



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 84 OF 2014

ERICK NAMISI SIFUMA

1ST CLAIMANT

SAMUEL NJUGUNA MWANGI

2ND CLAIMANT

PETER IMBAYI

3RD CLAIMANT

v

GUAVA RESTAURANT

RESPONDENT

RULING

1. On 13 November 2015, the Court delivered judgment in which it found that the Respondent owed the Claimants unpaid salary arrears and ordered payment of the same.
2. The Respondent failed to pay and the Claimants commenced execution process through committal to civil jail of the Respondent's directors.
3. On 10 February 2016, a Notice to Show Cause was issued to Daniel and Jimmy Waweru to show why warrants of arrest and committal to civil jail could not be issued.
4. Githui and Co. Advocates filed a Notice of Appointment for a person referred to as 2nd Respondent on 23 February 2016. The name of the said person was not disclosed.
5. The Notice to Show Cause came up before the Deputy Registrar the same day but it was adjourned to 9 March 2016 because it had not been served upon all the parties.
6. The firm of Ikua Mwangi & Co. Advocates on their part filed a Notice of Appointment of Advocates dated 8 March 2016 (on 9 March 2016) to act for one Jimmy Waweru and an affidavit of the said Jimmy Waweru.
7. On the same day, the Deputy Registrar struck out the Notices of Appointments as being irregular.
8. The Deputy Registrar also struck out the Notice to Show Cause on the basis that it was directed against persons who were not parties to the dispute and directed the Claimants to extract a proper Notice to Show Cause.
9. A new Show Cause Notice was issued against the Respondent on 18 March 2016.
10. Come 4 April 2016, the firm of Ikua, Mwangi & Co. Advocates filed a Notice of Preliminary

Objection in the following terms

1. *That the defendant is not a legal entity capable of being sued.*
2. *That execution cannot issue against a non existing entity in law.*
3. *There is no valid judgment upon which execution can flow.*
4. *The application is thus totally inept and cannot be sustained in law.*

11. Because the Claimants were not in Court on 4 April 2016, the Deputy Registrar fixed the objection for 27 April 2016.

12. Upon service of the Notice of Preliminary Objection, the Claimants filed an Answer to Preliminary Objection.

13. On 7 September 2016, the Deputy Registrar directed that the Preliminary Objection be placed before the Judge for directions and after two appearances, it was taken on 18 October 2016.

14. The Court has considered the objection and answer thereto and the oral submissions made in Court.

15. The Preliminary Objection here in the Court's considered view is destined for dismissal.

Evidence presented to Court

16. One, the Cause herein was served upon the Respondent and the Respondent filed a Reply to Memo of Claim on 11 June 2014 together with a List of Witnesses and witness statement. The witnesses were indicated as Jimmy Waweru and Danielle Waweru.

17. The issue of legal capacity or competence of the Respondent was not raised in the aforesaid Reply to Memorandum of Claim.

18. The filed witness statement of Jimmy Waweru indeed confirmed that the Claimants were employed by the Respondent which closed down at some point due to unforeseeable circumstances.

During oral testimony, one James Githinji Waweru testified on oath that he was a director of the Respondent and that the Claimants were employees of the Respondent in the kitchen department.

20. The witness did not all advert to any lack of legal personality on the part of the Respondent to be sued.

21. Mr. Maina who appeared for the Respondent explained away the failure to raise the defence either in the pleadings and or during testimony on an error or mistake which was only realised after judgment.

22. A party is under an obligation to place and or disclose its full case in good time and in the Court's view, the purported realisation by the Respondent that it had no legal capacity to be sued is meant to run rings round the Claimants and the Court.

Court functus officio

23. Two, the Court heard the Cause on the merits and a judgment was delivered way back in November 2015.

24. The options available to any party or the Respondent was to move Court to seek a review, setting aside of the judgment or to appeal to the Court of Appeal.

25. The process of preliminary objection as raised by the Respondent is unprecedented in practice and procedures of the Court and it was not even disclosed under what procedural or substantive law the objection was anchored on.

Legal capacity/competence in employment disputes

26. Lastly, the 2 authorities cited by the Respondent cannot help its cause because both related to applications by way of summons and one was in respect of an *ex parte* judgment.

27. Further, the 2 cases were determined on the basis of the common law while the present Cause is an employment dispute which is principally governed by the Employment Act, 2007.

28. Under section 2 of the Act, a *manager, agent, foreman or factor* of an employer is considered as an employer and there is nothing which would legally prevent an employee from moving against such person.

29. The legal logic/mischief of the said provision can be implied from the requirement for an employer to cause to be drawn up a written contract of service disclosing the name of the employer.

30. Many employers in the informal sector in this country were not (do not provide) providing employees with written contracts making it difficult for an employee to know the legal description of the employer.

Execution proceedings

31. The law and practice in this jurisdiction in cases of execution has always been to file objection proceedings where execution has issued against a party who was a stranger to the litigation

32. Although the Court was not called upon to determine the legal validity of the Deputy Registrars action to strike out the first Notice to Show Cause, it appears to the Court that the Notice was not irregular as the persons sought to be cited were directors of the Respondent.

Validity of judgment

33. Both parties herein participated in the proceedings and led evidence upon which the judgment of Court was anchored and it cannot become the mouth of the Respondent to contend that the judgment was (is) not valid just because it failed to raise a defence which it thinks was available to it.

34. In any case, had the defence been raised in time, the pleadings could easily have been perfected by appropriate amendments by the lay Claimants.

35. In conclusion, the Court finds that the preliminary objection by the Respondent is not only misguided but is an attempt to frustrate the Claimants, lay persons from asserting their rights, through procedural rigmarole.

36. The upshot being that the preliminary objection dated 2 April 2016 is dismissed with costs to each of the Claimants.

Delivered, dated and signed in Nakuru on this 28th day of October 2016.

Radido Stephen

Judge

Appearances

Claimants

in person

For Respondent

Mr. Maina instructed by Ikua, Mwangi & Co. Advocates

Court Assistant

Nixon/Daisy