



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.235 OF 2017

CONSOLIDATED WITH

CAUSE NO.237 OF 2017

CAUSE NO.239 OF 2017

CAUSE NO.240 OF 2017

CAUSE NO.241 OF 2017

JOHANA KIPKOSGEI KIGEN.....CLAIMANT

MARKO KIBIWOTT.....CLAIMANT

CEDRIC KIPKOSGEI CHERUIYOT.....CLAIMANT

FRANCIS KOSKEI KANGOGO.....CLAIMANT

FRANCIS KIPKEMBOI TOROITICH.....CLAIMANT

VERSUS

KEIYO TEACHERS SACCO SOCIETY LIMITED

(PRIME-TIME SACCO SOCIETY LIMITED)...RESPONDENT

RULING

The respondent, Keiyo Teachers Sacco Society Limited (Prime-time Sacco Society Limited) filed Notice of Preliminary Objection dated 29th November, 2017 to the effect that the relationship between the parties herein is regulated by an Employer-Contractor relationship.

Both parties filed written submissions.

The respondent submits that the respondent is a Cooperative Society desirous of operating a Front Office Service Operationalisation Accounts (FOSA) with a view to address the rising interest rates imposed by banks against members seeking credit. The respondent applied to the Regulator, Societies and Sacco Regulatory Authority (Sara) to know the conditions for operationalisation of the FOSA and was given policy guidelines that required the services of security to be provided by an independent contractor and who would obtain insurance for the firm for cash in transit.

The respondent also submits that the security department was alerted and in 2016 members were asked to constitute themselves into a limited liability company so as to apply to the respondents within the terms of the regulator. The claimants then formed a welfare group which was evaluated but disqualified by the regulator as a Security Provider (Limited liability) as this was required to be independently registered and insured. The services of *All State Security Services* were approved and were given a precondition that they absorb all the security at the respondent's Iten and Chepkorio branches which they did.

The place of employment and terms of service were not affected as the transfer of employees to the contractor was necessitated by change in legislation and desire to grow and serve the membership better. The claimants were absorbed by the contractor and paid gratuity.

The respondent has relied on the following cases of **John Charo versus Christopher Njao, HCCC No.53 of 2002 (2005) Mombasa eKLR;**

Safari Joseph Ngala & 2 others versus Rapid Kate Service Ltd Cause No.157 of 2016 (2017) eKLR; George Kamau Ndiritu & another versus Intercontinental Hotel Cause No.2347 of 2012 [2015] eKLR.

The claimants on their part submits that the claim herein relates to unfair termination of employment; unpaid terminal dues; issuance of Certificates of Service and costs of the suit. The suit is premised on the facts that the claimants were employed by the respondent a security guards and were declared redundant on 31st October, 2016 and which was unlawful. The circumstances leading to the redundancy is addressed in the Memorandum of claim.

The objections raised by the respondent fail to meet the principles set out in the case of **Mukisa Biscuit Co. Ltd versus West End Distributors Ltd [1969] EA** and reiterated in the cause of **Alex Aluchili Miloko versus Nakumatt Holdings, Cause No.253 of 2014 (ELRC Nakuru)** and which requires a party to address a question of law and where facts are a given and not left to the court discretion. The objections by the respondent do not meet the requisite principles as the facts surrounding the employment of the claimants by the respondents requires to be gone into and in essence is a delay tactic by the respondent so that this case is not heard expeditiously.

The objections by the respondent are premised on submissions that there is no employer and employee relationship between the parties herein but that of a contractor. The basis is that the claimants were transferred to a contractor to offer security services and gratuity paid.

The claimants filed Memorandum of Claim on the basis that they were employed by the respondent as Security Guard and were terminated on account of redundancy that was not procedural and amounted to unfair termination of employment and contrary to section 40 of the Employment Act, 2007. The claimants are seeking terminal due in the nature of notice pay; severance pay; retirement benefits, salaries, overtime and leave pay due and compensation for unfair termination of employment. Fundamentally the basis of the claim is a redundancy undertaken by the respondent.

In response filed on 29th November, 2017 the respondent has admitted having employed the claimants and that termination of employment was done in conformity with new regulatory requirements to enable the respondent Sacco operate a front office cash transactions and thus the abolition of offices held by the claimants.

On the admission by the respondent that there was an employment relationship between the parties, matters relating to operational changes, the nature of the same must be interrogated as to how this arose and how termination of the employment relationship was effected. The existence of a new entity and requirements for the claimants to be transferred under a third party aside, the existing employment between the parties and its end now challenged as being unfair must be gone into by the court by call of evidence.

The essence of the objections raised then goes outside the ambit of a legal question to be addressed by the court at this point as a preliminary point which can be addressed with finality. The need to call evidence to determine the issues between the parties then removes the same as covered by principles necessary for a preliminary objection as set out in the case of **Mukisa Biscuit Co. Ltd versus West End Distributors Ltd [1969] EA** cited above.

The submission that there is a contractor relationship between the parties herein does not arise. Where employment existed between the parties and it terminated under the provisions of section 40 of the Employment Act, 2007 the rights flowing therefrom only arise in a case of employer and employee and a matter this court has jurisdiction to address as set out under section 12 of the Employment and Labour Relations Court Act, 2011.

The circumstances and facts set out in the case of **Safari Joseph Ngala & 2 others versus Rapid Kate Service Ltd Cause No.157 of 2016 (2017) eKLR** and in the case of **George Kamau Ndiritu & another versus Intercontinental Hotel Cause No.2347 of 2012 [2015] eKLR** I respectfully find to be fundamentally different from the case herein. Where an employer sources for a service from a contractor within its business and such service is undertaken as agreed, this is different from an employment relationship where an employee is declared redundant and is seeking rights due therefrom.

Before conclusion, it is worthy to set out that preliminary objections should not be used to serve as a delay tactic as held in the case of **Peter Ochola Omburo versus Inter-Diocesan Properties Limited [2016] eKLR**. the principle objective of the court as stipulated at Section 3 and Section 29 (1) of the Employment and Labour Relations Court Act, 2011 is to ensure that disputes between employer and employee(s) are expeditiously heard without undue delay as such delay only perpetuates injustice to the employer or the employee. To delay a hearing by application of technicalities is also contrary to constitutional provisions set out under

Article 159 of the Constitution, 2010. Where it is apparent to the court that the objections by a party are used contrary to set principles, costs should be awarded.

Accordingly, the objections by the respondent lack merit and are hereby dismissed with costs to the claimant.

As both parties have since exchanged their pleadings, hearing directions shall issue.

Delivered in open court at Eldoret this 29th day of June, 2018

M. MBARU JUDGE

In the presence of:

Court Assistants: Martin and Robert

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