



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2241 OF 2016

ROBERT OLAHI ABALLA.....CLAIMANT

VERSUS

CHANYA INVESTMENTS LIMITED.....1ST RESPONDENT

CLESTIAN DISTRIBUTORS LIMITED.....2ND RESPONDENT

JUDGMENT

1. The Claimant herein moved this Honourable Court vide a Memorandum of Claim together with the Claimant's written statement dated 2nd November, 2016 seeking a slew of reliefs against the Respondent. The Claimant subsequently filed a list and bundle of documents dated 5th July 2018 and filed in Court on 9th July 2018.
2. 3. The Respondents on the other hand filed Response to Memorandum of Claim dated 1st December 2016 and filed in Court on 2nd December 2016. The Respondents subsequently filed its witness written statement dated 27th July 2018. The Respondents aver that the Claimant was not an employee of either of them. The Respondents further state in their response that the Claimant used to run private errands for Mr. Abraham M. Mwangi (hereinafter Mr. Mwangi), who died in the year 2014. The Respondents state that in consideration of the Claimant's ill health and for the private errands he undertook for Mr. Mwangi who paid the Claimant a stipend of Kshs. 20,000/- per month. It is further averred by the Respondents that when Mr. Mwangi died the Claimant continued to run private errands for Mrs. Ruth Kabura Mwangi.
3. The Claimant testified that he was employed by the then Managing Director of the Respondent Mr. Abraham M. Mwangi (Deceased) as from 27th December 1995 as a Manager to the two cafeterias at Mama Ngina Street and Uchumi Coffee House. The Claimant stated that this was communicated to all the staff and Directors vide a memo from the Managing Director to Supervisors dated 23rd December 2005. He stated that his duties ranged from Managerial duties, taking licences, permits, attending Court matters, human resources duties and general day to day administration as well as being personal assistant to the Managing Director. He stated that he served the Respondents until 30th November 2015 while earning monthly salary sum of Kshs. 20,000/-. He testified that the then Managing Director passed on 24th February 2014 before effecting any salary increase for the Claimant. He stated that during this employment period the Respondents failed to increase his salary despite the heavy work load while his juniors were being paid higher salary sum of Kshs. 60,000/- thus a disparity of Kshs. 40,000/-.
4. The 2nd Claimant's witness was Mr. Jackson Simiyu Nyongesa who adopted his written statement which was filed together with the Memorandum of Claim. He testified that the Claimant worked for the Respondents and in fact it was the Claimant who interviewed him for employment and that there were salary disparities based on unknown criteria but favoured those from central. Tribalism and discrimination on ethnic grounds was evident. In cross examination, it was the evidence of PW2 that discrimination occurred against the Claimant during his reign as a Manager.
5. The Respondent's witness was Mrs. Ruth Kabura Mwangi the widow of the deceased MD of the companies. She stated that the Claimant was known to her and her late husband but that he merely ran personal errands for her late husband and was not his employee. She adopted her witness statement dated 27th July 2018 as evidence-in-chief. In her evidence, she reiterated the response and denies that the Claimant was employed by the Respondents She stated that the Claimant accused her of among other things tribalism and discrimination. She stated that after the demise of her husband she did not know what to do and kept giving the Claimant a stipend as he would use the premises to conduct his business while occasionally running errands. She stated that was not a salary as far as she was concerned. She stated that in November 2015, the Claimant asked to be retired by the Respondents and be paid his terminal dues. She stated that the Claimant was informed that he could not be retired by the Respondents because he had never been employed by the Respondents. She testified that it is at that point that the

Claimant accused her of many things, including tribalism. The Respondents invite the court to consider her evidence in its entirety and dismiss the claim.

