



Andole v Banura & 3 others (Being sued on their own behalf and on behalf of Bandari Villas 1 residents) (Appeal E076 of 2023) [2025] KEELRC 2221 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2221 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E076 OF 2023
NJ ABUODHA, J
JULY 25, 2025**

BETWEEN

MICHAEL BUSUR ANDOLE APPELLANT

AND

AGNES BANURA 1ST RESPONDENT

**BANDARI VILLAS ONE COMPANY LTD & 2 OTHERS & 2 OTHERS & 2
OTHERS 2ND RESPONDENT**

**BEING SUED ON THEIR OWN BEHALF AND ON BEHALF OF BANDARI
VILLAS 1 RESIDENTS**

*(Being an appeal from the Judgment and decree of Hon. Rawlings
Liluma Musiega delivered on 28th April, 2023 CMEL NO. 1912 of 2019)*

JUDGMENT

1. Through the Memorandum of Appeal dated 25th May, 2023 the Appellant appeals against the Judgement of Hon. Rawlings Liluma Musiega delivered on 28th April, 2023 CMEL NO. 1912 of 2019. The Appeal was based on the grounds among others that: -
 - a. That the trial magistrate erred in fact and law to make a finding that the 1st Respondent was not an employer of the Appellant despite overwhelming evidence to prove that the 1st Respondent exercised control over the conditions of service of the appellant.
 - b. That the learned trial Magistrate erred in law and fact by failure to find that the Respondents were jointly and severally liable for the unlawful and unfair termination of the claimant's employment.



- c. That the trial Magistrate erred in law and fact by failing to give effect to the meaning of an employer as defined under Section 2 of the [Employment Act](#), 2007 which included an agent, foreman, manager or factor of such person public body, firm, corporation or company.
2. The Appellant therefore prayed that the judgment and decree of the trial court issued on 28th April, 2023 to 1st and 2nd respondent jointly and severally be set aside and the costs of the appeal be met by the respondents.
3. The Appeal was disposed of by written submissions.

Appellant's Submissions

4. The Appellant's Advocate Mr. Nyabena submitted as he did in the trial court that there was an employer-employee relationship between the 1st appellant and the 1st and 2nd respondents. Counsel in support of the submissions relied on section 2 of the [Employment Act](#) on the definition an employer and a contract of service. According to counsel, from the definitions contained in the Act, it was clear that an employer should have some measure of direct control over the employees work. The respondent's according to counsel were employers to the appellant since they were involved in the management of the 2nd respondent. They were managers in charge of security and payment of employees. According to Counsel, the trial court therefore erred in finding that the appellant was not an employee of the 1st respondents. Mr. Nyabena further submitted that by a ruling by Hon. Wanjala in an application seeking to strike out the 1st respondent from the suit, the Court declined to do so stating that the issue of who was the rightful employer of the appellant could only be decided at the trial and that there were documents showing that there was employer-employee relationship between the 1st respondent and the appellant. Counsel urged the court to take judicial notice of the operations of the respondent's welfare association. The 1st respondent's were paying their employees and security guards through their officials after collection of funds from the members. The appellant throughout maintained that he was employed and paid by the 1st respondent and that he never dealt with the 2nd respondent. The 1st respondent should therefore not be allowed to hide under the concept of corporate personality to escape liability. According to counsel, from the proceedings it would emerge that the 2nd respondent was a sham company being used by the 1st respondent to escape liability. In support of his submissions, Counsel relied on the case of Michael Otieno Ouma vs. Bonito Hotels Ltd t/a Tourist Hotel Bungoma.
5. Counsel submitted that from the cited authorities and section 2 of the Act, the appellant was indeed an employee of the 1st respondent. On Maurice Nyakundi was in charge of security, Agnes Banura executed payment instructions and one Joseph Ruwa was chairman. The contract of engagement was signed by the chairman. Counsel in conclusion urged the Court to find that the trial court erred in law and fact by ruling that the 1st respondent was not the appellant's employer and was not therefore liable for unfairly terminating his service.

Respondent's Submissions.

6. Mr. Saluni for the appellant on his part submitted that in reaching the decision, the trial court indicated that flowing from the principle of corporate personality, a company is a different entity from its members. Since the appellant had entered into an employment contract with the 2nd respondent, he had no case against the 1st respondent who were merely administrators of the 2nd respondent.
7. Counsel further submitted that the relationship between the appellant and the 1st respondent was first addressed by the trial court (Hon. Wanjala) who dismissed the application to strike out the 1st



respondent from the suit. The decision was based on the fact that the 1st respondent had produced crucial documents being the contract agreement between the appellant and the 2nd respondent and the termination letter issued by the 2nd respondent indicating that they were privy to the operations of the 2nd respondent which is expected of managers. It was not an indication of existence of an employer-employee relationship with the 1st respondent.

8. It was an uncontroverted fact during the trial that there was an employment contract between the appellant herein and the 2nd respondent dated 1st December, 2015 executed by the appellant and the chairman/secretary of the 2nd respondent as the employer. The appellant admitted to signing the contract.
9. Mr. Saluni further submitted that the presence of an employment contract between the appellant and the 2nd respondent supersedes any other document or test in determining the employer-employee relationship. There was therefore no need to apply the control test. Further the appellant acknowledged receiving a final warning from the 2nd respondent dated 29th December, 2016.

Determination.

10. This appeal revolves around the question whether the trial court erred in finding that there was no employer-employee relationship between the appellant and the 1st respondents. The court has carefully considered the record of appeal, pleadings, documents and judgment of the trial court. The court has further noted that counsel for the appellant in his submissions referred to the 1st appellants as managers of the 2nd appellant. It therefore cannot be gainsaid that the 1st appellants were indeed agents of the 2nd respondent. The foregoing coupled with the contract of employment between the appellant and the 2nd respondent dated 2nd December, 2015 which the appellant acknowledged signing, presents no other conclusion than that the appellant was an employee of the 2nd respondent. It is curious that whereas the appellant claims that he was an employee of the 1st respondents he joined the 2nd respondent as a party to the suit. The appellant in the back of his mind must have acknowledged a relationship with the 2nd respondent in order to have joined them as a party to the suit. That relationship must have been that of an employer-employee relationship.
11. In conclusion, the court is of the view that the trial court was right in holding as it did that there was no employer-employee relationship between the appellant and the 1st respondent. The appeal is therefore found unmerited and is hereby dismissed as against the 1st respondent. The Court however directs that the suit as against the 2nd respondent proceeds in the lower court to determine if merited, the claims by the appellant. For avoidance of doubt, the 1st respondents are hereby struck off the suit in the trial court.
12. Each party shall bear their own costs of the appeal.
13. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF JULY, 2025

DELIVERED VIRTUALLY THIS 25TH DAY OF JULY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

