



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.538 OF 2018

(Before D. K. N. Marete)

KIMEU KIETI & 184 OTHERS.....CLAIMANT

VERSUS

KENYA MEAT COMMISSION.....RESPONDENT

JUDGEMENT

This matter was originated by a Further Amended Plaint/Memorandum of Claim dated 31st October, 2018. It does not disclose any issue in dispute on its face.

The respondent in an Amended Statement of Response dated 12th October, 2018 denies the claim and prays that this be dismissed with cost. She also prays that this court allows her counter claim with interest.

The claimant's case is that at all material times to the claim, they have been employees of the respondent. They have also been housed by the said respondent.

The claimant's further case is that from 1994 to date, they have not been paid their terminal dues or any monies at all.

The claimant's other case is that in December, 1993, the respondent closed down for repairs and they were supposed to be paid their redundancy dues or benefits accrued thereon. It was also mutually agreed *inter partes* that once this was paid, they would vacate the staff quarters. In breach of the said term/agreement, the respondent has threatened to evict the claimant against established law, ethic and reason. They deem this unlawful and untenable. This, they now claim.

The claim a total of Kshs.697,294.00 respective to their individual accounts as provided at paragraph 8 of the claim and further pray as follows;

- a) An order that the Respondent do pay the Claimants such redundancy/terminal benefits with interest from 1994 as this Honourable Court will find due.
- b) The Respondent be restraining from allocating its houses currently occupied by the claimants to any other persons or evicting the claimants therefore until the final determination of this suit, payment of claimants' redundancy dues by the Respondent.
- c) Costs of this suit with interest

The respondent denies the claim and avers that the claimants were paid their dues upon termination of their services.

The respondent's further case is that upon being paid their dues in full, they individually signed tenancy agreement with the respondent binding themselves to pay monthly rents in accordance with the category of house they occupied.

The respondent's other case is one of casting a shadow on the bonafides of some of the claimants in her averment that the majority of these are not genuine in particular;

- i. Claimant numbers 18, 23, 48, 56, 61, 79, 152 and 179 herself.

ii. Claimant No. 32 has never been housed by the respondent

iii. Allegedly claimant numbers; 75, 87, 95, 97, 111, 135, 137, 139, 140, 141, 150, 156, 166, 167, 168, 178 are regarded by the Respondent as employees on unpaid leave from whom rent has never been demanded.

iv. Alleged claimant number 136 voluntarily surrendered the house to the Respondent in 1994;

v. Alleged claimants number 146 and 183 no longer pay monthly rent to the Defendant Respondent. They later refused to pay the said rent and are now in rent arrears.

vi. Alleged claimants numbers 99 and 59 are currently no longer employed by the Respondent and entitled to free housing and have never given instructions to be included in the suit.

The respondent further avers and expresses his case as follows;

9. In response to paragraph 6 and 7 of the amended Memorandum of Claim, the Respondent avers that after the Claimants were paid their dues they refused to vacate the staff quarters.

10. Further in response to the contents in paragraphs 6, 7, 8 and 9 of the Memorandum of Claim the Respondent avers that the claimants have failed to comply with the ruling delivered on the 20th December 2010 by S.M. Mungai by failing to pay rent and thus the eviction proceedings are lawful and warranted.

11. In further response to paragraph 8, the respondent issued a notice dated 20th December 1993 and the Claimants were accorded ample time to vacate the respondent's houses prior to the commencement of the various legal tussles created before 15th November 1995 when the claimants obtained injunctive orders not to be evicted from the houses and have since continued to occupy the houses to date.

12. The Respondent sought orders to vacate the injunctive orders given to the Claimants, through a Notice of Motion dated 21st May 2009, the said application was heard and determined on the 20th December 2010.

13. The court directed that the Claimants pay the outstanding rent arrears and continue to pay rent as and when it is due to justify the continued operation of the injunction granted.

14. The Respondent avers that the Claimant have made no attempt to pay the outstanding amount owed in Rent Arrears since orders were granted eight (8) years ago making them guilty of contempt of court.