6. The Claimant submitted that he was not paid terminal dues and no reason was given for his constructive dismissal. The Claimant submitted that the issues for determination were whether the Claimant was an employee of the Respondent? He submitted that from the evidence adduced the Respondents confirm that the Claimant was engaged by Mr. Abraham Mwangi who was the Managing Director to do among other things personal errands. The Claimant submitted that he fit in the definition of an employee under the Employment Act, 2007. The Claimant submits he fits the definition and indeed was being paid Kshs. 20,000/- per month. The Claimant relied on Section 8 of the Employment Act, 2007 as read with Section 35(1)(c). He submitted that it was conclusive that the Claimant was an employee. As to the second issue on what grounds was the Claimant terminated/dismitted? The Claimant submitted that the Respondent's witness confirmed that she continued paying the Claimant monthly stipend sum of Kshs. 20,000/- from 2014 until the end of November 2015. There was no reason given for termination/dissmissal the only thing the witness could say was that the Claimant was not formally engaged or employed by the Respondent. The Claimant submitted that the Respondent's witness' response when cross examined that the Claimant was not an employee contradicts her earlier assertion in both the Defence and witness written statement that the Claimant having been engaged by Mr. Abraham M. Mwangi (deceased) for private errands and which she continued to assign the Claimant. The operation of law converted the Claimant to an employee with full rights. The Claimant submitted that the Respondents did not give any reason for the sudden termination and therefore the termination/dissmissal was unfair and unlawful as no reason and due process not followed. As to the final question as to whether due process followed before the decision to dismiss the Claimant reached, the Claimant submitted that the evidence adduced orally and as contained in the witness statement shows that there was no hearing, no warning, no disciplinary mechanism put in place, no allegation or notice to show cause issued to the Claimant prior to and therefore no fair hearing was accorded to the Claimant. The Claimant submitted that the termination was therefore unfair and contravened Section 45(2) of The Employment Act, 2007. As to whether the Respondents were justified to dismiss the Claimant, the Claimant submitted that the evidence on record does not show any justification as the Respondents failed to adduce any reason and thus the Termination is unfair and unlawful and contravenes Section 45 (2) of the Employment Act, 2007. On the question as to whether the Claimant entitled to the prayers sought in the Memorandum of Claim, the Claimant submitted that from the evidence above it is safe to conclude that there was a case made out for a reasonable notice of 1 month- Kshs. 20,000/- and because he had proved the dismissal was discriminatory hence unlawful he would be entitled to compensation. The Claimant submitted that he is entitled to house allowance, which he claimed at rate of Kshs. 3,000/- per month for the entire 20 years thus a sum of Kshs. 720,000/-. The Claimant sought service for 20 years under Section 35(1)(c) read with Section 35(5) of the Employment Act. The Claimant submitted that the Respondents did not remit NSSF deductions and thus is entitled to service at rate of 15 days for every completed year - $20 * 15/30 * 20,000.00 = 200,000/-$. The Claimant submitted that he did not go on leave and the Respondent did not refute this fact therefore unutilized leave days for 20 years. The Claimant submitted that the Respondents did not avail any records to show whether the Claimant went on leave yet it is the duty of the Respondent to keep records hence he was entitled to leave pay for 20 years - $20\text{years} * 15/30 \text{ days} * 20,000.00 = \text{Kshs. } 400,000/-$. The Claimant submitted that for the unfair and unlawful termination, the law under Section 49(i)(c) of The Employment Act, 2007 provides compensation for loss of employment after 20 years' service. He submitted that the maximum compensation of 12 months will be fair and just in the circumstances thus; $12 * 20,000.00 = \text{Kshs. } 240,000/-$. The Claimant submitted that he is entitled to compensation for discrimination under Section 5 of The Employment Act, 2007. He submitted that both the Claimant and the Respondent's witness aver the same and whereas the Respondent's witness statement paragraph 11 alludes to the accusation "it is at that time the Claimant accused me of all manner of things, including tribalism". The Claimant's witness PW1 and PW2 adduced evidence that there was tribalism bias based on ethnicity. The Court is urged to award sum of Kshs. 3,000,000/-. The Claimant relied on the case of **G MV v Bank of Africa Kenya Limited [2013] eKLR** where Rika J. awarded sum of Kshs. 3,000,000/- on discrimination and the Court is persuaded to adopt the same figures. The Claimant also sought a certificate of service to be issued to him as he was an employee. As to who should bear the costs of this suit, the Claimant submitted that he is entitled to the costs of this suit and interest at Court rates from date of filing this suit until payment in full.

7. The Respondents submitted that the 1st Respondent runs Pokeshe Coffee Masters (formerly Uchumi Coffee House) on Uchumi House, Aga Khan Walk whereas the 2nd Respondent runs Pokeshe Coffee Masters on Jubilee Exchange Building, Mama Ngina Street. The Respondent submitted that the four (4) main issues for determination are as follows:

- (i) Whether the Claimant was an employee of the Respondents, (ii) Whether the Claimant was dismissed by the Respondents, (iii) Whether the Claimant is entitled to the prayer's sought, and (iv) Who bears the costs of the claim?

