



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 2174 OF 2014**

AGNES NALIAKA MASIKA .....CLAIMANT

**VERSUS**

RUKIA SUBOW .....1<sup>ST</sup> RESPONDENT

ALICE KIRAMBI.....2<sup>ND</sup> RESPONDENT

NAOMI OKUL.....3<sup>RD</sup> RESPONDENT

**RULING**

This case was initially filed in the High Court of Kenya at Nairobi as High Court Civil Case NO. 229 of 2012. The case was transferred to this court by an order of Justice H.P.G Waweru delivered on 6<sup>th</sup> July 2012 by virtue of Article 162 (2) (a) of the Constitution and Section 12(1) of the Industrial Court Act which grant the Industrial Court exclusive jurisdiction in employment and labour relations matters.

On 17<sup>th</sup> October 2012 the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed a preliminary objection on the following grounds:-

1. That the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are not proper parties to this suit by virtue of the provisions of Section 12 of the Non-Governmental Organizations Co-ordination Act. No. 19 of 1996.
2. That the Claimant's Claim is incompetent and improperly before court and should be struck out.
3. That the Claimant's claim reveals no cause of action, reasonable or otherwise as against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.
4. That the claim is fatally and incurably defective for non-compliance with the mandatory provisions of law and/or procedure.
5. That the claim is otherwise misconceived and/or an abuse of the process of the court.

The Preliminary objection was heard on 20<sup>th</sup> March 2014.

Mr. Mukele instructed by Mukele Moni & Company Advocates appeared for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, Ms. Oduor instructed by Nungo Oduor & Waigwa advocate appeared for the 2<sup>nd</sup> Respondent and Ms. Guserwa instructed by J.A. Guserwa & Company Advocates appeared for the Claimant.

Mr. Mukele submitted that the claim before court is incompetent. That the Respondents are sued as

officials of Maendeleo Ya Wanawake being National Chairman, National Secretary and National Treasurer respectively.

That Maendeleo Ya Wanawake is a Non-governmental Organization (NGO) registered under the Non-Governmental Organizations Co-ordination Act. (the Act). That under Section 12 of the Act Maendeleo Ya Wanawake is a body corporate capable of suing and being sued in its own name. Mr. Mukele submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are not proper parties to this suit, that the Claimant ought to have lodged her claim against

Maendeleo Ya Wanawake and not its officials. That there is no provision in law for Respondents to be sued in their representative capacities.

Mr. Mukele relied on the following authorities:-

1. Shirika La Kusaidia Watoto Wa Kenya alias Faida Kenya & 2 others V. Rhoda Rop & Another [2005] eKLR.
2. Kenya National Union of Nurses V AG Industrial Court Cause No. 1049 of 2012.

Mr. Mukele submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are not proper parties to the claim and urged the court to strike out the case against them with costs.

Mr. Osiemo holding brief for Ms. Oduor supported the submissions by Mr. Mukele. He submitted that the statement of Claim states the Claimant was appointed by Maendeleo Ya Wanawake and not the 2<sup>nd</sup> Respondent. That the Claimant was not working for the 2<sup>nd</sup> Respondent. That the 2<sup>nd</sup> Respondent has been enjoined in these proceedings improperly and that the whole case ought to be struck out on that basis alone. That the new Public Benefits Organizations Act which will replace the Act has similar provisions. He urged the court to strike out the claim with costs to the 2<sup>nd</sup> Respondent.

In response, Ms. Guserwa on behalf of the Claimant opposed the Preliminary Objection on the grounds that it is misconceived and is based on a misunderstanding of the law. She submitted that the statement of claim clearly defines the capacities in which the Respondents have been sued as national officials of Maendeleo Ya Wanawake. That none of the Respondent's counsels denied that the Respondents hold those offices. That Section 12 (3) of the Act uses the words "capable of being sued". That the parties who made the decision to terminate the employment of the Claimant have been named and they are the persons who will give evidence. That no law has been cited that states that officials cannot be sued.

On the authorities, Ms Guserwa submitted that they are distinguishable. She submitted that in the case of Shirika La Kusaidia Watoto Wa Kenya case (supra) the 2 plaintiffs did not reveal their capacity and why they intended to be enjoined. The second Authority was by an unregistered body which was not yet a trade Union and was therefore a busy body.

Ms. Guserwa further urged the court to apply the principle in Article 159 of the Constitution which requires the court to apply substantive justice. She urged the court to dismiss the preliminary objection.

I have considered the arguments of the parties on the preliminary objection and the cases cited by the counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

Both the Industrial Court Act and the Industrial Court (Procedure) Rules are silent on the issue of misjoinder of parties. In such cases we seek guidance from the Civil Procedure Act and the Civil Procedure Rules. Order 1 of the Civil Procedure Rules provides for parties to suits.

Rule 5 states that it shall not be necessary for all Defendants to be interested to all reliefs sought against him. Rule 7 provides that if the Plaintiff is not sure as to the persons from whom to get redress he may join two or more defendants to a claim. Rule 9 provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties and the court may deal with the matter before it as regards the rights

and interests of parties before it. Rule 10 provides for addition and substitution of parties.

The Employment Act defines an employer as “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the **agent**, foreman, manager or factor of such person, public body, firm, corporation or company.”

The Respondents herein have admitted that they are officials of Maendeleo Ya Wanawake as described in the Memorandum of Claim. They therefore fit into the definition of the employer as agents of the employer.

They have therefore not been misjoined in the claim as the claim properly sets out the capacity in which they have been sued. Rule 5 of the Civil Procedure Rules states that not all Defendants have to be interested in all the reliefs sought.

The fact that the reliefs prayed for are not against them does not make the suit defective as provided in Rule 9. The court will deal with them in the capacity in which they have been sued.

I have considered the 2 authorities cited and find both of them not relevant to the issue herein as they deal with the capacity of the Claimant to sue and not the Respondent or Defendant. They deal with the issue of *locus standi* which is not applicable to a person defending a suit or a claim.

For the foregoing reasons I find the Preliminary Objection without merit and dismiss the same. The Claimant is however well advised that where an agent acts for a known principle as is the case in the present case, it is advisable to join the principle as the Respondents herein would only be responsible vicariously and not personally.

Orders accordingly.

Read and signed in open Court this 9<sup>th</sup> day of June, 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

Ms. Mbugua holding brief for Ms. Guserwa for Claimant

Mr. Onyore for 1<sup>st</sup> & 3<sup>rd</sup> Respondent/Applicants

Mr. Onyore holding brief for Oduor for 2<sup>nd</sup> Respondent