



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC NO. 181 OF 2018

IN THE MATTER OF COMPLAINTS AND JURISDICTION ON CASES OF DISPUTE BETWEEN EMPLOYERS AND IN THE MATTER OF UNFAIR TERMINATION SECTIONS 47 AND 87 OF THE EMPLOYMENT ACT NO 11 OF 2007 LAWS OF KENYA.

BETWEEN

JANE WANJIKU MWANGI.....CLAIMANT

VERSUS

JOHN MWANGI NDERITU...RESPONDENT

JUDGMENT

1. The claimant sued the respondent for unlawful termination, underpayment and payment of house allowance during the entire period he was employed by the Respondent.
2. It is stated that the claimant was employed by the Respondent sometimes in March 2013 as a caretaker for the Respondents plot-JOMWAMU FLATS situated at Kiratina Estate in Nakuru.
3. She stated that her duties included opening the gate for tenants in the morning and evening, cleaning the outside area of the premises, collecting litter in the compound, rationing water usage for the tenants, letting vacant houses to new tenants and reporting to the landlord any breakages that need repairs.
4. She states that when she was employed, salaries and wages payable to her were not clearly agreed upon and that she was only paid Kshs. 14,000/- one time salary in the year 2014 which he paid the respondents son Kshs. 7,000/- for her rent and that she never received any other monies from the Respondent till his termination.
5. The Claimant stated that she was housed in the same apartments paying a rent of Kshs.2,000/- per month which house he rented till 11<sup>th</sup> April, 2018 when the Respondent locked her door without Notice .
6. It was stated that she learnt later that her house was locked by the landlord was to recover some alleged accumulated rent arrears of Kshs 76,830.
7. The Claimant contends that a caretaker as per legal Notice Number 112 of 1<sup>st</sup> May, 2017 ought to be paid Kshs. 25,031.70 as salary plus 15% house allowance which he prayed for this Court to order the Respondent to pay her back wages together with the house allowances.
8. The claimant prays for judgement against the respondent for;
  1. **One-month salary in lieu of notice of Kshs. 25,031.70.**
  2. **Underpayment of wages amounting to Kshs. 1,436,570.15.**
  3. **Annual Leave for the 5 years worked amounting to Kshs. 95,750.00.**
9. The respondent entered Appearance on 3<sup>rd</sup> July, 2018 and filed a Memorandum of Response on the 8<sup>th</sup> August, 2018 denying all the allegations contained therein and putting the claimant into strict proof thereof.

10. The Respondent averred that the Claimant herein was his Tenant commencing June, 2013 and not March, 2013 as alleged.
11. The Respondent state that the parties herein agreed that the Claimant would be paid 10% of all the rent collected and remitted to the Respondent bank Account as such the Respondent was paid a commission for work done not a salary.
12. He stated that the houses were fitted with a prepaid meters and the tenants would buy tokens for themselves without the help of the Claimant. Further that rent was deposited in the Respondent bank account by the Tenants without the need by the Claimant to collect or bank any rent monies for the Respondent.
13. That the Respondent had employed one Mary Ndegwa to look after his plot till June 2013 when the Claimant rented one of the house and later offered to look after the houses at a commission of 10% of the house rent collected.
14. That in February, 2014, his Son by the name James Ndirangu moved in to one of the houses to assist in managing the houses and any commission received from the houses was shared between the Claimant and the Respondent's son.
16. It was stated that the Claimant could at times mislead the tenants and collect cash from them as rent and instead of banking the same, she would pocket leading to loss of monies by the Respondent which incidents continued severally prompting the Respondent the agency and the commission as well.
16. That the monies lost through the hands of the claimant has accumulated to Kshs. 75,830 which the Claimant allegedly failed to account for and instead tried to move out of the said house without paying rent and or refunding the respondent the monies owed.
17. The Respondent also denied the jurisdiction of this Court in light of absence of employer-employee relationship.
18. The Claimant filed a rejoinder to the Memorandum of response on the 12<sup>th</sup> November, 2018 and stated that she was the caretaker of the building from the actions of the Respondent and evidence by the letter addressed to all Tenants dated 1<sup>st</sup> June, 2016, which read as follows "**Mpangaji Mpendwa, Mama Njoroge amesimamishwa kuwa msimamizi wa plot**" which he contends intimated an employment relationship between them.
19. It was stated that, the claimant was a tenant in the premises from November, 2010 and was only employed as a caretaker in March, 2013.

