Mung'oni v Rama Homes Limited t/a Rama Group of Companies & another (Cause E6500 of 2020) [2024] KEELRC 839 (KLR) (16 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 839 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E6500 OF 2020

NZIOKI WA MAKAU, J

APRIL 16, 2024

BETWEEN

STEPHEN WANGA MUNG'ONI ..... CLAIMANT

AND

RAMA HOMES LIMITED T/A RAMA GROUP OF COMPANIES ..... 1ST RESPONDENT

RAMA MACHINES LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondents through a Memorandum of Claim dated 27th November 2020, wherein he seeks: terminal dues totalling to Kshs. 3,386,780/-, and cost of the suit together with interest and any other relief as the Court may deem fit. His case is that the Respondents have neglected, refused and or failed to settle his terminal dues and damages that include notice pay of Kshs. 600,000/-, annual leave of Kshs. 200,000/- and maximum compensation for wrongful dismissal at Kshs. 2,586,780/-. The 1st and 2nd Respondents are Limited Liability Companies incorporated in Kenya under the *Companies Act*, No. 17 Laws of Kenya. According to the Claimant, the 1st and 2nd Respondents are sister companies.

2. The Claimant averred that he was employed by the 2nd Respondent as Operations Manager vide a Contract dated 19th August 2020 earning a gross salary of Kshs. 215,566/- per month. He was consequently issued with an Induction Form dated 24th August 2020 that had a letterhead of the 1st Respondent and had been executed by the Department Head of the 2nd Respondent. He also noted that during the pendency of his employment, his salary including the terminal dues were paid by the 1st Respondent company. It was the Claimant's averment that he had no disciplinary case, no warning or any other disciplinary case against him throughout his employment term with the Respondents and he believed the same was because he served in accordance with the terms of his service. He further

averred that on 14th October 2020, he was issued with a Show Cause Letter to which he was required to respond but the said letter was withdrawn before he could send his response to the Respondents. That his employment was then terminated on 15th October 2020 in a letter from the 2nd Respondent informing him that the company was being wound up voluntarily pursuant to a Resolution dated 12th October 2020. The Claimant asserted that he was however not issued three (3) months' notice or payment of three months' salary in lieu of notice and that the termination of his employment was wrongful and unlawful as against the provisions of his Employment Contract dated 19th August and the *Employment Act* of 2007.

3. In response, the 1st Respondent filed a Statement of Response dated 10th February 2021 denying that the 1st and 2nd Respondents are sister companies as alleged and asserting that the two companies are separate legal entities independently incorporated under the provisions of the Company Act. The 1st Respondent averred that it is a stranger to the mentioned contract of employment between the Claimant and the 2nd Respondent and as such, is not privy to the Claimant's averments on the same. It further denied issuing an induction form or induction process to the Claimant, which process it averred was undertaken by the 2nd Respondent and the Claimant. The 1st Respondent fronted that, in short, it merely leased its premises to the 2nd Respondent Company for their operations and that it was in no way involved in its management and/or operations or engaged with the Claimant in any way whatsoever. While acknowledging that it on numerous occasions loaned sums of money to the 2nd Respondent, which sums went to paying salaries to some of the 2nd Respondent's employees including the Claimant, the 1st Respondent averred that the obligation of the 2nd Respondent to pay salaries to its employees always remained with the 2nd Respondent. The 1st Respondent's case is that there was therefore no contractual relationship or otherwise between it and the Claimant to infer an employer-employee relationship and warrant payment of any terminal dues or damages as claimed. The 1st Respondent thus prays that the Claim against it be dismissed with costs.

4. In a Witness Statement made on 18th October 2023 by the 1st Respondent's Legal Officer, Mr. Justus Otieno, it was asserted that the Claimant has never been employed by the 1st Respondent. That the 1st Respondent, being a stranger to the employment relationship between the 2nd Respondent and the Claimant, is ignorant and generally unaware whether the Claimant has any issues with its employer - the 2nd Respondent. Mr. Otieno also noted that the 1st Respondents never issued any termination letter to the Claimant as it is a stranger to him.

