



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CAUSE NO.16 OF 2016

(Before D. K. N. Marete)

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

NYANAS WATER & SANITATION CO. LTD.....1ST RESPONDENT

KISUMU WATER & SANITATION CO. LTD.....2ND RESPONDENT

LAKE VICTORIA

SOUTH WATER SERVICE BOARD.....3RD RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....4TH RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 9th February, 2016. The issues in dispute are therein cited as:

1. *Refusal to pay salaries to 14 employee*
2. *Failure to remit Ukulima Sacco, Pension Scheme and Union dues.*

The 2nd respondent in a 2nd Respondent's Reply to Memorandum of Claim dated 18th June, 2018, denies any association with the claim and prays that the suit as against her be dismissed with costs.

The 4th respondent in a 4th Respondent's Response to Memorandum of Claim dated 20th June, 2018 comes out as follows;

“the 4th respondent avers that the claimant's claim against it is misconceived, bad in law, an abuse of court process and the same ought to be dismissed with costs to the 4th respondent.”

This is an echo of the 2nd respondent's defence.

The other respondents did not file responses to the claim. I would understand this bearing in mind the convoluted history of prosecution of this cause.

The claimant's case opens with an admission that she and the 1st Respondent did not have a Recognition Agreement despite the fact that the 1st Respondent has been deducting union dues. This matter, however, has been reported to the Minister and is under conciliation.

The claimant's further case comes out as follows;

2.01 That in the months of January to October 2013 and May 2014 to October 2014 the employees were never paid their salaries despite the fact that they continued working.

2.02 On 30th January, 2014 the Minister for Environment, Water & Natural Resources wrote a letter to the 2nd Respondents on the issues in failure to remit pension dues. Exhibit 4

2.03 On 13th November 2014 the sub county water officer wrote a letter to the 2nd Respondent on unpaid dues amounting to Kshs. 10,720,114.21 Refer to exhibit 9

2.04 That the dispute has gone through conciliation process but without success.

2.05 On 22nd January, 2015 the employees wrote a joint letter to the 2nd Respondent Chief Executive Officer on issue of salary arrears. Exhibit 10

2.06 On 27th January 2015 the 2nd Respondent Chief Executive Officer made a response to the employees concern and promised to look into the matter within 14 days. Refer to exhibit 12

2.07 On 31st March 2015 the 1st Respondent team leader transferred the services of some employees without consideration to employee's financial status. Refer to exhibit 17

2.08 On 7th July 2015 the claimant wrote a letter to the 1st Respondent on the issue of transfers and advised the 1st Respondent team leader accordingly, Refer to exhibit 22

2.09 On 26th August 2015 the Claimant wrote a letter to the conciliator requesting for certificate of referral since the issue was long overdue. Refer to exhibit 23.

Submissions

3.01 It is the Claimant's humble submission to the Hon. Court that the Respondents were deducting union dues, co-operative dues and pension dues but not remitting to respective institutions contrary to the law.

3.02 It is further the Claimant's submission that the Respondents jointly and severally failed and or neglected to pay employees salary arrears for 17 months amount to Kshs. 4,244,830.00

3.03 That the Respondent acted without respect to the law, Constitution and I.L.O Conventions.

3.04 The Claimant further submits that the employees have suffered and will continue to suffer if the Hon. Court fails to determine the issues in dispute on priority basis.

3.05 That in the interest of justice the Hon. Court to declare the Respondents action unlawful and direct them to pay all the amounts deducted but not remitted and salary arrears with interest

3.06 It is further the claimants' submission that the 1st Respondent and 3rd Respondent redeployment/transferring of the employees before addressing the issues in dispute was a major departure from the fair Labour practice guaranteed in the law and Constitution of Kenya.

3.07 That the deployment of employees was in bad faith and meant to silence the employees from demanding salary arrears when the 1st Respondent chose to replace regular employees with contract/casual employees who some of them have also been sacked mysteriously. The 1st Respondent have therefore decided to apply the tactics of use and dump in the presence of the 2nd Respondent who are the asset owners.

She prays as follows:

4.01 It is the Claimants humble prayer to the Honourable Court that the Honourable court to find the 1st and 2nd Respondent action unconstitutional and unlawful.

