



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1260 OF 2010**

(Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> December, 2018)

1. NABWERA NABII
2. ISAIAH KUBAI
3. MUTAKHA KANGU
4. PAUL MBATHA
5. SAKWA BUNYASI
6. NOOR ALI ADEN
7. ANTHONY K. KIRUI
8. BRIAN ODOUR
9. MOHAMMED HUSSEIN
10. JOSHUA OWITI OUMA
11. ROSE KULA
12. MORRIS OCHIENG'
13. JULIUS MUSYOKA JUSTIN
14. STEPHENE G. KIMANI
15. SOLOMON OLE SUNKUYIA
16. KENNEDY OBUYA
17. ALFRED OGINGA
18. FRANCIS OOKO

**19. ANGELA BETTY KOECH**

**20. LAWRENCE OTIENO**

**21. CHRIS NCHOGA**

**22. MOSES KURGAT**

**23. ALINDI BRIAN**

**24. ABRAHAM OTIENO**

**25. IRENE BIRIR.....CLAIMANTS**

**VERSUS**

**JANET ONGERA.....1<sup>ST</sup> RESPONDENT**

**PROF. PETER KAGWANJAH.....2<sup>ND</sup> RESPONDENT**

**HON. KIRAITU MURUNGI.....3<sup>RD</sup> RESPONDENT**

**HON. ANYANG NYONGO.....4<sup>TH</sup> RESPONDENT**

**(All trading as Yes Green Secretariat)**

**JUDGMENT**

1. The Claimants filed their Claim on 15<sup>th</sup> October 2010 seeking the following reliefs:-

*(i) That the Claimant do humbly pray for an order that their outstanding remuneration, due to them, of Kshs. 29,715,000 be awarded to them.*

*(ii) Costs of the suit be awarded to the Claimants.*

2. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a joint Replying Affidavit sworn by the 2<sup>nd</sup> Respondent and filed on 13<sup>th</sup> May 2011 and a Witness Statement made by the 2<sup>nd</sup> Respondent and filed on 11<sup>th</sup> June 2018. The 1<sup>st</sup> and 4<sup>th</sup> Respondents filed their Memorandum in Response to the Claim.

**Claimants Case**

3. The Claimants aver that they are all former employees of the Yes Green Secretariat whilst the Respondents were trading as the Yes Green Secretariat.

4. The Claimants aver that on or about 10<sup>th</sup> May 2010 they were engaged in oral arrangements by the Respondents on their respective designations and remuneration. The Claimants aver that the agreed remuneration was communicated to the Claimants in a meeting held at the Kenya International Conference Centre (KICC). Thereafter, one Commissioner was requested to prepare agreements for each Claimant but the same were never signed.

5. The Claimants aver that each of them undertook their duties until the culmination of the Constitutional Review Referendum. According to the Claimants, some of their dues were paid but a large sum of the dues remains unpaid.

6. CW1 Anthony Kipkoech testified that he was a Commissioner of the Respondent's Secretariat and the 4 Respondents were Directors of the Secretariat. It is his case that they had met and terms of engagement agreed upon. This was mainly to campaign for the new Constitution He testified that their engagement ended after the referendum but the Respondent did not pay their dues fully.

7. In cross-examination, CW1 testified that he understood that money was paid to 2 groups and that he belonged to the ODM faction. He further confirmed that Moses Kurgat registered the entity, Yes Green Secretariat and he, Moses Kurgat is one of the Claimants but they had not discussed whether Moses Kurgat was to de-register the entity.

8. CW2 Thomas Osoro Bichange testified that he was engaged at the Yes Green Secretariat at the Welfare Desk. He testified that he was paid the whole amount of Kshs. 543,000 for the three months he had worked and was aware that his counterparts in the ODM side were not paid and are the ones who filed the Claim.

9. In cross-examination, CW2 testified that he had no claim against the Respondents having been paid his dues and that the exercise was not a voluntary exercise.

### **1<sup>st</sup> and 4<sup>th</sup> Respondents Case**

10. The 1<sup>st</sup> and 4<sup>th</sup> Respondents filed their Memorandum on 4<sup>th</sup> July 2011 denying that there were any wages payable to the Claimants and their refusal to pay any wages.

