



**Mwangi v Advent Valuers Limited (Cause 1650 of 2016)
[2022] KEELRC 1107 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1107 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1650 OF 2016**

**SC RUTTO, J
APRIL 28, 2022**

BETWEEN

NICHOLAS NJENGA MWANGI CLAIMANT

AND

ADVENT VALUERS LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was offered employment by the respondent to serve as the chief security officer at the Shujaa Mall on 9th January, 2015. That his employment was unfairly terminated by the respondent vide a letter dated 1st July, 2016. As a result thereof, he seeks against the respondent notice pay, maximum compensatory damages, compensation for public holidays and weekly off days and accrued leave days.
2. The respondent opposed the claim and denied the existence of an employment relationship with the claimant. It contended that it only engaged the claimant in its capacity as the manager/agent of Virgin Estates Limited which is the owner and proprietor of Shujaa Mall, pursuant to a Property Management Agreement. It asked the Court to issue a declaratory order to the effect that the said Virgin Estates Limited being its principal, was the claimant's employer hence liable under the claim. It further asked the court to dismiss the claim with costs.
3. Subsequent to the defence, the respondent applied for leave to serve a Third-Party Notice upon Virgin Estates Limited. The Court vide a Ruling dated 2nd November, 2018, allowed the Application and directed that the said Third Party Notice be served upon the intended Third Party within 15 days, failure to which the leave lapses. The intended Third Party was also granted leave to file any appropriate response within 21 days of service of the Third-party Notice.
4. The respondent later sought leave from the Court to extend time within which to serve the Third-Party Notice, but the same declined.



5. The matter proceeded for trial on 29th September, 2021 when the claimant's case closed. The matter was then adjourned for defense hearing on 17th November, 2021 when the respondent presented and closed its case.

Claimant's case

6. At the commencement of the hearing, the claimant sought to adopt his witness statement dated 10th August, 2016 as well as the bundle of documents filed together with his claim, to constitute part of his evidence in chief.
7. In his testimony, the claimant stated that he was an employee of the respondent and was not privy to the agreement it had with Virgin Estates Limited. The claimant further told court that he was unfairly terminated by the respondent vide a letter dated 1st July, 2016. He termed the termination as unfair, illegal and contrary to the Employment Act since he was not offered an opportunity to appear and be heard prior to his termination. He further averred that he was not adequately compensated upon his termination.

Respondent's case

8. The respondent presented oral evidence through its Director, Mr. Timothy Saruni, who testified as RW1. Mr. Saruni also asked the Court to adopt his witness statement, bundle of documents and supplementary documents filed on behalf of the respondent, to constitute part of his evidence in chief. According to Mr. Saruni's witness statement filed on 5th October, 2016, the respondent entered into a Property Management Contract with Virgin Estates Limited, the owner and proprietor of Shujaa Mall. That the respondent was charged with rent collection, service charge collection maintenance of the premises, hiring, supervising and discharging all and any employees necessary for the operation of the mall.
9. That the respondent was required under the Agreement to open an operating account for and on behalf of Virgin Estates Limited, hence it would pay all expenses out of the account, with regard to the mall, including employees' salaries. That as such, the claimant was offered employment on account of the said Management Contract. That the said Virgin Estates Limited abruptly terminated the Management Contract without proper notice hence the respondent could no longer execute its functions under the said agreement, including supervising and remunerating employees. That if indeed, the claimant is owed any sum of money, then the same should be claimed from Virgin Estates Limited.

Submissions

10. The claimant submitted that the letter of appointment dated 9th January, 2015, which he executed with the respondent, constituted a valid contract of service in light of the provisions of sections 9 and 10 of the Employment Act. The claimant further submitted that he had no valid contract of service with Virgin Estates Limited hence there was no employer employee relationship. The claimant buttressed its submissions on several authorities including the cases of Yebuda Sulami & another vs Zalareeds Limited & 3 others (2019) eKLR and Aineah Liluyani Njirah vs Aga Khan Health Services (2013) eKLR. The claimant further submitted that the reason for his termination was on account of redundancy and the procedure stipulated under section 40 of the Employment Act was not complied with. On this score, he relied on the case of Mary Kisao Ngowa & 36 others vs Krystalline Limited (2015) eKLR.