4.02 That the Honourable court do find the Claimant's case merited.

4.03 It is further the Claimants prayer that the Honourable Court do order the Respondent to pay the employee's salary arrears due to them with interest at court rate and pay the same within 30 days from the date of the judgment.

4.04 The Claimant further pray to the Honourable Court do order the Respondents not to victimize or intimidate the Claimant members on the basis of their active participation in trade union activities and this dispute.

4.05 That employees be assigned duties within their profession.

4.06 That the Hon. Court do issue an order directing the Respondents or interested part not to effect transfers until the arrears are paid in full.

4.07 That the Hon. Court do order the Respondents jointly and severally to remit to the respective institutions trade union dues amounting to Kshs. 201,350.00., co-operative dues amounting to kshs.907,301.00 pension dues amounting to Kshs. 3,731,869.00 and salary arrears amounting to Kshs. 4,244,830.00 within 30 days from the date of the judgment.

4.08 The cost of the suit be quantified and awarded in favor of the Claimant by the trial Judge.

4.09 That the Honourable court do issue any other order it deem fit to address the cause of justice.

The 2nd Respondent's case is a denial of the claim. It comes out as follows;

4. The 2nd Respondent admits paragraphs 2.01 to 2.09 of the Statement of Claim to the limited extent that the issues of unpaid salaries/dues were brought to her attention and she promised to look into the same but the 2nd Respondent avers that she was/is NOT the employer of the employees complained about and her responsibility did not extent to settling the claim.

5. The 2nd Respondent denies paragraphs 3.01 to 3.07 in toto. In particular, she denies that:-

5.1 She was deducting union dues, co-operative dues and pension dues but not remitting to respective institutions contrary to the law or at all.

5.2 She (together with the 1st, 3rd and 4th Respondents) jointly and severally failed and or neglected to pay employees salary arrears for 17 months amounting to Kshs. 4,244.830/= or at all.

5.3 She acted without respect to the law, Constitution and I.L.O Conventions.

5.4 She caused the employees to suffer as stated in paragraph 3.04 or at all.

5.5 She re-deployed or transferred the employees before addressing the issues in dispute or at all.

5.6 She acted in bad faith and meant to silence the employees from demanding their salary arrears by replacing regular employees with contract/casual employees some of whom have also been sacked mysteriously as pleaded in paragraph 3.07 or at all.

6. The 2nd Respondent avers that:-

6.1 The 1st Respondent was/is a legal entity, expected to meet all its obligations including payment of staff salaries and remittances of staff statutory deductions.

6.2 The Constitution of Kenya 2010 devolved Water Provision Services to counties and caused re-alignment of the 1st Respondent to specific counties with her staff falling within Kisumu region being absorbed by Kisumu County and those falling in Nandi region being absorbed by Nandi County and being paid their salaries by Kisumu Water and Sanitation Company respectively.

6.3 The Claim s filed in incompetent as it does not indicate the date when the cause of action arose or the particulars of special damages,

as is by law required.

6.4 The Claim does not disclose any cause of action as against her (the 2nd Respondent).

The 4th respondent's case is also a denial of the claim. It is her case that the claimant has not shown any cause of action against her. She therefore has nothing to answer and further, the claim against her should be dismissed.

The issues in dispute therefore are:

1. Whether the claimant has a tangible case in respect of unpaid salaries and other dues?
2. Who is responsible to the claimant for payment of dues, if at all?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the claimant has a tangible case in respect of unpaid salaries and other dues. The claimant in her written submissions dated 4th July, 2018 submits a case of non payment of salary arrears of the employees for a period of seventeen months cumulative. She further submits as follows;

b) The 2nd Respondent was the licensor of the 1st and 3rd Respondent as at the time of this dispute within the meaning of section 53 and 5 of the Water Act 2002 now repealed. Since the 1st Respondent has no Board of Directors the 2nd and 3rd Respondent are directly liable to pay the dues in dispute.

-The 2nd Respondent made several promises to pay the amount but all in vain. Refer to exhibit 16 letter dated 17th March, 2015 found in pages 123

– 124 and exhibit 12 letter dated 27th January, 2015 from workers to the 2nd Respondent the same is found in pages 113 – 114 of the claim.

