



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 975 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th February 2018)

MARK ABUNG'ANA LITIEMA.....1ST CLAIMANT

ELPHAS ABELU SHIKAMI.....2ND CLAIMANT

GEOFFREY ORUKU ANDANDE.....3RD CLAIMANT

MORRIS OKONYO MUGANDA.....4TH CLAIMANT

VERSUS

L. B. SANGHANI FLATS/ESTATE.....RESPONDENT

JUDGMENT

1. The Claimants filed suit on 8th June 2015 seeking damages for unfair and unlawful termination and underpayments.
2. The gravamen of their suit is that on or about 4th March 2005, the Respondent offered the Claimants employment as private night guards at its estate with starting salary of Kshs.4,600 which salary was less the recommended minimum wage for night guards, Claimant's salary according to the General Wage Order was supposed to be Kshs.5175/= plus 15% basic salary for house allowance a total for 5951.25. The year 2009, January the salary was increased to Kshs.8,000/=. The Year 2010 the salary was increased to Kshs.10,000 per month, claimant continued to earn the same salary upto the end of December, 2014.
3. That in the year 2012, the recommended minimum wage for night guard was Kshs.9,571.65 plus 15% of the basic or house allowance Kshs.1,435.74 a total of Kshs.11,007.40. That in the year 2013, 2014 and 2015 the recommended minimum wage was Kshs.12,548 inclusive of a house allowance of Kshs.1,636.75. They aver that the Respondent never effected any of the minimum wage indicated herein and the same remain outstanding.
4. That the Claimants worked for the Respondent with due diligence and faithfulness until 10th May, 2015 when the Respondent without reason unlawfully and unfairly terminated the Claimant from Employment without any notice thereof. That the whole period the Claimant were in employment, they never received any warning letter for poor performance or misconduct.
5. That upon termination they were each paid Kshs.9,000/= through Mpesa to the 1st Claimant for the ten (10) days worked in May, 2015. No other monies were paid to them despite various demands claiming that the Claimants were engaged on a temporary basis.
6. The Claimants pray for underpayments, terminal dues and damages for unlawful dismissal as broken down in the Claim.
7. The Respondent filed a statement of Response wherein they deny the existence of any entity known as L.B. Sanghani Flats/Estate capable of being sued and avers that Lalji Bhimji Sanghani who is an adult of sound mind is the proprietor of the property known as L.R.Number 1870V/109 East Church Road which comprises of 22 flats, 3 basement houses and 6 servant quarters. They deny that the claimants were employed and aver that they were self employed offering security services to the tenants of the aforesaid plot.
8. The Respondent further denied all the averments in the Statement of Claim and puts the Claimants to strict proof thereof and in the alternative pleads that if at all the Claimants were engaged the agreement was an independent one between the tenants and the Claimants and

the proprietor was not involved in the contract at all. That the said contract was terminated as a result of rising insecurity in the estate leading the tenants to engage a security firm in their stead.

9. In evidence, RW2 stated that the tenants of the Respondent were never organized into an association and therefore never signed any agreement with the Claimants. Further that RW2 has been a tenant since January 2002 and he confirmed he knew the 1st Claimant who was an employee of Hatari Security who opted to take security services as self employed individual after Hatari security left and were paid security fees collected directly from the tenants.

10. The proprietor of the premises in question was RW1 and in his evidence he denied ever employing the Claimants but he did admit their presence in that he would occasionally pay them Kshs.1000/= when he would visit the premises. They pray for the Claim to be dismissed with costs.

Submissions

11. The Claimant submits that they were employed as Security Guards by the Respondent. That vide Legal Notice No 24 Protective Security Guards services Order 1998 clearly states that the Order shall apply to all persons employed directly or indirectly by undertaking or part of an undertaking which is involved in carrying on of any of the following activities:

i. Private investigations or security consultancy.

ii. Guarding of Industrial plants, banks, warehouses, shops, private homes or any other property or establishment against theft illegal entry or fire and

iii. Escort cash.

iv. The only people excluded on this order are those guarding government offices, religious organizations or educational bodies etc.

