



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COIRT
AT MOMBASA
CAUSE 343 OF 2015
CONSOLIDATED WITH
CAUSE 269 OF 2015

RAYMOND MALUKI.....1ST CLAIMANT

KHAMIS S. SALIM.....2ND CLAIMANT

VS

FATUMA WAMBUI KAMAU.....1ST RESPONDENT

ALI MOHAMED SHEI.....2ND RESPONDENT

ATHUMANI ALI ATHUMANI.....3RD RESPONDENT

JUDGMENT

Introduction

1. The claimants were employed by Mr. Yusuf Kangara Kuria who traded as Kisauni Timber Sales and Hardware. The first claimant was employed in 2001 while the second claimant was employed in 2006. The claimants worked continuously until their employer died on 16.12.2010 and left the business to his widow (1st Respondent). After the demise of their employer the first respondent took over the business and continued employing them in the same business but on 5.7.2011 she registered another business name, Kisauni Joinery and Timber Sales which she used to continue with the same business at the same venue and the claimants as her employees. On 3.8.2014, the 1st respondent terminated the claimants employment and paid them terminal dues only for the three years she had employed them, from July 2011 to August 2014. She however refused to entertain their claim for dues for the period when they were working for her deceased husband.

2. The claimants have now brought this suit against the 1st respondent as the heir of her husband's business, and the second and third respondent as the executors of the will left by the late Yusuf Kangara Kuria, to recover compensation for their accrued leave and service/gratuity pay for the period served upto the end of their employment by the deceased's business. The total claim by the first claimant is kshs.137,675 while the second claimant claims for kshs.97,025.

3. The respondents are unanimous that the claimants were employed by the late Yusuf Kangara Kuria until his demise on 16.12.2010. They are also unanimous that the deceased's business ended with his death and his estate was administered as per his last will, and there is now nothing left in the estate. They are further unanimous that the first respondent registered her new business on 5.7.2011 and she employed the claimants until 3.8.2014 when she declared them redundant. They have therefore denied the claimants' claim and prayed for the same to be dismissed with costs.

4. The suit was heard on 22.2.2016 and 27.7.2016 when the first and second claimant testified as Cw1 and Cw2 respectively and the first and second respondents testified as Rw1 and Rw2 respectively. Thereafter only the claimants filed written submissions.

Analysis and Determination

5. There is no dispute that the claimants were employed by Mr. Yusuf Kangara Kuria until his death on 16.12.2010. There is also no dispute that after the demise of the deceased, the claimant continued to work in his business until the business was taken over by the first respondent under a new name registered on 5.7.2011. There is further no dispute that the claimants were terminated on account of redundancy by the first respondent on 3.8.2014 after which they were paid terminal dues only for the three years they worked under the first respondent's new business starting 5.7.2011.

6. The issues for determination are:

(a) Whether the claimants are entitled to accrued leave and service/gratuity pay for the years served.

(b) If the answer to (a) above is yes, how much is payable to them.

(c) Whether the respondents are liable to pay the said dues.

Accrued leave plus service/gratuity pay

7. The claimants alleged that they never went for their leave during their entire service. The respondents produced petty cash vouchers showing payment to first claimants' leave for the year 2007 and the second claimants' leave for the year 2009. The claimants never challenged the authenticity of the said vouchers. However, the respondents never produced all the leave records to prove that the claimants either utilized all their leave days or they were paid cash in lieu of leave. Consequently, I find that the claimants had some leave days outstanding as at the time the first respondent took over the business on 16.12.2010 after the demise of her late husband. The number of days has however not been proved.

8. Even if the number of leave days was proved, the claimants have not produced any evidence to prove that they had agreed with the deceased employer to accumulate their leave. Additionally, even if they had evidence of an agreement to accumulate leave, the claim for leave accruing up to July 2011 is statute barred under section 90 of the Employment Act. The said provision limits the time within which to file a claim founded on employment contract to three years from the date when the cause of action arose.

9. As regards to service/gratuity pay, the claimants have not demonstrated the basis upon which the claim is made. Under section 35(6) of the Employment Act, the claimants are disqualified from claims of service pay because they were members of the NSSF. According to their statements from the NSSF, which they produced, their contributions were faithfully remitted by the employer.

10. On the other hand, gratuity is a contractual right that must be expressly agreed in the contract or provided for by a statute. In this case no evidence of express agreement of gratuity payment was adduced and no statute was cited as the basis for claiming gratuity. Consequently, I find and hold that the claimants are not entitled to service or gratuity pay.

11. Having found that the claim for leave is statute barred and that the claimants are not entitled to

service/gratuity pay, I see no need of answering the remaining two issues for determination because it will be of no value.

Disposition

12. The claimants' suit is dismissed with no order as to costs.

Signed, dated and delivered at Mombasa this 3rd day of February 2017.

O.N. MAKAU

JUDGE