**NMN v Board of Directors, Uhai East Africa Sexual Health and Rights Initiative (Uhai Eashri) & 2 others (Civil Suit E077 of 2022) [2024] KEHC 823 (KLR) (Civ) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 823 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT E077 OF 2022**

**CW MEOLI, J**

**JANUARY 31, 2024**

**BETWEEN**

**NMN ..... PLAINTIFF**

**AND**

**BOARD OF DIRECTORS, UHAI EAST AFRICA SEXUAL HEALTH AND RIGHTS INITIATIVE (UHAI EASHRI) ..... 1ST DEFENDANT**

**UHAI EAST AFRICA SEXUAL HEALTH AND RIGHTS INITIATIVE (UHAI EASHRI) ..... 2ND DEFENDANT**

**DR. SWB ..... 3RD DEFENDANT**

**RULING**

1. NMN (hereafter the Plaintiff) sued the Board of Directors, Uhai East Africa Sexual Health & Rights Initiative (UHAI EASHRI), Uhai East Africa Sexual Health & Rights Initiative (UHAI EASHRI) and Dr SWB (hereafter the 1st, 2nd & 3rd Defendant/Defendants) seeking inter alia a declaration that the 1st Defendant's action in expelling the Plaintiff from the 1st Defendant board was un-procedural, unconstitutional, illegal, null and void; a declaration that the 1st and 3rd Defendant are culpable for defamation; damages in the sum of USD 500,000 for breach of contractual duties and defamation and for psychological trauma caused by the Defendants ; and an order compelling the Defendants jointly and severally to furnish the Plaintiff with a written apology.

2. The Plaintiff avers that through a letter of appointment dated 19.02.2021 the 1st & 2nd Defendant appointed him to serve as a board member of the 2nd Defendant for a three (3) year term effective 22.02.2021 to 22.02.2024, renewable for one term. That in December 2021, the 2nd Defendant extended an invitation to the Plaintiff through the 3rd Defendant to attend a forum that was to be held

in South Africa from 18.12.2021 but being unavailable, the Plaintiff nominated an employee from an organization he leads to represent him in the conference.

3. The Plaintiff further avers that unknown to him, the 3rd Defendant's hidden intention was to initiate an intimate relationship with the Plaintiff and his partner, which intention clearly conflicted with her duties and responsibilities as a co-executive director and board member of the 2nd Defendant. That without due regard to her position, the 3rd Defendant further contacted the Plaintiff vide WhatsApp and persisted in her bid to initiate an intimate relationship, despite the Plaintiff raising concerns over possible conflict of interest as both parties were board members of the 2nd Defendant.

4. The Plaintiff goes on to aver that the 3rd Defendant thereafter requested to visit his house in Kampala as from 21.12.2021, which request he accepted but the 3rd Defendant used the opportunity to renew her pursuit of a romantic relationship despite his earlier rejection of her advances. That on or about 23.12.2021 the Plaintiff found the 3rd Defendant in bed with his partner resulting, causing him mental breakdown and an altercation, albeit non-violent ensued. He asserts that consequently, he decided to tender his resignation from the 2nd Defendant's board effective 30.01.2022.

5. He further pleaded that the Plaintiff's professional relationship with the 3rd Defendant deteriorated thereafter. Resulting in the latter making to her co-Defendants allegedly false and defamatory claims of verbal abuse and physical assault against the Plaintiff. That the Plaintiff had upon medical evaluation retracted his letter of resignation, leading to the meeting on 18.01.2022 with the co-chairs of the 1st Defendant, during which he received assurances that his withdrawal of resignation had been received and he would continue to execute his duties in his capacity as a board member of the 1st Defendant.

6. The Plaintiff asserts that on or about the 26.01.2022, the 3rd Defendant filed additional complaints with the 1st Defendant in respect of which the Plaintiff was invited to attend an emergency meeting 31.01.2022. That he was not accorded an opportunity to be heard and was later asked to sign resignation documents; that his subsequent letter to the 1st & 2nd Defendant seeking clarity on his summary did not elicit a response; and therefore the 1st and 2nd Defendants are in breach of their contractual duties.

