



REPUBLIC OF KENYA



KENYA LAW
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Mwangi v Regis Runda Academy Limited & 3 others (Cause E256 of 2023) [2024] KEELRC 363 (KLR) (27 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 363 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E256 OF 2023
JK GAKERI, J
FEBRUARY 27, 2024

BETWEEN

JOSEPH MBOGO MWANGI CLAIMANT

AND

REGIS RUNDA ACADEMY LIMITED 1ST RESPONDENT

GEMS NATIONAL ACADEMY LIMITED 2ND RESPONDENT

GEMS CAMBRIDGE INTERNATIONAL SCHOOL 3RD RESPONDENT

REGIS SCHOOL RUNDA 4TH RESPONDENT

RULING

1. Before the court for determination is the 1st Respondent's Notice of Motion dated 11th October, 2023 seeking orders that:-
 1. The Memorandum of Claim dated 9th March, 2023 and the entire suit against the 1st Respondent be struck out with costs to the 1st Respondent.
 2. The Claimant bears the costs of this application.
2. The Notice of Motion is expressed under Section 2 of the *Employment And Labour Relations Court Act*, 2011 and Rule 28(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and is based on the grounds set out on its face and the Affidavit of Peter Mburu Burugu sworn on 11th October, 2023 who deposes that he is the shareholder and director of Regis Runda Academy Ltd (my company), the registered proprietor of plot "A" L.R. No. 11681/10 on which school buildings infrastructure and other amenities have been constructed.
3. The company has a 99 year lease from its holding company, Runda Gardens Development Ltd.



4. The affiant disposes that effective 1st January, 2019, the holding company leased the school buildings to Gems National Academy Ltd using its registered business name as Regis Schools and started operating a school by the name Regis School Runda.
5. That the lease was terminated on or around December 2022 and the affiant's company entered its premises on account of default under the lease by Gems National Academy Ltd.
6. That unable to relocate the school elsewhere, Gems National Academy Ltd and Regis Schools granted the affiant's company a 1-year license to operate Regis School effective 1st January, 2023 and the company accepted the arrangement without assuming liabilities incurred by the 1st and 2nd Respondents prior to that date to salvage the school from collapse and closure.
7. The affiant states that his company took into consideration the best interests of the students learning, parents and staff who would be prejudiced if the school collapsed at the beginning of an academic year.
8. That under the terms of the license, the company entered into a tripartite 1 year contract addendums with specific individual staff of Gems National Academy Ltd and Regis Schools handed over to it for purposes of running the school for the 1-year license period to guarantee payment of their salaries and other emoluments and their primary employment remained Gems National Academic Ltd and Regis Schools and the Claimant was not among them.
9. That the one (1) year license granted will automatically lapse on 31st December, 2023 and the staff will revert to Gems National Academy Ltd and Regis Schools as their primary employer.
10. That the Claimant was not a direct and indirect employee of the 1st Respondent and there is no contract of employment between Regis Runda Academy Ltd and the Claimant.

Response

11. By a Replying Affidavit sworn on 24th October, 2023, the Claimant deposes that he was employed as Regional Accountant of the Respondents company and/or school in April 2016 until 31st July, 2022, worked at Gems Cambridge International School and in 2019 the 3rd Respondent bought Hillcrest International School and started another school by the name Regis School Runda and staff of the 3rd Respondent were transferred to the 4th Respondent located along Kiambu Road.
12. That Regis School Runda was owned by the 2nd Respondent and the 4th Respondent paid his salary.
13. That he received notice of redundancy on 31st May, 2022 from one Mr. Ernest Mureithi and employment on account of redundancy was terminated on 31st July, 2022 and computed dues at Kshs.3,127,894.31 but only paid Kshs.1,280,000/= and efforts to secure the balance had fallen through.
14. That in December 2022, the Respondents informed the Claimant that Gems National Academy Ltd trading as Regis School Runda had transferred its business and assets to Regis Runda Academy, the 1st Respondent and reproduces the contents of the undated communication to staff.
15. That he was informed that the 1st Respondent was not liable for any liabilities from the previous owner of the school, the 2nd Respondent.
16. That the transfer of business meant that the 1st Respondent took over the assets and liabilities of the 2nd and 4th Respondents and the transfer was to ensure continuity of operations of the school to safeguard the welfare of learners, employees and other stakeholders.



