



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 90 OF 2019

DOCK WORKERS UNION (K).....CLAIMANT

VS

KENYA PORTS AUTHORITY.....RESPONDENT

RULING

1. Before me is the Claimant's application brought by Notice of Motion dated 25th November 2019, seeking orders to restrain the Respondent from evicting the Claimant's members namely; Zuhura Ali, Elphas Mang'oli and Stephen Muthui (the Grievants) from the KPA staff houses.

2. The application, which is supported by the affidavit of the Claimant's General Secretary, Simon Kiprono Sang is based on the following grounds:

a) The Grievants were terminated from service by the Respondent on diverse dates and have lodged appeals with the Respondent, in accordance with the Human Resource Manual of 2011, Industrial Relations Machinery and Section 12 of the Employment Act, 2007;

b) Before their termination, the Grievants were living in the staff quarters of the Respondent and are awaiting the Respondent to constitute an appeals committee to hear them before vacating the houses they occupy;

c) The Union is up to date with the rent for Elphas Mang'oli and there are no arrears. According to the Housing Policy issued in 1999 by the then Secretary to the Cabinet, rent is charged at market rates and the houses can be rented out to anybody, except where security is involved;

d) Internal dispute resolution is recognised by the Constitution of Kenya and it is necessary that the Respondent constitutes an appeals committee to hear the Grievants. Sending away the Grievants from the subject houses is itself a travesty of justice, because they shall have been denied the right of appeal against the decision of the Disciplinary Inquiry Committee of the Respondent.

3. In response to the Claimant's application, the Respondent filed a replying affidavit sworn by its Principal Human Resources Officer (Discipline), Constance Mcharo on 19th February 2020 and a further replying affidavit sworn by its Ag. Head of Administration, Bildad Kiseru on 20th July 2020.

4. In her affidavit, Constance Mcharo states that the Respondent terminated the services of Elphas Mang'oli vide a letter dated 11th February 2011, following recommendation by a Committee of Inquiry that found Mang'oli guilty of involvement in the fraudulent removal of a container.

5. Mcharo adds that the Claimant Union appealed the decision on behalf of Mang'oli, leading to the setting up of an Appeals Committee before which Mang'oli was accorded an opportunity to appear and make submissions. The Appeals Committee upheld the verdict of the Committee of Inquiry and its decision was communicated vide a letter dated 9th July 2012.

6. Mcharo depones that Mang'oli filed a claim by way of **Cause No 61 of 2016: Elphas Mang'oli v Kenya Ports Authority**, which was dismissed by **Makau J** vide a judgment delivered on 8th December 2017.

7. Mcharo adds that Mang'oli had, on 8th March 2019 sought to file an appeal before the Court of Appeal out of time, which the Respondent had challenged by its application dated 26th March 2019.

8. The Respondent's position is that the appeal filed by the Claimant cannot be interpreted as conferring employment fringe benefits upon

Mang'oli.