7. On 10.06.2022 the 1st and 2nd Defendant filed a joint statement of defence denying the key averments in the plaint and asserting that the Plaintiff's request to retract or rescind his notice of resignation was not accepted and no assurances were issued to the contrary. Hence the notice of resignation took effect as of 30.01.2022.

8. The 3rd Defendant prior to filing her statement of defence on 03.10.2022 in which she denies the key averments in the Plaint, filed a motion dated 21.06.2022 seeking inter alia that this court be pleased to strike out the 3rd Defendant as a party to this suit. The motion is expressed to be brought pursuant to Section 1A, 1B, 3 & 3A of the *Civil Procedure Act* (CPA), Order 1 Rule 10(2) and Order 51 Rule 1 of the Civil Procedure Rules (CPR inter alia, and anchored on the grounds on the face of the motion, as amplified in the supporting affidavit sworn by 3rd Defendant.

9. She swore that the suit is scandalous, frivolous, vexatious and an abuse of the court process. That the Plaintiff's claim is founded on purported defamation and dismissal as a board member of the 1st Defendant. She goes on to depose that the defamation part of the suit ought to fail as the Plaintiff has failed to reproduce and or disclose the purported defamatory words published by her to the 1st & 2nd Defendants, and that it is not enough to merely describe the substance, purpose or effect of the words complained of without setting them out verbatim in the plaint.

10. As concerns the second limb of the Plaintiff's claim, she denies any role in the appointment of the Plaintiff hence contractual obligation to the Plaintiff. In her view, there is no reasonable cause of action against her, and her name should be struck out, the suit being vexatious, without foundation, and a waste of judicial time.

11. The Plaintiff opposed the motion by way of replying affidavit dated 10.08.2022. He attacks the motion as misleading, ill-informed and a deliberate effort by the 3rd Defendant to defeat and frustrate the matter. That there was no misjoinder of the 3rd Defendant as she has been sued in her personal capacity on account of her defamatory statements as particularized in the plaint. He avows that Order 1 Rule 9 of the CPR provides that no suit shall be defeated by reason of misjoinder or non-joinder of a party and the suit is not an abuse of the court process as it discloses a reasonable cause of action against the 3rd Defendant. In conclusion, he asserts that the 3rd Defendant is a necessary party for the effectual and complete adjudication of the issues raised in the suit.

12. The 3rd Defendant thereafter filed a Preliminary objection dated 11.01.2023 in respect of the Plaintiff's suit premised on the sole ground that this court lacks jurisdiction to hear and determine the matter pursuant to the provisions of Article 162(2)(a) of the *Constitution* and Section 87 of the *Employment Act*. Therefore, the suit ought to be dismissed with costs. On 27.06.2023, directions were taken to dispose of the 3rd Defendant's motion and preliminary objection by way of written submissions. On that occasion, counsel for the 1st and 2nd Defendants intimated to the court that they would not be participating in the instant proceedings.

13. Counsel for the 3rd Defendant in addressing the motion dated 21.06.2022, relied on Order 1 Rule 10, Order 2 Rule 7(1) of the CPR and Bullen & Leake and Jacobs Precedents of Pleadings, Sweet & Maxwell, Vol 1, 17th Ed, at Pg. 636 to submit that the Plaintiff has failed to reproduce and or disclose the purported defamatory words published by the 3rd Defendant to the 1st & 2nd Defendant, the result being that no sustainable cause of action is pleaded against the 3rd Defendant. On the Plaintiff's purported dismissal, it was submitted that from the Plaintiff's own averments in the plaint, the 3rd Defendant had no power to sanction the termination of the Plaintiff's contract, nor did she have a role in the Plaintiff's appointment hence no contractual obligation existed between the 3rd Defendant and the Plaintiff.

