



REPUBLIC OF KENYA



KENYA LAW

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Karisa & 21 others v Armo Aquarius Limited t/a Lily Palm Resort (Cause E009 of 2021) [2024] KEELRC 426 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 426 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE E009 OF 2021
M MBARÚ, J
FEBRUARY 29, 2024

BETWEEN

HARISON KARISA 1ST CLAIMANT
JOHN BAYA 2ND CLAIMANT
PAUL EDWARD MATETE 3RD CLAIMANT
LILIAN OKUMU 4TH CLAIMANT
ALEX KATANA 5TH CLAIMANT
AISHA ALI 6TH CLAIMANT
GLADYS MWANDORO 7TH CLAIMANT
FESTUS SIFA CHISANDO 8TH CLAIMANT
ADERSON KATANA 9TH CLAIMANT
CHARO BAYA 10TH CLAIMANT
JARED OBINA 11TH CLAIMANT
JOSEPH KAINDIO 12TH CLAIMANT
DAVID RANDU 13TH CLAIMANT
BOHA KATANA 14TH CLAIMANT
NGONYO MUMBA 15TH CLAIMANT
SHAURI MANG'ARO 16TH CLAIMANT
DANIEL OGUTU 17TH CLAIMANT
JEFFERSON KATANA 18TH CLAIMANT
ALEX MULANGI 19TH CLAIMANT



MAJIMBO MTSUNGA 20TH CLAIMANT
RAMA KAZUNGU KARISA 21ST CLAIMANT
SILVESTER CHARO CHEA 22ND CLAIMANT

AND

ARMO AQUARIUS LIMITED T/A LILY PALM RESORT RESPONDENT

JUDGMENT

1. The claimants filed their claim dated 14 July 2021 and Amended Claim dated 9 June 2022. They are seeking the following orders;
 - 1) That the respondent's decision to declare the claimants redundant is unfair;
 - 2) That the aggrieved employees be paid by the respondent as computed in paragraph 16 herein above.
 - 3) That the costs of this suit be paid for by the respondent.
2. The issues in dispute herein are that;
 - a) There was unfair redundancy;
 - b) Non-payment of severance pay;
 - c) Notice pay;
 - d) Public holidays pay;
 - e) Unpaid salaries;
 - f) Unpaid house allowances;
 - g) Compensation for unfair termination.
3. The claimants were at all material times residents in Malindi County employed by the respondent company in the hotel sector in Watamu, Kilifi County. The claimants were employed on different dates and in various positions by the respondent. they worked until 30 March 2020 when their employment was terminated without notice of justified cause.
4. The claim is that on 30 March 2020, the respondent declared the claimants redundant without due process or notice to their trade union or issuance of personal notices. There was no notice to the labour officer.
5. On various dates, the claimants were issued with notices of redundancy without payment of their terminal dues. the respondent took over from Boci Boci (K) Limited without payment of terminal dues. The respondent orally informed the claimants that there was no more work for them and asked them not to report back to the premises.
6. The claim is that there was no redundancy situation to justify layoff or abrupt termination of employment. During employment, the claimants were not provided with housing or compensated for working during public holidays.



At the end of employment, no severance pay was awarded.

The claimants are seeking payment of the following dues;

- a) Service pay for the duration of employment;
- b) Two months' notice pay;
- c) Pending leave days;
- d) Pending and unpaid public holidays;
- e) Salary arrears in April and June 2017;
- f) Unpaid house allowances;
- g) Severance pay for years worked;
- h) 12 months' compensation.

The claimants are seeking their redundancy dues.