Evidence

5. The Claimant, a Lift Engineer, testified that he always received his salary from Rama Homes Limited. Under cross-examination, the Claimant acknowledged that the person listed in Exhibit 1 as his employer is Rama Machines Ltd while Exhibit 3 says that the document is for Rama Machines c/o Rama Homes. In reference to Exhibit 4, the Claimant confirmed he signed that he received the terminal dues and noted that his services were terminated after two (2) months of joining.

6. The 1st Respondent's witness Mr. Justus Otieno, relied on his Witness Statement and affirmed in cross-examination that the Claimant has never been employed by the 1st Respondent. He reiterated that the 1st Respondent used to bail out the 2nd Respondent so that the 2nd Respondent could pay employees. He confirmed that the letterhead on Exhibit 4 is Rama Homes Limited (1st Respondent) being a discharge to the Claimant because the money was from the account of Rama Homes Limited while the discharge came from Rama Holding Limited. While admitting that there was no mention of Rama Machines Limited in the said letter (exh 4), he asserted that there was a silent agreement that when Rama Machines requests for funds, Rama Homes would give them the funds. That there

was a symbiotic relationship and understanding between the two companies but the same was not in writing. He asserted in re-examination that Rama Homes Limited does not have the Claimant's employee records, as he is not its employee.

Claimant's Submissions

7. The Claimant submitted that the issues for determination are as follows:

    a. Whether there existed employer-employee relationship.

    b. Whether the Claimant was wrongfully terminated.

    c. Whether the Claimant is entitled to the relief sought.

8. It was the Claimant's submission that both the 1st and 2nd Respondent shared the same office space. That during the pendency of his employment, he was paid vide cheques issued by the 1st Respondent, including the terminal dues, and at no time was his salary paid by the 2nd Respondent. He fronted that therefore the 1st Respondent had an employer-employee relationship with him it was paying his salary and paid his terminal dues and further, he used to report to work at the 1st Respondent's offices that were shared by both the 1st and 2nd Respondents. It was also the Claimant's submission that the 1st Respondent had not produced any proof of loan agreements for its allegation that it loaned the 2nd Respondent, as required under sections 107 and 109 of the *Evidence Act*.

9. The Claimant relied on the decision in Patrick Mutua Mwanzia & 19 others v Habo Group of Companies [2018] eKLR, where the Court observed that although two groups of claimants were issued with appointment letters from two different companies, being the respondent and another company, all their payslips were from the respondent who also issued their termination letters. The said Court went on to find on a balance of probability that the respondent was therefore the employer of all the claimants because the respondent was the one who paid their salary and the one who terminated their services. Further, in Industrial Court Cause No 1011 of 2010 - Symon Wairobi Gatuma v East African Breweries Limited & 3 others (unreported), the Court found that subsidiary or sister companies are often merely places of work for many employees, and that Courts should look at the business structure, and not the legal structure adopted by the enterprise, in enforcing employees' rights. The Claimant submitted that although the 1st Respondent argues it was a separate legal entity, there is adequate material to find such separateness was merely a façade aimed at placing barriers in the way of the Claimant realizing his employment rights. He relied on the decision in Phillip Ateng Qguk & 27 others v Westmont Power [Kenya] Limited & another [2015] eKLR, in which the Court noted that the E.A. Power Management Company was merely a façade company, joined at the hip with the respondent company (Westmont) and the Court viewed the said companies as economic units, rather than legally separate.

10. As to whether the termination was wrongful, the Claimant submitted that section 43 of the *Employment Act* obligates the employer, while terminating the services of an employee, to provide the reasons for termination. That in this case, no proof was availed to the Claimant to substantiate the reasons for termination and furthermore, the Respondent did not follow the procedure for termination as outlined in section 41 of the Act. That in addition, the evidence of both the Claimant and the 1st Respondent's was that no disciplinary hearing took place before the Claimant was terminated, meaning the termination was unfair. The Claimant cited the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [20131 eKLR wherein the Court analysed the effect of section 41 of the *Employment Act* that required employees going through a termination process to

be informed of their inadequacies at work and be granted an opportunity to defend themselves in a hearing before a sanction is arrived at.