9. Mcharo states that Stephen Muthui's employment came to an end by way of forfeiture of appointment, on account of failure to report to work for a prolonged period of time.
10. Following an appeal, Muthui was given an opportunity to appear before a Committee of Inquiry, which upheld the forfeiture of his appointment. This decision was communicated to Muthui by letter dated 30th September 2019.
11. Mcharo states that from July 2018, Zuhura Ali was a habitual absentee from work, which led her Head of Department to recommend forfeiture of her appointment vide letter dated 8th April 2019. Action was taken against Ali by a letter of forfeiture of appointment dated 13th June 2019.
12. By her letter dated 23rd July 2019, Ali appealed against the forfeiture of appointment, stating that she was being treated by various doctors.
13. The Head of Human Resources sought an opinion from the Head of Medical Services regarding the medical records produced by Ali. By letter dated 13th August 2019, the Head of Medical Services stated that there was no record of Ali's treatment or authorised sick off.
14. In a further replying affidavit sworn by the Respondent's Ag. Head of Administration, Bildad Kiseru on 20th July 2020, reference is made to Section 12(2)(1) of the Kenya Revenue Authority Act which empowers the Respondent to provide housing and other accommodation for its employees.
15. Kiseru further makes reference to Section 31 of the Employment Act which obligates an employer to provide housing or a housing allowance to its employees.
16. Kiseru states that in order to give effect to the foregoing provisions, the Respondent had developed a Housing Policy by which an employee would, by virtue of their employment and subject to availability, be allocated a house owned by the Respondent.
17. Kiseru depones that the employee allocated a house was made clearly aware that upon termination of their employment, they or their dependants in case of death, would be required to vacate the house within the following timelines:
 - a) On retirement or death- within 3 months
 - b) On dismissal including forfeiture or retirement in public interest- within 1 month
 - c) On resignation – within 1 month
18. Kiseru points out that the employees allocated houses, while being charged market rate rents, were paid house allowance commensurate with their respective job grades as per the Collective Bargaining Agreement. He adds that the house allowance paid to the employees was significantly higher than the rents charged to them.
19. The Respondent submits that by providing housing close to the work premises at affordable rates while paying house allowance, it had offered its employees terms that were more favourable than those set out in the Employment Act as envisaged by Section 26(2) of the Act.
20. The Respondent further submits that at no time did either of the parties envisage that this arrangement would be construed as a landlord/tenant agreement.
21. At the time of hearing of this application, one of the Grievants, Stephen Muthui had passed away. In his oral submissions before the Court on 2nd March 2020, Mr. Ochieng appearing for the Claimant Union stated that Muthui's claim had been closed.
22. Regarding Elphas Mang'oli, Mr. Ochieng told the Court that an appeal was pending at the Court of Appeal.
23. With respect to Zuhura Ali, Mr. Ochieng stated that the internal disciplinary process had not been exhausted.
24. By the Claimant's word, Stephen Muthui is now deceased and in the absence of an application for his substitution, his claim over the KPA house is spent.
25. Regarding Elphas Mang'oli and Zuhura Ali, the Claimant's application is premised on two grounds; first, that the two Grievants have not exhausted the appeal process and secondly, that they had running tenancies with the Respondent.
26. The Claimant admitted that what was pending in the case of Mang'oli was an appeal at the Court of Appeal and not an internal disciplinary process. With regard to Zuhura Ali, the Claimant did not produce any documentary evidence to show pendency of any internal disciplinary mechanism.
27. The Respondent made reference to the decision in *Fadhil Juma Kisua & another v Kenya Ports Authority [2015] eKLR* where **Makau J** stated the following:

“The right to housing of an employee under section 31 of the Employment Act is only available as long as the employment relationship between the parties exists. Such right is either enjoyed in form of a physical shelter or paid monthly allowance. It cannot therefore continue after termination of the employment contract unless the employer permits the former employee to continue using the house on humanitarian consideration.”

28. From the evidence on record, the Grievants are no longer employees of the Respondent and the proposition that they are yet to exhaust the appeal processes whether internally at the shop floor or in court does not change this fact.

29. It follows therefore that the said Grievants cannot lay a claim to housing based on the provisions of Section 31 of the Employment Act.

30. Moreover, Clause L.3 of the Respondent’s Housing Policy unequivocally states that an employee or their dependants will be required to vacate the house upon retirement, death, dismissal or resignation.

31. As to whether there exists a tenancy agreement between the Grievants and the Respondent that may survive after termination of employment, the Court makes the following observations:

a) The rent charged to the Grievants in the course of their employment was recovered from their monthly salaries through a check-off system;

b) The Grievants were paid house allowance in excess of the rent charged to them.

32. It seems to me therefore that the arrangement between the Grievants and the Respondent was one where the parties had negotiated superior terms of employment as permitted by Section 26 of the Employment Act.

33. To my mind, this did not in any way create a tenancy agreement outside the terms of employment.

34. The order sought by the Claimant on behalf of the Grievants falls within the four corners of an injunction and the conditions under which such an order may be granted were spelt out in the celebrated case of ***Giella v Cassman Brown & Co Ltd (1973) EA, 358*** as follows:

a) That the applicant has established a *prima facie* case;

b) That the applicant will suffer irreparable harm if the order sought is not granted; and

c) The balance of convenience tilts in favour of the applicant.

35. All the Claimant states is that if the Grievants vacate the Respondent’s houses they are currently occupying then their right of appeal will be compromised. This statement was neither extrapolated nor was it backed by any evidence.

36. In the result, I find and hold that the Claimant has failed to make out a case for grant of an injunction.

37. The application dated 25th November 2019 is therefore disallowed. The interim orders issued on 27th November 2019 are discharged.

38. Each party will bear their own costs.

39. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OCTOBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Ochieng (Union Representative) for the Claimant

Mrs. Ikegu for the Respondent