The respondent's further raises a counter claim for Kshs.81,730,500.00 being the cumulative total 104 rental premises occupied by the claimants. It is her further case that the claimant's have ignored various court orders directing them to pay their rent arrears as accrued.

The respondent's other case is that she has continued to loose revenue as a consequence of rent arrears by the claimant. Demand and eviction notices have been duly issued to the claimant to no avail. They have refused to comply *in toto*.

The respondent's penultimate case is that the claimants are not entitled to any of the prayers as set out in the Amended Memorandum of Claim.

She prays as follows;

1. The claimant suit be dismissed with costs to be borne by the claimants and allow our counterclaim with interest.

2. The claimants be ordered to pay the rental arrears with interest as stated in the counter-claim from 1994.

3. This Honourable Court be pleased to issue an Order against the Claimant, their agents, or servants to vacate and surrender the properties, houses and premises of the Respondent.

4. This Honourable Court do order that the OCS Athi River Police Station do effect the orders carry out an eviction and keep peace in removing the Respondent/Claimants from the premises.

5. An order to pay costs.

This is an ancient matter. It is not only circumlocutous but convoluted. It is a sad chapter for Employment and Labour Relations in Kenya.

The matter came to court variously, indeed variously, until 15th October, 2018 when this court issued directions on the way forward and towards finalization. Hence today's judgement of court.

The issues for determination therefore are;

1. Whether the claimants are entitled to payment of terminal dues?
2. Whether the respondent should be restrained from allocating the houses (quarters) currently occupied by the claimants or even evict them before payment of redundancy dues, if any or at all?
3. Whether the respondent is entitled to the counter claim?
4. Who bears the costs of this cause?

The 1st issue for determination is whether the claimants are entitled to payment of terminal dues. The claimants in their written submissions dated 12th November, 2018 reiterate their case of entitlement to redundancy dues as prayed in the claim. The claimants rely on the provisions of section 40 of the Employment Act, 2007 which provides as follows;

1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions-
 - a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
 - c. The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy
 - d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
 - e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
 - f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
 - g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

The claimants submit that they were terminated on account of redundancy. They were asked to go for three months unpaid leave from December, 1994 on grounds of the respondent's rehabilitation, but even on such rehabilitation, they did not resume their jobs. They were also promised that they would be paid their dues and benefits so as to vacate the respondent's premises but this was not to be.

The claimants submit that the respondent did not comply with the provisions and requirements of section 40 of the Employment Act, 2007 afore cited thus rendering their termination of employment unlawful. On this, they rely on the authority of **Barclays Bank of Kenya Limited and Another v Gladys Muthoni and 20 Others [2018]**, where the court at paragraph 27 clearly observed that when it comes to termination on account of redundancy:

'...there ought to be two notices – a specific notice alerting the respondents about the impending redundancy and the reasons therefore, and another one terminating their services.'

Further, the claimants rely on the authority of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014]** at paragraph 28 where the court stated;

'...my understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable...'

It is their case and submission that to date, they have not been paid their dues or benefits and claim the same.

The respondent in her written submissions dated 26th November, 2018 submit and obstruct a case for determination of the legality of the redundancy as submitted by the claimants. It is her case that this issue was never pleaded and therefore should not be anywhere near this cause or even be a matter for determination by court. On this, she relies on the authority of **Hellen wangare Wangeci vs. Carumera Muthoni Cathua 2015 eKLR** the court opined thus:-

'For the sake of certainty and finality each party is bound by its own pleadings and cannot be allowed to raise a different case without due amendment properly made. Each party thus knows the case has to meet and cannot be taken by surprise at trial. The

court is as bound by the pleadings of the parties as they themselves.”

I agree. This is a non issue by virtue of not having been pleaded *ab initio*.

The respondent further submits that in all, the claimants were paid all their dues at the time of redundancy and consequential termination of employment. Again, the respondent at page 85 of her list of documents demonstrates clearly that the benefits payable were on account of redundancy and no more. This is as follows;

7. ... the court only need to look at what has been pleaded and sought in the claim and the Respondents submits that all the terminal dues were paid as evidenced from documents from page 4 to 251.

Again,

17. ... as provided at page 4-425 of the Respondents bundle of documents, the Respondent submits that the Claimant herein were paid all their dues in full upon the termination of their services. However they refused to vacate the premises.

The respondent in support of his case submits that consultation in redundancy is not all total and absolute but would depend on the circumstances of each particular case. This is by reliance on the authority of **Kenya Airways vs. Aviation and Allied Workers Union Kenya and Others, CA No. 46 of 2013** where the learned Justices of Appeal observed that;

“...It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer’s prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However in some circumstances an absence of consultation where consultation would reasonable be expected may cast doubt on the genuiness of the alleged redundancy or its timing. So, too may a failure to consider any redeployment possibilities.

The claimants have not adduced any evidence in support of their claim whatsoever. They have particularly not brought out any evidence in support of a case of non payment of their terminal dues at the point of separation. The respondent’s in their list of documents as in their submission present an avalanche of documents in support of payment of terminal dues to the claimants. The claimants have not either supported their claim of an arrangement *inter partes* that they were to retain their staff premises pending payment of terminal dues. These were payments in satiation of the redundancy of the claimants. They cannot therefore be heard to deny payment of what was due to them. He who alleges must prove: section 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya refers. I therefore find that the claimants are not entitled to payment of terminal dues whatsoever, this having been met at the time of departure.

The 2nd issue for determination is whether the respondent should be restrained from allocating the houses (quarters) currently occupied by the claimants or even evict them before payment of redundancy dues, if any or at all. The claimants peg their continued stay in the respondent’s quarters on ground of their unpaid terminal dues. It is their case and submission that this was the arrangement *inter partes* from the onset.

The respondent’s submission is that the claimants have refused and failed to pay rent since 1994 when they ceased to be employees of the respondent. They have been illegally staying in the respondent’s houses and should be ordered to pay and vacate without any further delay. This arose with effect from 20th December, 1993 when they were issued with notices of termination and consequential vacation from the respondent’s houses.

Having lost on a case of non payment of terminal dues upon redundancy in 1994, the claimants case on restriction from eviction lies on quick sand. It has not basis in law or even fact. It collapses *in toto*.

The respondent’s have further ably demonstrated that the claimants have practiced their continued occupation of the respondent’s premises through defiance of court orders for payment of rent arrears and or eviction. This is a serious development. This is a rule of law society. Disobedience of court orders is not an asset to anybody, even disgruntled employees. This cannot be condoned under any circumstances. I therefore find that any continued restraint on the respondent from taking their quarters/premises would be an anomaly and unaffordable in the circumstances. The claimants must leave – and live their lives off the respondent. The respondent must be allowed to enjoy the fruits of her investment and labour.

The 3rd issue for determination is whether the respondent is entitled to the counter claim. She is. And this for obvious reasons. The claimants have only resisted to do what they ought to have done from day one. Pay their rents as and when they fell due. The respondent is therefore entitled to the counter claim as prayed.

I am therefore inclined to dismiss the claim and order relief to the respondent as follows;

- i. That the claimants individually meet and pay their respective shares of the counter claim of Kshs.81,730,500.00 to the respondent.
- ii. That the claimants meet and pay any further sums of rent accrued to the respondents up to the date of voluntary vacation of the premises or eviction, whichever is the earlier.
- iii. That the claimants, their agents, servants and assigns be and are hereby awarded thirty (30) days in which time they should prepare and award vacant position of the respondent’s premises they now occupy.

iv. That the OCS, Athi River Police Station be and is hereby ordered to effect this judgement of court by an eviction of the claimants from the respondent's premises should they not comply with this courts order on vacation within thirty (30) days of this judgement of court.

v. The OCS, Athi River Police Station be and is hereby ordered to keep and maintain peace at all times but particularly during the execution of this judgement of court.

vi. That the parties shall bear their costs of the claim.

Dated and signed this day of 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 20th day of December, 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Messrs. Amendi and Wangalwa instructed by Billy Amendi & Company Advocates for the claimants.
2. Messrs. Cohen instructed by Ahmednasir, Abdikadir & Company Advocates for the respondent.