11. It was the Claimant's submission that having proven that his termination was not in keeping with the *Employment Act* of 2007, he is entitled to the reliefs sought, including compensation for wrongful termination. That firstly, a three-month notice of termination was provided for in the Contract dated 19th August 2020 but since the same was not issued to him, he is entitled to payment in lieu of notice for the three months. That for the claim for annual leave, the Respondent never adduced any evidence to show that he proceeded for leave and the Court should as such grant the claim. The Claimant submitted that compensation for unfair termination or dismissal is guided by the statutory capping under section 49 of the *Employment Act*, 2007.

1st Respondent's Submissions

12. The 1st Respondent submitted that section 2 of the *Employment Act* defines an "employee" as a person employed for wages or a salary and includes an apprentice and indentured learner. That an "employer" means 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. That a "contract of service" means 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, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies. The 1st Respondent further noted that section 9(1) of the *Employment Act* provides that a contract of service for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing. That section 9(2) of the Act provides that an employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

13. It was the 1st Respondent's submission that the Claimant's Employment Contract dated 19th August 2024 (Claimant's Exhibit 1), indicates as follows: the heading of the Contract is the 2nd Respondent; 2nd Respondent as the employer; execution by Claimant of Appendix I of the Employment Contract bearing his Job Description and Performance Targets to the 2nd Respondent; the Claimant executed the 2nd Respondent Employee Code of Conduct to the 2nd Respondent. The 1st Respondent asserted that the evidence on record therefore leaves no doubt in mind that the Claimant was employed by the 2nd Respondent, with the rights and obligations towards each other spelt out in the attendant Employment Contract. It further submitted that the burden to prove an existence of such an employer-employee relationship is on the Claimant who has invariably failed to discharge the same so that such burden shifts to the 1st Respondent to disprove the same. It cited the case of Kaiga v Das (ELRC Cause 2 of 2023) [2023] KEELRC 2194 (KLR) in which the Court held that where there is contention as to whether there is an employer - employee relationship, the burden of proof of the employment relationship lays with the claimant. The 1st Respondent noted that the Claimant has provided two assertions to that effect; first, that he was issued with an induction form bearing the letterhead of the 1st Respondent, and second, that his salary was paid by the 1st Respondent.

14. Further, the 1st Respondent drew the attention of the Court to the decision in Christine Adot Lopeivo v Wvcliffe Mwathi Pere [2013] eKLR setting out the guiding parameters that distinguish contracts of service, including the control test, integration test, economic or business reality test, and the mutuality

of obligation. According to the 1st Respondent, the foregoing tests can only conclusively point to an existing employment relationship between the Claimant and 2nd Respondent in this case. That the Claimant has not given any evidence showing he worked under the instructions of the 1st Respondent or fulfilled any existing obligations with them. That in the case of Samuel Wambugu Ndirangu v 2NK Sacco Society Limited [2019] eKLR, the Court stated that a positive determination of the existence of the employer-employee relationship entails the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee's conduct (this is what gives the test the nom de guerre - control test). The 1st Respondent denied the Claimant's assertion that payment of salary and terminal dues is sufficient enough to impute an employer - employee relationship between himself and the 1st Respondent. It submitted that that particular test cannot in any way be used in isolation with the rest of the requirements established in the Christine Adot Lopeiyo case (supra). That even by appropriating the doctrine of privity of contract between the parties, the Claimant is unwittingly attempting to appropriate the obligations of the 2nd Respondent upon a third party. That the existence of an employer-employee bond requires a comprehensive evaluation of various factors such as the degree of control exerted by the alleged employer over the work performed and even the provision of benefits. It was the 1st Respondent's submission that considering the foregoing, there is no such employer-employee relationship in existence between the 1st Respondent and the Claimant. That any decision in regards to the termination of the Claimant's services was therefore the prerogative of the 2nd Respondent as dictated in the Employment Contract. That when the Claimant received the termination letter authored by the 2nd Respondent, he signed it in confirmation that he understood the contents of the said letter.