11. The respondent submitted that it engaged the claimant as head of security at Shujaa Mall in its capacity as the agent of Virgin Estates Limited. That as such, the claimant was hired at the behest of Virgin Estates Limited which acted as the principal in the transaction. It supported this position on a passage from Bowstead and Reynolds on Agency Seventeen Edition, Sweets and Maxwell page 1-100. The respondent further submitted that Virgin Estates Limited terminated the management contract without notice hence it had no option but to let go of the claimant.

Analysis and determination

12. From the pleadings, evidence on record and submissions before Court, the issues falling for determination are:
 - a. Whether there was an employment relationship between the claimant and the respondent?
 - b. If the answer to (a) is in the affirmative, whether the claimant's termination was unfair and unlawful?
 - c. Is the claimant entitled to the reliefs sought?

Whether there was an employment relationship between the claimant and the respondent?

13. The claimant has averred that he was an employee of the respondent. To support his assertion, he has produced an offer of employment letter 9th January, 2015 issued by the respondent's director and signed by himself in acceptance. In its preamble, it states as follows: "Further to our various discussions, we are pleased to offer you employment as the Chief Security Officer at Shujaa Mall, Nairobi."
14. The letter of appointment contains clauses on commencement date, station of work, hours of work, salary, leave, termination of employment, confidentiality and non-disclosures.
15. The claimant further supported the existence of the employment relationship on the letter terminating his employment and which was issued by the respondent on 1st July, 2016.
16. The respondent disputed this assertion and sought to rely on clauses 2.3.1 and 2.3.2 of the Property Management Agreement which provides as follows: -

"2.3.1 Employees for management office

The Property Manager is authorized to hire supervise and discharge and pay all employees necessary to be employed in the management, maintenance and operation of premises provided that all wages payable to such employees shall be paid out of the operating account provided for in 3.3 hereinbelow.

2.3.2 The Property Manager shall do and perform all acts required of an employer and shall execute and file all other returns governing employment."

17. As per clause 3 of the Property Management Agreement the claimant's salary was paid out of the operating accounts of Virgin Estates Limited. The funds from the account was to be used to provide the services at Shujaa Mall, including the claimant's salary.
18. It is therefore the respondent's case that it was not the claimant's employer and that it merely acted as a principal of Virgin Estates Limited, which was his actual employer.
19. The question therefore is whether the claimant was the employee of the respondent or was it a mere agent of Virgin Estates Limited?



20. To put this issue into context, it is imperative to revisit the engagement of the three parties (claimant, respondent and Virgin Estates Limited) before the commencement of the contract of employment, during the performance of the contract of employment and after termination of the contract of employment.
21. The starting point is a letter dated 12th November, 2014, emanating from Dr. Mutonyi of Safemark Group Limited to the respondent, and through which the claimant was recommended for employment as the chief security officer of Shujaa Mall.
22. This communication was followed by an email of 4th January, 2015, by a Mr. Wachira Njuguna, through which he had directed RW1 to issue the claimant with an appointment letter. The email reads as follows;

“Good morning Mr. Saruni, Refer to Dr. Mutonyi’s advice on the recruitment of the chief security officer. I note that you have not responded to the recommendations given by our security consultant. Please meet Dr. Mutonyi immediately to settle this issue. Nicholas is the preferred candidate and you therefore should go ahead and recruit him. He should commence employment before the 7th of January, 2015. You can negotiate a further discount on salary considering that the mall is new and not fully let and also that he lives nearby. Please acknowledge receipt of this instruction and copy me the notice of the meeting with Dr. Mutonyi.”

