



IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 268 OF 2013

M W M .....CLAIMANT

VERSUS

M F S... ..RESPONDENT

RULING

INTRODUCTION

1. The Notice of Motion before the court is brought by J M K (applicant) and it is dated 10/6/2014. It basically seeks the following orders:
  - a. **Leave to join the applicant as a respondent in the suit.**
  - b. **Review and/or setting aside of this court's judgment dated 30/5/2014.**
  - c. **leave to issue to the applicant to file defence to the suit.**
  - d. **Fresh trial of the suit.**

The Motion is supported by the applicant's affidavit sworn on 10/6/2014.

The gist of the Motion is that, although the applicant was not party to the suit, he was adversely mentioned both in pleadings, proceedings and judgment which was a contravention of the doctrine of fair trial/hearing with respect to him.

2 The Motion is opposed by the claimant vide the grounds of opposition and replying affidavit dated 20/6/2014. The gist of the opposition is that the Motion has not met the threshold for reviewing or setting aside of the impugned judgment. The claimant has also raised preliminary objection on ground of *locus standi*, *functus officio* and privity of contract.

3 The respondent replied the Motion by the affidavit sworn by Boniface Muthusi on 27/6/2014 which neither expressly opposed nor supported the applicant's Motion.

BACKGROUND

4 This suit was filed by the claimant in person on 24/8/2013. The respondent filed her response on 13/9/2013 through Messrs Mogaka Omwenga & Mabeya Advocates. On 16/9/2013 the suit was mentioned for direction before this court when the parties fixed the suit for hearing on 22/10/2013. Before the date set for the hearing the claimant appointed counsel who sought leave and amended the claim. The counsel for the respondent consented to the leave sought by the claimant and also amended

the response.

5 The suit was mentioned for pretrial direction on 14/11/2013 and 26/11/2013 when the parties confirmed that the pleadings were closed and fixed the suit for hearing on 18/2/2014 when each was to call one witness. The respondent never suggested that the applicant was a necessary party to the suit. The court also did not see the need to join him because no orders were sought against him.

6 On 18/2/2014, the claimant was ready to proceed with her hearing but the counsel for respondent sought adjournment because her witness was away. The counsel also filed list of documents on the same day and sought leave that they be accepted on record. Despite objection by the claimant's counsel, the court granted adjournment to the defence and the parties agreed to come for hearing on 25/2/2014.

7 On the said 25/2/2014, the claimant's case was heard and closed. The defence counsel again sought adjournment on ground that his claimant had gone to Kisumu for urgent business. She never disclosed the identity of the witness and no written statement had been filed. The application for adjournment was declined after the claimant's counsel opposed it strongly. The counsel then closed the defence case without calling any witness. Thereafter the counsel for both parties filed written submissions and the court pronounced itself on 30/5/2014 vide the impugned judgment.

### **ANALYSIS**

8 The court has carefully read and considered the Motion, Affidavits and submissions filed. It is not in dispute that the alleged sexual harassment and subsequent dismissal of the claimant from employment took place when the applicant was the Managing Director and the Chief Executive Officer of the respondent. It is also not in dispute that the claimant had complained about sexual harassment by the applicant to the Board immediately after her dismissal and much earlier than pleading it in this suit. It is also not in dispute that the applicant was at all material times aware of this case having been the one who gave instructions to advocates for the respondent according to the supporting affidavit. The issues for determination in the Motion are:

- a. **Whether the court has jurisdiction to entertain the Motion.**
- b. **Whether the court is *functus officio***
- c. **whether the applicant has *locus standi* to bring the Motion.**
- d. **Whether the Motion meets the threshold for reviewing or setting aside the impugned judgment.**
- e. **Whether the order sought should issue.**

### **Jurisdiction**

9 There is no doubt that this court has jurisdiction to review and set aside its own decisions as per Section 12 of the Industrial Court Act (ICA) and rule 32 of the Industrial Court Procedure Rules (ICPR). The applicant has however not demonstrated that the court has jurisdiction to entertain an application by an interested party (necessary party as he describes himself) to be enjoined as a respondent or otherwise at all after judgment. The applicant has correctly submitted that the ICA and ICPR do not provide for joinder of parties and sought refuge under the Civil Procedure Act and the Rules. The court has perused the relevant provision being Order 1 rules 14 but that law only allows for joinder of parties before trial. Consequently the court finds that it lacks jurisdiction to entertain the application for joinder of the applicant because it is being brought after judgment has already been delivered.

10 In addition to the foregoing, the court understands the grounds of the Motion generally and (f) in particular to say that the court erred when like the claimant and the respondent, made no attempt to enjoin the applicant as an essential party or summon him as a witness. With tremendous respect, that kind of argument is best suited for appeal as opposed to review. The court appreciates that the applicant has the desire to be heard but unfortunately cases have their life cycle and once it is complete the court has to down its tools. The applicant will also have to appreciate that the proceeding before the court

were adversarial and the court's role is that of an impartial umpire. The court did not see any reason to enjoin the applicant because neither the claimant nor the respondent sought any relief from him even after the amendment of the pleadings.

11 The fundamental consideration for joinder of a person as a defendant is whether the party seeking the joinder has a right of relief against the intended new defendant. The second factor to consider is whether failure to join the intended party (necessary party) would hinder the court from making an effective decree. In the present case the foregoing fundamental considerations are not applicable because no orders were made against the applicant and the decree passed by the court is enforceable against the respondent without involving the applicant. Consequently the court does not see the reason to exercise its discretion as sought by the applicant in this present motion.

### **DISPOSITION**

12 In view of the reasons stated above the applicant's Notice of Motion dated 10/6/2014 is dismissed with no orders as to costs.

**Dated, signed and delivered this 3<sup>rd</sup> October 2014**

**O. N. Makau**

**Judge**