



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1071 OF 2013

GODFREY OUMA ONYANGO.....CLAIMANT

VERSUS

AVCO AGENCIES LIMITED.....RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on 15th July, 2013 the claimant averred that he was employed by the respondent on 27th November, 2010 as a Mason on a daily wage of Kshs.700/= per day. He worked until 7th January, 2013 when he was dismissed by his supervisor on instructions of the respondent. He complained that upon dismissal he was never paid his terminal dues. According to the claimant he reported the dispute to labour office for conciliation but the respondent refused and ignored to attend conciliation meetings.
2. The claimant therefore avers that the termination of his services was unfair and unlawful hence seeks an order for compensation from the Court.
3. The respondent by a memorandum of response filed on 2nd September, 2013 denied employing the claimant. The respondent further stated that if there was any nexus between them and the claimant, this only existed because of the labour contract between the respondent and one Brighton Lumati Alukongo t/a Lumati contractors. According to the respondent Lumati contractors was responsible for providing labour. The respondent therefore averred that claim if any should therefore have been instuted against the said Lumati Contractors.
4. In his testimony before Court, the claimant stated that he used to work at Nyari Estate and that they used to sign in and out of work. The foreman kept the records and it was the foreman that was responsible for keeping records and allocation of sites. He further stated that he worked on other sites as well. It was his evidence that he was never given any reason for termination. He further stated that upon termination he was never paid his terminal dues.
5. In cross-examination he stated that he got employed through his supervisor Mr. Lumati and that he was employed as a Mason at a salary of Kshs.700/= per day.
6. He asserted that his employer was the respondent and only supervisors changed. He denied ever being employed by Lumati even after being shown a statement from Lumati stating he was his employee.

7. The respondent called one witness a Mr. Davinder Singh Sura who stated that he was the respondent's director. It was his evidence that he never knew the claimant directly but through their subcontractor Mr. Lumati. According to him, Mr. Lumati got an accident and was in a coma for 3 months. That is when he stood in for him and met directly with the claimant. He produced an agreement between the respondent and Mr. Lumati stating that Mr. Lumati was a subcontractor.

8. According to him, the respondent used to pay Mr. Lumati for work done and he referred the Court to discharge vouchers attached to the memorandum of response.

9. In cross-examination he stated that the respondent signed the agreement as the contractor and Lumati as the client. He further stated that the contract was executed on 20th July, 2012 but entered into on 27th July, 2010. He denied the letter by Lumati to the respondent stating the claimant was his employee was a fabrication.

10. The memorandum of response filed by the respondent on 2nd September, 2013 at paragraph 4, 5 and 7 raised the issue of privity of contract between the claimant and the respondent.

11. The respondent annexed a contract dated 20th July, 2012 but entered into on 27th July, 2010 between the respondent as the client and Mr. Brighton Lumati Alukongo as the contractor. However at the execution page, the respondent has signed as a contractor and Mr. Lumati as client. This however could have been a mix up because if it be true that Mr. Lumati was the respondent's foreman why would he execute an agreement as the respondent's client? Further the respondent attached several vouchers acknowledging payments from the respondent to Mr. Alupati.

12. These averments by the respondent together with the attached documents behoved the claimant to either file a reply to the memorandum of response attaching documents in rebuttal or seek to join Mr. Lumati as a co-defendant in the suit. It was not enough for the claimant to argue that since the said Mr. Lumati was not called as respondent's witness the averments and documents submitted by the respondent were fabricated.

13. Proof in civil cases is on a balance of probabilities and the duty to prove the claim lies with the claimant. The respondent's duty is to show the Court that the claim against him does not lie.

14. In the circumstance of this case, the claimant has not reasonably discharged the burden on him to prove his claim to the minimum threshold set in civil claims. The respondent on the other hand has reasonably shown to the Court that it was more probable than not that the claimant was not employed by him but by Mr. Lumati.

15. The Court therefore finds the respondent non-suited against the claimant and states that a claim if any lies against Mr. Lumati.

16. The suit is therefore dismissed with costs.

17. It is so ordered.

Dated at Nairobi this 19th day of February 2016

Abuodha J. N.

Judge

Delivered this 19th day of February 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge