



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 156 OF 2013

GEORGE OKOTH OWUOR .....CLAIMANT

VERSUS

PARLIAMENTARY SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT

MABRUK J. MPONDA (*Immediate former Changamwe Constituency officer  
Manager*).....2<sup>ND</sup> RESPONDENT

## **RULING**

### **INTRODUCTION**

The 1<sup>st</sup> respondent (applicant) has filed the Notice of Motion dated 4/7/2013 asking for orders that she has been improperly enjoined as a defendant in this case and that her name should be struck out of the suit. In the alternative she prays for the striking out of the entire suit for disclosing no reasonable cause of action. The Motion is based on the grounds set out on its own body and the supporting affidavit of Agnes Kamoni sworn on 4/7/2013.

The claimant reacted by amending his claim to enjoin 3<sup>rd</sup> respondent after which he filed a replying affidavit opposing the Motion before the court. The second and third the respondent did not reply to the Motion but the latter opposed the Motion by filing written submissions.

### **APPLICANTS CASE**

It was submitted for the applicant that the contract of employment herein was between the claimant and the 3<sup>rd</sup> Respondent (the MP for Changamwe constituency dated 1/7/2008). She denied ever being a party to the said contract of employment and therefore a stranger to the said contract under the doctrine of privity of contract consequently no obligation accrued against her and in favour of the claimant under the said contract of employment.

According to the applicant, she was not the employer of the claimant; she was only facilitating the smooth relationship between the claimant and the 3<sup>rd</sup> respondent who was the employer herein. That the 3<sup>rd</sup> respondent is the one who was to pay his constituency office staff from the money advanced to him by the applicant for that purpose.

### **CLAIMANT CASE**

It was submitted for the claimant that Regulations 13 of the Parliamentary Service (constituency offices) Regulations 2005, provides for allocation of funds by the applicant to the 3<sup>rd</sup> respondent for the payment of emoluments for staff at the constituency office. The joinder of the applicant to this suit is therefore informed by the obligation created by the said regulation 13 *supra*. According to the claimant the joinder is necessary so as to call upon the applicant to confirm to the court whether or not she complied with the said Regulation 13 and whether or not the 3<sup>rd</sup> respondent accounted for money disbursed to him as required under the Regulation 34 *supra*.

It was further submitted that Regulation 36 *supra*, mandates the secretary to the applicant to satisfy himself that all the handing over procedures have been fully complied with before making last payment of salaries and allowances to the outgoing constituency office manager and other staff.

In view of the foregoing the claimant maintains that the joinder of the applicant to this suit was necessary for fair, just, effective and complete determination of the claim. It was further submitted that the contract of employment was signed by the 3<sup>rd</sup> respondent on behalf of the applicant who had the power to interfere with it and who would benefit from damages for any breach caused by the claimant.

### **3<sup>RD</sup> RESPONDENT'S CASE**

He submitted that the applicant was the employer of the claimant because she is the one who used to pay his salaries. He therefore opposed the Motion before the court.

### **ANALYSIS AND DETERMINATION**

The issues for determination out of the Motion, affidavits and submissions made by the parties are:

- a. **Whether the claim against the applicant should be struck out for misjoinder or**
- b. **Whether the suit should altogether be struck out for not disclosing a reasonable cause of action.**

The Second option seems to have been one taken by events after the amendment of the suit which enjoined the 3<sup>rd</sup> respondent to the suit. Judging by the arguments from both the applicant and the 3<sup>rd</sup> respondent, there is a reasonable cause of action instituted by the claimant. The dispute is therefore not whether the claimant has any cause of action, but rather who among the three respondents is the correct defendant to be sued. The two respondents are not saying that there is no reasonable claim by the claimant. They are only engaging in a ping pong of blame regarding who should shoulder the claim by the claimant.

### **IS THE CLAIM AGAINST THE APPLICANT INCOMPETENT FOR MISJOINDER**

The answer is no. Whereas the court appreciates the doctrine of privity of contracts, it could appear that the applicant deliberately created an obligations and benefits in the contracts made between the claimant and the 3<sup>rd</sup> respondent. Such obligations are contained in the PSC regulations and the schedule to the contract. As confessed by the learned counsel for the applicant the contract of employment was drawn by the applicant as a standard contract for all constituencies.

Whereas the court appreciates that the claimant should have first verified with the applicant whether his dues were released to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents before enjoining her to the suit, the court also blames the applicant for not exhibiting her affidavit, the said proof of disbursement to the court.

On ground of such non-disclosure on the applicant's part and the failure by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent to confirm that they received the claimants dues and paid to him, this court finds that the three respondents herein have an obligation to this court to tender evidence on whether the claimant is entitled to the dues sought and who among them should be held liable.

**DISPOSITION**

In view of the mater aforestated, the court finds that it is necessary to have the applicant enjoined as a respondent in this case. The Motion dated 4/7/2013 is therefore dismissed without costs.

**Dated, Signed and delivered this 14<sup>th</sup> February 2014.**

**O.N. Makau**

**Judge**