11. The 1<sup>st</sup> and 4<sup>th</sup> Respondents aver that in May 2010 the Respondents who are party supporters volunteered to offer their services in various capacities to the YES Team whose Secretariat was temporarily based at KICC. They aver that there were no advertisements for any available vacancies and neither were there any interviews.

12. The 1<sup>st</sup> and 4<sup>th</sup> Respondents aver that the Claimants were entitled to reimbursable costs paid through vouchers and meals which the Secretariat paid directly to the suppliers. The amount of money available was dependent on contributions from well-wishers thus no realisable budget would be made.

13. The 1<sup>st</sup> and 4<sup>th</sup> Respondents aver that the Claimant admitted receiving payments but there was no evidence that it was part payment.

### **2<sup>nd</sup> and 3<sup>rd</sup> Respondents Case**

14. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents aver that they were actively involved in the campaigns rooting for the passage of Kenya's new Constitution (Yes Campaign) which campaign was supported by camps affiliated to both the Party of National Unity (PNU) and Orange Democratic Movement (ODM).

15. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents aver the entity YES Green Secretariat was registered as a business without their consent or knowledge by one of the Claimants, Moses Kurgat. They contend that they informed the said Claimant to de-register the same but they cannot confirm whether the said registration or de-registration was effected despite their efforts to obtain a certificate from the Registrar of Companies.

16. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents aver that the participation of all involved in the Yes Campaign was voluntary in nature.

17. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents aver that indeed payments were made to the Claimants in form of a gratuity that is ex gratia payment meant to facilitate the performance of the civic duty as opposed to a fixed consideration. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cannot confirm whether any gratuitous payments and how much was paid to the Claimants as that responsibility lay on the ODM side of YES

Campaign which the Claimants were affiliated.

18. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents aver they did not engage the service of the Claimants as volunteers.

19. RW1, Professor Peter Kagwanjah, the 2<sup>nd</sup> Respondent herein testified on behalf of the 3<sup>rd</sup> Respondent and himself. He testified that he was appointed by the President to the Secretariat for the Party of National Unity (PNU).

20. RW1 testified that by nature their work was that of volunteers and no contract was signed. He testified that when money was available his team would convene and share it out and that they met up to 27<sup>th</sup> August 2010. RW1 further testified that they never engaged the services of the Claimants as none of them were from the PNU side.

21. In cross-examination, RW1 testified that the staff to the secretariat was brought by the Political Parties. He further testified that they had no budget but requested for funds.

### **Claimants' Submissions**

22. The Claimants submitted that they were contracted for the Referendum process and undertook their work with the facilitation of the Respondents under whose name the business had been registered.

23. The Claimants submitted that Section 2 of the Employment Act defines a contract of service and that there can be no termination of non-existent services since the 1<sup>st</sup> Claimant received a termination letter dated 14<sup>th</sup> July 2010 from the 4<sup>th</sup> Respondent.

24. The Claimants submitted that their salaries had been budgeted for and that they were not only employees of the Respondent, but employees for discernible sums payable monthly. Further, that it is clear from the 1<sup>st</sup> and 4<sup>th</sup> Respondents documents that the Claimants received a certain remuneration.

25. The Claimants further submitted that they had adduced evidence that their payments were ascertainable and that there was a salary structure for each member in their designation. Therefore, they were not voluntary employees.

### **2<sup>nd</sup> Respondent's submissions**

26. The 2<sup>nd</sup> Respondent submitted that the Claimants have failed to prove the existence of any contractual employer-employee relationship between the Claimants and the 2<sup>nd</sup> Respondent. In addition, the Claimant had not been identified and had not proved that they are constituted or are not constituted as an employer's organisation or a trade union in accordance with Section 12 of the Labour Relations Act, 2007.

27. The 2<sup>nd</sup> Respondent submitted that the Claimants had failed to prove any injury occasioned upon them or the existence of a contractual employer-employee relationship. The Respondent further submitted that there is no contract of service as defined in Section 2 of the Labour Institutions Act. The 2<sup>nd</sup> Respondent relied on the case of **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance (1968 ) 2QB 497** where MacKenna J held:-

**“A contract of service exists if these three conditions are fulfilled.**

***(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.***

***(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.***

***(iii) The other provisions of the contract are consistent with its being a contract of service.”***

28. The 2<sup>nd</sup> Respondent further relied on the finding in **United States v Silk (1947)** which was adopted in **Wiebe Door Services Ltd v Canada (Minister of National Revenue) (1986) FC 5.5.3** and submitted that the Claimants have not established that they fall within the employer-employee relation.