14. While calling to aid the decision in Werrot & Company Ltd & Others v Andrew Douglas Gregory & Others [1998] eKLR, counsel contended that the Plaintiff's pleadings are scandalous and that the 3rd Defendant is not a necessary party to the suit, in the absence of the right of relief in respect of the Plaintiff's cause of action, as pleaded against the 3rd Defendant. The court was thus urged to exercise its inherent power to strike out the 3rd Defendant's name from the proceedings by allowing the motion as prayed.

15. Submitting on the preliminary objection, counsel anchored his submissions on the of-cited decision of Mukisa Biscuit and the Supreme Court decision in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR as to the purport and effect of a preliminary objection. Citing the provisions of Article 162(2)(a) of the *Constitution*, Section 2 & 87 of the *Employment Act* and Section 12 of the *Employment and Labour Relations Court Act*, counsel argued that from the Plaintiff's pleadings it is not in dispute that the latter was contracted by the 2nd Defendant as a director, and remunerated for his services in the form of commissions, allowances, vacation pay and or any other advantages offered by the 2nd Defendant. Hence the jurisdiction regarding his claim arising from such employment lies with the Employment and Labour Relations Court.

16. In supporting his above arguments, counsel cited the English decision in H.L Bolton (Engineering) Co. Limited v T.L Graham & Sons Limited (1957) 1 QB 159 was relied on, alongside the cases of

Christine Adot Lopeiyo v Wycliffe Mwathi Pere [2013] eKLR, Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] 1 KLR and Prof. Daniel N. Mugendi v Kenyatta University & 3 Others, Civil Appeal No. 6 of 2012. The court was thus urged to allow the motion and or preliminary objection with costs.

17. Counsel for the Plaintiff, submitting the motion dated 21.06.2022, contended that the 3rd Defendant has been sued in her personal capacity on grounds of her defamatory statements regarding the Plaintiff. He relied on the case Kingori v Chege & 3 Others [2002] 2 KLR 243, and further asserted that the court's power to strike out parties who have been wrongfully enjoined is discretionary. Pointing out that the 3rd Defendant has not met the threshold required for the exercise of such discretion, here citing the decision in Civicon Limited v Kivuwatt Limited & 2 Others [2015] eKLR.

18. Counsel further cited the provisions of Order 1 Rule 9 of the CPR, the decisions in Zephir Holdings Limited v Mimosa Plantations Limited & 2 Others [2014] eKLR, William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others [2016] eKLR and Local Building & Construction Limited v Institute of the Blessed Virgin Mary Loreto Msongari & 2 Others [2019] eKLR to submit that the 3rd Defendant is a necessary party to the proceedings. That misjoinder of the 3rd Defendant ought not defeat the suit.

19. Addressing the preliminary objection, counsel equally anchored his submissions on the decision of-cited decision of Owners of Motor Vessel "Lillian S" (supra), Article 162(2)(a) of the *Constitution* and Section 2 & 87 of the *Employment Act* to argue that having been appointed as a board member, the Plaintiff was not an employee of the 2nd Defendant for wages or salaries. Hence, the Plaintiff's appointment letter did not constitute a "contract of service" within the meaning of the *Employment Act*. The decision in Rift Valley Water Services Board & 3 Others v Geoffrey Asanyo & 2 Others, Civil Appeal No 60 of 2015 as consolidated with Civil Appeal No. 61 of 2015 was called to aid in that regard. It was further submitted that by dint of Article 165(3) of the *Constitution* this court has original unlimited jurisdiction in civil matters. In conclusion, counsel cited Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate & 4 Others [2013] eKLR to urge the court to dismiss both the motion and preliminary objection with costs.