17. That the 1st Respondent was untruthful by denying that it did not take over the liabilities of the 2nd, 3rd and 4th Respondents yet it was receiving school fees to recover rent arrears owed to them to the exclusion of all other creditors and its refusal to pay the Claimant was discriminatory.
18. The Claimant avers that he was not privy to the contract between the 1st Respondent and the other Respondents who were one and the same.
19. That the Respondents kept on changing their names and management to escape liability and deny employees their dues as exemplified by the letter by one Peter Burugu and the school Principal, Mr. Clifford Oluoch that Regis Runda Academy Ltd, the Lessee of Runda Gardens intended to operate its own school by the name Regis Runda Academy whose registration was on-going.
20. The Claimant urged the court to dismiss the application.

Applicant's submissions

21. Counsel submitted that the Claimant's Replying Affidavit lay it bare that the orders sought herein are justified as he admits having been employed by Gems Africa Ltd and his work station was to be Gems Cambridge International School, 3rd Respondent, effective 18th November, 2018.
22. That the Claimant has sued the workstation as opposed to the employer and admitted that he was aware that Regis School Runda was the trade name for Gems National Academy Ltd.
23. Counsel submitted that the Claimant had neither pleaded, deposed or provided anything to show how the 1st Respondent was party to his contractual relationships with the 2nd, 3rd and 4th Respondents as he admits that he was not privy to any contracts between the 1st and the 2nd, 3rd and 4th Respondents.
24. It was admitted that since the Claimant admitted that his employer was Gems Africa Ltd since 1st April, 2016 and though his work place changed from Gems International School to Regis School Runda, he could not posit that he was the 1st Respondent's employee by implication by virtue of its dealings with the other Respondents.
25. That between 1st January, 2019 to December 2022, there existed a landlord/tenant relationship between the 1st Respondent's holding company and the 2nd Respondent (as a tenant) and the Claimant's contract of employment could not bind the landlord.
26. Counsel further submitted that the Claimant had admitted that his employment ended from 31st July, 2022 before the 1st Respondent was granted the 1-year license agreement to operate Regis School Runda effective 1st January, 2023 and was thus not covered by the terms and conditions of the license.
27. According to counsel, the Claimant was seeking a retrospective application of the one (1) year license which was legally untenable and the provisions of the *Employment Act*, 2007 were inapplicable.
28. Counsel relied on the doctrine of privity of contract to submit that exceptions to the doctrine notwithstanding the general rule was that a stranger cannot benefit or be held liable under a contractual relationship he/she was not party to and the Claimant had no reasonable cause of action against the 1st Respondent having been an employee of Gems Africa Ltd and was not party to the 1-year license agreement granted by the 2nd and 4th Respondents which was for the benefit of their current employees.
29. Counsel urged that since there was no employer-employee relationship between the Claimant and the 1st Respondent, the court had discretionary jurisdiction to invoke the provisions of Article 162(2) of the *Constitution* of Kenya, 2010 and Section 12(1) of the *Employment and Labour Relations Court Act*, 2011 to summarily terminate the suit against a stranger to an employment relationship.



30. Reliance was made on the Court of Appeal decision in *Blue Shield Insurance Company Ltd V Joseph Mboya Oguttu* (2009) eKLR to urge that the 1st Respondent had met the threshold for the exercise of its discretion to strike out the suit against the 1st Respondent.
31. According to counsel, the suit against the 1st Respondent was unsustainable.