15. Without prejudice to the foregoing, the 1st Respondent submitted that the Claimant's position with the 2nd Respondent Company was rendered redundant on account of the winding up of the 2nd Respondent Company, as stated in his Termination Letter dated 15th October 2020. That the Claimant further admitted to Court that he received his terminal dues and attached pay checks showing the 2nd Respondent's compliance with the terms of the Employment Agreement. The 1st Respondent argued that the Termination on account of redundancy was therefore materially and substantively lawful and as per the conditions clearly set out in the case of Dennis Odhiambo Obare v Catholic Diocese of Nakuru [2019] eKLR. That it therefore ends that the Claimant was procedurally and substantively terminated with all terminal dues paid and the Claim thus falls short and ought to be dismissed.

16. The Claimant sued the 1st and 2nd Respondents. The 1st Respondent denies being his employer and recites the provisions of sections 2 and 9 of the *Employment Act*. Whereas the 1st Respondent asserts the Claimant was not its employee, it concedes that it paid his salary. The explanation given is that the 2nd Respondent would occasionally require bailing out by the 1st Respondent hence the salary payments to the Claimant. In the case of Patrick Mutua Mwanzia & 19 others v Habo Group of Companies (supra) the court held that in all probability, the claimants in that case were employed by the Respondent who paid their salaries. Similarly, in this case, the 1st Respondent paid the salaries of the Claimant yet it asserts it was bailing out the 2nd Respondent. Why did the 1st Respondent not make payments to the 2nd Respondent's account who then would pay its "employee"? In my considered view, the employment of the Claimant was joint as the 2 Respondents both shared varied responsibilities over the Claimant. This was in addition to another of the Respondents' relations – Rama Holdings Limited. In the Claimant's case, he was terminated after a very short stint with the Respondents. He sought in recompense, terminal dues totalling to Kshs. 3,386,780/-, and cost of the suit together with interest and any other relief as the Court may deem fit. He breaks this down to notice pay of Kshs. 600,000/-, annual leave of Kshs. 200,000/- and maximum compensation for wrongful dismissal

amounting to Kshs. 2,586,780/-. As the operations manager he earned a gross salary of Kshs. 215,566/- per month hence the sums sought.

17. The Claimant worked for 3 or so months and as such even pro rata leave would not equate to a month's salary. The pro rata leave earned was only equivalent to Kshs. 20,000/- which he is entitled to. He was also entitled to notice pay of Kshs. 600,000/- being the equivalent of 3 months pay in terms of clause 6 of his contract of employment. The termination was on account of purported redundancy and therefore the provisions of section 40 of the *Employment Act* would kick in where the employee would need to be notified of the intended lay off. This seems to have been done on 15th October 2020 and the only fault was in not giving notice as required in law. The Claimant would be therefore be entitled to notice pay, pay for leave earned and not taken as enumerated in section 40. The Claimant is not entitled to maximum damages under section 49 of the *Employment Act* as he had only served for 3 months. There is no way he could be entitled to damages in excess of the period of service. I would cap compensation to 1 month for the failure of the employer to give the requisite one month notice in terms of section 40 of the *Employment Act*. The sum he would be entitled to is Kshs. 200,000/-. From his own pleadings he concedes terminal dues amounting to 99,866/- were paid to him. As such, netting the sum I find he was paid as against what he was entitled to in law, he would be only entitled to receive Kshs. 720,134/- as the balance of terminal dues.

18. In the final result, the Court thus finds the termination to have been afoul the law. Judgment is entered against the Respondents jointly and severally for:-

    a. one month's compensation – Kshs. 200,000/-

    b. 3 month's salary as notice – Kshs. 800,000/- less amount paid – Kshs. 99,866/- leaving balance of Kshs. 700,134/- under this head.

    c. Pro rata leave – Kshs. 20,000/-

    d. Costs of the suit.

    e. Interest at court rates on the sums in (a), (b) and (c) above from the date of judgment till payment in full.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL 2024.

NZIOKI WA MAKAU

JUDGE