23. During cross examination, the claimant stated that the said Mr. Wachira Njuguna was the Managing Director of Virgin Estates Limited.
24. Seemingly, the claimant was not issued with a letter of appointment hence his email of 13th January, 2015, through which he addressed the said Mr. Wachira Njuguna as follows;

“I would like to appreciate your gesture to offer me the position of security manager at Shujaa Mall. I was released by Dr. Mutonyi immediately and started on Friday 9th January. However, I have not received a letter of appointment as authority to mingle with other Shujaa Mall and Makini security teams as I need to start evaluating and implementing security policies immediately without the staff asking questions. I also request the team members to be informed about the development. Regards”

25. To clarify the relationship between the claimant vis a vis the respondent and Virgin Estates Limited, Mr. Wachira followed up with another email of 9th January, 2015, addressed to the respondent as follows;

“Good morning Mr. Saruni, the deadline for your action on engaging Nicolas the security officer was Thursday yesterday. Please go ahead and commit him on a first three months period on a temporary basis. You may place him on a gross monthly salary of Kshs 60,000/= (all inclusive of taxes). The contracts should have an automatic renewal after three months. Kindly note that he will be functionally reporting to me while administratively to yourselves. When the mall becomes full you may upgrade his status to a 3 year contract renewable and maybe a small increment. By way of this email I request JP to instruct Nicholas to report to his station at Shujaa Mall today at 8 am without fail. Saruni and JP should confirm instruction and confirm action taken.”



26. It was subsequent to the foregoing that the claimant was issued with an offer of employment letter dated 9th January, 2015. The same has been executed in duplicate by the respondent and the claimant.
27. An employee has been defined under Section 2 of the *Employment Act* to mean, “a person employed for wages or a salary and includes an apprentice and indentured learner.”
28. On the other hand, an employer is defined under the same section to mean “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”
29. Within the context of the *Employment Act*, the employer and employee may enter into a contract of service which is defined to mean “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”
30. Section 10 of the *Employment Act* provides for particulars of employment to be included in a written contract of service. The same include but not limited to: the name, age, permanent address and sex of the employee; the name of the employer; the job description of the employment; the date of commencement of the employment; the form and duration of the contract; the place of work; the hours of work; the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits; the intervals at which remuneration is paid; and the date on which the employee’s period of continuous employment began, taking into account any employment with a previous employer which counts towards that period.
31. It is notable that the letter of appointment executed between the claimant and the respondent and which constituted the contract of service in this case, contained more particulars than the ones specified under Section 10 of the *Employment Act*. This included provisions in respect of annual leave, sick leave and termination clause of the employment contract.
32. Applying the facts and context of the instant case, against the relevant provisions of the *Employment Act*, it is evident that the parties were in an employment relationship.
33. In as much as the trail of email exchanged between the parties, reveal that Virgin Estates Limited had a hand, controlled the manner in which the claimant was recruited and dictated the terms of his engagement, once employed he was under the control of the respondent. Indeed, as per the email of 9th January, 2015, the claimant was to report functionally to Virgin Estates Limited and administratively to the respondent. Therefore, the respondent cannot run away from its responsibility as an employer in this case.
34. Once it had hired the claimant and executed a contract of employment with him, he was under their control as an employee. Afterall, it executed the letter of appointment with the claimant and not with Virgin Estates Limited. Over and above, clause 2.3.2 of the Property Management Agreement granted the respondent authority to perform all acts required of an employer.
35. Indeed, it is also the respondent that terminated the employment of the claimant. In the event claimant was not its employee, then why did it terminate his services as opposed to surrendering him to Virgin Estates Limited, upon termination of the Property Management Contract? The fact that it terminated his contract of employment confirmed that he was its employee. To further confirm this fact, the respondent stated as follows in the letter of termination; “Be that as it may and as we do not have any other vacancy to absorb you at the moment. Please be advised that should you wish to continue



serving in the same capacity, kindly proceed and write an application directly to the landlords for consideration.” By that statement, the respondent was intimating that it would have retained the claimant in the event it had a suitable vacancy within its employment.

36. Accordingly, it is the finding of this Court that the claimant was an employee of the respondent for all intents and purposes.

