Sila & 44 others v Shree Haree Builders & another (Cause 1875 of 2017) [2023] KEELRC 862 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 862 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1875 OF 2017

SC RUTTO, J

APRIL 14, 2023

BETWEEN

JOHN SILA & 44 OTHERS ..... CLAIMANT

AND

SHREE HAREE BUILDERS ..... 1ST RESPONDENT

EURECCA DEVELOPERS LTD ..... 2ND RESPONDENT

JUDGMENT

1. The claimants jointly brought the instant suit through a statement of claim dated September 19, 2017. It is the claimants' case that on diverse dates, between February, 2015 and September, 2016, the respondents jointly employed them as casuals at Riverside Drive to develop some office suits. That on or about December 14, 2016, the claimants arrived at work as usual and were shocked to find the site at Riverside Drive closed. That the security guard at the site informed them that they had instructions not to talk to them and that they had been terminated from employment. The claimants further aver that they tried to engage the site managers and the developer but they brushed them off telling them that they were no longer employees there. It is on account of the foregoing that each of the claimants seek against the respondents jointly and severally, the sum of Kshs 10,864,817.00 being leave pay, compensatory damages, notice pay and underpayment.

2. The 2nd respondent opposed the claim through its statement of response dated November 17, 2017. It denied the existence of the employment relationship and averred that since it never employed the claimants, the issue of unfair dismissal or breach of contract does not arise. Putting the claimants to strict proof, the 2nd respondent denied owing the claimants any sum of money. Consequently, it termed the claimants' suit as misplaced, without merit and an abuse of court process.

3. On its part, the 1st respondent entered appearance through the firm of Desai, Sarvia and Pallan Advocates but did not file any defence. On October 14, 2022, the said firm of advocates filed a chamber

summons application through which they sought to cease acting for the 1st respondent. On November 3, 2022, the said application was allowed hence going into defence hearing, the 1st respondent was unrepresented.

4. The matter proceeded for part hearing on April 4, 2022 and further, on November 3, 2022 when the 2nd respondent presented and closed its case. During the trial, each side called oral evidence.

Claimant's Case

5. Mr John Sila, the 1st claimant testified on his own behalf and on behalf of the other claimants. To this end, he placed reliance on the authority dated September 19, 2017. To start with, Mr Sila adopted his witness statement dated September 19, 2017, as well as the bundle of documents of even date to constitute his evidence in chief.

6. It was his testimony that all the claimants were paid a daily wage of Kshs 350.00 which was below the minimum wage of Kshs 527.00 per day. That they were never issued with contracts of service and were not allowed to proceed on annual leave. That nonetheless, they executed their duties with due diligence and dispatch.

7. That on December 14, 2016, upon arrival at their work place on Riverside Drive, they were shocked to find the site had been closed. That the security guard at the site asked them to leave and informed them that they had instructions not to talk to them. That they rushed to the labour office to lodge a complaint. That the labour officer gave them a letter addressed to Meghprin contractors who were their employers at the time. That they did a search at the company registry and through a letter dated March 13, 2017, the registrar informed them that the said company was not registered.

8. That they then went to see a Mr Salesh who was one of the directors of Meghprin. That Mr Salesh called the labour office and stated that he wanted to settle the matter. That they (claimants) later went to the site and to their consternation, the sign board had been changed and there was a new one erected with the name Shree Haree Builders. That however, the site manager, Mr Premji and Mr Salesh were still there. That they tried to engage them but they were brushed off. That they also tried to talk to the developer but they were chased away.

9. Mr Sila stated that there was no valid reason for their termination and their families suffered as they were bread winners. Closing his testimony in chief, he asked the court to grant the claimants their prayers as sought in the claim.

2nd Respondent's Case

10. The 2nd respondent called oral evidence through Mr Salim Amirali Hassan Ali who testified as RW1. He introduced himself as the caretaker of the 2nd respondent's property. Similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the 2nd respondent as exhibits before court.

11. It was his evidence that the 2nd respondent is a developer and is the landowner of the land situated at Riverside. That since the 2nd respondent is not a contractor, it always contracts qualified independent contractors to undertake construction for them. That in this case, the 2nd respondent engaged the 1st respondent at its project in Riverside. That therefore, it is the 1st respondent who engaged the claimants as employees.

12. That the 2nd respondent did not deal with the claimants hence does not know them. That there has never been a contract of service between the 2nd respondent and the claimants.

13. That the 1st respondent is an independent contractor hence no liability attached to the 2nd respondent. That the 2nd respondent does not owe the claimant any money or the sum claimed.

14. RW1 asked the court to dismiss the claim against the 2nd respondent with costs.

Submissions

15. It was submitted on behalf of the claimants that they were employed by both respondents. That the 2nd respondent is not being candid as distribution of work was done by both respondents hence the 2nd respondent was not independent. That the 2nd respondent failed to produce a register of employees to ascertain that the claimants were not its employees. That further, there was no evidence that they paid the 1st respondent for the project.

16. Citing the case of *David Gichana Omuya v Mombasa Maize Millers Ltd* (2014) eKLR, it was further submitted by the claimants that the respondents did not have genuine reasons or even belief that any reason existed to terminate them. That even if it was to be assumed that the said dismissal was substantively fair, which the claimants deny, the respondent must still prove that the dismissal was procedurally fair.

