



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO.466 OF 2015
CONSOLIDATED WITH 468 OF 2015

KAZUNGU KALAMA NGUMA

JUSTINE MWANYALE MLANDA.....CLAIMANTS

VS

VICTOR OKOTH WAUDI.....RESPONDENT

JUDGMENT

Introduction

1. The claimants brought separate suits on 13.7.2015 claiming terminal dues plus compensation for unfair termination of their employment by the respondent on 17.4.2015. The respondent has denied liability for the alleged unfair termination and averred there has never been any employment relationship between him and the claimants.

2. The suits were consolidated by consent and heard on 5.2.2016 and 21.7.2016 when the claimants testified as CW1 and CW2 respectively while the respondent testified as RW1 and called Mr. Peterson Mwakoi as RW2. Thereafter both parties filed written submissions.

Analysis and Determination

3. After considering of the pleadings, evidence and submissions presented to the court there is no dispute that the claimants were employed by the Mr. Joseph Okoth Waudi (now deceased) in 2011 and 1990 respectively; that the deceased died in 2013 but left his Bar and Restaurant Business running; that the claimants continued to work there until 17.4.2015 when they were dismissed from employment by RW2 (the manager).

4. The issues for determination are:

- (a) Whether there was employment relationship between the claimants and the respondent**
- (b) Whether the suit is brought against the wrong defendant**
- (c) Whether the claimants' employment contract was unfairly terminated by the respondent**

(d) Whether the reliefs sought by the claimants should be granted.

Employment Relationship

5. There is no doubt that in an employment contract, there must be an employee and employer. Under section 2 of the Employment Act, employer is defined as:

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

6. The burden of proving that the respondent fits in the foregoing description of the employer, lies on the claimants. In discharging the said burden of prove, the claimants contended that the respondent took over his father’s business after his death in 2013 as the Managing Director while RW2 remained a manager. They further contended that since the demise of the late Waudi, the respondent continued to employ them and pay their salary. Finally the claimants contended that the respondent is the one who dismissed them from employment through RW2.

7. The respondent has however denied that he took over his late father’s business. He has also denied that he was managing the said business and paid any salary to the claimants. Finally, he has denied that he dismissed the claimants from their employment in his father’s business and maintained that he has his own business which he runs within his father’s premises. The respondent’s evidence has been supported by the RW2 who admitted to be the manager of the late Waudi’s business and that he is the one who was paying salary to the claimants. RW2 further contended that the late Waudi’s widow is the one who took over the deceased’s business and not the respondent.

8. On a balance of probability, I agree with the evidence by the defence that the respondent never employed the claimants but they remained employees of the estate of the respondent’s father. That without any evidence that the respondent was a manager or agent of the deceased’s business, I am of the considered view that the respondent does not fit within the description of an employer under section 2 of the Employment Act. Consequently, the answer to the first question for determination is that there was never any employment relationship between the respondent and the claimants herein.

Wrong Defendant

9. In view of the foregoing finding that the parties herein did not relate as employer-employee, it is my further finding that the respondent is the wrong defendant herein. He cannot be sued just because he is the first born of the deceased employer, or just because he operates his personal businesses within the late employer’s premises. The claimants must prove a legal nexus between the respondent and his father’s business either as a manager, agent or Administrator of the deceased’s estate.

10. Having found that the respondent is the wrong defendant herein for want of employment relationship with the claimants, I do not see any point to answer the remaining questions for determination. Instead I shall down my tools at this point and let the claimants consider suing the right defendant.

Disposition

11. For the reasons stated above, the suits by the two claimants is dismissed. Each party to bear his own costs.

Signed, dated and delivered at Mombasa this 13th day of January 2017.

O.N. MAKAU

JUDGE