Claimant's submissions

32. Counsel submitted on whether the Respondents were one and the same person, whether there was a contract between the Claimant and the 1st Respondent and whether the Claimant had a claim against the 1st Respondent.
33. On the relationship between the organization, counsel rehashed the Claimant's employment history but mistakenly stated that the notice of redundancy was issued by Mr. Peter Burugu yet it was Dr. Ernest Mureithi, Director of Regis School Runda as the letter dated 13th May, 2022 reveals.
34. Counsel submitted as there was no winding up process, the Respondents were one and the same person as only the business names changed while the premises, assets, emoluments, clients and students remained the same.
35. That the license agreement was meant to hoodwink the public, that the 2nd, 3rd and 4th Respondents are still the current owners of the school yet the 1st Respondent was the owner and Manager. That it was meant to confuse creditors.
36. The decision in *Inchwara V APA Insurance Ltd* (Civil Appeal 17 of 2018) was cited to urge that the 1st Respondent was an integral part of the web.
37. As to whether there was a contract between the Claimant and the 1st Respondent, counsel submitted that there was an implied contract between the Claimant and the four Respondents and rights and liabilities of the 2nd, 3rd and 4th Respondents became those of the 1st Respondent after it took over the ownership and management and operations of the business.
38. Reliance was made on the sentiments of the court in *Ali Abdi Mohamed V Kenya Shell & Company Ltd*.
39. As to whether the Claimant has a claim against the 1st Respondent, counsel relied on the provisions of the *Transfer of Business Act* as well as the sentiments of Mbaru J. in *Elizabeth Wacheke & 62 others V Airtel Network (K) Ltd & another* on the rights of employee in cases of a transfer of business.
40. Counsel urged that the notice dated 31st January, 2023 where the 1st Respondent was absolving itself from liabilities of the previous entities did not notify the public who was to assume the same.
41. That the Claimant had an enforceable claim against the 1st Respondent.
42. Finally, as to the timelines of the claim vis-à-vis, the provisions of Section 8 of the Transfer of Business Act, 2012 which provides that proceedings against transferees be instituted within 6 months from the date of the transfer to urge that the Claimant filed the instant suit on 29th March, 2023 in compliance with the provision.
43. Reliance was made on the sentiments of Mativo J. (as he then was) in Republic V Communication Commission of Kenya; Safaricom Ltd and 2 others 2018.
44. Finally, counsel submitted that the 1st Respondent's application herein was not only frivolous and vexatious but intended to defeat the ends of justice.



Analysis and determination

45. The singular issue for determination is whether the 1st Respondent's Notice of Motion dated 11th October, 2023 is merited.
46. These are issues to be interrogated after the court has heard and received all the evidence the parties will avail at the hearing. For the instant application, the only issue is whether the Claimant's suit against the 1st Respondent should be struck out.
47. Counsels for the parties have adopted opposing positions on various grounds.
48. While the applicant relies on the common law doctrine of privity of contract and the provisions of the *Employment Act*, 2007, counsel for the Claimant relies on the provisions of doctrine of implied contract, the Business Transfer Act, 2012 and the contention that the four Respondents were one and the same person.
49. Needless to underscore, the provisions of Section 12 of the *Employment and Labour Relations Court Act*, 2011 and Rule 28(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* relied upon by the applicant do not provide for the striking out of a suit.
50. Order 1 Rule 3 of the *Civil Procedure Rules, 2010* provides 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.
51. However, Order, 1 Rule 10(2) of the *Civil Procedure Rules, 2010* provides that;
- 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.
52. The foregoing provision is explicit that the court may suo motu or on application strike out or add a person to a suit and the court's power is discretionary which must be exercised judiciously not capriciously or whimsically.
53. In *DT Dobie and Company (K) Ltd V Joseph Mbaria Muchina & another* (1982) KLR 1, Madan J.A. (as he then was) stated as follows;
- “The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the cause”.
54. The court emphasized that in determining an application to strike out, the court ought to act cautiously and carefully as it is obligated to consider all facts without trying the case.



55. In this case, the applicant seeks the striking out of the Claimant's case against it on among other grounds that it does not disclose any reasonable or any cause of action at all against the 1st Respondent.
56. According to the 1st Respondent, since there was no employment relationship between the Claimant and the 1st Respondent or other contractual relationship, the action against it is scandalous, frivolous and vexatious and no amendment can be made to the claim to breath life into the suit against the 1st Respondent.
57. The question as to whether there was a contractual or other relationship with the 1st Respondent is one of the factual issues to be canvassed at the hearing.
58. More significantly, the Claimant's case is for the most part grounded on liability which is another critical issue for determination.
59. The Claimant provided a detailed history of his employment until declaration of redundancy and separation as well as the non-payment of his dues in full.
60. A panoramic view of this case reveals that the 1st Respondent is part of the factual matrix of the case and if the order sought is granted, it would mean that its role in the chain of transactions would not be fully appreciated, which, in the court's view would be premature. More significantly, the 1st Respondent's applicant's is grounded on facts which can only be fully appreciated at the hearing.
61. Regrettably, none of the Respondents has responded to the Claimant's case or controverted any allegation yet the suit was filed almost one year ago.
62. From the foregoing, the court is persuaded that granting the 1st Respondent's prayer at this stage would not be in the interest of justice as the Respondents cases are yet to be articulated.
63. In the end, it is the finding of the court that the 1st Respondent's Notice of Motion dated 11th October, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF FEBRUARY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

