



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 1227 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 13th February, 2019)

JIMNAH MUCHIRICLAIMANT /RESPONDENT

VERSUS

AGRICULTURAL SOCIETY OF KENYARESPONDENT/APPLICANT

RULING

1. The Application before the Court is dated 12th November, 2018, brought under Section 90 of the Employment Act, Section 12 of the Employment and Labour Relations Court Act, Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 where the Respondent/Applicant seeks for orders:

1. That the suit be and is hereby struck out.

2. The Claimant do bear the costs of this application as well as the entire suit.

2. The Application is premised on the grounds that:-

a. There was no employee-employer relationship between the claimant and the respondent, the claimant herein having been admittedly a volunteer. Therefore, there can be no employer-employee dispute capable of being adjudicated upon by this Court.

b. The Claimant's alleged cause of action arose earlier and or on the 27th February, 2012, when the Claimant wrote a demand letter seeking for his purported terminal dues, initiating the running of time required for filing an employment claim culmination of which was that the right to initiate claim was extinguished on or before the 26th February, 2015 under section 90 of the Employment act. The institution of this suit on the 30th June, 2017 was way out of statutory time.

c. That it is just and fair that the orders herein as sought are granted.

d. It is in the wider interest of justice that the orders sought herein are granted.

3. The Application is supported by the Affidavit of Dr. John Kennedy Omanga retained by the Respondent as a legal advisor and states that the Respondent is managed by council and committees who are stationed in the different branches all over the Country.

4. That the members who constitute the council or committees are either elected or volunteer themselves to serve in the council or committees. He avers that as a volunteer one is not entitled to wages and or salaries but are entitled to sitting allowances in order for them to conduct the business of the council and or committee as such the Claimant was not an employee and therefore the Court lacks jurisdiction.

5. Further, it is contented that the Claimant received a letter on 9th September, 2011, requesting him to step aside which prompted him to seek directions from the Respondent on various occasions. That the Claimant ultimately demanded for his purported terminal dues vide his Advocate's letter dated 27th February, 2012.

6. The Respondent contends that, having sought his terminal dues through this letter, the Claimant had effectively commenced the alleged employment dispute and set in motion the time for filing of a claim seeking and or challenging any dispute as regards his employment, which

in this case ought to have been filed on 26th February, 2015. That the Claimant having filed the claim on 30th June, 2017, the same had indeed been filed outside the statutory time limitations provided under Section 90 of the Employment Act and hence the Court does not have jurisdiction over the same.

7. They pray for the application to be dismissed with costs.

8. The Claimant/Respondent has filed Grounds of opposition wherein he avers that the Application has no legal standing, is unsubstantiated and is only meant to delay rolling of the wheels of justice. That the issue of whether there was an employer-employee relationship between the parties herein is not an issue on a point of law but a fact that can only be fully determined upon calling of evidence and hearing the parties.

9. The Claimant avers that the Honourable Court has the requisite jurisdiction to entertain this claim as defined by the constitution and the provisions of the Employment Act and goes against the spirit of the said laws.

Submission

10. On behalf of the Claimant, it is submitted that the Claimant was an employee as defined under section 2 of the Employment Act and a contract of service between the Claimant and the Respondent and cite the decision of Mbaru J in Christine **Adot Lopeyio v Wydiffe Mwathi/tereNRB ELRC Cause No. 1688 of 2012 [2013] eKLR**, set out various tests to determine the character of an employer-employee relationship in a Contract of Service. They include the following:-

1. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.

2. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.

3. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.

11. That in the Claimant's letter of appointment, "you are expected to attend all meetings of the committee and articulate the official Society Policies in respect. You are also expected to perform any other function as it will be assigned to you by the Committee Chairman and the National Chairman from time to time. "

12. Also, vide a letter dated 9th September, 2011 the Claimant was accused of unwarranted conduct while performing the activities of the society and asked to step aside from his employment to facilitate investigation, fair hearing and process.

13. That from the above, it is a clear indication that the Claimant was controlled and directed by the Respondent and was subjected to the rules and procedures of the Respondent rather than personal command.

14. It is also submitted that the Claimant was receiving a wage from the Respondent and rely on the definition of salary contained in Mitra's Legal & Commercial Dictionary, 4th Edition, by A.N. Saha, at page 691, "salary" means "a recompense or consideration made to a person for his pains, industry or work for another person, wages, allowances or other remuneration for work or service"; and at page 672, therein, "remuneration" ordinarily means "reward, recompense, pay, wages or salary for service rendered", the learned Judges took the view that "salary" or "wages" is the remuneration for a contract of service, and the definition of "salary" or "wages" includes allowances payable to an employee for services rendered because these allowances are part of the remuneration to which an employee is entitled under his contract of employment. "Salary" or "wages" or "pay" means remuneration for service paid or payable in cash or capable of being expressed in terms of money, including allowances. The word "remuneration" means "a reward or pay for service rendered";

15. That the word "remuneration" is a word of wide import and it includes allowances to which an employee is entitled under his contract of employment; and those allowances are a part of the contract of employment to which an employee is entitled as a reward for his services. That in any case, it is an elementary principle of industrial law that once a certain amenity is given to the employees, it cannot be withdrawn from them except by mutual agreement of the parties. The labour laws are beneficial legislations, and hence they should be construed liberally so that their object, which is to provide maximum benefits to the employees, is achieved; and such object can only be achieved if a wide and liberal construction is given to the expressions "salary" or "wages" or "remuneration".

16. It is submitted that the Claimant being entitled to allowances as remuneration for services that he rendered for over 30 years and as such they urge the Honourable Court to find that he was an employee of the Respondent.

17. That the Respondent refers to article 38 of their Constitution to prove that the Claimant was not their employee. We aver that the Constitution has been amended several times and specifically in the years 1975, 1986, 2006, 2012, 2013 and 2017 and that, the proper version of the constitution to rely on would be the Constitution at the time the Respondent engaged the services of the Claimant.

18. The Claimant avers that the Respondent has failed to prove that the Claimant was acting on a voluntary basis. That no article of the constitution shows the members were engaged on a voluntary basis. That in any event this can only be proved upon calling of evidence and hearing of the parties herein that the Court can fully render itself to this question. They urge the Court to dismiss the Application.

19. The Claimant has not submitted on the issue of limitation of time.

20. I have examined all the averments and submission of the parties. From the pleadings of the Claimant, the Claimant has indicated that he was never received any terminal letter since he wrote to the Respondent in 2012 and since he was suspended from work in 2011.

21. In view of this fact, the issue of the date of termination of the Claimant remains a triable issue, which cannot be dealt with as a Preliminary Objection. The issue of the nature of the relationship between the Claimant and the Respondent is also an issue that can only be proved through evidence.

22. It is my position that the issues being raised at this point are not issues of law but of fact and which cannot be resolved through this Preliminary Objection. I dismiss the Preliminary Objection and direct the main claim to proceed.

23. Costs in the cause.

Dated and delivered in open Court this 13th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Barasa holding brief Kingori for Claimant – Present

Okoth holding brief Ochieng for Respondent – Present