20. The court has considered the material canvassed in respect of the motion and preliminary objection alongside the rival submissions of the parties. The court proposes to first deal with the 3rd Defendant's Preliminary Objection (PO). The 3rd Defendant's PO is premised on Article 162(2)(a) of the *Constitution* and Section 87 of the *Employment Act*. Article 162 of the *Constitution* provides that; -

> "(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
>
> (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
>
> (a) a) employment and labour relations; and
>
> (b) the environment and the use and occupation of, and title to, land.
>
> (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
>
> (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article."

21. Section 87 of the *Employment Act* provides that;-

> "(1) Subject to the provisions of this Act whenever—
>
> (a) An employer or employee neglects or refuses to fulfill a contract of service; or
>
> (b) Any question, difference or dispute arises as to the rights or liabilities of either party; or
>
> (c) Touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.
>
> (2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).
>
> (3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute."

22. The gist of the 3rd Defendant's PO is that the dispute herein is primarily an employer-employee dispute which ought to be heard before the Employment and Labour Relations Court. In Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969) EA 696, Law J A. stated:"

> "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....
>
> A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop."

23. In the case of Oraro v Mbaja [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that:

> "A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.
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> Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and

it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

See also Kigwor Company Limited v Samedy Trading Company Limited [2021] eKLR.

24. In Mulemi v Angwenye & Another (Civil Appeal 170 of 2016) [2021] KECA 214 the same court further distilled the definition of a preliminary objection as elucidated in Mukisa Biscuits (supra) by stating as follows: -

> " i) It must be a pure point of law;
>
> ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
>
> iii) If argued as a pure point of law, it may dispose of the suit;
>
> iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court's discretion".

25. The key objection raised by the 3rd Defendant relates to the jurisdiction and in a proper case, such an objection constitutes a pure point of law. The locus classicus on the question of jurisdiction is the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

26. As held in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR a court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. It would appear that the 3rd Defendant's jurisdictional challenge arises from the averments by the at paragraphs 5, 6 & 32 of the Plaint and prayer (c) of the reliefs as sought against the Defendants. To the following effect: -

> "
>
> "4. ....
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> 5. Through a letter of appointment dated the 19th day of February, 2021 the 1st and 2nd Defendants appointed the Plaintiff to serve as a board member of UHAI East Africa Sexual and Health Rights Initiative (UHAI EASHRI) for a three (3) year term effective 22nd February, 2021 to February, 2024 subject to one term renewal. Since his appointment to the board, the Plaintiff demonstrated due diligence and positive performance in his roles in that capacity.
>
> 6. Upon receipt of the said letter of appointment the Plaintiff accepted his appointment to be a member of the 1st Defendant in good faith after which

the 1st and 2nd Defendants undertook to supply the Plaintiff with a copy of the board manual and other constitutive documents governing the Board of Directors detailing the rights and duties of the board members of the 1st Defendant. The 1st and 2nd Defendants further undertook to provide the Plaintiff with an orientation schedule to enable the Plaintiff to familiarize himself with the procedures, policies, roles, and responsibilities of the Board of Directors of the 2nd Defendant; UHAI East African Sexual and Human Rights Initiative....

32. The Plaintiff avers that by reason of their conduct and handling of the Plaintiff, the 1st and the 3rd Defendants are in breach of their contractual duties owed to the Plaintiff.

33. .....

REASONS WHEREFORE the plaintiff prays for Orders and Judgment against the defendants for:-

a) .....

b) .....

c) The Plaintiff be awarded a total of United States Dollars 500,000 for breach of contract and defamation.

d) ....." (sic)

27. It is further the Plaintiff's pleaded case that in respect of the emergency board meeting held on 31.01.2022, he was not given an opportunity to explain or respond to any allegations against him and was subjected to proceedings by ambush. He went on to aver that in spite of persistent requests to be heard by the 1st Defendant, after multiple emails requesting communication and clarification, on 17.03.2022, he was notified by the co-chair of the 1st Defendant to sign a resignation letter and statutory declaration whose contents were foreign to him thus dislodging him from his position as a board member of the 1st Defendant. From the foregoing, the foundation of the Plaintiff's cause of action can easily be discerned from his pleadings and requires no further examination. Therefore, the 3rd Defendant's objection raises a pure point of law.

