



**Imboha v Mukunga & another (Cause 469 of 2016)  
[2023] KEELRC 2139 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2139 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 469 OF 2016  
NZIOKI WA MAKAU, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**CHARLES SHIVACHI IMBOHA ..... CLAIMANT**

**AND**

**STEPHEN MUKUNGA ..... 1<sup>ST</sup> RESPONDENT**

**EUNICE MUKUNGA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant brought this suit against the Respondents claiming wrongful and unfair termination of his services non-payment of his terminal benefits. The dues sought are salary in lieu of notice, service pay, leave pay, house allowance, and compensation for unfair termination. The Claimant further prayed for costs of the suit, interest, certificate of service and any other relief as the Court may deem fit. It was the Claimant's averment that the Respondents employed him as a Security Guard in March 2005 at a monthly salary of Kshs. 10,000/-. He noted that the Respondents did not give him an appointment letter and contended that he served the Respondents with loyalty and diligence until 3<sup>rd</sup> November 2014 when they terminated his services. He further averred that during the time he was in the employ of the Respondents, they neither gave him the required leave and house allowance nor notice and that he was summarily dismissed without the due procedure of the law.
2. In response, the Respondents filed their Reply to Memorandum of Claim dated 31<sup>st</sup> May 2016. They denied having ever employed the Claimant but averred that they were aware the Claimant used to work as a security guard for their late father, Hon. Boniface Mganga, on a rental property along Ngong Road until 5<sup>th</sup> July 2011 when their father died. Their position was that the said property had since then been rented out to a new tenant who did not require security services. Further, that the instant suit was time barred under the provisions of section 90 of the *Employment Act* 2007. They thus prayed that for the suit to be dismissed with costs.



3. The Claimant's response was that after the death of the Respondents' father, the Respondents assumed implied responsibility as he continued to serve them and they continued to pay his monthly salary from 2011 to 2014 when they terminated his services. He denied that the property was rented out immediately upon the death of Hon. Mganga, averring that it was rented out in 2014 at the point when the Respondents terminated his services. He prayed that the Response be struck out with costs and judgment entered in his favour as prayed in the Claim.
4. Evidence

The Claimant testified that the Respondents informed him they wanted to sell the house but did not pay him upon terminating his services. He stated that upon the death of Hon. Mganga, the 1<sup>st</sup> Respondent told him to continue working at the residence. He further confirmed that he did not live on the premises but stayed at his own place. Under cross-examination, the Claimant confirmed that his job ended when the new owner and the 1<sup>st</sup> Respondent told him to leave.
5. The 1<sup>st</sup> Respondent (RW1) testified and clarified that his name was Stephen Kifuso Mganga and not Mukunga. He testified that he could not have been the one who employed the Claimant as he was in North Carolina USA in March 2005 and that he never paid the Claimant. He notified the Court that after they rented out the house, the new tenant (Lucy Wambui) let the Claimant continue in employment for a few months before letting him go. RW1 confirmed in cross-examination that the Claimant was still in employment when their father passed away in 2011 but that they leased the house around that time. He further asserted in re-examination that he did not know the terms of employment between the Claimant and his late father.
6. The 2<sup>nd</sup> Respondent testified and also clarified that her name was Ashley Eunice Machocho Mganga and not Eunice Mukunga. She confirmed that the Claimant worked for their father and that she neither terminated him nor was she in charge of his dues. She stated in cross-examination that the Claimant did not continue working at the residence after the passing of their dad in 2011. She further confirmed that their mother was not living in the said residence and that she did not know who paid the Claimant or who terminated him.
7. Claimant's Submissions

The Claimant submitted that the following are the issues for determination:

  - i. Whether there existed an employer/employee relationship between the parties.
  - ii. Whether the termination of the claimant was wrongful and unfair.
  - iii. Whether the Claimant is entitled to the prayers sought.
  - iv. Whether the claim is statute barred.
  - v. Who should be condemned to pay costs.
8. It was the Claimant's submission that of the nine (9) years that he worked at the residence, five (5) years were under the Respondents' father while the remaining four (4) years were under the Respondents. He reiterated that upon the death of Hon. Mganga, the two Respondents approached and persuaded him to remain in employment on the terms which had been agreed between him and the late Hon. Mganga. According to the Claimant, there thus existed an agreement of service between the parties. As to whether the claim was statute barred as alleged, he submitted that the case was filed within time because his employment was terminated in 2014 and the claim was filed in court on 23<sup>rd</sup> March 2016.



