

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 12 OF 2017

KENYA UNION OF COMMERCIAL,

FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

MURANG'A MWALIMU HOUSE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued on behalf of the Grievant Christopher Wachira for failure to pay his terminal benefits. The Claimant averred that the Respondent employed the Grievant on 1st January 2003 as a night watchman earning Kshs. 2,800/- per month with no house allowance. It was the Claimant's position that the parties had no recognition agreement but that the Grievant's right of union representation was guaranteed under the right of freedom of association. The Claimant averred that the Grievant worked until 7th September 2015 when he was verbally terminated as the house he was guarding was undergoing renovations. It was averred that at the time of termination the Grievant had worked for the Respondent for a continuous period of 12 years when he was told not to report the next day, that is on 9th September 2015 as his services would not be required. The Grievant was in state of confusion and asked what would happen to him as his services had been terminated. It was averred that the Respondent advised the Grievant that the issue of service and notice would be tackled by the board of directors once it met. The Claimant averred that the Grievant went to the Respondent's office where he met the chairman and the manager and enquired from them when he would be paid his dues and was advised to wait for three weeks to enable the board of directors meet. The Grievant approached the Claimant for redress and the Claimant wrote three letters, the first dated 8th October 2015, a reminder dated 4th November 2015 and the final letter dated 11th January 2016. The Respondent never replied to the Union's letters and the Claimant reported the matter to the Cabinet Secretary Ministry of Labour and on 30th May 2016 a conciliator was appointed calling for the first meeting on 27th June 2016. The Claimant averred that it forwarded its memorandum on 17th June 2016 and attended the meeting on 27th June 2016 but the Respondent did not show up. The Conciliator called for another meeting on 18th July 2016 but the Respondent did not show up causing the conciliator to indicate on 8th August 2016 that the union was at liberty to initiate industrial process. The Claimant tabulated the dues it sought on behalf of the Grievant being salary in lieu of notice, pay for accrued annual leaves not taken for 12 years, salary for September 2015, underpayment of wages, service gratuity for 12 years at rate of 15 days for each year worked and maximum compensation for unlawful termination.

2. The Respondent filed a defence in which it denied the Grievant was its employee. It averred that the Grievant's engagement as a night watchman was an arrangement and agreement between him and all the tenants in the Respondent's commercial building whereby each tenant would contribute Kshs. 200/- towards his monthly dues. The Respondent denied meeting with the Grievant to discuss his terminal dues or receiving any correspondence from the Claimant at all. The Respondent sought the dismissal of the Claimant's claim with costs.

3. The hearing took place on 24th January 2018 and 20th February 2018. The Claimant presented the Grievant Mr. Christopher Pharis Wachira who testified that he was employed as a night watchman earning Kshs. 2,800/- at first. He stated that his services were terminated without notice as the building was under renovation. He testified that he was not paid his September salary or the terminal dues he sought and that the Respondent did not come to the Labour Office despite summons. He therefore sought for the payment of his dues as per the claim.

4. The defence called Cyrus Wambugu who testified that he was a businessman from Murang'a. He said he did not know the Claimant and that he was a tenant in the Respondent's premises and that the security was organised by the tenants and there were monthly contributions by the tenants and the Grievant was paid by one of the tenants who collected the money as he reported to work when the tenants had left the premises. In cross-examination he testified that he found the Grievant guarding the premises when he became a tenant at the Respondent's premises. He stated that the Grievant was paid by tenants and denied that he was the manager for the Respondent. He stated that he was requested to collect the payment for the Grievant and denied receiving any demand letter from union officials. He testified that the premises were demolished and that no one dismissed the Grievant. He stated that he did not know the terms of engagement of the Grievant and that if the house was vacant there was no payment made. He denied dismissing the Grievant and stated that the amount paid would vary as there would be vacant houses at times. He testified in re-examination that the Grievant approached him to collect money from his fellow tenants and that was why there was a rota and that the case paid was from the tenants and not the Respondent.

