



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 350 OF 2015

SUSAN MUMBUA.....1ST CLAIMANT
LORNA TSISIGA.....2ND CLAIMANT
TIVENDER KAUR JUTTILA.....3RD CLAIMANT
JOHANESS OLUOCH.....4TH CLAIMANT
JOAN WANGUI KARIUKI.....5TH CLAIMANT
HARRISON NDWIGA MURIUKI.....6TH CLAIMANT
DANIEL MUEMA MUTANGILI.....7TH CLAIMANT

VERSUS

NAVITAS LIMITED.....1ST RESPONDENT
AUSTRALIAN UNIVERSITY STUDIES
INSTITUTE (AUSI).....2ND RESPONDENT
AUSEDKEN LIMITED.....3RD RESPONDENT

RULING

1. The 1st and 2nd Respondent filed a Notice of Preliminary objection to the effect that the 2nd Respondent is not a legal entity capable of being sued in its name and that the 1st Respondent is a shareholder of the 3rd Respondent and is not liable for the 3rd Respondent's actions. The 1st and 2nd Respondents assert that there is no privity of contract between the Claimants and the 1st Respondent.
2. The preliminary objection was filed on 17th March 2015 when the application by the Claimants dated 9th March 2015 was coming up for *inter partes* hearing. The Court permitted the preliminary objection being raised though notice thereof had not been given as service was effected in Court while counsel for the Claimants was on his feet. He was ready to prosecute his application which

was unopposed.

3. The Court consented to the preliminary objection being raised to secure the ends of justice.
4. Mr. Bituga urged the preliminary objection. He submitted as that the 1st Respondent is sued as it has substantial shareholding of the 3rd Respondent. The 1st Respondent is a company incorporated in Australia while the 2nd Respondent is a college run by the 3rd Respondent. He stated that the 2nd Respondent is not a legal entity capable of being sued in its own name. He relied on the case of **Maurice Ooko Otieno v Mater Misericordiae Hospital [2004] eKLR** where the Court held that a party must have capacity to be sued for it to be sued. He submitted that the 1st Respondent is a mere shareholder of the 3rd Respondent and the shares held are immaterial on whether it should be sued for liabilities of the 3rd Respondent. He relied on the **Principles of Commercial Law** by Laibuta for the proposition that an entity once incorporated assumes independent legal existence. It matters not if you hold shares in the company you cannot be sued. He placed reliance on the case of **Priority Development Co. Ltd v Cianda Development Holdings & Another** where the Court held that even though the objector held 93% shares it was not to be held liable for the liabilities of the defendant. The case of **Mohamed Adan v Linksoft Ltd & Another** was cited for the position that a limited liability company is a different and separate legal entity from its shareholders and directors. This is also recognized by Section 16 of the Companies Act and for the foregoing reasons he urged the Court to strike out the claims against the 1st and 2nd Respondents with costs.
5. Mr. Kirimi for the Claimants opposed the preliminary objection and submitted that the Court should refer to the authority of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696**. He stated that the preliminary objection should be argued on the basis that all the facts pleaded are correct. He submitted that the Respondents were sued for the reason that the letters of appointments were issued by the 2nd and 3rd Respondent and in particular the 2nd Respondent, while the letters of termination have all been executed by the 1st Respondent. The payslips were issued by the 2nd Respondent. He submitted that it was wrong for counsel to submit that there is no privity of contract between the Claimants and the Respondent. The Claimants have sued the three to eliminate the mischief being perpetuated by the Respondents. He said that if the Claimants had only sued the 3rd Respondent the 3rd Respondent will argue that it has not terminated employment and if they sue only the 1st Respondent the 1st Respondent will argue that it did not employ the employees. If they sue the 2nd Respondent it will argue that it did not terminate the employment or that it is wholly owned by the 3rd Respondent. He submitted that it was only proper that the Claimants bring all the 3 who are represented by one firm of advocates to court. He relied on the case of **TAWU v Kenya Bus Services Ltd Cause No. 68 of 2006** where Rika J. emphasized that in employment law the objection by objector counts for nothing and proceeded to dismiss the preliminary objection. Counsel stated that the preliminary objection here is an exact replica. He stated that the authorities cited by the Respondents were distinguishable.
6. In a brief reprise Mr. Bituga submitted that in reply to the case of **Mukisa Biscuit** the Claimants had sued the 1st Respondent on account of substantial shareholding in the 3rd Respondent. In relation to the case of **TAWU v Kenya Bus** he submitted that there was no finding of fact or law that the principle of separate legal entities does not apply in employment law. He stated that the Court has not benefit of the argument advanced for the objector in the case.
7. The case of **Mukisa Biscuit v West End Distributors** is the locus classicus on preliminary objection. In the case Law J.A. stated a preliminary objection to be thus:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to

arbitration.”

Sir Charles Newbold, President stated thus in the same judgment:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. In the matter before the Court no proper objection was taken. The issues have not arisen out of pleadings but the submissions of counsel. This is markedly different from the **Mukisa Biscuit** case. The preliminary objection taken by the 1st and 2nd Respondent thus does not lie. As the application was unopposed and no grounds were filed, the order that would commend itself for the Court to make is one ordering the Respondents to deposit a sum of Kshs. 75,026,220.50 or a bond of Kshs. 75,026,220.50 from a reputable international bank within 7 days of today. This is because there has been no denial that the Respondents wish to leave the jurisdiction of the Court by the end of this month.
9. The parties are at liberty to apply.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of **March** 2015

Nzioki wa Makau

JUDGE