9. The Claimant submitted that his testimony of how his employment came to an end was not controverted and that he is thus entitled to the prayers sought. That since he was not issued any notice before his termination of employment as provided for under sections 35 and 41 the Employment Act, he is entitled to one month's salary in lieu of notice. That despite the provisions of section 31 of the Employment Act that an employer shall at all times, at his own expense, provide reasonable accommodation for each of his employees, he was neither housed nor paid house allowance during his tenure as the Respondents' employee. That as he was also not given any leave contrary to section 28 of the Employment Act that entitles an employee to one-month annual leave, he ought to be paid the unpaid leave days for the period he served the Respondents.
10. The Claimant further submitted that courts have adopted a compensation two prong approach when granting employees the maximum award of 12 months' salary. That firstly, the employee must have worked for the employer for a considerable period of time and secondly, the period taken to unsuccessfully secure a job is considered. It was the Claimant's submission that the longer the period worked and unsuccessful job hunt leads to a larger award, as was determined by the Court in the case of Alfred Muthomi & others v National Bank of Kenya Limited [2018] eKLR. He thus prayed that the Court in the instant case considers the period he served the Respondent when granting the reliefs sought in the Memorandum of Claim and asserted that since costs follow event, he is entitled to the costs of the suit.
11. On the issue of how the Respondents' names were presented in the claim, the Claimant submitted that he filed the Claim in person with the assistance of someone who did not know the Respondents' proper names and that he had also not had a benefit of education. That nevertheless, summons was properly served upon the Respondents through their Advocates and the said Respondents had in fact admitted to knowing him as their father's security guard. In addition, that the Respondents had not raised an issue with the way their names were spelled out in their pleadings.
12. Respondents' Submissions  
According to the Respondents, the issues for determination are:
  - a. Whether the Claimant's employment contract with the deceased is enforceable against the Respondents.
  - b. What is the effect of an employer's death on the contract of employment.
  - c. Whether the claim is time-barred and brought against the wrong parties.
  - d. Whether the Respondents terminated the Claimant's employment.
  - e. Whether the Claimant is entitled to the reliefs sought.
13. It was the Respondents' submission that the deceased employer died on 5<sup>th</sup> July 2011 when the employment contract was automatically terminated. That the Claimant cannot now bring a claim based on that contract against them in their individual capacities when in fact they did not contract or terminate his employment. Moreover, that the Claimant failed to sue the new tenant under whose employment he continued and was terminated but instead chose to sue the Respondents, who are strangers to his employment. Their stance was that as they were not privy to the oral contract between the Claimant and the late Mr. Mganga, the claim against them on the said contract thus fails. They relied on the Court of Appeal decision in Agricultural Finance Corporation v Lengetia Ltd [1985] KLR 765 that a contract affects only the parties to it and cannot be enforced by or against a person who is



not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The Respondents submitted that the Court of Appeal further held as follows:

