



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1028 OF 2012

KENYA BUILDING, CONSTRUCTION,

TIMBER FURNITURE & ALLIED

INDUSTRIES EMPLOYEES UNION.....CLAIMANT

VERSUS

STELLA BUILDERS LTD.....RESPONDENT

JUDGEMENT

1. The claimant union brought the instant suit on behalf of the grievant alleging that the grievant was an employee of the respondent from October, 2008 earning a daily wage of Kshs 300 per day. His services were terminated on 25th November, 2011.
2. According to the Union the grievant worked diligently without any reprimand and that he committed no offence to warrant his dismissal. Upon termination, the respondent did not pay the grievant his terminal dues. The claimant further averred that the grievant was underpaid by the respondent.
3. The respondent on its part denied knowledge of the grievant's allegations. The respondent further averred that it was never involved in employing individuals. The respondent therefore denied the grievant was its employee.
4. In his oral evidence the grievant stated that he was employed by the respondent as a construction labourer. He was not issued with an appointment letter and further that his salary per day was Kshs 200. The grievant further stated that on 25th November, 2011 his services were terminated as he was informed there was no more work. He stated that his site foreman was called John. They used to work 7 days a week and that they rarely had off days. In cross-examination he stated he was employed in 2008 and that the billboard indicated the respondent was a construction company.
5. The respondent on its part called one witness a Mr Sheshikant Vekeria who stated he was the respondent's director. It was his evidence that the grievant never worked for the respondent and denied knowledge of him. According to the witness they had been wrongly sued. Stella Building and Construction was not their company. According to him the respondent was incorporated in 2008 and their first construction work was in 2009. He stated that one John was a foreman for a sub-contractor and that the Langata projects started in 2009.

6. In cross-examination he stated that the respondent sub-contracts and he further stated he had not joined the sub-contractor in the suit. He further stated that they did not employ casuals directly and only dealt with sub-contractors.

7. This case presents a common scenario in the building and construction industry where building and construction works can be allocated to a main contractor who sub-contracts all or certain aspects of the work. In such circumstances it must be clear who is the employer of the workers engaged in the site. The respondent claimed it subcontracted the construction works in Langata site where the claimant was engaged as a construction labourer.

8. They produced no evidence of a contract between themselves and Dostana Builders. Under this contract, Dostana builders was to make own arrangements for the engagement of all labour and other workmen required for the works. The grievant and the claimant did not dispute this contracts. In fact the claimant in his own evidence confirmed that indeed he was working at a construction site in Langata and in his view he was employed by the respondent.

9. The onus of prof in civil claims such as this one is on a balance of probabilities. That is to say, the person alleging the existence or non-existence of a fact must demonstrate that it is more probable than not that what is being alleged to exist or not exists is so.

10. Whereas the claimant alleged the respondent employed the grievant nothing was produced, and no one was called as a witness to vouch for this. The respondent on the other hand denied the claimant was its employee and further exhibited a contract showing that the Langata Construction works were sub contracted to Dostana Builders. The claimant did not dispute this fact.

11. In the circumstances it is more probable than not that the respondent sub-contracted the Langata works to Dostana Builders. The court therefore finds the respondent non-suited against the claimants and hereby dismisses the suit with costs.

12. It is so ordered.

Dated at Nairobi this 3rd day of November, 2017

Abuodha J. N.

Judge

Delivered this 3rd day of November, 2017

Abuodha J. N.

Judge