



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1510 OF 2015

BERNARD NJOROGE MBAO.....CLAIMANT

VERSUS

AWIL OGLE-

the proprietor Solia Plaza-Embakasi.....RESPONDENT

RULING

1. The application dated 26th August 2015 seeks an order restraining the respondent from terminating the claimant's services, and from interfering or evicting the claimant from his resident house / room at Solia plaza – Embakasi Nairobi pending the hearing and determination of the claim.
2. The application is based on grounds set out on the face of the application to the effect that the claimant is an employee of the respondent in the position of a caretaker of Solia plaza, residence in Embakasi earning a monthly salary of Kshs.40,000 and house rent of Kshs.4,500.00 paid by provision of a residence in the work place.
3. That the respondent has since employing the claimant refused to issue him with an official contract and intends to terminate the employment of the claimant on the basis that he is not an employee.
4. The application is supported by an affidavit of the claimant in which he states that he was employed by the respondent in April 2015 and as a result, the claimant relocated from Garissa to Nairobi to work for the respondent and now the respondent intends to terminate his employment.

Response

5. The respondent filed a replying affidavit sworn on 21st October 2015, in which he states that the claimant is a brother to a Mr. Kamau, who is the respondent's close friend. That Mr. Kamau had requested the respondent to allow the claimant to use one of the rooms as he settles down in Nairobi having relocated from Garissa town in a hurry following the insecurity in that town at the time.
6. In April 2015, the respondent instructed his caretaker Mr. Andrew Omwoyo Ondiko to give the claimant a single room. Meanwhile the claimant requested to assist the plumber as and when there was some plumbing work to be done and the respondent agreed. The claimant was paid on piece work basis.
7. That the respondent at times sent the claimant to buy some materials, hence the amounts reflected in the M-pesa. That the said statement does not reflect monthly payment of Kshs.40,000.00 as

- alleged by the claimant or at all.
8. That Mr. Andrew Omwoyo Odiko has been the caretaker for the past five (5) years and the claimant has never been employed as such. That on 7th August 2013, the respondent requested the claimant to vacate the premises and handover the room to the caretaker. The letter did not terminate his employment since he was never an employee of the respondent.
 9. That this suit is without basis and same be dismissed with costs.

Determination

10. For the claimant to get a temporary injunction to remain in the disputed premises and at the alleged work place, he has to establish;
 - a. A *prima facie* case with a probability of success;
 - b. That he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
 - c. That the balance of convenience is in favour of granting the temporary injunction.

See (**Giella – Vs. Cassman Brown Co. Ltd. [1975] E.A. 358**).

11. The grant of an interlocutory order is an exercise of judicial discretion which must be exercised judiciously.

see (**seargent V. Patel [1949] IV A.A. C.A. 63**).

12. Having considered the competing arguments by the parties the court is not at this stage of the hearing satisfied that the claimant / applicant has established a *prima facie* case with a probability of success.
13. There is no documentary evidence of employment and / or that of monthly payment by the respondent to the claimant on a regular basis for the court to conclude that he was an employee of the respondent at all. The court will at this stage refrain from making any determination on the merits of the case or any defence to it. This must await the substantive hearing of the suit.
14. The claimant / applicant has not shown that he would suffer injury that cannot adequately be remedied by way of damages. Indeed, the claimant seeks payment of terminal benefits in the sum of Kshs.63,500 in the main suit if he is successful.
15. Accordingly, the balance of convenience is in favour of the respondent.
16. The application is dismissed with costs in the cause.

Dated and Delivered at Nairobi this 5th day of February 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE