



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**CAUSE NO. 137 OF 2014**

**JOSEPHAT MARK SHIMENGA..... CLAIMANT**

**v**

**THE MANAGING DIRECTOR, ROOTS  
ACADEMY.....RESPONDENT**

**RULING**

1. The Claimant commenced legal proceedings on 6 May 2014 against a Respondent named as The Managing Director Roots Academy. Notice of Summons and a copy of the Memorandum of Claim were served upon a Sarah Kiarie, mentioned in the affidavit of service as Head Teacher, Roots Academy.
2. On 5 June 2014, the firm of Mirugi Kariuki & Co. Advocates filed a Response on behalf of the Respondent. The Response denied that the Respondent was the employer of the Claimant, the Respondent being a former colleague of the Claimant.
3. On 9 June 2014, the Claimant filed an Amended Memorandum of Claim in which the Respondent was stated as Roots Academy Ltd.
4. When the Amended Memorandum of Claim was served upon Roots Academy Ltd, it instructed Mirugi Kariuki & Co. Advocates and the firm filed a Notice of Preliminary Objection on 30 June 2014.
5. The objection was

1. THAT the parties are bound by their own pleadings.

2. THAT the amendments were made out of time and without leave of Court.

3. THAT the Claimant had instituted suit against the wrong party and cannot therefore seek to breathe life into a non-existent suit and sue another party.

4. THAT the present suit had no feet to stand hence cannot be the basis of another suit.

5. THAT the cause is bad in law, misconceived and does not disclose a cause of action against the Respondent.

6. THAT the Claimant had no claim as against the Respondent and the suit was a non-starter and cannot therefore form the basis of another suit.

6. This objection is the subject of this ruling.
7. Mr. Kahiga for the Respondent submitted that the initial appearance was made on behalf of the Managing Director of Roots Academy and that the amendment brought on board Roots Academy

- Ltd. It was submitted that the new Respondent had no relationship with the initial Respondent because under company law, individuals and companies are distinct.
8. Counsel also submitted that no leave was sought to amend the Statement of Claim.
  9. Mr. Kahiga cited the authorities of *George Kamau Kimani & 5 others v County Government of Trans Nzoia (2014)* eKLR and other authorities filed with the Notice of Objection.
  10. Mr. Ngamate for the Claimant opposed the objection. He stated that an order was made on 20 June 2014 allowing the Claimant to serve the Amended Memorandum of Claim and submitted that companies are run by people and that the cause of action had not changed and that no injustice would be occasioned to the initial Respondent. He urged that amendments should be freely allowed.
  11. He further submitted that costs could compensate any prejudice to the Respondents. He cited the case of *John Gitau Mungai v Stephen Thuku Kabebe & 3 others (2014)* eKLR.
  12. The Court has considered the authorities, and relevant statutory provisions on amendments, which were not mentioned by the parties.
  13. The Industrial Court (Procedure) Rules, 2010 have a lacuna as to the manner of amending pleadings as in the present matter. Therefore, it is open to the Court to borrow a leaf from the Civil Procedure Act and Rules.
  14. It is correct that the Amended Memorandum of Claim was filed without leave. Was leave necessary?
  15. The Respondent had filed a Response on 5 June 2014. The pleadings therefore were deemed closed 14 days after service of the Response or 14 days after service of Reply to Response.
  16. The Amended Memorandum of Claim was filed on 9 June 2014, just 4 days after filing of the Response. It is clear that the pleadings had not closed and leave was not required.
  17. The objection on the ground of failure to secure leave must therefore fail.
  18. The Respondent also raised an objection on the ground the suit was non-existent and had been instituted against a wrong party.
  19. Pursuant to order 1 rule 10 and order 8 rule 3(3) of the Civil Procedure Rules, an amendment may be allowed notwithstanding that the effect would be to substitute a new party.
  20. Because of the clear statutory provisions, the Court reaches the conclusion that grounds 3, 4 and 5 of the Notice of objection are frivolous. They lack merit.
  21. The Court therefore orders the preliminary objection to be dismissed with costs in the Cause.

**Delivered, dated and signed in open Court in Nakuru on this 5<sup>th</sup> day of December 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Ngamate for Claimant

Mr. Kahiga for Respondent