



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omondi v Nelson (Cause 272 of 2015)**  
**[2016] KEELRC 1874 (KLR) (29 September 2016) (Judgment)**

*Thomas Omondi v Tom Nelson [2016] eKLR*

Neutral citation: [2016] KEELRC 1874 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE 272 OF 2015**

**J RIKA, J**

**SEPTEMBER 29, 2016**

**BETWEEN**

**THOMAS OMONDI ..... CLAIMANT**

**AND**

**TOM NELSON ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim on the 28<sup>th</sup> April 2015. He states he was employed by the Respondent through an oral contract, to take care of the Respondent's furniture and other properties, which were at Pirates Beach in Mombasa. The Respondent took away some of his tables on the 27<sup>th</sup> August 2014 and 4<sup>th</sup> September 2014, without informing the Claimant. The Claimant considered this to have amounted to the Respondent "dispensing with the Claimant's services." The Claimant complains the Respondent refused pay to him wages at Kshs. 500 per day, from 27<sup>th</sup> November 2013 to-date. He asserts the Respondent terminated his contract of employment without notice or cause. He prays the Court to grant him the following orders against the Respondent:-
  - a) Kshs. 500 per day from 27<sup>th</sup> November 2013 to-date.
  - b) Notice pay at Kshs. 13,000.
  - c) 12 months' salary in compensation for unfair termination.
  - d) Costs.
  - e) Interest.
  - f) Any other award the Court is minded to grant.



2. The Respondent filed his Statement of Response on the 18<sup>th</sup> June 2015. He states he does not own any furniture outside his residence at Kibaki Flats. The residence is secured. It is fenced off. There is a Security Guard manning the gate. Strangers such as the Claimant do not have free access to the residence. The Respondent's furniture is within the compound, and is for his own use. The Respondent knew the Claimant as a Beach Boy, who along with other Beach Boys, illegally and forcibly occupied the territory along the Pirates Beach, outside the wall surrounding Kibaki Flats. The Respondent used to see the Claimant illegally charge Members of the Public a fee, for sitting on abandoned articles outside Kibaki Flats. The Respondent has never dealt with the Claimant in any way. He prays the Court to dismiss the Claim with costs to the Respondent.
3. Both Parties testified and closed their respective cases on the 23<sup>rd</sup> February 2016. The matter was last mentioned in Court on the 27<sup>th</sup> June 2016 when the Decision of the Court was scheduled for delivery on 30<sup>th</sup> September 2016.
4. Mr. Omondi testified he worked for the Respondent at a Club in the year 2011. The Parties met again in 2013. The Respondent informed the Claimant, the Respondent had opened a small kiosk at Kenyatta Beach Mombasa. He employed the Claimant at the kiosk, at a daily wage of Kshs. 500, to sell sandwiches and samosas.
5. There was word that County Authorities would demolish the kiosk. The Respondent removed his items from the kiosk before the demolition could take place. He closed down. He asked the Claimant to continue looking after the remaining furniture. After this the Respondent engaged the Claimant to clean the Respondent's House. The Respondent was to pay the Claimant Kshs. 500 per day. He did not pay the Claimant. The Respondent eventually retrieved all his furniture and closed the Kiosk. The Claimant reported the retrieval to the Police.
6. Cross-examined, the Claimant testified he did not mention he was employed to sell snacks in his Statement of Claim. He worked for 12 months without pay. He hustled at the Beach to keep alive, selling groundnuts and eggs for the 12 months. He earned Kshs. 200-300 per day from hustling. He had a shed at the Beach. The shed belonged to the Respondent. He did not hire out the Respondent's furniture to Beach Goers. He engaged another Guard at night to guard the Respondent's furniture at a cost of Kshs. 100 per night. It is not true that the furniture did not belong to the Respondent. The Claimant was not able to take the furniture to the Police Station owing to its weight. The Claimant denied that he walked along the beach extorting money from Beach Goers. He testified he had earlier worked at Masai Mombasa Restaurant where the Respondent had an interest.
7. Mr. Page testified he has been a resident at Kibaki Flats over the past 3 years. The place is enclosed, with an electric fence. His furniture is inside the compound. He knew the Claimant when the Claimant worked at Masai Restaurant. He was fired from there for being drunk on the job. He was a Beach Boy. The Respondent did not know what the Claimant did at the Beach to sustain himself. Page had his furniture at his lawn, within the residential premises. It is a figment of the Claimant's imagination to say he was employed by the Respondent, and promised Kshs. 500 per day. The Respondent told the Court this Cause is a perfect case of fraud, which has gravely upset him. It should be dismissed with costs to him.
8. Cross-examined he stated he did not have a lease agreement to show he tenanted Kibaki Flats. He knew the Claimant from his time at Masai Restaurant. It is not true that the Respondent wished to start a business at Pirates Beach, and had in preparation, taken furniture there. The Claimant did not clean the Respondent's house at any time. He did not have a shed at the Beach, where the Claimant sold snacks. It is not true that the Respondent asked the Claimant to look after the Respondent's furniture. Redirected, Page stated he did not have any agreement with the Claimant.



### **The Court Finds//:-**

9. The Claimant did not come out clearly to establish that there existed an employment relationship between him and the Respondent. He says he was engaged by word of mouth to look after the Respondent's furniture. He did not call any Witness who saw him being engaged or who saw him looking after the Respondent's furniture. He did not call any Witness who saw the Claimant work at the Respondent's Kiosk, or who saw the Respondent retrieve his furniture and close the Kiosk for fear of demolition by County Authorities.
10. He told the Court he sold groundnuts and eggs at the Beach to make ends meet. He stated he was a hustler at Pirates Beach, making Kshs. 200-300 per day. The Court is not able to find any employment relationship between him and the Respondent. The hustling activities were not in the nature of tasks assigned to him by the Respondent. He was not under the control of the Respondent, instructed by the Respondent, remunerated by the Respondent, or provided any tools of work by the Respondent. He was not an Employee as defined under Section 2 of the *Employment Act* 2007.
11. It was not shown that the Respondent was running or intended to run any business at Pirates Beach. There was nothing to prove he owned or operated a Kiosk, at which he employed the Claimant. The story told by the Claimant about being employed to guard Respondent's furniture at the Beach; about the Claimant engaging a Guard for the night to protect the Respondent's furniture at Kshs. 100 per night; is a story which should be told to the marines, not to a Court of Law. Why would the Claimant report the Respondent's act of retrieving Respondent's own furniture to the Police?
12. The Court is persuaded the Respondent lived with his furniture secured by an electric fence, and with the benefit of Security Guards, within Kibaki Flats. He did not engage the Claimant. The Claimant appeared to the Court to be a Beach Boy plying his trade at Pirates Beach, who through past familiarization with the Respondent, intended to draw the Respondent in activities the Claimant describes as hustling. It is not proper for a Party to bring another before the Court in the name of hustling. The Respondent disproved the presence of an employment relationship, and cannot be called upon to justify termination of an employment that never was. The Claimant did not show he had any form of contract with the Respondent which was terminated by the Respondent unfairly. The Claim is dismissed with an order that the Claimant meets 30% of the costs incurred by the Respondent in this unnecessary Claim.

**DATED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2016.**

**JAMES RIKA**

**JUDGE**