Unfair and unlawful termination

37. Pursuant to Section 45 (2) (b) of the *Employment Act*, termination of employment by an employer is deemed unfair if the employer fails to prove; that the reason for the termination is valid and fair and is related to the employee’s conduct, capacity or compatibility; or based on the operational requirements of the employer.
38. In the instant case, the claimant’s contract of employment was terminated by the respondent on grounds that the landlord, Virgin Estates Limited, had terminated its services with effect from 1st July, 2016. The letter of termination goes on to state that the claimant’s salary was based on the service charge account and remuneration payable by the landlord. It can therefore be inferred that the respondent was not in a position to continue paying the claimant’s salary. Indeed, the respondent advised the claimant to apply to Virgin Estates Limited directly in the event he wished to serve in the same capacity.
39. From the foregoing, it is therefore apparent that the reason for the claimant’s termination was on account of its operational requirements.
40. The respondent produced in evidence a letter dated 29th June, 2016 from Virgin Estates Limited and through which it opted not to renew the Property Management Contract with the respondent. In this case, the contract was expiring on 30th June, 2016.
41. It is undoubted that the claimant’s employment was specifically in respect of Shujaa Mall. From his employment contract and the trail of email exchanged between the respondent and Virgin Estates Limited, the sole purpose for which the claimant was hired was to serve as the chief security officer of Shujaa Mall. As such, his employment was dependent on the sustainability of the Property Management Contract between the respondent and Virgin Estates Limited. It therefore follows that upon termination of the Property Management Contract, the substratum of the employment contract was lost. Simply put, further performance of the employment contract had been frustrated.
42. Besides, the claimant’s salary was based on proceeds of service charge from the Mall, hence with the respondent having lost management of the mall, the revenue stream which had erstwhile sustained his salary, had ceased to exist.
43. In light of the foregoing, the respondent had a valid and fair reason to terminate the claimant’s contract of employment based on its operational requirements.
44. The employment relationship had ended on no fault of either the claimant or the respondent.
45. The claimant has pleaded that his termination was unfair as the respondent did not follow the right procedure in termination.
46. As stated herein, the termination of the employment contract was not on account of a disciplinary issue arising from the claimant’s poor performance or misconduct. As such, the provisions of section 41 of the *Employment Act* do not come into play. What presents before me is a case of normal termination based on the contract of employment between the parties.



47. In this case, the claimant was given reasons for his termination hence the only flaw in the termination process, was the fact that he was given a shorter notice period compared to the one stipulated under his contract of employment. In this regard, the respondent was required to give the claimant one month notice in the event of termination of the employment contract.
48. It is however notable that the termination of the Property Management Contract by Virgin Estates Limited was dated 29th June, 2016 and was effective 1st July, 2016. It was therefore abrupt and the notice period given was two (2) days. This extremely short notice had a domino effect on the claimant's termination notice.
49. The foregoing notwithstanding, the respondent was bound under clause 1(d) of the employment contract to give the claimant one month notice prior to termination or payment of one month's salary in lieu of notice.
50. The termination of the Property Management Contract having been abrupt, hence resulting in the respondent's breach of its contractual terms of employment with the claimant, it had the option of claiming the pay in lieu of the notice from Virgin Estates Limited. Whether it did so, is neither here nor there. What's relevant is that it was bound to give the claimant one month's notice and in lieu thereof, payment.
51. To this end, the claim succeeds to the extent that the claimant's termination was not in line with clause 1 (d) of his employment contract. As such, he is entitled to the same. The respondent is at liberty to seek recourse from Virgin Estates Limited in this regard.

Reliefs

52. The claimant is entitled to one month's salary in lieu of notice.
53. As the termination was on account of no fault by either party, the claim for compensatory damages is not viable.
54. The claim for accrued leave days and week off days is similarly denied on account of lack of supporting evidence.

Conclusion

55. In the final analysis, the court finds that the claimant is entitled to the sum of Kshs 60,000/= being payment of one month's salary in lieu of notice.
56. The award will be subject to interest at court rates from the date of filing the suit until payment in full.
57. The respondent shall also bear the costs of this claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Nderitu

For the Respondent Ms. Feksi



Court assistant Barille Sora

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.

STELLA RUTTO

JUDGE