“...The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

14. The Respondents further submitted that their testimony in court was that they did not stay with their father in the subject house and that the Claimant was employed by their late father when they were both not around. That they thus did not require, obtain or benefit from the Claimant's services. Furthermore, the lack of employment relationship has been confirmed by the Claimant's conspicuously lack of knowledge of the Respondents' names, residence, occupation, and relationship with each other. They also submitted that in contracts of service, when an employer dies, the contract terminates as held in the case of *Farrow v Wilson* (1861-73) All ER Rep 846. That this Court should thus find that the contracts between the Claimant and the deceased and between the Claimant and the new tenant are not enforceable against the Respondents.
15. The Respondents submitted that the Claimant ought to have sued the Estate of the Deceased and within the time stipulated under section 90 of the *Employment Act*. That the rationale behind Order 31 Rule 1 Civil Procedure Rules is that legal representatives would be better placed to defend or settle any claims, being appraised of the facts and circumstances of the claim. That it was thus unfair to haul individuals into litigation on claims that ordinarily lie against an estate and that this Court should not countenance such a state of affairs. It was the Respondents' submission that as the Claimant's contract of service with the deceased was terminated in 2011 upon death of Hon. Mganga, any claim on that contract ought to have been brought to court by 2014 and not in 2016 as in the instant case. That even if the Claimant's employment was terminated in 2014, which they deny, the cause of action was limited to one (1) year ending in 2015 because claims on continuing injuries ought to be brought within 12 months of cessation. They urged the Court to find that the claim herein is therefore time-barred.
16. Without prejudice to the foregoing, the Respondents submitted that the Claimant was not entitled to house allowance even if this Court assumes that he earned Kshs. 10,000/- monthly. That employers have the option of paying a gross salary inclusive of house allowance provided they do not fall below the minimum wage. That notably, the Claimant had not brought a claim for underpayment and was only claiming house allowance for 15 months he alleges he worked under the new contract with the new tenant. That if the minimum wage were to be used as the basic pay to compute house allowance, he would not be owed. That the minimum wage for a night watchman in 2011 was Kshs. 8,463/-, 15% of which is Kshs. 1,269.45 summing up to Kshs. 9,732.45, which falls below the gross salary of Kshs. 10,000/- allegedly paid to him. That this therefore meant that the Claimant's house allowance was covered in his salary.
17. According to the Respondents, a maximum award of compensation would be excessive in the circumstances. That the Claimant did not complain of ill-treatment on the part of the Respondents during his employment with the deceased and new tenant and he even immediately secured employment with the new tenant upon the automatic termination of the first contract with the deceased.
18. The Claimant sued who he perceived to be his erstwhile employers. He seeks a raft of reliefs which if proved would entitle him to recompense from the Respondents. The issues for determination, as distilled by the Court, are as follows:-
  - i. Whether there existed an employer/employee relationship between the parties.



- ii. Whether the claim is statutorily time-barred.
  - iii. Whether the termination of the Claimant was wrongful and unfair.
  - iv. Whether the Claimant is entitled to the prayers sought.
  - v. Who should be condemned to pay costs.
19. The first issue for determination is whether there existed an employee/employer relationship between the parties. The Claimant sued Stephen Mukunga and Eunice Mukunga. He had intended to sue the heirs of Hon. Boniface Mganga (Deceased) his former employer. The Respondents indicated their names to be Stephen Kifuso Mganga and Ashley Eunice Machocho Mganga. The first of the Respondents' witness indicated that he was a student in North Carolina USA at the time of the alleged employment. The second witness for the Respondents indicated that she was a girl aged 16 years at the time and could not be an employer of the Claimant. The evidence adduced was that the Claimant worked for Hon. Boniface Mganga who served as an MP and that when the MP passed away, the house he had purchased was rented to another tenant a Ms. Lucy Wambui, she retained the Claimant as an employee for 3 months before terminating his services. The Claimant seemed not to know his employer(s) as he indicated the wrong names in his suit. The Respondents have proved that they were not in a position to employ the Claimant with one a resident of the United States of America where he was pursuing his education and the other a girl of 16. The Claimant attempted to embellish his case by asserting that Eunice used to work at a salon but she proved to Court to have been below the age of 18 years and therefore incapable of being the Claimant's employer. As to the first issue, the Court returns that there was no employee/employer relationship between the parties.
20. The second issue for determination is whether the claim is statutorily time-barred. The employment of the Claimant came to an end in 2011. He sued the Respondents in 2016. Claims for relief such as that sought by the Claimant are to be mounted within 3 years and the outer limit was 2014. There is no extension of time and the suit by the Claimant was therefore filed out of time and was therefore statutorily time barred in terms of section 90 of the *Employment Act*. As such, the suit was dead on arrival and incapable of achieving the intended result.
21. The determination of the first issue distilled for determination make it superfluous to determine the third issue since there being no employment relationship between the parties there could conceivably be no room to navigate in relation to the fairness or otherwise of the alleged employment since none existed in the first place.
22. As to whether the Claimant is entitled to the reliefs sought and who is liable for costs, the Claimant is not entitled to the reliefs sought as he did not prove the existence of the relationship of employer and employee between him and the two Respondents. He thus cannot recover anything from the 2 Respondents. On the final issue as to who is to bear the costs of the suit, the Claimant having mounted a hopeless claim against people who were neither his employer nor responsible for any payments to him, the burden of costs of the suit falls squarely on his shoulders. The final result is the suit is unmerited and is dismissed with costs to the Respondents.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