#### **Claimant's case**

20. The claimant, **Jane Wanjiku Mwangi, CW-1** gave sworn testimony and stated that he was employed as a caretaker in March 2013. That he was also a tenant at the Respondent's house having rented a house sometimes in 2011 or 2012 then employed as a caretaker in March, 2013. She testified that she was to be paid Kshs.10,000/- per month. Her duties were to open the gate at 5am in the morning, clean the compound and burn the garbage collected, collect rent from all tenants and bank the same for the respondent as per the exhibit marked as JMW-6. That she paid her rent of Kshs.2,000/- on monthly basis however that he was only paid a commission of Kshs.14,000/- once to divide between her and the respondent son and was never paid any other money till her dismissal.
21. She testified further that she reported any incident at the plot as a caretaker and even reported the death of one of the tenants at the plot as evidence in her exhibit JWM- 1(a). Further that Exhibit JWM-4 is a rent reconciliation signed by the Landlord and her as the caretaker. She stated that the cash collected was at times used to pay for water Bill and repair and the remaining cash would be deposited at the Respondent bank.
22. The Claimant stated that he was not an agent to be paid a commission but an employee who ought to be paid salary and thus prayed to be paid as claimed in his Memorandum of Claim.
23. On Cross examination, she testified that she was the caretaker of the Respondent from March, 2013 till 11<sup>th</sup> April, 2018 when her services were terminated. She stated that she was only paid Kshs.14,000/- to share with the Respondent son once and was never paid any other monies. She further contends that she was not sacked for stealing any monies and that she was only taken to the chief when she filed this case in Court.

#### **Respondent's case.**

24. The Respondent, **John Mwangi Nderitu(RW-1)** testified that he came to know the claimant as a tenant at his plot and later was taken up as an agent. He stated that he sacked the claimant as she was stealing from him. He contended that they have tried resolving the issue amicably and they recorded an agreement on how the monies owed to him which were collected by the claimant were to be paid and produced a copy of the agreement. That when the claimant failed to pay the monies as agreed he sacked her on 1<sup>st</sup> July, 2016 but the claimant continued renting his house and his son Ndirangu took over the management of the plots and became the agent. That from February, 2014 the claimant and the Respondent had agreed to have the claimant and the Respondent's son take care of the plot and be paid 10% commission which was to be divided by half. He therefore maintains that the claimant was employed briefly as an agent and not a caretaker and was entitled to a commission and not a salary as pleaded.
25. On cross examinations, he stated that the claimant became his agent in February, 2014 who was entitled to 5% commission and on other days the commission was deducted from rent. He testified that document JWM (II) an agreement between him and the claimant indicating that the claimant is a caretaker is a language problem as his duties were those of an agent.

### Claimant submissions

26. The claimant's advocate submitted that the claimant was employed as a caretaker and not an agent. He argued that the documents produced in Court by the Claimant as the Respondent indicated that the Claimant was referred to as a caretaker who ought to be paid as by the wages payable to a caretaker under the Remuneration order.

27. It was submitted that the Claimant was unfairly terminated from employment on the 11<sup>th</sup> May, 2018 when her house was locked and that no reason was given for the termination. Further that despite the allegation by the respondent of misused funds, there was no warning letter produced in Court.

28. It was also submitted that the Claimant was employed by the Respondent orally and was to be paid on a monthly basis which was argued was only paid once from the time of employment till the time of dismissal, therefore the claimant was underpaid during her employment at the Respondent employ.

29. It was submitted that under legal Notice Number 2 of 1<sup>st</sup> May, 2018 the pay for a caretaker ought to be Kshs.26,283.30 exclusive of the 15% house allowance of Kshs. 3,942.50 which amounts to Kshs.30,225.80 per month. He further argued that the total rent collected from the Respondent building is Kshs 55,000/- therefore the 10% the Landlord paid the claimant was Kshs 5,500/- which was way below the pay a caretaker ought to be paid.

