



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 180 of 2012**

**DAVID B. SIMIYU MUSUNGU.....CLAIMANT**

**VERSUS**

**K.K. SECURITY LIMITED .....RESPONDENT**

**RULING**

This is a ruling on a Preliminary Objection (P.O.) raised by the Respondent to the suit. The Preliminary Objection is contained in paragraph 1 and 2 of the Response (defence). The grounds raised are:-

- (a) The Respondent is sued in the wrong name.
- (b) The suit is totally defective and the Claimant lacks *Locus standi* for non-compliance with the statutory provisions.

The parties agreed to file written submissions which I have carefully considered in this ruling. I have also carefully perused the pleadings and all the annexed exhibits.

In dealing with the first ground of the Preliminary Objection, I have perused the letter for dismissal and the court proceedings marked Appendix 2 and 3 in the Memorandum of Claim. They all show that the Claimant was employed as a security guard by KK Security Limited. There seems to be many companies with almost similar names and possibly ownership referred to as KK Group of Companies in the Letterhead.

The letter for dismissal has a letterhead of KK Security. Whether that was a mere logo, I doubt because the letter is signed by the Human Resource Manager for KK Security Ltd. That name cannot be treated as Kenya Kazi Services Limited. By both a casual or diligent look, the two appear as two different persons one of which may be strange to the Claimant.

In my view, the person applying mischief is the employer. He is the one who misled the employee on his identity. The employer is the one obligated under the law to prepare a contract in writing and explain to the employee all the terms and to keep updating him on any changes.

The letter of employment, Appendix 1 was by a person called Emergency Assistance Radio Services Ltd (EARS). This must be the one who changed name to either KK Security Ltd or Kenya Kazi Services Limited. The employer should have come clear and updated the Claimant to his understanding

on his change of identity. There is no doubt as to the correct name of the Claimant's employer and in my view that is a triable issue. Where there is doubt as to the identity of the defendant, Order 1 Rule 10 provides for substitution or joinder of parties as defendants for purposes of doing substantive justice. This court is not bound by the Civil Procedure Rules, but I do not see any just reasons to warrant me take a contrary view.

Consequently, I find that the mischief can be cured by either an amendment to correct the error in the name as per the Certificate of Incorporation or by joinder of the alleged 'correct' name as another respondent to the claim. Whichever option is taken by the Claimant, he will be bound to serve the new Respondent with summons to enter appearance. In this case, I recall granting leave to amend claim on 25-7-2012 which I believe cures the mischief in issue.

As regards *locus standi*, I do not doubt that the Claimant has a right to be heard by this court on his employment dispute filed against his former employer. It is his constitutional rights provided he adheres to the rules of procedure for this court which I find, he complied with.

I will not deal with the grounds of Limitation and duplicity of suits raised in the submissions because I believe they are not part of the initial Preliminary Objection in paragraph 1 and 2 of the response. In addition the issue of limitation should only be raised by the new respondents once he enters appearance after a joinder. As regards the duplicity of suits, I believe that issue should be raised in the subordinate court suit which was filed subsequent to this suit.

Consequently, I dismiss the Preliminary Objection with no orders as to costs. I further direct the Claimant to effect service of the pleadings and summons to enter appearance on the 2<sup>nd</sup> Respondent.

**Orders accordingly.**

**DATED and DELIVERED** at Nairobi this 16<sup>th</sup> day of November, 2012.

Onesmus N. Makau  
**JUDGE**