



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1592 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 1st October, 2018)

JARED MANGERA AND 11 OTHERS.....CLAIMANTS

VERSUS

PROFESSIONAL CLEAN CARE LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants filed suit on 11th September 2014 seeking damages for termination on account of redundancy of Jared Mangera and 11 others and failure to pay them their severance payment/or terminal benefits. They aver that on or about June 2010, the Respondent employed them as Process Minders earning a salary of 13,000/= per month.
2. They aver that they commenced the employment in June 2010 and served the Respondent with loyalty and diligence until 13th July 2014 when the Respondent wrongfully and unlawfully terminated their services without notice and refused to pay their severance payment which amount to Kshs. 5,127,500 herein plus compensation for wrongful dismissal to a maximum of 12 months wages plus costs and interests of the suit.
3. The Respondent filed their Statement of Response where they denied the averments in the Memorandum of Claim. They aver that the Claimants were engaged on fixed term contracts to perform piece work. The basis of the fixed term nature of the contracts is that the Respondent tendered for a contract to provide cleaning services to the East African Breweries Limited sometime in 2010 and was successful.
4. The Respondent therefore employed the Claimants on a fixed term contract basis which term was contingent on the existence and continuation of the tender. This contingency was specifically stated in the Claimants' contracts which they duly signed and acknowledged and pursuant to the termination of the tender. The Respondent's specific work for which it had employed the Claimants ended and each of the Claimants was given one month notice of termination of the employment and they were paid all their terminal benefits.
5. They aver that the suit is incompetent because it has been filed as a representative suit yet there is no signed authority given by the other Claimants to the 1st Claimant to swear the verifying affidavit as required by Order 4 Rule 3 of the Civil Procedure Rules 2010 neither has leave been given by this Court as per Rule 9 of the Industrial Court Procedure Rules 2010 for one Claimant to file suit on behalf of the claims by other Claimants. They state that it is doubtful if some of the claims are not fictitious since there are no verifying affidavits by the 2nd to 12th Claimants.
6. They further aver that there is no schedule with the Claimant's description and address as required by Rule 9(3) of the Industrial Court Procedure Rules 2010 and without prejudice to the foregoing and in the alternative.
7. They also state that the claim for pro-rata leave, annual paid leave of 84 days, public holidays and house allowance even if merited are time barred under Section 90 of the Employment Act because they would constitute "continuing breaches" and a suit for such breaches should have been filed within one year of cessation of the breach. In the further alternative, if the claims are held to be non-continuing breaches, then any claim beyond 3 years back is time barred and no demand or notice of intention to sue was given to the Respondents before the suit was filed.

Submissions

8. The Claimants filed their submissions where they submit that the Respondent's witness/general manager failed to state or disclose when and whether the letters of Notice of Termination were issued on time but said that he generally dispatched the letters to the supervisors who in turn were to issue them to the respective Claimants on the field. Therefore the Notice of termination of the contract was unfairly and un-

procedurally done in untimely manner.

9. They aver that they were employed on a contract which did not specify the duration of the contract pursuant to Section 10(2)(e) of the Employment Act 2007 which stipulates that a written contract should state the form and duration of the contract. The Respondent's contract of providing cleaning and minding services to East Africa Breweries Limited (EABL) was not in any way known to them. It is therefore unfair not to have disclosed to them the duration of employment contract and as such they believed that they were permanently employed since the Respondent had other assignments which it could redeploy the Claimants.

10. They state that their employment was terminated on 31st August 2014 as this was their last day on duty. They further aver that they had worked continuously for 4 years and within which time they had no signs of losing their jobs. They contend that the termination was unfair and they are therefore entitled to remedies as per Section 49 (1) of the Employment Act. They urge the Court to allow their claims as sought in their Statement of Claim.

11. The Respondent filed their submissions where they submitted that the Claimants were fairly and lawfully terminated having been issued with 1 months' notice of their termination based on the fact of the cancellation of the EABL tender. They relied on the case of **Trade Bank Ltd Vs LZ Engineering Construction Ltd (2000) 1AE266.**

12. They aver that since the term of the contract were such that the employment would terminate on the occurrence of an event being the termination of the cleaning contract with EABL, then the Court ought to look only at the terms of the contract and no further and by doing so they state that the Court will come to the conclusion that the contracts in question actually came to an end by the effluxion of time and there was no dismissal at all.

13. They also aver that the termination was also not an act by the employer but rather was by operation of the terms of the agreement and therefore apart from not qualifying as a dismissal, the same cannot be defined as a redundancy because it is neither the employees fault nor the employers fault. They relied on the case of **Samuel Chacha Mwita Vs Kenya Medical Research Institute (2014) eKLR.**

14. They further aver that the Claimants sought relief in their Statement of Claim claiming notice pay. They state that each of the Claimants was given 1 month notice of termination and therefore this prayer is unmerited.

15. In the prayer for Severance payments, they aver that the Claimants' termination was not a redundancy and therefore this prayer has no basis and ought to be dismissed. In the claim for Public Holidays they aver that the Claimants were compensated for overtime including public holidays through extra off days making this claim unmerited and so should be dismissed. In the claim for house allowance, the Respondents state that the same is without merit as the Claimants were paid a consolidated salary.

16. In conclusion, they urge this Court to breath life into the terms of the contract of employment and find that the Claimants suit is misconceived and ought to be dismissed with costs.

17. I have examined the evidence and submissions of both Parties. 1st I note that this Claim is filed by Claimants and the CW1 Jared Mangera is the only one who gave evidence in Court. He indicated that the others had given him authority to present this case on their behalf but no such authority was exhibited before Court as required by Rule 9 of Industrial Court (Procedure) Rules 2010. It is not clear whether CW1 had authority of the other Claimants to give evidence on their behalf either. In the circumstances, the cases of the 2nd and 12th Claimants remained unprosecuted and stand dismissed accordingly.

18. As to the CW1's case, he has averred that he was wrongly terminated by the Respondent. I have looked at the contract between CW1 (1st Claimant herein) and Respondent. I note that the contract stated as follows:-

***“You will be employed on contract basis as long as we remain the maintenance contract contractor for East African Breweries Limited Nairobi*”**

19. It is apparent that the contract was therefore contingent upon the Respondent's own contract with East African Breweries Limited Nairobi.

20. The Respondents have demonstrated that their contract with East African Breweries Limited ended on 31.8.2014 as per their Appendix N. It therefore follows that the employment contract between Claimant and Respondent also had to cease without any wrong doing by the Respondent.

21. In the circumstances, the averment by the Claimant that he was unfairly terminated does not hold any water. I find the Claimants' case without any merit and I therefore dismiss it accordingly.

22. Each Party will bear its on costs.

Dated and delivered in open Court this 1st day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Okello holding brief for Kerongo for Claimant – Present

Weru for Respondent – Present