7. In evidence, the claimants called the 18th claimant, Jefferson Katana who testified that he was employed on 1st February 2013 as head barman by the respondent then known and trading as Lily Palm Resort. He was not issued with any written contract of employment. his basic wage was Kshs. 21,750 per month without any house allowance.
8. Mr Katana testified that he worked for the respondent until 30 March 2020 when the respondent unfairly declared a redundancy and abruptly told there was work. No notice was issued or terminal dues paid. he had worked for 7 years without any record and was hence entitled to his claims.
9. Katana testified that in the year 2012, the ownership of the respondent changed from PochiPochi, and notices were issued to this effect. There was notice to all employees on the change of ownership and all employees moved to the respondent entity. The respondent issued the claimants with pay slips, leave forms, and notice terminating employment.
10. Katana testified that in response, the respondent has asserted that they forged. However, the documents produced in court this is not correct since all records filed are signed and stamped by the respondent. There is no report to the police of any fraud or forgery. The defense that the claimants left PochiPochi in the year 2017 is not correct since there are work records issued by the respondent for the years 2019 and 2018.
11. There was no redundancy to justify termination of employment. After laying off in March 2020, the respondent brought in new employees to replace the claimants.

Response

12. In response, the respondent filed its response on 28 July 2022 and denied that it is not registered as a hotel of any nature but as a limited liability company whose main objective is the management of various businesses and not limited to hotel management. It has no hotel running in Watamu as alleged.
13. The response is also that the letter dated 15 April 2016 submitted by the claimants as AA^p is not issued by the respondent. The respondent never owned any hotel in Watamu as alleged and hence not able to employ such a large number of employees as the claimants. There is no letter of employment attached to the claim. The respondent was simply a managing company at Boci Boci (K) Limited for a contract



of five (5) years and after the lapse, this was terminated and hence the claimants were not under its control as employees.

14. Being a managing company, the respondent was incapable of terminating employees since there was no existing employment contract between the claimants and the respondent. In the year 2020, the respondent did not carry out any management between it and Boci Boci (K) Limited as the respondent ended in 2017 and there was no renewal of the contract and hence could not terminate employment.
15. The response is also that the claimants have not produced any notice of redundancy issued by the respondent. There is no letter dated 30 February 2020 from the respondent declaring a redundancy. The respondent has never been an employer.
16. To demonstrate that there was no employment between the parties, the respondent's case is that Shauri Mangaro joined Kenya Hotels and Allied Workers Union on 1st September 2020 and the employer is indicated to be Armo Aquarius. The rest of the claimants were employed by Lily Palm. The respondent cannot have issued redundancy notices to employees of Lily Palm since they were not answerable to them,
17. The claimants filed notices issued by Boci Boci (K) Limited which the company trades as Armo Aquarius Beach Resort. The respondent has never owned a beach resort under such a name. Under company law, Boci Boci (K) Limited cannot be confused for Armo Aquarius Limited and the claim is fatally defective and should be dismissed.
18. The claimants filed a transfer of employees from Boci Boci (K) Limited to Armo Aquarius Limited without filing any minutes or company resolutions from both companies. Such letters are without the company seal and manufactured by the claimants. The claim should be dismissed with costs.
The respondent did not attend court or call any witnesses.
At the close of the hearing, the claimants filed written submissions.
19. The claimants submitted that there was an employment relationship with the respondent evidenced by the fact that they were initially employed by Boci Boci (K) Limited. In the year 2012, there was a notice of transfer of employment to Armo Aquarius Limited. Under such notices, the respondent became the employer.
20. The respondent declared a redundancy through notices dated 30 February 2020 which were verbal. Redundancy is defined as loss of work due to no fault of the employee as held in [*Kyalo Alex David v Serena Beach Resort & Spa* \[2017\] eKLR](#).
21. The claimants are entitled to the claims sought following the unfair termination of employment and unprocedural declaration of redundancy.

Determination

Whether there was any employment relationship between the parties;

Whether there was a redundancy;

Whether the orders sought should be issued.

22. The claimants assert that they were employed by Boci Boci (K) Limited until the year 2012 when there was transfer of employment under the respondent. The claimants filed notices dated 1st October 2012 to the effect that, Boci Boci (K) Limited was winding up its operations on 31st December 2012 and the claimants would be transferred to the new company Armo Aquarius Limited.