5. The second defence witness was Stanley Kamau Muthama who testified that he was a director of the Respondent. He stated that he never employed the Grievant. He denied that the first defence witness was the Respondent's manager. He stated that the building currently had not tenants and that there were times there were 12 or 15 tenants and that depended on how the tenants came or left. He testified that the Respondent too had offices in the building and paid the security fee just like any other tenant and the Respondent did not know who the watchman was. He testified the Respondent occupied room 11 and that the letter written was to facilitate collection by tenants. He said that the Respondent did not have employees. In cross-examination he testified that the tenant Mr. Wambugu would at times collect the security fee or Mama Wambugu would collect the fee. He testified that the Chairman of the Respondent was the one called to the Labour Office for

the meeting and that he did not know if the Grievant was alone at work or if there were other security guards. He did not know who the current watchman was and that he did not know why the Grievant's services were terminated or if his services were terminated. In re-examination he testified that he did not have any contract with the first defence witness. He stated that he knew there was a watchman and the tenants would pay through Mr. Wambugu.

6. The last defence witness was Veronica Njeri Kamau who testified that she was a tailor in Murang'a and that she rented a room at the Respondent's building for 5 years. She stated that she knew the Grievant was a watchman there and that he was brought by the previous watchman. She testified that initially the tenants would pay the watchman individually if he came to work early and would be paid around the 5th. She knew Mr. Wambugu as a fellow tenant and stated that he was not a manager for the Respondent. She stated that he was a contractor and had offices in the building. She testified that she did not know how the watchman left as they were told to vacate the building for renovations. She was cross-examined and testified that she was not a board member of the Respondent and did not know the name of the previous watchman. She stated that she did see a list when paying the cash for the watchman and that the tenants left at different times. She testified that when the Grievant was absent he would get another watchman to keep an eye. In re-exam she stated that as a tenant she would pay electricity and water charges as well as security separately. She paid rent to an agent and there was no manager on the premises. That marked the end of oral testimony and the parties were to file submissions.

7. The Claimant filed submissions on 26th February 2018 and the Respondent filed submissions on 19th March 2018. The Claimant submitted that the schedule of the Grievant's salary was confirmed on the letterhead of the Respondent which was used by the tenants. The Claimant submitted that the Grievant was dismissed without notice and payment of the terminal benefits. The Claimant submitted that the Grievant was entitled to the dues set out in the claim.

8. The Respondent submitted that the issues for determination were whether the Grievant was an employee of the Respondent company and whether the Claimant is entitled to the relief sought. It was submitted that the Claimant had a burden to prove the facts alleged in the claim and that the Claimant had failed to prove the employment of the Grievant by the Respondent. The Respondent relied on the case of **Victor Mbachii & Another v Nurtun Bates Ltd [2013] eKLR** where it was held that *a company is a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil*. The Respondent submitted that it was evident that the monthly contributions for the Grievant's salary were from tenants and therefore the Grievant was not an employee of the Respondent. The Respondent relied on the cases of **Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] eKLR** and **Christine Adot Lopeiyo v Wycliffe Mwathi Pere [2013] eKLR** for the argument that it had no control over the Grievant and therefore was not his employer. The Respondent submitted that the suit should therefore fail as there was no oral or written contract of employment between the Grievant and the Respondent.

9. The suit was one which ought not to have seen the light of day. The union admits it has no recognition agreement with the Respondent. It is only on the basis of a recognition agreement with an employer that the union can represent its member (the employee) in a dispute between the said employee and the employer. The Claimant should read the Labour Institutions Act, 2007 and the Labour Relations Act, 2007. Both are readily available for free on the National Law Reporting website www.kenyalaw.org for the full effect of what a trade union can and cannot do. The Grievant was a watchman at the premises which was shut down for renovations. He stated that he was employed by a manager of the Respondent who turns out to have been a tenant of the Respondent. He was actually brought to work by the former watchman who worked at the premises. The Grievant was not employed by any single individual but had an arrangement where he would be paid by the tenants in occupation of the premises. He made claims for 12 years which is not permitted by Section 90 of the Employment Act, 2007 that sets the limit if any claim to 3 years and a year in the case of a continuing injury. By his own admission, the Grievant was paid by contributions of tenants in the building and the fact that he sought the payment of his terminal dues by the Respondent was erroneous. In the premises the suit was not proved on a balance of probabilities. As he may be unable to refund the costs that would ensue, I will order that each party bears their own costs as the suit is dismissed.

It is so ordered.

Dated and delivered at Nyeri this 26th day of April 2018

Nzioki wa Makau

JUDGE