28. The High Court draws its original jurisdiction to entertain disputes from Article 165 (3) of the *Constitution* as read with Section 5 of the *High Court (Organization and Administration) Act*. On the other hand, the Employment and Labour Relations Court draws its jurisdiction to entertain disputes from Article 162(2)(a) of the *Constitution* as read with Section 87 of the *Employment Act* and Section 12(1) of the *Employment and Labour Relations Court Act*, the latter which provides that; -

"(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

29. The Plaintiff describes the 1st Defendant as the Board of Directors of UHAI East Africa Sexual and Health Rights Initiative (UHAI EASHRI), a company limited by guarantee and incorporated under the *Companies Act*. Whereas the 2nd Defendant is described as a company limited by guarantee and incorporated under the *Companies Act*. The 3rd Defendant's position is that the Plaintiff was contracted by the 2nd Defendant as a board member/director and further, based on the prayers in the Plaint, was remunerated for his services as a director whether it was in the form of commissions, allowances, vacation pay and or any other advantages by the 2nd Defendant. Which remuneration as claimed herein amounts to an employment claim, for determination before the Employment and Labour Relations Court.

30. Section 2 of the *Employment Act* defines "Employee" to mean "a person employed for wages or a salary and includes an apprentice and indentured learner" and "Employer" to mean "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." Section 2 of the *Companies Act* 2015 defines "Director" to mean "in relation to a body corporate, includes— (a) any person occupying the position of a director of the body (by whatever name the person is called); and (b) any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of the body are accustomed to act."

31. The Plaintiff pleaded in the plaint that he was appointed to serve as a director in the 2nd Defendant's board. However, apart from the period of appointment as board member, the manner in which the Plaintiff was remunerated or whether he was engaged as a director under a specific or express contract of service is unclear. Sections 140 to 150 of the *Companies Act* generally set out the duties of directors of a Company. Further the duties, roles, and obligations of the board of directors can be stipulated by a board manual or any other such document by whatever name.

32. The roles of directors and servants, and relationship between a company and its directors was metaphorically described by Denning L. J in H.L Bolton (Engineering) Co. Limited v T.L Graham & Sons Limited (1957) CA 159 at 172, as follows:

> " A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance

with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

33. In distinguishing between directors and mere servants or employees, Makau, J in Raphael M. Nzomo & 7 others v Nairobi County Government & 4 others [2017] eKLR adopted the test spelt out in Eaton v Robert Eaton Ltd and Secretary of State for Employment [1988] IRLR 83. The test is as follows:- a) Did the director have a descriptive title like marketing director, managing director or sales director? b) Was there an express contract of employment, or if not, was there a board minute or memorandum consisting of an agreement to employ the director as an employee, c) Was remuneration paid by way of salary or directors fees, d) Was remuneration fixed in advance or paid on an ad hoc basis, e) Was remuneration by way of entitlement, or in effect gratuitous (in other words was the director in a position to sue for it, and f) Did the director merely act in his own capacity as director or, was he under the control of the board of directors in respect of the management of his work. The court agrees with Makau J's application of the test.

34. More recently, the Court of Appeal in Rift Valley Water Services Board & 3 others v Asanyo & 2 others (Civil Appeal 60 & 61 of 2015 (Consolidated)) [2022] KECA 778 (KLR), when faced with a similar a situation as obtaining herein observed that; -