29. The 2<sup>nd</sup> Respondent submitted that proceedings are defective for reason that Order 1 Rule 13 of the Civil Procedure Rules requires that the appearance of one or several Plaintiffs or Defendants requires the written authority signed by each of the persons forming the group which wasn't the instance in this Claim.

30. The 2<sup>nd</sup> Respondent submitted that the Claimants do not have locus standi to institute the suit as they do not fall within the classes of persons and/or bodies contemplated under Section 12 of the Labour Relations Act. In submitting on the question of locus standi the 2<sup>nd</sup> Respondent relied on the case of **Law Society of Kenya v Commissioner of Lands & 2 Others KLR (E&L) 1.**

31. In conclusion, the 2<sup>nd</sup> Respondent submitted that the PNU Political Wing to the Yes Secretariat paid all gratuities owed to the volunteers. Therefore, the Claimants' case, if any, may lie against the ODM Political Party and not even the 1<sup>st</sup> and 4<sup>th</sup> Respondents.

### **3<sup>rd</sup> Respondent's written submissions**

32. The 3<sup>rd</sup> Respondents submitted that during the hearing the 2<sup>nd</sup> Respondent confirmed that the Yes Green Secretariat was a formation crafted by the ODM and PNU political parties for campaigning during the voting of the new Constitution. The 3<sup>rd</sup> Respondent further submitted that the 2<sup>nd</sup> Respondent testified that although they lobbied for financing as one unit, these monies would be split between the ODM and PNU for them to share to their volunteers.

33. The 3<sup>rd</sup> Respondent submitted that this Court does find that the 1<sup>st</sup> and 4<sup>th</sup> Respondent being the official representatives of the ODM Secretariat are liable to pay the Claimants. He further submitted that the Claimants were from the ODM Party and that PNU had paid its own volunteers once they received their portion of the Secretariat's financing.

34. I have examined all evidence and submissions of the Parties. The issues for determination are as follows:-

***1. Whether the Claimants were engaged by the Respondents on volunteer basis and if not what was the nature of the engagement.***

***2. Whether Claimants are entitled to prayers sought.***

35. On the 1<sup>st</sup> issue, the Claimants testified that they were engaged by the Yes Secretariat in various capacities. They were never issued with any appointment letters though but the 16<sup>th</sup> Claimant, 15<sup>th</sup> Claimant, 17<sup>th</sup> Claimant, 8<sup>th</sup> Claimant exhibited their identification copies showing that they were engaged by the Yes Secretariat for 2 months from 7.6.2010 to 4.8.2010. The other Claimants had no such documentation.

36. There is no other evidence which points towards the nature of the engagement save for the letter to the 1<sup>st</sup> Claimant dated 14.7.2010 terminating his engagement from the Yes Green National Secretariat signed by Hon. Peter Anyang Nyong as Co-convenor.

37. Only the 8<sup>th</sup> Claimant gave evidence in Court. He indicated that he was not employed on voluntary basis. He never indicated that he was testifying on behalf of the other Claimants nor had authority to prosecute the case on behalf of the other Claimants.

38. From the evidence of the 8<sup>th</sup> Claimant it is not possible that the Claimants were employees of the Respondent. The 8<sup>th</sup> Claimant was issued with identification card showing he was to serve for only 2 months as per his identification card. He also admitted he was paid 500,000/= for the period. There is no indication that he served beyond the two months.

39. It is therefore apparent that it is not established that Claimants were employees of the Respondent and therefore their claims as employees for terminal benefits is also not established.

40. Other Claimants also never testified and therefore their case remained unprosecuted and unproved. In the circumstances, I find the claim by the Claimants is not proved and is therefore not merited. I dismiss the claim accordingly with no order as to costs.

Dated and delivered in open Court this **20<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Khasiani holding Wandabwa for Claimants - Present

Njuguna holding brief Kihara for 2<sup>nd</sup> Respondent – Present

Njeru holding brig Mugo for 3<sup>rd</sup> Respondent