23. These notices are issued under the name and letterheads of Boci Boci (K) Limited t/a Aquarius Beach Resort.
24. The claimants filed payment statements all under the name and head of Armo Aquarius Ltd.
25. The claimants also filed leave application forms under the name and letter heard of Lily Palm Resort/ Armo Aquarius Limited t/a Lily Palm Resort.
26. Part of the records filed by the claimants in support of their case are their union membership cards. A few indicate as follows;
 - a) Alex Katana, a member of Kenya Hotels and Allied Workers Union as of 1st September 2019 and the employer is Armo Aquarius;
 - b) Harison Gona, a member of Kenya Hotels and Allied Workers Union from 3 October 2014, and the employer is Lily Palm;
 - c) Lilian Okumu a member of Kenya Hotels and Allied Workers Union since 3 October 2013 and the employer is Lily Palm;
 - d) Paul Edward a member of Kenya Hotels and Allied Workers Union from 3 October 2015 and the employer is Lily Palm Resort.

There are disparities in who the employer is.

27. On 20 December 2021, the court delivered a ruling on a preliminary objection filed by the respondent about the employment and representation of the claimants.
28. In paragraph 15 of the ruling, the court posed the following questions;

In any event, the facts in the case cause are neither agreed nor settled. For instance, there is disagreement about whether Lily Palm Resort is the same thing as Armo Aquarius Ltd T/A Lily Palm Resort. There is disagreement on whether there was a valid redundancy declared against the grievants. There is disagreement about whether there was a contract of employment between the grievants and the Respondent. Where there is no agreement on the primary facts in a dispute such as in this case, I think that it is not appropriate to close out a party on account of preliminary objections.
29. The claimants amended their Memorandum of Claim on 9 June 2022. They maintained that the respondent was the employer. That the respondent is a business in the hotel sector in Watamu Town Kilifi County.
30. In response, the respondent denied owning any business hotel in Watamu or within the Republic of Kenya. that they were sourced as managing company of the respondent for 5 years and such contract lapsed and could not employ or terminate employment. By 30 March 2020, there was no relationship between the respondent and Boci Boci (K) Limited as the contract in issue had lapsed. The respondent asserted that they did not issue the redundancy notices to the claimants as alleged.
31. Indeed, as contested by the respondent in response, Armo Aquarius Limited as noted in the claim is a business in its name. A limited liability company can sue and be sued under its name. The trade name of Lily Palm Resort Ltd noted in the letter dated 20 May 202 from the Conciliator and letter dated 12 April 2021, connotes a limited liability company with its personality.
32. As noted above, the letters and notices dated 1st October 2012 by Boci Boci (K) Limited transferred the claimants to Armo Aquarius Limited. A company under its rights and personality.



The payment statements are issued under Armo Aquarius Ltd.

33. The respondent asserts that it is a limited liability company whose main objective is the management of various businesses and is not limited to hotel management. As a management company, it never carried out any management between Boci Boci (K) Limited, and its contract ended in the year 2017 and was not renewed.
34. These averments are not supported by any material evidence. The alleged contract that ended in the year 2017 is not attached. On the claims made, the respondent had a duty beyond its assertions to support and give records on the face of the claims that there was employment.
35. However, despite these averments by the respondent, the claimants amended the claim on 13 June 2022 and failed to delve into this matter.

The response by the respondent was filed on 28 October 2021.

36. The claimants had a fair chance to address any gaps and going back to the ruling delivered on 20 December 2021 address the question of who the employer was.
37. Without discharging this burden, proceeding on the reliefs sought against a party who has challenged the employment relationship would not achieve the desired results. The claimants have the advantage of legal representation, and the duty to establish who the employer was and who declared redundancy verbally, these are questions that ought to have been addressed before commencing the suit or soon after the court ruling on 20 December 2021.
38. Without establishing an employment relationship between the parties, moving further would be purely academic. The court finds the claim is without merit and is hereby dismissed. No orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