-These are evidences of commitment by the 2nd Respondent.

c) The 3rd Respondent who currently operates the 1st Respondents was licensed by the 2nd Respondent to take over the 1st Respondent operations and when they accepted that they became responsible for all liabilities including the issues in dispute. The 3rd Respondent took over the operations of the 1st Respondent in November, 2014. It is therefore upon the 3rd Respondent to disclose to the Hon. Court the content of their agreement with the 2nd Respondent if any. The claimant was not involved in the process and therefore has no records to produce. The burden of proof therefore is with the 3rd Respondent.

d) The 3rd Respondent currently pays the employees' salaries and remits trade union dues. Her senior most officers in the 1st Respondent are Project Manager and team leader among other employees they have employed in the 1st Respondent. She is therefore the employer at the moment hence should be directed to pay. She is the employer within the meaning of the employment Act, 2007.

This is by dint of section 2 of the Employment Act, 2007 which provides as follows;

“Means any person, public body, firm, corporation or company who or which has entered into contract of service to employ any individual and includes the agent, foreman, manager or factor or such person, public body, firm, corporation or company.”

e) The 2nd Respondent failed and or deliberately neglected to perform her functions well when they promised to act but neglected to. In the event the Hon. Court do not order the 3rd Respondent to pay the same the Hon. Court to direct the 2nd Respondent to pay.

The claimant further submits that the 4th respondent is by virtue of devolution directly responsible for provision of water services. They were brought on board before initiation of this litigation with a view to amicably resolving the issues in dispute but this did not work. The 1st respondent is now not properly constituted due to the neglect of the 4th respondent in appointing a board of directors for her.

Further, the 4th respondent is by operation of the law the proprietor of the assets of the 1st respondent. Although she is not a direct employer, she bears responsibility in this saga.

The claimant in the penultimate submits that the workers have continued in employment and provision of services inspite of these frustrations and therefore the need to remedy the situation.

The 2nd respondent denies liability in so far as the claim is concerned. It is her submission that employment presupposes a contract of employment between an employer and an employee. It is not possible that in the circumstances of this case an employee was employed by all the four respondents at the same time. Unless this is clarified, it would not be possible to peg liability in the circumstances.

The 4th respondent in her written submission dated 2nd July, 2017 submits a case of no liability on grounds that no cause of action has been established against herself. On this, she seeks to rely on the authority of **Time Magazine International Ltd and another vs. Michael F Rotich and another (2002) Eklr** where Onyango Otieno J. (as he then was) adopted a definition of reasonable causes of action as meaning, *“a cause of action with some chances of success.”*

It is her case and submission that this has not been established in this instance.

The 4th respondent further seeks to rely on the authority of **Crescent Construction Co. Ltd Vs Delphis Bank Ltd (2007) eKLR** where it was observed as follows;

“...it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

So far, so good for her case.

I find a case for the claimant plausible. This is because she comes out clearly in an elucidation of the linkage between the respondents. The 1st respondent takes primal responsibility as employer and therefore ought to be at the forefront of meeting the salary arrears and other dues now claimed. However, it is notable from the case of the claimant that the 1st respondent and the other respondents are so intertwined so that this matter binds all the respondents in one way or the other. I would therefore dispel and discount the respective cases of the 2nd and 4th respondents and treat these as mere denials. This defence is unmerited and must be stashed away. I therefore find a case of unpaid salaries and other dues to the claimant and peg this on to the respondents. And this answers the 1st and 2nd issues for determination.

I am therefore inclined to allow the claim and award relief as follows;

i. That the respondents be and are hereby ordered to pay salary arrears and union dues as follows;

- a) Payment of salary arrears amounting to over Kshs.4 million for the period of seventeen months.
- b) Payment of union dues amounting Kshs.252,000.00
- ii. That the respondents be and are hereby awarded liability at parity; in equal shares.
- iii. That the respondents be and are hereby ordered to meet and pay all dues in (i) above within thirty (30) days of this judgement of court.
- iv. That the claimant be and is hereby awarded interest at court rates from the date of this judgement of court.
- v. The costs of this claim shall be borne by the respondents.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Dickens Atela for the claimant union.
2. Ms Staussi instructed by M/s Staussi & Asunah Advocates for the 2nd respondent.
3. Mr. Njoga instructed by Ouma Njoga & Company Advoctes for the 3rd respondent.
4. Mr. Yogo instructed by Otieno Yogo & Company Advocates for the 4th respondent.