The Respondents submitted that the Claimant was not their employee. The Respondents invite the Court to consider the circumstances under which the Claimant operated and determine whether employer/employee relationship existed between the Claimant and the Respondents as defined or contemplated under the Employment Act, 2007. The Respondent submitted that Section 2 of the Act defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. An employer on the other hand is defined as person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual. The Respondent submitted that the Claimant did not produce in court a contract of employment between him and the Respondents. The Respondents submit that whereas a contract of service under Section 2 of the Act can either be oral or written, a contract of employment where the employer is a juridical person as is the case herein ought to have been in writing so as to clearly define the terms of the Claimant's employment. The Respondent submitted that the Claimant avers at paragraph 1 (a) of the memorandum of claim that he was employed by the Respondents on 27th December 1995 but he however contradicts the same in his witness statement at paragraph 1 when he states that he was employed on the said date by the 1st Respondent but assigned similar duties with the 2nd Respondent. He did not produce any contract of employment issued to him by either of the Respondents to support any of these assertions. The Respondent submitted that the Claimant was unable to show which of the two Respondents had employed him. The Respondents submit that it's illogical for the Claimant to claim that he was employed by both Respondents. It is also illogical that the Claimant worked for the Respondents for twenty (20) years, as alleged, without contracts of employment or even a single pay slip to show that he was indeed employed by the Respondents. The Respondents submit that the circumstances under which the Claimant worked for Mr. Mwangi and thereafter Mrs. Mwangi point to the conclusion that the Claimant ran errands for Mr. Mwangi and thereafter Mrs. Mwangi. Indeed the Claimant states at paragraph 5 of his statement that he was a personal assistant to Mr. Mwangi. The Respondents invite the court to consider the documents presented to court by the Claimant. The court will note that the said documents include documents in respect of Raki Commodities Ltd (see page 15 of claimant's bundle of documents), bank deposits slips for one Peter Nganga Muchogu (see page 23 of claimant's bundle of documents). Many of the documents produced by the Claimant support the Respondents' assertion that the Claimant ran private errands for Mr. Mwangi and thereafter for Mrs. Mwangi when her husband died. The Respondents submit that the Claimant kept copies of the documents produced in court for the sole purpose of lodging a

claim for compensation against the Respondents. The said documents are of no probative value to his case. The Respondent submitted that in her statement the Respondents' witness questions the authenticity of the said documents. It submitted that it was apparent that the Claimant used to make copies of letters or documents given to him by Mr. Mwangi whenever he was on an errand for him. It is also difficult to tell the source or authenticity of many of the documents filed in support of the claim. The Respondent urged the Court to note that save for the memo dated 23rd December 2005 allegedly authored by Mr. Mwangi, all the other letters where the Claimant is linked with the Respondents are from third parties. The Respondent submitted that a critical look at the memo also shows some disparity in the dates and the contents of the memo. For instance, the memo is authored on 23rd December 2005, close to ten (10) years after the Claimant had been allegedly employed, yet it purports to introduce the Claimant to the company's supervisors. The memo also calls for an inventory on 31st December 1995 (past). The Respondent submitted that the authenticity of the said memo, just like other documents, is in serious doubt. The Respondents further submit that even if there existed an employer/employee relationship between the Claimant and Mr. Mwangi and thereafter with Mrs. Mwangi, which is denied, the Court should not arrive at the conclusion that an employer/employee relationship existed between the Respondents and the Claimant just because both Mr. Mwangi and Mrs. Mwangi were directors of the Respondents. It is trite law that the company is a distinct and separate entity from its directors. The Respondents invite the Court to draw the said distinction. The Respondents submit that the Claimant has not shown that he was employed by the Respondents. The Respondents cited the case of **Casmir Nyakuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR** where the court stated that while it is the responsibility of an employer to prove or disprove a term of employment, the claimant was not released from the burden of proving his case. It is trite law that he who alleges must prove. In this case, the Respondents denied the existence of employer/employee relationship. The responsibility therefore fell on the Claimant to show that the said relationship existed. The Respondent submitted that in the **Casmir** case, the court held that an employment relationship is not the same as a work relationship. The court went further to state that the mere fact that parties work together does not necessarily give rise to an employment relationship. The same position was reached by the court in **John Kamau Mburu v Program for Appropriate Technology In Health (Path) & Another (2015) eKLR**, where it was held as follows:

"An employment relationship is not the same as a work relationship. In other words, the mere fact that parties work together does not necessarily give rise to an employment relationship. In Ontario Ltd v Sagaz Industries Inc. 2001 SCC 59 the Supreme Court of Canada held that in determining whether an employment relationship actually exists, the Court must examine the total relationship between the parties." The Respondent cited the case of **Daniel Kimanzi Maithya v Inter-Security Service Limited [2019] eKLR**, where the Court adopted the control test as a way of ascertaining whether employer/employee relationship existed. The said test was adopted by the court in the case of **Kenya Petroleum Oil Workers Union v Francis Kiarie Kinyanjui T/A Suncor Gas & Petroleum [2014] eKLR**. In the said case, the court held as follows;

"...the Court emphasized the control test, stating that an Employer is a person, who has the power or the right to control and direct how work is to be done. Employee contributes labour and expertise to an endeavour and is in return, paid a salary at an agreed interval...the Employer retains managerial control and apportions the Employee duties packaged into a job...other employment sources define an Employer as a person having control or custody of any Employment, Place of Employment, or of any Employee."

8. The Respondent submitted that the Claimant did not show who among the Respondents had control over him in the execution of his responsibilities. On the contrary, the Respondents' witness stated that the Claimant used to run errands for Mr. Mwangi and ran similar errands for her for some time after the death of Mr. Mwangi. The Respondents submit that since there was no contract of employment or any other valid evidence of employment, the relationship between the Claimant and the Respondents was not one of employer/employee. The Respondents humbly urge the court to find that the Claimant was not an employee of the Respondents. As to whether the Claimant was dismissed by the Respondents, they submit that having shown that the Claimant was not an employee of the Respondents, the issue of whether or not the Claimant was dismissed from employment becomes an academic exercise. Even if, the Claimant was an employee of the Respondents, which is denied, the Claimant did not lead evidence to show that he was dismissed from employment. The Respondent submitted that the Claimant stated at paragraph 9 of his witness statement that he was asked to resign so that he can be paid his terminal dues. He further states at paragraph 9 of the statement that he was not paid his terminal dues upon his resignation. This contradicts his averment at paragraph 2 of the memorandum of claim where he states that he was asked to retire. On the other hand, the Respondent's witness stated that the Claimant had requested to be retired but the Respondents could not retire him because he was not an employee of the Respondents. The Respondents submitted that on a balance of probability, the version put forth by Respondents witness that the Claimant requested to be retired is to be believed because if the Claimant had resigned as alleged by him he would have produced his letter of resignation as evidence of the same. The Respondents urge the court to find that the Claimant was not dismissed from employment by the Respondents. Once the court finds that the Claimant was not dismissed from employment, the assertion that the process leading to his dismissal was unlawful becomes moot. As to whether the Claimant is entitled to the prayers sought, the Respondents submit that all the Claimant's prayers for compensation are premised on a finding by this Honourable Court that; (i) the Claimant was an employee of the Respondents and, (ii) the Claimant had been dismissed unlawfully. The Respondents submit that they have shown above that the Claimant was not their employee and even if he was an employee, no evidence was led by the Claimant to show that he worked for the Respondents in the month of December 2015. The Respondent submitted that the Claimant has not proved to the required standard that he is deserving of the prayers sought. If the court finds that the Claimant was an employee of the Respondents, then the Claimant would be entitled to one month's salary in lieu of notice and service pay only. The Respondents urged the Honourable Court to dismiss the claim with costs to the Respondents.

9. The Claimant asserts he was employed in 1995 but he did not avail any documentation to prove this. His letters relate to 2010-2014 which are merely 4 years and there is no proof that he was an employee of either of the 2 companies. He could not possibly have been engaged for 20 years without proof of any sort to show his employment. The letters he produced could easily have been availed to any third party who transacted with Mr. Mwangi as they relate to entities not before Court. There was no proof that the Claimant worked in any period for the Respondents and as such would not recover. He sought payment of his terminal dues which he computed to include house allowance as well as service pay. He also alleged discrimination. The fact that he accused the director of the Respondents of discrimination is not proof of discrimination and he should have adduced cogent evidence for this aspect of his claim to succeed. The final analysis is that the Claimant's claim is unsuccessful and is dismissed with costs to the Respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE