



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE NO 113 OF 2015

NELSON KAITA BOSO.....CLAIMANT

VS

AGGREY NYAVANGA

CAROLYNE BAHATI INNAH

T/A WINDROSE TRADING AGENCIES.....RESPONDENTS

JUDGMENT

Introduction

1. This claim is brought by Nelson Kaita Boso against Aggrey Nyavanga and Carolyne Bahati Innah, trading as Windrose Trading Agencies.
2. The claim is documented by a Statement of Claim dated 5th March 2015 and filed in court on even date. The Respondents filed a Reply on 21st August 2015.
3. When the matter came up for trial the parties testified on their own behalf. They also filed written submissions.

The Claimant's Case

4. The Claimant states that sometime in October 2011, the Respondents together with one Sven Hochman approached and engaged him to spearhead the formation and registration of the Respondent business entity.
5. The Claimant further states that pursuant to the said instructions, he proceeded to register the Respondent business entity on 22nd December 2011, which was to deal with importation and distribution of household commodities mainly foodstuffs.
6. The Claimant adds that he was informally assigned the duty to oversee the initial operations of the Respondent entity on a full time basis as negotiations went on to formally engage his services.
7. The Claimant states that on 1st May 2012, his engagement was formalised and he was designated as the Sales and Import Agent at a monthly salary of Kshs. 30,000.
8. The Claimant avers that he was faithfully discharging his duties but the Respondent was frustrating his work as follows:
 - a) For the period between October 2011 and 31st December 2013, the Respondents only paid him Kshs. 150,000 as salary which payment was made in erratic instalments;
 - b) The Respondents never substantively responded to correspondence from the Claimant over a raft of issues touching on the Claimant's employment, as raised by the Claimant;
 - c) The Respondents unilaterally closed down the office the Claimant was using within Mombasa thereby shutting the Claimant out of employment.

9. The Claimant's case is that the actions of the Respondents forced him out of employment and by 31st December 2013, his contract was constructively terminated.

10. The Claimant states that by the time of termination, he had unpaid salary arrears, he had not taken his leave and was not reimbursed expenses he incurred in the course of his work.

11. The Claimant's claim against the Respondents is as follows:

- a) Unpaid salary (October 2011-December 2013).....Kshs. 780,000
- b) Unpaid leave.....45,000
- c) Gratuity @ 15 days' for every year.....30,000
- d) 1 month's salary in lieu of notice.....30,000
- e) Unpaid expenses (January 2012 – December 2013.....72,000
- f) 12 months' salary in compensation.....360,000
- g) Costs plus interest

The Respondents' Case

12. In their Reply dated 20th August 2015 and filed in court on 21st August 2015, the Respondents deny that they were trading in the name of Windrose Trading Agencies.

13. The Respondents state that they themselves were employees of Windrose Trading Agencies where the Claimant was Sales Director and Import Agent. The Respondents add that the Claimant cannot purport to sue his fellow employees.

14. The Respondents aver that the Claimant had a duty to bring business into Windrose Trading Agencies as an equal partner and/or Director to enable the said Windrose Trading Agencies to operate.

15. The Respondents blame the Claimant for failing to do his duty by bringing business, doing sales and further failing to commit his time and skill towards Windrose Trading Agencies causing the business to collapse. The Respondents state that the Claimant cannot blame his co-employees for his own flaws.

16. The Respondents aver that the Claimant failed to clear and forward consignments at the Port which caused them to expire and/or damage due to unfavourable conditions at the Port.

17. The Respondents further aver that the Claimant misappropriated funds given to him for clearing consignments at the Port and further caused demurrage charges to escalate. They claim that the Claimant was the author of failure of the business where he was an equal shareholder.

18. The Respondents state that they have been wrongly sued as they were mere employees and/or agents of a known principal.

19. The Respondents aver that the Claimant was not dismissed and/or terminated as alleged but he himself chose to close shop and thus rendered the Respondents jobless.

20. The Respondents add that the Claimant was the most senior employee charged with the control of Windrose Trading Agencies from its formation and operations to day to day running and dealings.