17. On the other hand, the 2nd respondent submitted that the claimants have totally failed to show any connection between them and the 2nd respondent and to establish any labour relationship. That there are grave inconsistences in the claimant's claim which inconsistencies gravely affect them. That the notable inconsistencies are the claimants No 5,10,18 and 42 are said to have worked from February, 2017 which was after the alleged termination. That further, the claim for claimant no. 14 has been duplicated as he is also claimant no. 20. The 2nd respondent further submitted without prejudice that the claimants were casual labourers hired on a daily basis hence cannot maintain an action for wrongful termination under section 35(1) (a) of the *Employment Act*.

Analysis and Determination

18. Having considered the pleadings, the evidence and submissions on record, the issues falling for determination by the court can be identified as being: -

    a. Who was the claimants' employer?

    b. What was the nature of the claimants' engagement?

    c. Whether the claimants' termination was unfair and unlawful.

    d. Are the claimants entitled to the reliefs sought?

Who was the claimants' employer?

19. The claimants aver that they were employed by the respondents on diverse dates from February, 2015 upto September, 2016. Whereas the 1st respondent did not file a defence to affirm or dispute the employment relationship, the 2nd respondent was categorical that it did not have an employment relationship with the claimants and has denied engaging them.

20. In support of its position, the 2nd respondent exhibited a labour contract it executed with the 1st respondent on December 11, 2015. In the said contract, the 1st respondent is identified as a contractor while the respondent is identified as a developer. Of significance is clause 4 of the said contract which provides that: -

i. All workers on site (except the clerk of works and any supervision staff) will be employees of the contractor and the contractor shall be fully responsible for them. The contractor will be responsible for all salaries, statutory deductions not limited to but including Payee (sic), NSSF and NHIF and any other dues for employees.

ii. The developer shall not bear any liability in respect of personal injuries to any persons arising out of or in the course of the execution of this contract and charges incurred in relation thereto.

iii. The developer will be responsible for payments to the contractor only based on work done and not for the workers present on site.

iv. The developer shall make advance payments weekly every Friday to the contractor based on work completed during the week against appropriate invoices.

v. The developer will not be responsible for the contractor's employees or any tax and other statutory deductions due by the contractor.

vi. The contractor will ensure all requisite instances under the *Employment Act* and the *Work Injury Benefits Act* are in place and cover all labourers on the developer's site and will indemnify the client for lack thereof.

21. What can be deduced from the foregoing contractual provision between the 1st and 2nd respondent is that all employees on the 2nd respondent's site were the 1st respondent's employees and subsequently, it was responsible for their salaries and statutory deductions. The 1st respondent was also obliged to ensure statutory compliances under the *Employment Act* and *Work Injury Benefits Act*.

22. Therefore, for all intents and purposes, it is evident that the 1st respondent was the employer of all employees on site, including the claimants. Indeed, the claimants have not adduced any evidence to prove that they had an employment relationship with the 2nd respondent.

23. Having been disowned by the 2nd respondent from the word go, it was incumbent upon the claimants to prove that they were indeed its employees. On this issue, my thinking aligns with that of the court in the case of *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR where it was held that: -

> "This court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the claimant from the burden of proving their case. Even where an employment contract is oral in nature, the claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice."

24. In the circumstances, I am not persuaded that the claimants have established to the requisite threshold, the existence of an employment relationship with the 2nd respondent, moreso noting that the same was fundamental as it lay a foundation for their case. On the other hand, the 2nd respondent has established that it was not responsible for employees at its site. In any event, the evidence points to the 1st respondent being the claimant's employer.

25. Having found as such, the case by the claimants against the 2nd respondent, collapses at this point.

Nature of the claimant's engagement?

26. It is imperative to determine the kind of employment relationship that existed between the 1st respondent and the claimants. This is significant as the claimants expressly pleaded that they were employed as casuals. Further, a resolution of this issue, will determine the rights accruing to the claimants and the reliefs, if any, available to them.

27. Section 2 of the *Employment Act* is key in this regard as it defines the term "casual employee" to mean: -

> " .. an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time".

28. Essentially, a casual employee is an employee who is engaged for twenty four hours at a time. As per the provisions of section 35(1) (a) of the *Employment Act*, such engagement is terminable by either party at the end of the day, without notice.

29. Engagement on casual basis may be converted to a regular term contract in terms of section 37 of the *Employment Act*. The said statutory provision is couched as follows: -

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot 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 or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

30. It is instructive to note that this conversion is significant in that, such an employee becomes entitled to the safeguards available to an employee on a regular contract of employment. Such safeguards may include, issuance of notice prior to termination or payment of salary in lieu of notice, protection from unfair termination, benefits such as leave, rest days and issuance of certificate of service.

31. In this case, the claimants did not plead that their engagement was continuous beyond three months hence was converted by operation of law under section 37 of the *Employment Act*. Coupled with foregoing, it was pleaded that the claimants who are 45 in number, were engaged on diverse dates between February, 2015 upto September, 2016. This is a block period and it is therefore impossible to tell who among the claimants was employed from what period and whether the said period fit the bill for conversion to permanent terms under section 37 of the *Employment Act*.

32. Having failed to plead conversion from casual basis, I am unable to find that the claimants were engaged on other terms beyond casual basis. What this means is that their employment was terminable at the end of the day hence no notice or reason was required prior to termination.

33. Therefore, the reliefs sought do not avail as the claimants were not entitled to the safeguards under the *Employment Act*.

34. Having determined as such, it is not logical to determine whether the claimants were unfairly and unlawfully terminated from employment as that issue falls by the wayside.

Conclusion

35. In the final analysis, the claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimants Mr. Gomba

For the 1st Respondent No appearance

For the 2nd Respondent Ms. Makaba instructed by Mr. Mwangi

Court assistant Abdimalik Hussein

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 had 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.