



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1 OF 2010

Respondents' Case

The respondents filed a memorandum of defence dated 25th March 2010 and an amended memorandum of defence dated 20th July 2010. In the amended memorandum of defence the respondents aver that the claimant was employed by the respondents as a kitchen technician from 1st November 2001 at a salary of shs.6,000 per month and worked until November 2003 when his employment came to an end and he was paid his full terminal dues. From 1st November 2003 the claimant was not an employee of the respondent but was offered accommodation at the respondent's flat on humanitarian grounds where he was residing to the date of hearing of the suit.

At the hearing MARY GATHONI NDEGWA, the 2nd respondent testified on behalf of all the respondents. She confirmed that the respondents employed the claimant in a café that they were operating at a petrol station on Haile Selassie Avenue where he worked as a cook. The name of the business was Bon Parts Auto operating under the name Bon Investments. The café and station were closed in November 2003 and all workers including the claimant was paid. She referred to the payment receipts annexed to the memorandum.

She testified that since the claimant was a good workman and had a family she allowed him to stay in a room the respondents had in Woodley until he gets another job. She also used to help him and whenever she had visitors at home or if a friend had a function she would call the claimant to cook and get paid. The claimant also got other jobs on his own.

After a while the respondent asked Realcom, the agents who were managing the property to ask the claimant to leave. The claimant however did not leave and was still occupying the room to the date of hearing of the claim on 22nd January 2018. She testified that the claimant has never been a caretaker at the premises, that there has always been a Manager of the property. At first it was ENA, then Realcom and later Capital Towers. She questioned how the claimant could have worked for six years without a salary as he alleged.

Under cross-examination Mary testified that she did not know how the claimant obtained the documents he had annexed to his memorandum of claim some of which related to tenants of the respondents.

Determination

I have considered the pleadings and evidence on record. The issues for determination are whether the claimant was an employee of the respondents and if he is entitled to the prayers sought.

The Employment Act defines an employee as –

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

Both the claimant and respondent admit that the claimant was employed at the respondent's business from 2001 to 15th November 2003 when the respondent closed the business. From 2003 both the claimant and respondent agree that no salary was paid to the claimant. The claimant insists he was a caretaker and to prove his averments has filed several documents among them several notices addressed to him requesting him to vacate the premises of the respondent. None of the documents refer to the claimant as an employee of the respondent. None are addressed to the claimant.

I find no evidence of employment relationship in the documents filed by the claimant. The claimant has further not explained how he worked as caretaker without pay from November 2003 to 2009. He did not file any documents demanding payment of salary. He did not deny that he was still residing in the premises up to the date of hearing even though he was no longer employed by the respondent. He further did not explain how he could have remained in the premises as a caretaker of the respondents yet the property was under Property Managers as reflected in the documents he has filed in court which include Ena Property Consultants Limited, Realcom and Capital Towers Limited.

The claimant admitted that while living at the respondents' premises he worked at a café in Yaya Centre.

Conclusion

From the evidence on record there is no proof that the claimant was an employee of the respondents with the result that the claim is dismissed with costs for want of proof.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE