2015, the Claimant received an email from the respondent's human resource manager summoning her to a hearing with the Respondent directors on 4th May 2015. Such notice is issued by Anne Pondo of anne@peopleinsightslimited.com and a look at the address domain, the same relate to the 2nd respondent. Indeed the email to the Claimant is signed thereunder the name – People Insights Ltd.

17. Also, on 9th June 2015, Anne Pondo sent an email to the Claimant under reference of *Subway Clearance Procedure*. The Director of the 1st respondent, Christopher J Bak followed up the first communication [29th April 2015] from Anne Pondo on 5th May 2015 with a letter of summary dismissal as therein she makes reference to the disciplinary meeting held on 4th May 2015.

18. I find a close agency relationship between the Respondents. To separate the two would be to remove an important party from these proceedings. Despite the 1st respondent not being opposed to the 2nd Respondent's application, the Claimant should have a chance to argue the matter against each respondent.

19. On the issue in dispute being unfair termination of employment, noting the circumstances set out above, the Court must address all procedural and substantive matters gone into by the parties to be able to address the issues in dispute in whole. Indeed where Ms Pondo depones in her affidavit that she is the Administrator for the 2nd Respondent but sent communications to the Claimant with regard to her disciplinary hearing and upon which the 1st Respondent relied upon to dismiss the claimant, such are matters that cannot be removed from the dispute. Indeed as the Court of Appeal addressed in the case of **Ainear Liluyani Njirah versus Agha Khan Health Services** cited above, matters that directly impact on the parties to a contract must be put into account. Even where the Court of Appeal case related to a contract under the law of Contract and the matter herein relates to the Employment Act which is fundamentally different in context, I find a clear link between all the parties herein especially with regard to the 2nd respondent. To remove the 2nd Respondent herein, the Court will be denied crucial evidence that is necessary with regard to the issues set out as being in dispute. I have gone through the case of **George Onyango Ochieng versus Chemelil Sugar Company Ltd [2014] eKLR**. I note the facts are different from this case and the Court will address the claim herein on its merits.

20. Without going into the merits of the main claim, and as the Court held in **Kizito M Lubano**;

... Parties in an employment relationship should be left to address disciplinary matters by the use of internal mechanisms. Such is to ensure that an employee is heard at the shop floor as the best forum where basic facts in employment are to be found.

21. As such, an employee has the right to challenge any resulting decision of the employer from such proceedings by filing claim with the court. Where such internal proceedings or mechanisms are found to involve and include the 2nd respondents or both respondents jointly and severally, the respondents thus become necessary parties herein. I find the 2nd Respondent officer Ms Pondo, who avers that she is the administrator of the 2nd Respondent to have issued key communication to the Claimant that directly touch on her employment and relate to the issues in dispute herein. To remove the 2nd respondents from proceedings herein will cause great injustice to the Claimant and remove a crucial party that I find necessary for the Court in addressing the issues in dispute.

The application dated 15th February 2016 is hereby dismissed. Costs shall be in the cause.

Orders accordingly.

Delivered in open court at Nairobi and dated this 22nd day of September 2016.

M. MBARU

JUDGE

In the presence of:

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