



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KISUMU

CAUSE NO. 262 OF 2013

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KENNETH KAUNDA OGOLLA T/A KELLY'S BAR & RESTAURANT.....RESPONDENT

JUDGEMENT

The Claimant herein the Kenya Hotels and Allied Workers Union filed this suit by Memorandum of Claim dated 17th September, 2013 on behalf of its member, Benjamin Omboko. The issue in dispute is refusal by the Respondent to pay Benjamin Omboko his terminal dues.

The Claimant states that it is a Trade Union registered on 3rd November, 1999 to cater for employees in the hospitality industry. The Claimant avers that the Respondent Kelly's Bar and Restaurant which operates a Hotel Business based in Kisumu employed Mr. Benjamin Omboko, herein after called the Grievant, on 4th December, 2009 as a cook at a monthly salary of Shs.4,000. The Grievant worked for the Respondent until 4th December, 2011 when he gave notice of one month to the Respondent of his intention to leave employment. Upon leaving employment the Grievant was not paid terminal dues.

The Claimant prays for payment of terminal dues in the total sum of Shs.144,565/- made up as follows:-

1. 1 Month Notice - Kshs. 8,193.00
2. 2 Years Leave - 8193 x 48 days
30 Kshs. 13,108.00
3. Public Holidays - 8193 x 20 days
30 Kshs. 5,462.00
4. Service pay for 2 years - 8193 x 15 x 2
30 Kshs. 8,193.00
5. Under-payment of wages
Dec. 2009 - April 2010

(7614 x 5) - (4,000 x 5)

38,070 - 20,000 Kshs. 18,070.00

May 2010 - April 2011

(8375 x 12) - (400 x 12)

65,947 - 48,000 Kshs. 37,947.00

May 2011 - Nov. 2011

(9421 x 7) - (4,000 x 7)

65,947 - 28,000 Kshs. 37,947.00

6. 4 days worked Dec 2011

8193 x 4 days

30 Kshs. 1,092.00

TOTAL Kshs.144,565.00

The Respondent filed a defence in which it denies knowledge of Kelly's Bar & Restaurant, the Grievant and all other averments in the Memorandum of Claim. The Respondent states that he came to court because he was responding to pleadings served upon him. The Respondent states he is Kenneth Kaunda Ogolla and trades as Kelly's Investments. He attached a certificate of registration of a business name of KELLY INVESTMENTS. He pleads he is a stranger to all averments in the Memorandum of Claim.

At the hearing of this case the Grievant testified on his behalf while Kenneth Kaunda Ogolla testified on behalf of the Respondent. The parties were thereafter given timelines for filing of written submissions but only the Claimant filed. The Respondent did not attend court on 8th December, 2015 the date taken by consent for mention to confirm filing of written submissions and to take date for judgement.

Determination

The issues for determination are whether Kenneth Kaunda Ogolla is the proprietor of Kelly's Bar and Restaurant, the Grievant's employer, and whether the Respondent owes the Grievant the sums claimed.

According to the Claimant, the Grievant was employed by Kelly's Bar and Restaurant. He resigned, but was not paid terminal benefits as set out above.

The record shows that the Respondent was served with Summons on 23rd September, 2013. The affidavit of service filed on 30th September 2013 states that service was effected upon a Manager by the name Steve Ogola. Paragraph 3 of the affidavit of service states as follows:-

*That on the **23rd September, 2013** at around **04.00 pm**, I proceeded to Kilimani Shopping Centre where the respondent business is situated and upon enquires at the counter I was informed by a lady at the counter thereafter again on the 24th September, 2013 I went back at around 11.00 am and was informed that the Manager was not there, again on 25th September 2013, I found the lady on the bar counter who directed me to a gentleman, I introduced myself to him and informed him the purpose of my visit and he informed me that he was a manager and his name is Steve ogola, I thereafter tendered to him a copy of the memorandum of claim Notice dated 17th September, 2013; supporting affidavit together with annexures which he accepted and signed on a copy of the said document returned herewith duly served.*

Thereafter a hearing notice was served upon the Respondent on 9th October, 2013. The affidavit of service reads as follows:-

***THAT on the 9th day of October 2013;** I proceeded to Kilimani Shopping Centre and thereafter to Kelly's bar and restaurant where I found a gentle man I introduced myself to him and I informed him the purpose of my visit and he introduced himself to me as Mr. Owaga the manager thereafter tendered to him copies of the said hearing notice dated 8th October 2013, which he accepted and signed but refused to stamp and informed me that the said business is under new management a copy of the said document is returned herewith duly served.*

