



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 781 OF 2017

JOEL MATUKU MWANZAKU.....CLAIMANT

VS

MUL OIL CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. At pre-trial conference, it was agreed that this matter be heard as a test case in which judgment would apply in *Cause No 783 of 2017: Wilfred Mwambisi Mbala v Mul Oil Construction Ltd*; *Cause No 785 of 2017: Charles Wachira Wanjohi v Mul Oil Construction Ltd* and *Cause No 812 of 2017: Kisangi Kinyili v Mul Oil Construction Ltd*.

2. The Claimant's claim is by way of Memorandum of Claim dated 28th September 2017 and filed in court on 2nd October 2017. The Respondent filed a Response on 6th February 2018.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Steel Fixer for a period of three (3) years up to 15th June 2017 when his employment was terminated. He was paid Kshs. 5,600 per week.

4. The Claimant pleads that on 15th June 2017, he reported to work as usual but his employment was terminated verbally.

5. The Claimant claims that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a. One month's pay in lieu of notice.....Kshs. 5,600
- b. Leave pay for 3 years.....62,400
- c. 54 rest days.....129,600
- d. Compensation for unfair termination.....96,000
- e. Certificate of service
- f. Costs plus interest

The Respondent's Case

6. In its Response dated 5th February 2018 and filed in court on 6th February 2018, the Respondent states that the Claimant was employed by one Sammy Mwangi and not the Respondent.

7. The Respondent further states that it had subcontracted Sammy Mwangi, vide an agreement dated 1st January 2013, to carry out specific works at piece rates payable at the end of the specific work or engagement.

Findings and Determination

8. The first issue for determination in this case is whether there was an employment relationship between the Claimant and the Respondent, capable of enforcement by this Court.

9. In his Memorandum of Claim dated 28th September 2017 and filed in court on 2nd October 2017, the Claimant claims that he worked for the Respondent for 3 years up to 15th June 2017. Significantly, he does not plead the effective date of his employment with the Respondent.

10. Because the Claimant's entire claim is premised on an employment relationship, it was incumbent upon him to prove its existence. I have said before and I will say it again that not every work relationship is an employment relationship (see *John Kamau Mburu v Program for Appropriate Technology in Health & another [2015] eKLR*).

11. In support of its case that there was no employment relationship between it and the Claimant, the Respondent called Sammy Mwangi who described himself as a subcontractor. Mwangi testified that he had been subcontracted by the Respondent to undertake several works. He produced a construction contract between himself and the Respondent dated 1st January 2013 plus several payment certificates.

12. I need to point out that the question before me is not whether Sammy Mwangi was the Claimant's employer as the line of cross examination by the Claimant's Counsel seems to suggest.

13. This case turns on the question whether there was an employment relationship between the Claimant and the Respondent and the burden of proving this fell squarely on the Claimant. Having failed to call independent evidence to prove this, the only finding to make is that there was no employment relationship between the parties capable of enforcement by this Court, which exercises specialised jurisdiction.

14. As a result, the Claimant's entire claim fails and is dismissed.

15. Pursuant to the pre-trial agreement that this case would be heard as a test case for *Cause No 783 of 2017: Wilfred Mwambisi Mbala v Mul Oil Construction Ltd*; *Cause No 785 of 2017: Charles Wachira Wanjohi v Mul Oil Construction Ltd* and *Cause No 812 of 2017: Kisangi Kinyili v Mul Oil Construction Ltd*, these cases also stand dismissed.

16. Each party will bear their own costs.

17. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF DECEMBER 2019

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JUDGE

Appearance:

Mr. Ngonze for the Claimants

Mr. Tolo for the Respondent