> " 18. The question as to whether the 1st respondent was an employee of the 2nd respondent with the right of claim as such in the Industrial Court has a simple answer to it. He was not. Section 2 of the *Employment Act*, Revised 2021 (2007) defines an "employee" in no uncertain terms as "a person employed for wages or a salary, and includes an apprentice and indentured learner". Conversely, an "employer" is defined 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". In our considered judgment, the 1st respondent was not employed by the 2nd respondent "... for wages or a salary." Neither was he an apprentice or indentured learner. We find nothing on record to suggest that the 2nd respondent had entered into a contract of service to employ the 1st respondent as its employee within the meaning of the Act. Accordingly, the *Employment Act* did not apply to him. What then was the nature of the relationship between the 1st respondent and the 2nd respondent?
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> 19 ...
>
> 20. We hasten to draw a clear distinction between an employee and a member of a board of directors of a corporate entity, such as the 1st appellant. That distinction lies in our answer to the question as to whether directors are employees of the company to whose board they are appointed. They are not. In McMillan v Guest [1942] AC p.561, it was held that a company director is an officeholder who is not, without more, an employee of the company. That is the position here. In the absence of a contract of service in terms of which a director is engaged as a full-time employee of a company, it cannot be presumed

that such a director is an employee of the company (see Parsons v Albert J. Parsons and Sons Ltd [1979] ICR p.271).

21. Apart from the letter dated 18th December 2012 by which the 1st respondent's term of service as a member of the 2nd respondent's board of directors was extended; we find nothing on record to suggest that the 1st respondent had a contract of service to constitute him an employee of the 2nd respondent. A "contract of service" is defined in section 2 of the *Employment Act*, Revised 2021 (2007) as "an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time ...." Neither can it be said that the 2nd respondent's letter of 18th December 2012 aforesaid constituted "a contract of service to employ" the 1st respondent.

22. Having considered the records of the two appeals as consolidated, ..... we find and hold that the 1st respondent was not an employee of the 2nd respondent within the meaning of the *Employment Act*, 2007."

35. Applying the totality of the foregoing to the Plaintiff's pleadings, it is evident that save for the averment that he was appointed to serve as board member or director of the 2nd Defendant, there is no indication that he was engaged in the said position on a contract of service for wages or salary. The Plaintiff's position as a board member, rather than an employee, would be governed by the *Companies Act* and not the *Employment Act*. Consequently, this court is cloaked with the necessary jurisdiction to entertain the claim as presented by the Plaintiff by his pleadings, hence the 3rd Defendant's preliminary objection must fail.

36. Moving on, the motion dated 21.06.2022 seeks that the court be pleased to strike out the 3rd Defendant as a party to this suit. It invokes the provisions of Section 1A, 1B, 3 & 3A of the CPA alongside Order 1 Rule 10(2) of the CPR. The power of the court to enjoin or strike out a party from proceedings is donated by Order 1 Rule 10 (2) of the CPR which provides that: -

"(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.."

37. The grounds upon which the motion is premised are twofold. Firstly, the 3rd Defendant contends that the suit ought to fail as the Plaintiff has failed to reproduce verbatim and or disclose the purported defamatory publication or words complained of in the Plaint, and secondly that having no role in the appointment of the Plaintiff, no contractual relationship/obligation could arise between herself and the Plaintiff. The Plaintiff's countered that there was no misjoinder of the 3rd Defendant, that she has been sued in her personal capacity on account of her defamatory statements as particularized in the plaint and she is therefore a necessary party to the effectual and complete adjudication of the issues raised in the suit. Further that Order 1 Rule 9 of the CPR provides that no suit shall be defeated by reason of misjoinder or non-joinder.

38. Regarding the first ground, Order 2 Rule 7 (1) of the CPR provides as follows:

> " Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense".

39. The above rule and question whether a plaintiff in a defamation suit is required to set out in verbatim the words complained of has been the subject of numerous pronouncements by superior courts. Nkalubo vs Kibirige[1973]EA 102 the Court of Appeal for East Africa held that:-