The next affidavit of service was for service upon the Respondent's Advocates on 21st November, 2013 and paragraph 3 thereof reads as follows:-

***THAT on the 21st day of November, 2013;** I proceeded to Kilimani shopping Centre where the defendant business premises is situated within Milimani Estate where upon inquiries I was directed to the Manager's office where I found Kennedy who is the Manager he informed me that they had already instructed Ogejo Olendo and Company Advocate to act for them I therefore proceeded to reinsurance plaza where the advocate office is, I found the secretary I introduced myself to her and I informed her the purposes of my visit, thereafter I tendered to her a copy of the said mentioned notice dated 21st November, 2013 which she accepted and stamped on a copy of the said document returned herewith duly served.*

It is after this service which was effected on the Respondent's advocates that the Respondent entered appearance and filed a defence dated 18th February, 2014 denying any knowledge of the issues pleaded in the Memorandum of Claim. The defence prompted the Claimant to amend the memorandum of claim to replace the name of Kellys Bar & Restaurant with that of Kenneth Kaunda Ogolla T/A Kellys Bar & Restaurant. The Defence however states at paragraph 2 that Kenneth Kaunda Ogolla trades as Kellys Investments.

On 16th February, 2015 the Respondent filed another defence dated 13th February, 2015. Paragraph 1 thereof admits the description of the parties in the following terms:-

*Paragraph 1 of the memorandum of claim is admitted as they merely describe the parties hereto save that the Respondent address for service for the purpose of this suit is care of **Messrs. Ogejo, Olendo & Company Advocates, Reinsurance Plaza, 5th Floor, Oginga Odinga Street, P O Box 3640-40100 Kisumu.***

At the hearing, Kenneth Kaunda Ogolla stated that he was in court because he was served with summons but denied being the proprietor of Kellys Bar and Restaurant. He also denied ever receiving the letters dated 20th March, 2012, 14th May, 2012, 6th June, 2012 and 22nd July, 2013 all from the Claimant. He however did not deny receiving summons or hearing notices.

Under cross examination he admitted that all letters, Summons and Claim and hearing notices were served upon Kellys Bar & Restaurant. He stated he came to court by mistake, and responded to the Summons by error. Mr. Kaunda stated as follows in cross examination and re-examination.

Cross Examination

The letters were served on Kelly's Bar & Restaurant. I do not know how I received the documents from court and the Union. Kelly investments is a clearing company. I came to this court by mistake. I decided to respond to them by error. My office is not located in Kelly's bar & Restaurant. My office is at Block 52.

Re-Examination

My office is in Block 52. It is upstairs. My office is on the same block as Kelly's bar on the upper

floor. I got the court papers in my office.

I am convinced that Kenneth Kaunda Ogolla did not tell the truth to the court based on the contradiction in the defence and in his testimony. All the affidavits of service filed on 30th September 2013, 17th October, 2013 and 21st November 2013 were served in Kellys Bar & Restaurant. They were served on different persons all of whom are described as managers of Kellys Bar and Restaurant, which later engaged counsel to defend the case on its behalf.

Kenneth Kaunda did not explain how he came into possession of the summons if he does not know Kellys Bar & Restaurant. The fact that he registered a business name in the name of Kellys Investment does not mean he did not or does not run Kellys Bar and Restaurant. The Grievant who worked at Kellys Bar & Restaurant stated that Kenneth Kaunda Ogolla was the sole director of Kellys Bar and Restaurant. He worked there and cannot make a mistake in identifying the premises or his employer.

I am convinced that Kenneth Kaunda Ogolla was at the time material to this suit the proprietor of Kellys Bar & Restaurant and was therefore the employer of Benjamin Omboko, the Grievant. In this era of 2010 constitution the Claimant cannot be denied his rights, merely because of a technical error in the name of the Respondent. He knows where he worked and who his employer was and that is the person he has brought to the court.

The Respondent did not deny that the Grievant was employed by Kellys Bar & Restaurant. The Respondent also did not deny that the Grievant was not paid terminal dues as set out at Paragraph 4.1 of the Memorandum of Claim amounting to Kshs.144,565 in total.

The foregoing being the case, I enter judgement for the Claimant against the Respondent Kenneth Kaunda Ogolla T/A Kellys Bar & Respondent in the sum of Kshs.144,565.

The Claimant prayed for costs of the suit. I award the Claimant the sum of Kshs.10,000 which in my opinion is reasonable to cover court fees, service fees and minimal incidental expenses incidental to the suit.

Dated signed and delivered this 16th day of June, 2016

MAUREEN ONYANGO

JUDGE