30. The Claimant concluded by urging the Court to allow the claim as prayed.

### Respondents Submissions.

31. The Respondent from the onset submitted that the employment relationship between them was that of contract for works and not contract for services. He cited the case of **Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] eKlr.**

32. He argued that the perimeters on assessing an employment and a service contract was stated in the case of **Charles Juma Oleng –v- Auto garage Limited and another [2014] eKlr.** He thus argued that the claimant was paid commission for collecting rent, issuing rent receipts on behalf of the landlord and letting out vacant houses. Therefore, there were no fixed working hours for the Claimant who could have secured other employment if she wished and that there was a caretaker by the name James Ndirangu who did the cleaning of the plot and collected garbage.

33. It was submitted that this Court lacks jurisdiction to grant the prayers sought since there is no employment relationship between the parties herein as the claimant was under contract of works as was held in **Elijah Moranga –v- John Leinsly Irene Onderi [2014] eKlr.**

34. On whether the Claimant was unfairly terminated from employment it was submitted that the claimant was contracted to be an agent at the Respondent premises in June 2014 which services were withdrawn in June 2016 after theft of fund on 2<sup>nd</sup> June, 2016 and that the Claimant has not provided any services of employment to the Respondent from 2016 till 2018 when his rent arrears accumulated to 76,000 prompting the locking of her house to compel her to pay the house rent arrears. Furthermore that the Claimant was paid her commission when the same fell due as evidence by the exhibit marked JMW-3 to 5.

35. The Respondent in conclusion submitted that the Claimant has not proved her case on a balance of probability and therefore urged the court to dismiss the claim.

36. I have examined the evidence and submissions of the parties herein. The issues for this court's consideration are as follows:-

**1. What was the nature of the relationship between the claimant and the Respondent.**

**2. Whether the claimant is entitled to the remedies sought.**

### ISSUE NO. 1

37. From the evidence of the claimant, she avers that she was employed as a caretaker with effect from March 2013. Of course there is no any express agreement or contract exhibited before court as proof of this engagement.

38. In order to understand the nature of the relationship between the claimant and the respondent, this court will have recourse to their conduct or actions in this relationship. It is an agreed Principle of Law that the conduct of the parties in any agreement can be a guide of what the terms of engagement were.

39. In the Court of Appeal case of **Ali Abdi Mohamed VS Kenya Shell & Co. Ltd (2017) eKLR**, the learned JJA stated as follows;

**“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded..”**

40. In our current case, we have instances where the claimant and respondent by their conduct show that the claimant collected rent from tenants, she reported any incidences in the premises and was referred to as a caretaker.

41. Exh. JWM 4, which has been produced by the claimant also show that the claimant was referred to as a caretaker and was agreeing to pay rent collected less commission to the respondent. Exh. JWM 4 is also an agreement between the claimant and the respondent where the claimant was also admitting she owed money to the respondent and was willing to pay.

42. This was in April 2016 Exh. JWM III shows the commission payable to the claimant.

43. By virtue of these exhibits the claimant was always paid a commission on moneys collected. There is no incident showing that she was paid any salary.

44. Commission is paid to an agent. A commission agent is paid a commission and not a salary as was in the case of the claimant. A commission agent is not an employee as is only eligible to be paid commission.

45. Despite the fact that the claimant was called a caretaker, the conduct of the parties point to the fact that she was a commission agent and was always paid a commission and not a salary.

46. I therefore find that the claimant was not an employee of the respondent but an agent.

#### **ISSUE NO.2**

47. Having found as above it follows that the claimant is not entitled to remedies sought accruing out of an employer-employee relationship. She is definitely not entitled to payment of salary arrears, house allowance, leave etc. as claimed.

48. If there was any commission owing, that is the only claim the claimant would have sought. Since she has not sought for any commission, I find the claim fails in total.

49. I therefore dismiss this claim with costs to the respondents.

**DATED AND DELIVERED IN OPEN COURT THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2021**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Awour for claimants – present

No appearance for respondent

Court Assistant - Fred