> " In all suits for libel the actual words complained of must be set out in the plaint. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends....This is not a mere technicality, because justice can only be done if the defendant knows exactly what words were complained of, so that he can prepare his defence....The essence of defamation suit is that certain specific words used by the defendant were defamatory of the plaintiff. Where one is dealing with spoken words, it may of course transpire in the course of evidence that the words used were not exactly what the plaintiff believed them to have been, but if they were to the same effect, he can still recover, although an application for leave to amend would be prudent. If, however, a suit were founded on an allegation that certain words were used and then, without any amendment of the pleadings, the plaintiff were awarded damages on evidence that substantially different words were used, no defendant would know how to prepare his case and injustice rather than justice would result.....It must be borne in mind that rules of court are drafted to aid the efficient administration of justice and failure of one party to observe these rules can result in a failure of justice to the other. This is a case in which there was no miscarriage of justice, and it would be unjust now to allow the appeal to succeed on this issue."

40. More recently, Waweru J (as he then was) in Peter Maina Ndirangu v Nation Media Group Limited (2014) e KLR in dismissing a defamation claim held that:

> " To sustain an action in libel, it is important that the words used are set out verbatim in the particulars of the claim. In Gatley on Libel and Slander 11th Edition Sweet & Maxwell 2008 the learned writers have observed at page 967, paragraph 28.11 thus -
>
> > "In a libel claim the words used are material facts and they must therefore be set out verbatim in the particulars of the claim, preferably in the form of a quotation. It is not enough to describe their substance, purport or effect."

And in Fitzsimons –vs- Duncan Kemp & Co Ltd [1908]2lr. R. 483

> " In libel you must declare upon the words; it is not sufficient to state their substance."
>
> In Collins –vs- Jones [1955] 1QB 564 Denning, L.J. stated:
>
> > "A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of whose contents he is unaware. He must in his pleading set out the words with reasonable certainty. The court will require him to give particulars to ensure that he has a proper case to put before the court and is not merely a fishing one".

41. Further, in Harrison Kariuki Muru v National Bank of Kenya Limited & Another [2019] eKLR the court cited Collins v Jones (1955) All ER 145 as follows;

> " The particulars of the facts and matters referred to in this rule would ordinarily constitute the words concerning the plaintiff which in his view, are calculated to lower him in the estimation of the right thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an amputation on him disparaging or injurious to him in his office, profession, calling trade or business".

42. The court in Harrison Kariuki (above) also cited the case of Hon. Kennedy Nyakundi v Jackson Ongubo & Gusii Star [2016] eKLR where the English case of Muir v January (1990) BLR 388 was cited to the following effect: -

> " In an action of defamation, the actual words used are material facts. It is an elementary rule of pleading that all material facts must be pleaded. Therefore, in an action for defamation the actual words, or the part complained of, must be pleaded by setting out in the declaration. It is not enough to describe their substance, purpose or effect. If the words are in a foreign language, the actual words used must be set out in the foreign language, followed by a literal translation. Failure to comply with this rule of pleading rendered the pleading defective, and in the absence of an amendment to cure the defect, the plaintiff could not obtain judgment on the basis of the pleading...
>
> "The law requires the very words in the libel to be set out in order that the court may judge whether they constitute a ground of action. The plaintiff has not done this. "

43. In concluding, the court in Harrison Kariuki stated that:

> " A plaintiff in a libel action not only must set out with reasonable certainty in his pleading the words complained of, but also must be prepared to give such particulars as to ensure that he had a proper case to put before the court and is not merely fishing for one..."

See also Emofule J in Kariunga Kirubua & Co Advocates vs The Law Society Of Kenya & Others[2009] eKLR.

44. The foregoing decisions require no elucidation. A plaintiff in a defamation suit must set out the particulars of the alleged defamatory statement with certainty in order to give the defendant notice of the exact words he is alleged to have published, enable him to understand the manner in which the words are perceived as defamatory, hence mount his defence appropriately. More importantly, the trial court in determining whether a statement bears a defamatory meaning, whether in its plain meaning or by innuendo, must construe the specific words used or complained of. This is the rationale for the requirement that the exact alleged defamatory words complained of are not only to be impleaded but equally set out verbatim in the plaint. This is not a technicality.