12. That the allegations by the Respondents that the Claimants were self-employed, is baseless and this allegation is only meant to subvert the provisions of Article 94(5) of the Constitution of Kenya and Section 13(6) of the Employment Act. They also rely on the **Court of Appeal Case No. 79 of 2015 Krystalline Salt Ltd Vs Kwekwe Mwakele and 67 Others**, where it was held that the Respondents spent their time under the control and supervision of the appellant. It was not clear with the allegations by the appellant that the Respondents were self-employed contractors and the burden of proof shifted to the appellant (employer). Again, the Court found that Respondents were recruited, worked and paid by the employer in his plant for the work done.

13. The Claimants submit that at all material times they were paid their salaries through Mpesa by the caretaker and or one of the tenants with the authority of the Landlord and were terminated by the Respondent on theft allegations.

14. They further submit that underpayments are due to them by reason of being in employment of the Respondent as provided by section 48(1), (2) & (3) of the Labour Institutions Act as evidence by the Mpesa statements attached to the Claim.

15. It is also urged on behalf of the Claimants that there was discrimination between the claimants and other security firms engaged by the Respondent within the meaning of Section 5(3)(b) of the Employment Act, 2007.

16. Counsel for the Claimants also argued that the documents sought to be relied on by the Respondents have no nexus to the instant Claim as they do not mention the names of the Claimants anywhere. Further that there was no reason for termination of the Claimants services and due procedure was not followed during termination.

17. They further contend that the Respondents did not adduce documentation in evidence to show that the Claimants were employed on another date other than what is on the Statement of Claim. They pray for the Court to find that there was an oral contract of employment between the Claimants and the Respondent and the failure to reduce the same into writing was contrary to Section 9 of the Employment Act, 2007.

18. It is the Claimants position that due process was not followed in their termination as envisaged under section 41 of the Employment Act and pray for the prayers sought in the claim to be allowed.

19. The Respondent in submissions states that the Claimants suit does not fall within the ordinary meaning of employer and employee envisaged under section 2 of the Employment Act. They also cite the case of **Mombasa Cause No. 272 of 2015 Thomas Omondi vs. Tom Nelson** where it was held:

“The Claimant did not come out clearly to establish that there existed an employment relationship between him and the Respondent. He says he was engaged by word of mouth to look after the Respondent’s furniture. He did not call any witnesses who saw him being engaged... the respondent disproved the presence of an employment relationship and cannot be called upon to justify termination of an employment that never was.”

20. It is submitted on behalf of the Respondent that though the burden of proving or disproving an employment relationship shifts to the employer the same does not release the Claimants from proving their cases. Counsel for the Respondents cited the case for **Wallen Yaberi Onserio Vs Protective Custody Limited Industrial Cause 1091 of 2012** to buttress this position.

21. Counsel also submitted that if at all the Claimants were employed by the tenants their termination was proper as envisaged under Section 44 of the Employment Act.

22. I have examined all evidence on record plus submissions of the parties. The issues for determination are as follows:-

1. Who employed the Claimants?

2. Whether the Claimants were unlawfully and unfairly terminated.

3. Whether the Claimants are entitled to the remedies sought.

23. On the 1st issue, the Claimants have described the Respondent in paragraph 2 of the Statement of Claim as a Residential Estate situated along East Church Road Westlands.

24. The Claimants does not however indicate whether the Respondent is a legal entity or not. A Residential Estate unless registered as such under the relevant laws cannot be a legal entity capable of suing or being sued. The Respondent in their response have denied the existence of an entity known as L.B Sanghani Flats/ Estate capable of being sued.

25. The Claimants did not make any effort to correct the anormology in the Respondents description. No evidence is adduced to show that the Respondent as sued is a legal entity.

26. A legal entity has been defined by www.busienssdictionary.com as:-

“An association, corporation, partnership, proprietorship, trust or individual that has legal standing in the eyes of the law. A legal entity has legal capacity to enter into agreements or contracts, assume obligations, incur and pay debts, sue and be sued in its own right and to be held responsible for its actions”.

27. The Claimants have not really established that the Respondent is a legal entity. Such an entity as sued would not have had the capacity to employ the Claimants. On that ground alone, this suit fails in its entirety.

28. Each party will bear its own costs.

Dated and delivered in open Court this 28th day of February, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Monleu holding brief Solonka for Respondent – Present

Shah holding brief Makori for Claimants – Present