Findings and Determination

21. From the pleadings, evidence and submissions of the parties, the first issue emerging for determination in this case is whether there was an employment relationship between the Claimant and the Respondents.

22. The Claimant claims to have been employed by Aggrey Nyavanga and Carolyne Bahati Innah as proprietors of Windrose Trading Agencies.

23. In response, Aggrey Nyavanga and Carolyne Bahati Innah state that they too were employees of Windrose Trading Agencies, whose real owner and financier was one Sven Hochman.

24. In advancing his case, the Claimant relies on an employment agreement dated 1st June 2012 between himself and Windrose Trading Agencies. He also relies on an extract of records from the Business Registration Services Registry dated 6th August 2019, showing Aggrey Nyavanga and Carolyne Bahati Innah as proprietors of Windrose Trading Agencies.

25. The employment contract dated 1st June 2012 is signed by the Claimant as employee and Aggrey Nyavanga and Carolyne Bahati Innah as directors and employees of Windrose Trading Agencies.

26. This reveals a rather unusual arrangement; firstly, because Windrose Trading Agencies which was registered as a Business Name could not legally have directors and secondly, because parties all describing themselves as employees could not legally execute an employment agreement. I say this fully aware that under Section 2 of the Employment Act, the definition of an employer includes an agent, foreman and/or manager of the employer.

27. I will therefore do further analysis in order to determine the crucial question as to whether there was an employment relationship between the parties. Section 2 of the Employment Act defines an employee as:

“a person employed for wages or a salary and includes an indentured learner”

28. The Claimant did not adduce any evidence to show that he was ever paid salary by either Aggrey Nyavanga or Carolyne Bahati Innah.

29. Instead, the Claimant produced a trail of email correspondence between himself and Sven Hochman on the consistent subject of management of the business and payment of the Claimant’s salary. In all his complaints and laments about his unpaid salaries, the Claimant did not address himself to either Aggrey Nyavanga or Carolyne Bahati Innah.

30. In particular, in the Claimant’s email to Sven Hochman dated 16th December 2013 he complains about none payment of salary not only to himself but also to Aggrey Nyavanga and Carolyne Bahati Innah. He states *inter alia*:

“You knew well where you’ll find salaries for this new team you employed into office. Why Nyavanga, Nelson and Carol were subjected to a long wait of 2 (two years) now, you have special people? Our money first-then to your new team, otherwise i’ll (sic) pick up this matter within the full force of the Law without further notice.”

31. In an earlier email dated 23rd September 2013, the Claimant alludes to a planned deregistration of Carolyne Bahati Innah from the certificate of registration. Reading from the Claimant’s further email dated 1st October 2013, the move to remove Carolyne from the business appears to have been actualised.

32. In its decision in *Maurice Oduor Oketch v Chequered Flag [2013] eKLR* this Court stated the following:

“In determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the Employment Act, 2007 actually exists.”

33. Having examined the facts and circumstances of the present case, I did not find any evidence that would piece together an employment relationship between the Claimant on the one hand and Aggrey Nyavanga or Carolyne Bahati Innah on the other hand. To rule otherwise on the basis of the mere appearance of the names of the latter two on the certificate of registration of Windrose Agencies Limited would in my view, result in a grave injustice.

34. What is more, from his own documentary evidence availed to the Court, the Claimant himself appears to have been aware that his real employer was Sven Hochman not Aggrey Nyavanga or Carolyne Bahati Innah. He came to court to try his luck but he has tested fate.

35. Ultimately, I find and hold that the Claimant has failed to establish an employment relationship between himself and the Respondents, capable of enforcement by this Court which exercises specialised jurisdiction.

36. The Claimant’s entire claim therefore collapses and is dismissed with costs to the Respondents.

37. These are the orders of the Court.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 14TH DAY OF MAY 2020

LINNET NDOLO

JUDGE

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, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and

affordable resolution of civil disputes.

LINNET NDOLO

JUDGE

Appearance:

Mr. Jumbale for the Claimant

Mr. Bosire for the Respondent