45. The Plaintiff herein merely set out the purport of the alleged defamatory words published by the Defendants, and the 3rd Defendant in particular. The court agrees with the 3rd Defendant that this pleading is woefully inadequate. Clearly, the first ground has merit, but the remedy does not lie, in the first instance, in peremptorily striking out the suit. Striking out a pleading is a draconian action.

Concerning the exercise of the court's power to strike out pleadings, Madan JA (as he then was) in D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR stated that: -

> " A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

46. The foregoing principles have held sway in subsequent years and have been applied consistently in Kenyan courts. In Kivanga Estates v National Bank of Kenya Limited [2017] eKLR, for instance, the Court of Appeal echoing the dicta in D.T Dobie (supra) stated; -

> " It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit. Yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations ... Striking out a pleading though draconian, the Court will in its discretion resort to it, where, for instance the court is satisfied that the pleading has been brought in abuse of its process or where, it is found to be scandalous, frivolous and vexatious".

47. In the court's view, the first ground has merit. However, in the court's view the plaint herein though wanting, is not hopeless and may be redeemed by appropriate amendment.

48. Regarding the second ground, it is pertinent to point out that at this juncture the court is not concerned with the merits of the Plaintiff's suit, but to determine whether the 3rd Defendant was improperly joined in the instant proceedings and whether her name ought to be struck out. Upon a perfunctory review of the Plaintiff's pleadings and responses, he appears to assert that the claims against the Defendants are intertwined; that the 1st & 2nd Defendant's impugned decision to "expel" him from the board arose the 3rd Defendant's actions and allegations. Related to this is the question whether the Plaintiff's suit discloses a cause of action against the 3rd Defendant.

49. Although Order 1 Rule 10 of the CPR generally provides for the striking out of parties, Order 1 Rule 9 provides that no suit shall be defeated by misjoinder or non-joinder of any party. Order 1 Rules 3 and 5 of the CPR provide respectively, that:

> " All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise...
>
> It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him".

50. In addition, under Order 1 Rule 10 (2) of the CPR the Court may order that a party deemed necessary for effectual and complete settlement of all questions raised in a suit be enjoined or added. In the case of Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] 1 EA 55:

> " A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown.
>
> Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."

51. Further in Civicon Limited (supra) the court stated:

> " Again, the power given under the Rules is discretionary, which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings.
>
> Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial."

52. It appears to the court upon reviewing the pleadings that the transactions allegedly giving rise to the claim herein are interrelated. Hence the 3rd Defendant's joinder to this suit appears intertwined with that of the 1st and 2nd Defendant herein. Whether this is indeed the case, alongside the question of the weight of the claims made against the defendants and their liability, if any, will be determined by the trial court at the right time. For now, it appears to the court that the 3rd Defendant's participation in this suit while inconveniencing, is in the worst case, necessary for the resolution of the issues arising. An order of costs would adequately compensate the 3rd Defendant if the trial court were to find that her joinder was without cause. The second ground therefore fails.

53. In conclusion, the court finds that the 3rd Defendant's motion has only succeeded in part. Consequently, and in exercise of its discretion under Order 2 Rule 15 (1) of the CPR, the court directs the Plaintiff to amend the plaint in order to bring it to conformity with the provisions of Order 2 Rule

7 (1) of the CPR and relevant case law. The amended plaint shall be filed within 14 days of this ruling. In default, the averments contained in the plaint relating to the Plaintiff's claim that is grounded on defamation will stand automatically struck out, with costs to the Defendants. The Defendants will have corresponding leave to amend their defence statements.

54. In the result, the 3rd Defendant's Preliminary Objection hereby dismissed, while the motion is allowed in part. In the circumstances of the case, the parties will bear their own costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Plaintiff: Mr. Tambo h/b for Mr. Mitula

For the 1st and 2nd Defendants: Mr. Gichuhi

For the 3rd Defendant: Mr. Odiyo for Ms. Thogo

C/A: Carol